IN THE SUPREME COURT OF NEW ZEALAND SC 95/2013

[2014] NZSC Trans 24

BETWEEN **WIREMU KINGI**

Appellant

AND **JILLIAN NAERA**

KEREAMA PENE

ANAHA MOREHU

WARWICK MOREHU

ERIC HODGE

First Respondents

TAI ERU

Second Respondent

Hearing:	18 November 2014
Coram:	McGrath J William Young J Glazebrook J O'Regan J Blanchard J
Appearances:	D G Hurd and J F Anderson for the Appellant F E Geiringer and M I de Villiers for the Respondents

---

CIVIL APPEAL

MR HURD:

May it please the Court. Hurd and Ms Anderson for Mr Kingi. Mr Kingi is the appellant, effectively, having been one of the first respondents in the Court.

McGRATH J:
Thank you Mr Hurd, Ms Anderson.

MR GEIRINGER:
Mr Geiringer and Ms de Villiers for the respondents.

McGRATH J:
Thank you Mr Geiringer. Mr Hurd, I think you're starting?

MR GEIRINGER:
Can I just go over a couple of very quick preliminary matters. One is, in front of all of Your Honours is a brief memorandum on the costs issues that was filed this morning, which I can address those, I just wanted to draw that to Your Honours' attention.

McGRATH J:
We won't go into that at the moment.

MR GEIRINGER:
And the other, just to say I'm a bit under the weather today, I'm not suggesting I'm going to keel over, but I'm a bit deaf, more deaf than usually, so if I need something repeated I apologise.

McGRATH J:
Well just you indicate if there's anything getting in the way of your full understanding of what's said and we can adjourn if necessary.

MR GEIRINGER:
Thank you.

McGRATH J:
Mr Hurd, can I just say that I think that we would be assisted if we had a little more specified about the nature of the commercial arrangements that are being entered into. Now we'd actually quite like you to come to that as soon as is convenient. We want to make sure that we've got a common understanding of that and while we don't want to get into an argument, if you were able to tell us your understanding of them earlier on, we would allow Mr Geiringer a little time just to say whether he agrees or

doesn't agree. As I say, we don't intend to get into a debate at this stage, but we think it would help us understand better how these statutory provisions and general principles of trust law apply.

MR HURD:
Certainly Your Honour. Well if it suits the Court I'm quite happy to actually begin with just that.

McGRATH J:
Thank you. At some stage we may pause just to make sure we've got a common understanding but a little more than we've been able to get out of the material you've directed us to so far.

MR HURD:
All right. Your Honours, what is involved here is effectively a joint venture arrangement between the Tikitere Trust and its two neighbouring trusts, to investigate, and if it's viable, exploit a geothermal resource which lies beneath the lands of the three trusts. So the three trusts are immediately adjacent, the lands are adjacent to one another, underneath is a resource, hence, this arrangement.

The contractual arrangements before the Court at the moment are the Tikitere project agreement and that can be found in volume 2, at page 194, and it's a detailed contract, the Court will see, is from its length but in essence what it does is that each of the three trusts grants rights to a company called Tikitere Geothermal Power Limited, which you will see is also a party, obviously, to this agreement, and the rights, essentially, are the rights to undertake investigations and undertake a project, being ultimately the construction of a power station, if that, if a whole lot of things fall into place, if it's viable, if consents are obtained, et cetera et cetera. So, in fact it's not actually, the project agreement isn't actually an agreement by Trust A granting something to Trust B as such. Each of the trusts grants rights to this company, Tikitere Geothermal Power Limited. Now Tikitere Geothermal Power Limited was a company established by the Tikitere trustees. Initially Tikitere had 100% of shares in that company. Now I should pause to say two things about this arrangement. The first is that I think it's common ground, and certainly in the Court below it was accepted, that there are probably two special features about these arrangements, because of course geothermal exploitation is not unusual for entities including Māori trusts, which have resources underneath their lands. What, I suppose, marks this out

is a bit unusual is first of all that Māori are doing it for themselves so that Tikitere Geothermal Power Limited was established so effectively, whoever owns that could get the benefit of the resource and its exploitation long-term. The second thing is that it has always been accepted that the resource will not be accessed from Tikitere's land. It'll actually be accessed from one of the other trust's land, and that the power station, if one ever gets to that, will not be on Tikitere's land either. So from Tikitere's point of view it's perhaps in the happier position where it doesn't actually suffer either of those burdens that might otherwise exist.

Now as well as this agreement there were other agreements entered into contemporaneously and there are two option and royalty agreements, and these are in the same volume, so if one goes to page 246, this is the option and royalty agreement between, the parties are the Tikitere Trust, Tikitere Geothermal Power Limited, which I'll call TGL for convenience, and the trustees of one of the adjoining trusts, this is Paehinahina Mourea, and what this agreement does is it grants an option to Paehinahina Mourea to elect either royalties from this arrangement, or to take shares in TGL, Tikitere Geothermal Power Limited. I can interpose to say that in fact what has since happened is that Paehinahina Mourea has elected to take shares and the result of that for Tikitere Geothermal Power Limited I'll mention in a moment in terms of shareholding.

The other option and royalty agreement is at 262 of the same volume and this is with the other trust, Manupirua Bath Trust and again it grants an option, royalties or shares. Not both in either case but one or the other. This trust has elected royalties so it isn't going to be a shareholder, is not a shareholder in TGL. There are a couple of other agreements that I want to –

BLANCHARD J:
Just pausing with the option agreements. Presumably there are some monies having to be paid in respect of taking out shares or royalties. Are you going to tell us about those?

MR HURD:
Well in terms of shares, all that happens is that in return for the involvement in the project, if the shares option is elected, there is an allocation of shares. There isn't actually money paid for those shares. It's what, what that trust gets for its, the rights it grants to TGL basically.

BLANCHARD J:

There's a reference to a purchase price on page 249 and it seems to be completely blank.

MR HURD:

249? Yes, one of the difficulties in this case was that there were concerns, and my friends would say unduly heightened concerns, by the parties to whom I act, about the commercial sensitivity of some of this information. So the documents that were actually provided to the Court had some redactions and that's why there was a redaction.

BLANCHARD J:

Is there a purchase price for the shares?

MR HURD:

Yes there is.

BLANCHARD J:

I thought you just said there wasn't.

MR HURD:

No that – the purchase price, Your Honour, is an upfront payment that was to be made to the trust if it elected to accept shares.

BLANCHARD J:

So presumably then somebody has paid a price to the trust that has taken up shares, is that what you're saying?

MR HURD:

What I'm saying is that the, perhaps if Your Honour will just bear with me. Can I just have a look at this agreement again, it's been a long time. Yes the, where the purchase price fits in is referred to in 4.1 under the share option. So what happens if it's exercised is that TGL will deliver share certificates et cetera, and PMT shall pay to TGL the purchase price.

BLANCHARD J:

And that's happened?

MR HURD:

That's happened, as I understand it.

BLANCHARD J:

And in the case –

GLAZEBROOK J:

But that means that the trust is paying for the shares?

MR HURD:

Sorry, the Paehinahina Mourea Trust is paying for the shares but the purchase price, and I'm sorry I don't have the, unfortunately we're not helped by the fact it's a redacted copy without the purchase price, so I can't be sure now whether it was a purely nominal price or whether it was a significant –

BLANCHARD J:

Well that's pretty important.

MR HURD:

- well I can certainly look into the –

BLANCHARD J:

We may not necessarily need to know the exact price but we certainly need to know whether there is something more than a nominal consideration.

MR HURD:

- well I understand –

BLANCHARD J:

I'm quite surprised that this is not dealt with in these submissions.

MR HURD:

- well as we have seen the case, in the approved grounds of appeal, and we

maybe wrong in this, and if we are I'm sorry, but we have seen it as essentially two legal issues on clearly established facts, the facts being as to the nature of the allegedly conflicting interests.

GLAZEBROOK J:

The trouble is the clearly established facts must include the nature of the arrangement so if we don't know the nature of the arrangement then it's difficult for us to apply them in a vacuum on the clearly established facts.

BLANCHARD J:

Because they're not clearly established.

MR HURD:

Well –

GLAZEBROOK J:

But it doesn't matter.

MR HURD:

- but the fact that gives rise to the alleged conflict is clearly established.

GLAZEBROOK J:

But the benefit isn't necessarily if we don't understand the arrangement. The alleged benefit.

MR HURD:

I understand what Your Honours are saying to me, and there's no point me standing here trying to dissuade you, or tell you that what you've just told me you think is relevant, isn't relevant. I will certainly make some enquiries, if I may, during the adjournment and try to get to the bottom of what –

GLAZEBROOK J:

So it's actually an upfront payment from the trust if it elected to pay shares, not the other way round. You said upfront payment to the trust. There are upfront fees but I'm assuming –

MR HURD:

That's on the royalty option.

GLAZEBROOK J:

That's on the royalty option.

MR HURD:

Yes.

BLANCHARD J:

Presumably, with the other trust, which I'm calling MAWT, having elected to take royalties, it will have received a substantial upfront payment?

GLAZEBROOK J:

Or will have paid the upfront payment? Let's make sure we know which way the money goes.

MR HURD:

It would be helpful, I agree.

BLANCHARD J:

Well it's TGL that paid it, that's at the bottom of page 251. I assume the same provision is in the other option agreement. And those are quite substantial amounts if you look at page 260. Once again I'm not sure if the amounts are the same in the other agreement, I haven't looked.

MR HURD:

No but these are what are described as upfront fees and they only apply if, in fact, the royalty option is accepted.

BLANCHARD J:

But it has been by the other trust.

MR HURD:

By the other trust but we're looking at the Paehinahina Trust at the moment.

GLAZEBROOK J:

They are paid on the date scheduled, in schedule 3, that's not an immediate one, is it, because if it's only an investigation you wouldn't be paying an upfront fee immediately would you, or would you?

MR HURD:

Which one are you –

GLAZEBROOK J:

On royalties.

MR HURD:

Which agreement is –

GLAZEBROOK J:

You don't have the dates in schedule 3. So they pay upfront fees on the dates set out. I would have thought that any upfront fees would be once you started commissioning rather than the investigation stage, but who knows because there are no dates in schedule 3.

MR HURD:

Well I'll –

GLAZEBROOK J:

Or it might be my copy.

MR HURD:

My friend thinks he can assist and that would help if you –

MR GEIRINGER:

I can just ask a couple of questions for Your Honours obviously.

BLANCHARD J:

Just before you do, is there a page missing after 274, because in that option agreement, and now I've got to find it again, yes, on page 267, clause 5, I think it is, .2, these are dreadful photocopies, it says royalty payments calculated in accordance with schedule 3. There is no schedule 3.

MR HURD:

Again that must have been redacted as part of what was put before the Court.

BLANCHARD J:

Well it wasn't redacted in the other agreement.

MR HURD:

Well when I say it must have been redacted I'm making an assumption that that must have been what happened.

BLANCHARD J:

Well again do we assume that the amounts are substantial, as they would have been for upfront fees et cetera, in the other agreement on page 260?

MR HURD:

I think one can assume that they would have been significant but less than in the Paehinahina agreement and that reflects the relative weightings of the trust contributions which can be seen if one looks at the share options, and what shareholdings one has an option for. So Paehinahina had an option to take many more shares than Manupirua, or MAWT.

BLANCHARD J:

Thank you.

McGRATH J:

Now is that, you want to continue now, can you?

MR HURD:

Yes I can.

McGRATH J:

Or have you finished with the –

GLAZEBROOK J:

You were going to tell us what happened with the shareholding I think.

MR HURD:

Yes, yes, what happened with the shareholding is that, as I said, Paehinahina elected shares. There were also some disputes, this was after the Māori Land Court proceedings, and as things have gone on, there were apparently some disputes between Paehinahina and the trust, Tikitere, as a result of which there was a variation of the arrangements, which isn't before the Court, and the net result is that the shareholding in TGL is now held 65% by Paehinahina and 35% by Tikitere. And meanwhile MAWT takes royalties.

McGRATH J:

Is that a convenient point for you to pause. Are you happy?

BLANCHARD J:

I think so.

GLAZEBROOK J:

You're going to come back to us with the issue of the purchase price, just in a generic sense?

MR HURD:

I'll try to get those details, yes, if I can, and I'm sorry, I don't have those with me.

McGRATH J:

That's fine.

MR HURD:

That's the position I'm in, this has been going on for five years now, I'm sorry, so this is the sort of delight one has.

McGRATH J:

At that point then I'll ask you just to take your seat for a moment and I'll see if Mr Geiringer has anything he wants –

MR HURD:

Can I just add one other thing before –

McGRATH J:

So you've got another point, yes, go on.

MR HURD:

– before Mr, just to, because it's referred to by my friend in his submissions, and it's part of the transaction, is still on the same volume at 275, and at 288 there are two different agreements, both involving the same party, and that's a company called Green Energy Limited, and if I go to the latter one first of all at 288, Green Energy Limited was given a management role in respect of the project and part of the consideration for that role was it had an option to take a small shareholding, and that's contained in the option agreement which begins at 275. In fact those arrangements have been terminated so the management arrangement with Green Energy has come to an end and the option has been surrendered, but I mention that just for completeness.

Now that, I think, is my attempt to answer Your Honours' questions about the arrangements but by all means my friend can now tell you when –

McGRATH J:

I think it might be helpful to get in position just on the arrangements, on the contractual arrangements Mr Geiringer, thank you.

MR GEIRINGER:

Just to say, I'm at a little bit of a disadvantage in that I too had only had redacted agreements until August of this year, and I've only got some of the agreements in unredacted form. But I was given the understanding that the option arrangements were the same between all of the option agreements. I only have an unredacted option agreement, that being the one between the company and Green Energy, but I was led to believe that the prices, the sales price was duplicated and it is a nominal price. In the unredcated copy you can see the price for the purchase of a share is $1 for all of the shares.

GLAZEBROOK J:

So it's a nominal, okay.

BLANCHARD J:

Is that for Green?

MR GEIRINGER:

That's for Green but I was led to believe that it was the same arrangement. So as my learned friend explains, what the trusts are providing is essentially a lease. It's described as a lease in the agreement over their lands. The trusts, all three trusts provide quite extensive lease rights over essentially all of their lands to the company. It's limited by its purpose as the company is going to use that land for the development of geothermal power and there is a description of how that will come about and that's at, I think, at clause 7 of the main agreement. So that explains the limitations on the lease but other than that the lease is quite general and limited and runs for the period of the agreement, which I believe is 52 years.

So that's what the trusts are providing from their end and they were given a choice, as my learned friend explains, of either purchasing shares, but purchasing I put in inverted commas, or it involved receiving a royalty and in the case that they purchased, there is a nominal sales price but it's, I am led to believe, $1, and if they receive royalties there was to be an upfront payment and this, you'll see, was something that was discussed at length in the judgment because one of the defences of Green Energy, which was alleged to have been quite conflicted in its relationship, Green Energy and Mr Carswell, was alleged to be quite conflicted in its role as advisor, was that they were going to meet the cost of any upfront payment, and that that was a significant risk to him and his company and that that explained why what he was doing was actually for the greater good and not – and that he shouldn't be criticised because he would eventually also be receiving, as my learned friend said, he was also given the option agreement to purchase an interest in the company. So there was the alleged conflict and his response was, yes, I'm getting that but I'm also funding the upfront payments. And the upfront payment to the Paehinahina Mourea Trust was $2 million and I believe the upfront payment to the other trust was substantially smaller but still significant, was it? I don't have that number to my fingertips but it was a lesser amount that Paehinahina Mourea but still a substantial financial upfront payment.

The other matter I think my learned friend has done a reasonable job of explaining the relationship I would say a couple of notes. As you will have seen in the submissions there was a decision made at first instance that the Court needn't enquire into the quality of the arrangements, and as part of that agreement the main expert evidence for my clients that said that this was a horrible agreement and was very detrimental to the trust, that evidence was agreed not to be, needed to be gone

into by the Court, so was set to one side. One of the objections that my clients had to the decision was that it assumes the quality of the agreement whilst noting expressly that it's not looking into the quality. So in the Court of Appeal it was sought to allow the Court of Appeal to see the evidence from my clients' experts and my learned friend objected to that and that evidence wasn't before the Court of Appeal and is not before Your Honours. So the whole investigation into the quality of the agreement and the exposure it puts on the trust is not something that any Court at any stage has gone into, and it's not something that this Court has the evidence from my clients in relation to in front of it.

McGRATH J:
Well these are points you will no doubt make later on but you're comfortable that, as I think your words were, that your friend has done a pretty good job in summarising the bare contractual arrangements.

MR GEIRINGER:
Yes, thank you, Your Honour.

McGRATH J:
Thank you Mr Geiringer.

MR HURD:
Now Your Honours with that introduction, and as I said I'll come back and hopefully be able to confirm or otherwise just what these consideration figures were, can I then turn to what I'd actually intended to say by way of introduction.

McGRATH J:
Certainly.

BLANCHARD J:
Just one further thing. I think we need to be quite clear on what shareholdings the trustees had in the other trusts, or the close relatives had in the other trusts. I jotted down some notes. This, I think, was taken from a Māori Land Court description, and I may have missed something, in the case of Ms Emery, the complaint seemed to be that her husband was a trustee of, sorry I haven't got a grasp on the names, PMT –

MR HURD:

Yes, I think it was actually MAWT but it doesn't matter, it was one of the –

BLANCHARD J:

Yes, that was the only complaint made about her?

MR HURD:

As I understand it, yes, and that's the only complaint that the Court, at first instance, or subsequent Courts, considered in relation to her.

BLANCHARD J:

Ms Fenwick, she seems to be the one on whom fire has mostly been concentrated. She owns, and I don't expect you'll have these figures off the top of your head, 1.57991 shares in Tikitere out of 83.63569 shares. I'm not quite sure why that was even mentioned, but it was, and critically 93,187 shares out of 1,977,351 shares in PMT, and her family, whoever they may be, owns 20% of the shares in PMT, and then Mr Eru, he seemed to own a very small number of shares in PMT. Were those the conflicts that we're supposed to be looking at?

MR HURD:

Yes, yes.

BLANCHARD J:

Thank you.

MR HURD:

The only gloss I would put on that is, as one does, looking back now after all this time, at findings that there have been, the one thing that isn't, I don't think, spelled out, is the point that Your Honour Justice Blanchard raised, about whatever family means in the case of Ms Fenwick. There isn't any file, or any detail of how close the family relationships are of those who hold the 20%. My friend talks about it being immediate family but there's nothing in the judgment or in the judgments below which have formed that view at all. So at the moment indeterminate relationships but family it's described as. Now is there anything else that…

McGRATH J:

No, I think we can get you to start now Mr Hurd.

MR HURD:

The, sum of what I'm about to say probably is now rendered redundant anyway, but the case obviously concerns this joint venture arrangement and we've discussed the nature of that. The context in which the case falls to be considered is, in this case, three Ahu Whenua Trusts, constituted by the Māori Land Court under the Te Ture Whenua Māori Act 1993. I'll come back later and discuss the particular characteristics of that Act and these trusts, but what I would say at this point is a couple of things. First, that I think it can properly be said that Ahu Whenua Trusts are really a construct to enable lands to be preserved and maintained on behalf of a whole range of beneficial owners over what can be an indeterminate period because trusts under the Act have no vesting date. The rule against perpetuities is expressed not to apply so that, in fact, they come to an end only if the Court, as it is empowered to do, chooses to direct that they come to an end. Absent that they will go on from generation to generation presumably. Also relevant to that is, and it's referred to in the judgment and in the submissions, is the nature of Māori land holdings and Māori lineage and ownership. It's probably no surprise to say that in the Māori community, particularly in an area such as Rotorua, which is, of course, is a very long-standing and significant Māori population, there are continuing family succession arrangements and so forth which affect land holdings, and those who are the beneficial owners under these Ahu Whenua Trusts, are actually people who have inherited at some point and no doubt they will in turn pass on. And one of things that means is a very diverse and often very splintered and often very small in some cases degrees of ownership, and one can see that in the case, just look at the broad numbers on Tikitere Trust. Tikitere Trust's asset is a 32 hectare piece of land, not a huge property, as at 2009 it had 1222 owners and still counting because it continues to increase, of course, as one goes on generation to generation, and the other factor which I think needs to be mentioned contextually is, I've said that these three trusts own immediately adjacent properties, again in terms of a stable population base, the prospects of cross-beneficial ownerships are very real, and I think the Judge at this point, it's referred to in the submissions, described it as, when you're talking about Mr Eru, would be the norm rather than the exception, that people would have ownership of interests and not just one but a range of these trust, and of course the fact that the three trusts are next door to each other only exaggerates that.

So that's the backdrop in my submission. So against that backdrop the issues on this appeal are, first of all, whether the beneficial ownership interests, His Honour

Justice Blanchard helpfully summarised for us, whether they result in the project agreement being voidable. The trustees with those other ownership interests having participated in and voted on the decision to enter into it, and, so that's the first issue. The second issue is, well, if the answer to that is yes, and it's voidable, whether what, if you'll excuse me, I would call the full blown or traditional rule as to the consequence of that, which is what has been applied by the Court of Appeal, is the appropriate response. And that, both these issues are of critical concern, particularly for the Māori community because of the nature of ownership and but also the second issue, of course, raises some more significant general issues about just what is the proper, what should be the proper reach of the, what I'll call the strict rule.

So in terms of the first of those issues, that is whether these interests rendered the project agreement voidable, we say that really raises the inter-relationship between this Act, Te Ture Whenua, and for the common law, and we're referring particularly to sections 227 and 227A of the Act, and relying, at this stage just summarising, I think it's important that we just take Your Honours to those provisions now. It's in our casebook at volume 1, and if one goes to 227, 227 abrogates what would be the default rule at common law, that trustees have to act unanimously by providing that in the circumstances set out in 227, trustees may act by majority. The Court of Appeal, and I think my friend in his submissions, suggests that this is really just a, almost a consequence of 227A, which I'll come to in a moment. In my submission that can't be correct, of course, because 227 was part of the Act as originally enacted. 227A, which I'll come to now, is, in fact, inserted subsequently. But, so 227 abrogates the default position.

McGRATH J:
Where does the Court of Appeal say that, just give me a paragraph reference?

MR HURD:
Where the Court of Appeal says?

McGRATH J:
Brings in section 227A as influential on 227, I think that's what you said?

MR HURD:
If Your Honours will bear with me, I'm sorry.

McGRATH J:
We can come to it later if that's easier.

MR HURD:
So if I could, I don't think it's a big point, but I just wanted to make it clear. 227A(1) allows persons who are employees, or officers of the trust, or interested in, or concerned in any contract made by the trust, to nevertheless be appointed as trustees and to hold office accordingly. Now that again is a departure from the strict common law position. Then 227A(2) is a prohibition on voting or participating in a decision, but with a little exception, which I'll come to at the end of the clause. So what 227A(2) does is prohibits persons who are employees or servants or officers of the trust, or interested or concerned in any contract made by the trust, from participating in any decision which directly or indirectly affects that relationship, or that contract. The words I point to at the end of 227A(2) are the final words, "Other than as a trustee of another trust." So the end result is there is a prohibition in subsection (2) but it does not apply simply by virtue of a participating trustee also being a trustee in another trust which is in a contractual relationship or whatever with the first trust. And that, again, is a very major departure from the common law position, because at common law if one were trustees of two trusts, one would be regarded as having duties, separate duties to each of those two trusts, and it would be a complete, if you'll excuse the expression, no-no to say you could then properly participate in a decision affecting the interests or the commercial interests of those two trusts.

So by any view, in our submission, 227 and 227A very substantially impact on what was the traditional common law position. What we say though is that properly construed 227A(2) effectively ousts the common law rule in relation to interested trustee participation, and to do, to get to that point, what we say, I suppose, the starting point, is to look at what 227A(2) actually says and does, because obviously if it's no different to the common law then there's little point in us spending a lot of time trying to persuade Your Honours that it somehow ousts the common law, which is the same as, but clearly it's not the same as the common law for the reasons we've already talked about. But we go further than that, and in our submission the section has to be construed narrowly and we say it has to be construed narrowly because first of all the very nature of Māori land ownership, and what we've talked about, we've already discussed in the case of Ms Fenwick, who's family and who isn't. so if one was to say that any beneficial interest in a trust was a disqualifying matter for, or

made one, and the words are interested or concerned, in a contract made by the trust which is under consideration, then one would obviously have issues about, well how far does that go. Are we talking about beneficial interests by the trustee in their own name, are we talking about family interests, what are we talking about? So that one could go on endlessly about that.

The second thing, and maybe it should have been the first, is that if one were to take a broad view of what is prohibited by 227A(2) then it would equally apply to an interest in Trust A. So if somebody was a trustee of the Tikitere Trust, but also a beneficial owner in that trust, and beneficial ownership made one concerned or interested in contracts made by the trust, then that interest, in itself, would fall foul of the section and that can't have been intended because, in our submission, one would expect, and one would expect to be welcomed the involvement of beneficial owners as trustees.

BLANCHARD J:
But the common law position isn't that if you're a trustee and a beneficiary of a trust, you're precluded in participating in the making of a contract by your trust.

MR HURD:
I'm not suggesting that. I'm saying that if the section were applied –

BLANCHARD J:
Well the section wouldn't intend that either.

MR HURD:
Well we agree. All I'm saying –

BLANCHARD J:
I would have thought that's pretty obvious.

MR HURD:
Well it maybe and if it is that's good but all I'm saying, Your Honour, is that there has to be some gloss on these words to get to that common sense outcome.

GLAZEBROOK J:
What gloss had to be on the words?

MR HURD:
That one needs –

GLAZEBROOK J:
The common law would be that that wasn't a problem.

MR HURD:
Yes, but –

GLAZEBROOK J:
It probably isn't a problem under 227A and if it was probably the common law would rescue it.

MR HURD:
Well if we can just deal with 227A, which I'm trying to deal with in my – under 227A all I'm saying is that unless one reads it down, and it's perfectly sensible to read it down, then 227A would be triggered, and that can't have been intended. So that's one of the reasons why I say 227A(2) needs to be read narrowly. The other is the words themselves in 227A(2), that the reference to interested or concerned, follows other relationships which are talked about, employment, remuneration, which is obviously part of employment, which are, by any view, very direct arrangements. So in my submission 227A(2) is properly to be read strictly and in a limited fashion.

GLAZEBROOK J:
But what you want to do is to say it ousts the common law because it wouldn't need to be read strictly at all if the common law survived because the beneficiary and trustee position wouldn't be a problem.

MR HURD:
Well if the common law still applies and if, in fact, section 227A(2) produces a different result from the common law, being a less or a more narrow prohibition than the common law would provide, then what is the point of 227A(2)?

GLAZEBROOK J:
But the point is, what you can do is modify the common law in specific ways, leaving the rest of the common law as it is, or you can say this covers the field, but I'm not

sure your argument on having to read down section 227A(2) to be consistent with the common law actually suggests that it's an exclusive interpretation and not – and an ouster of the common law.

MR HURD:

Well all, I suppose, it comes down to, and I don't want to labour this endlessly, I understand what Your Honours are saying, is that inherent in a prohibition of this sort is that if one isn't within the prohibition one is entitled to do what would be prohibited if one were within the prohibition. So if the prohibition is more narrow than the common law, and it is, if only because of the abrogation we talked about a few months ago, then if one then says the common law nevertheless continues to apply, the end result is it's the common law, what's the point of 227A(2). And what is a trustee supposed to make of a provision which says these are the circumstances in which I'm prohibited from acting, and then the Court comes along and says, yes, well that's all very well but this is a common law anyway, so if you're not caught under that you're caught under the common law.

BLANCHARD J:

Section 227A(2) looks to me like the common law but carved out of it the position where a trustee of one trust is also a trustee of another trust and it says that's okay.

MR HURD:

Well, I understand what Your Honour is saying about that, but my answer to that, I suppose, would be well why would want one as a draftsman to try to do that? Why would one want to try to paraphrase the common law and then make an exception, rather than saying, in the case of these trusts, notwithstanding any rule of law to the contrary, it's not going to be a –

BLANCHARD J:

Well it's saying what the law to the contrary is.

MR HURD:

Well that's the issue I suppose.

BLANCHARD J:

It's just a drafting technique. It's convenient to have the law set out and then, but it doesn't apply in this particular situation of conflict of duty and duty between two trusteeships.

MR HURD:

Well I understand what Your Honour is saying about that. Your Honour will understand my contrary submission about that.

BLANCHARD J:

I do.

GLAZEBROOK J:

Well it's also combined with the majority. It means that the rest of the trust can have dealings with a trustee, which would normally be prohibited, because a trustee can't profit from the trust.

MR HURD:

Yes.

GLAZEBROOK J:

So it is a change of the common law to that extent because you have decisions by majority and then ability for the interested trustee to step back and therefore be able to have a transaction with the trust with impunity subject, obviously, to whatever else might be said about it, in terms of undue influence or anything of that nature.

MR HURD:

I certainly accept that read with 227 it achieves that result. The issue, I suppose, is whether that is the, is the rule that it's on about, 227A(2), and in my submission it goes beyond that and in fact it is an attempt to exclude the common law. As I say we've exchanged our views on that but certainly in my submission –

GLAZEBROOK J:

Can we link it back to what the benefits are said to be, because my interest is why – well, perhaps do you say that it isn't a contract with the trust if you're just a beneficiary of another trust that is then thrown into a contract. Just so I see – why did you say that this arrangement does or doesn't come within section 227A(2)?

MR HURD:

I'm saying –

GLAZEBROOK J:

That this particular arrangement, which is why we were interested in the particular arrangement.

MR HURD:

Although my argument would be more general than just the particular arrangement but I'll apply both ways. So what I say the issue is, is whether the role or the entitlement as a beneficial owner of a trust, means that one is interested or concerned in any contract formed by that trust. In my submission that doesn't follow. It's too wide a view of the concept of interested or concerned because it's in the contract, not in the trust, it's in the contract.

BLANCHARD J:

So you're saying a beneficiary doesn't have an interest in a contract made by the trust of which you're a beneficiary?

MR HURD:

Not if one is merely a beneficiary in terms of this regime. But that's insufficiently close to be an interest in a contract.

GLAZEBROOK J:

And why do you say that in law or under the statute?

MR HURD:

Well I say under the statute, first of all, if one looks at the nature of the beneficial interests that beneficial owners of Ahu Whenua Trusts have, which are, as I said before, a particular species of trust, they're one of innumerable parties with beneficial ownership, highly diversified and splintered ownership, but that in my submission cannot have been intended to be caught by a prohibition on parties interested or concerned in a contract. That it's just too far away. Now that's what I say in terms of the section. In terms of the common law position, which we've –

GLAZEBROOK J:

Sorry, is that – so it's because they are splintered interests. What say they're not splintered interests, or is that not possible under these trusts?

MR HURD:

Well I suppose anything is possible but under an Ahu Whenua Trust it would be inherently most unlikely and there's no suggestion that any of these trusts have other than highly diversified ownership and I've talked about the numbers with the Tikitere Trust which exemplify that.

O'REGAN J:

Well that isn't the argument with Ms Fenwick though, is it, because it isn't here, isn't it argued that she and her family are actually, hold a very high proportion of one of the other trusts?

MR HURD:

Well what's said is that she and her family, whatever her family is supposed to encompass and how direct that is, hold 20% of one of the other trusts, and so one could debate when is an interest substantial so – but I accept that Ms Fenwick's case is, if one brings her family interests into it, is outside the veil, the pure highly, highly, sort of splintered ownership I'm talking about, but it just happens, but we don't actually have the detail –

BLANCHARD J:

Well she, herself, has got roughly 5%, hasn't she?

MR HURD:

About 5%. I'll take Your Honour's mathematics. It sounds pretty close to me.

O'REGAN J:

Well doesn't that undermine the point you've just made though, because 5% s a substantial interest, isn't it?

MR HURD:

Well, one could argue, I suppose, endlessly what is substantial.

O'REGAN J:

Well it's not one, 1220th.

MR HURD:
No.

BLANCHARD J:
It's not like Mr Eru.

MR HURD:
Well Mr Eru has got a very small interest.

BLANCHARD J:
Who's got a tiny shareholding.

MR HURD:
No it's not but I suppose the issue is where one draws a line if one has to draw a line, and certainly my submission would be that it's still below where one could sensibly draw the line.

GLAZEBROOK J:
Although one of the difficulties when you have, say, a 5% interest, of a 20% interest, and you have very, very diversified interests otherwise, is that that 5% or 20% could have an inordinate effect on the trust because you've got a bulk interest with a whole pile of splintered shareholding which is why say in public companies a 5 or 10% interest, listed companies, is seen as quite a significant shareholding if you've got a diversified range of what they call mum and dad investors aside from that.

MR HURD:
I understand that. I suppose what I would say in relation to that is that the, that actually raises an issue which isn't before this Court on the appeal, but which is, I think, the Court needs to be aware of in considering all of this, and that is that how one, how decisions are made by beneficial owners of these trusts and you will have seen reference in the submissions to votes being taken at meetings and such. In fact the way they take the votes is by head count. So, in fact, the decisions made at those meetings have no relationship to the degree of what I'd call proprietary ownership, they're simply by head count –

BLANCHARD J:

Is there no ability to ask for a poll on a shareholding basis?

MR HURD:

There may be ultimately, and I say maybe because I just don't know the answer, and one would think there ought to be. All I'm saying is, in practice, and what's happened here at the various meetings including board of director meetings, is simply people turn up and this person here might own 5% pr 10%, this person over here might own one millionth of a percent. They each have one vote, basically, as to why –

GLAZEBROOK J:

Well, of course, logically though that will weight in favour of the people who live around the area rather than absentee and probably a few don't own very much, your family doesn't own very much, you're not so motivated to turn up, especially if you don't live nearby. Those are all of the sort of issues that…

MR HURD:

That can, I accept that that might happen. Equally, I mean there have been talks at one of the meetings here of people being bussed in for the meetings so, you know, I could debate that endlessly. But all I'm saying, really in response to what His Honour Justice O'Regan's point, about well 5% is pretty significant, is that in the particular way these trusts seem to operate, and seem to make decisions, in fact the percentage in the end, in terms of decision-making, translate through to any particular weight in voting anyway. Whether it could, by demand in a poll, remains to be seen. But in practice that's not the way it works.

Now the second part of Your Honour Justice Glazebrook's question to me was what about the common law and what would be the position of this beneficial interest, or a beneficial interest in a trust at common law, and I really intended to address that under –

GLAZEBROOK J:

Don't let me divert you.

MR HURD:

No, no, because in a sense that these two issues on this appeal actually do inter-relate significantly, obviously, once – the second is dependent on the first, but

there's a further inter-relationship. So in terms of the first issue I have tried to explain as clearly as I can where I am on that issue. I apprehend that some, at least, of Your Honours may not be convinced of that but that's my submission on that issue. So I say it's not voidable if the section governs the issue.

If it is voidable then the issue becomes whether the, as I said earlier, the full blown rule ought to apply. That is sudden death, it's voidable, in this case at the instance of any one of the 1200 plus beneficiaries who chooses to seek to avoid it without further consideration or whether what in fact should happen is that the Court should have the ability to look at the transaction as a whole, look at the circumstances and decide, the onus being on the trustees, whether it's a transaction that ought to proceed or not. And that really takes me to the common law position because section 227A(2), whatever else we may agree or disagree about it, doesn't include any specific consequence of what is to happen and I have to accept and need to draw Your Honours' attention to, section 237 of the Act, which gives the Māori Land Court all of the powers and authorities of the High Court in relation to trusts. So while it's silent, section 227A(2), I can't say that's the end of anything in particular. We have that broad series of powers under 237.

But this issue about what the appropriate approach ought to be at common law, and also traverses what indeed the common law position on voidability actually is, and on the approach actually is. Now Your Honours will have seen in the materials that there are a number of authorities discussed, and I don't intend to discuss those in any great extent with Your Honours because I think the issue is more a point of principle than really one that's going to be finally resolved on these authorities. But in my submission what, in fact, one can take from the authorities, is that there is something of a debate about what the appropriate response is, where a transaction is entered into in breach of trust, and is the full blown position I've referred to, there's the other position we've tried to refer to.

Now our submission to Your Honours is that the true position ought to be that what I call the full blown response, applies only in cases of classic self-dealing, that is literally the trustee is contracting with himself, or in substance contracting with himself. He's contracting with a one man company of which he's the man or something of that sort, and that that's where, in fact, that rule ought to apply. But it oughtn't to be applied generally just to any conflict of interest which has been involved in the transaction, or in the decision, and that takes me really I suppose first,

Your Honours, to how it is that the Courts have tried to determine what the proper limits of this rule are, and when it applies, and –

McGRATH J:
You're still within the common law at the moment. You're not relating this to the scheme of the Act?

MR HURD:
No, because the Act is silent on consequences so either way we would be into this.

McGRATH J:
But you're not referring to the scheme of the Act?

MR HURD:
No.

McGRATH J:
No, just straight from it, all right, thank you.

MR HURD:
And the case that's often cited for its exposition of where, how widely the principle is applied, is *Re Thompson's Settlement* [1986] Ch 99, which is referred to in our submissions and there's an extract of that which appears at paragraph 44 of our submissions. The *Thompson's* case has been described by some commentators and other Judges as the high water mark in terms of the stringent rule and its application. Now at paragraph 44 of our written submissions I've set out the passage that's often quoted from *Thompson's* –

GLAZEBROOK J:
Can you tell us where it is in the authorities? The reason I'm asking that is I seem to have, oh no I found them. I'd lost your submissions but it's okay I've found them.

MR HURD:
It's at number 3, it's at tab number 3 anyway in the authorities, the *Thompson's* case, but I thought just referring to it as it's set out in the submissions might be most convenient.

GLAZEBROOK J:
It's okay, I'd lost your submissions but I've now found them.

MR HURD:
And you'll see it's set out there His Honour Justice Vinelott saying that he doesn't think the self-dealing rule can be so confined. Can I explain that what was argued in *Thompson's* was that the self-dealing law only applied to a strict sale and not to anything else basically, and Vinelott concerned an assignment or re-grant of a lease. But he says, "I do not think the self-dealing rule can be so confined." He says that it's clear that it's an application of the wider principle, which I'll call the conflict of interest principle, and he goes on to say, "The principle is applied stringently in cases where a trustee concurs in a transaction which cannot be carried into effect without his concurrence and who also has an interest in or owes a fiduciary duty to another in relation to the same transaction." He then explains why he says that, "The transaction cannot stand if challenged by a beneficiary because in the absence of an express provision in the trust instrument the beneficiaries are entitled to require that the trustees act unanimously and that each brings to bear a mind unclouded by any contrary interest or duty in deciding whether it is in the interests of the beneficiaries that the trustees concur in it."

So if one just looks at that last sentence, there are two parts to the explanation. First is, that in the absence of something which negatives this, beneficiaries are entitled to require that all trustees participate in and compare in the result. Now as we've discussed, by virtue of section 227, that leg is removed in the case of Ahu Whenua Trusts because there is no requirement for you to meet.

The second leg, "That each brings to bear a mind unclouded by any contrary interest or duty," is curtailed because there is no prohibition on, or it's apparently permitted if one is a trustee of two trusts to do this, even though one owes duties which conflict.

WILLIAM YOUNG J:
Where does the Judge define what he means by the "fair-dealing rule"?

MR HURD:
I'm not sure that he does.

WILLIAM YOUNG J:
It looks as though he's talking about transactions between –

BLANCHARD J:
It comes in on page 111 towards the top in a quotation from *Tito v Waddell* No *2* [1977] Ch 106 and it's a rule about a trustee buying a beneficial interest.

WILLIAM YOUNG J:
Yes, that's what I thought it was.

MR HURD:
Yes and so that's the origin of the rule. What's now being done is saying, but it's not limited to just that, you know –

WILLIAM YOUNG J:
This doesn't, what we're talking about here doesn't seem to be an easy fit within the fair-dealing rule.

MR HURD:
Absolutely not. Absolutely not. But, of course, if one extends the rule to apply to any conflict of interest, if one concludes that these beneficial interests constituted a conflict then, of course, on that basis the Court of Appeal says, well the consequence of a breach of the self-dealing rule applies, and it's our submission that it ought to apply.

So that's in terms of the rationale for the rule and its application. But in our submission it goes further than that because as one of the Judges, I think it's in the *Drexell Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 case, which isn't, I'll just mention it and not belabour it at tab 11, and the Judge there described this as a rule riddled with exceptions and the point is that there are a whole range of what is being regarded as exceptions to this rule. So our argument is either that you do it as a matter of principle and say this rule should not apply beyond, effectively, the trustee selling to himself or contracting something valuable to himself, or one approaches it the other way round, through the exceptions. But in our submission either way should lead to the same answer.

Now we've discussed the exceptions in written submissions at paragraph 45 and can

I just take Your Honours to two exceptions in particular. The first one I want to mention is that appearing on page 16 in our submissions at (e) and that is where two trustees do not share a common trustee and the trustee has only a limited beneficial interest in the trust property, and then we set out a passage from *Lewin on Trusts*, and you will see that the passage indicates is that in that situation that is an acknowledged exception, and the effect, if it applies, as you'll see from the latter part of the extract that we've quoted, is not that we all go home and forget about it, but that, in fact, what has to happen is the trustee has to basically come along and persuade the Court that the transaction looked at in all of its detail was a proper one and one that didn't involve him taking advantage of his position.

BLANCHARD J:

You're not arguing, are you, that Ms Fenwick's interest in the other trust as a beneficiary was de minimis?

MR HURD:

I'm not saying de minimis but I'm saying it was limited and one can see what we're saying here because this particular passage refers to a case called *Hickley v Hickley* 2 Ch. D. 190, which isn't in the casebook, but which is in turn referred to in one of the judgments which is in the casebook, *Farrar v Farrars Ltd* (1888) 40 Ch D 395 , at tab number 7, if I could just take Your Honours to *Farrar* and see what was said in *Farrar* about the *Hickley* case I have just mentioned.

GLAZEBROOK J:

What tab are we?

MR HURD:

Tab 7. And *Farrar* I should say involved a shareholding in a company so it doesn't actually involve a beneficial, interest as a beneficiary under a trust. But it calls in aid the *Hickley* decision, and that appears at page 405 of the report half way down the page, that the proposition is contrary, the decision of Vice-Chancellor Bacon in *Hickley*, in that case on the facts, "greater difficulties were presented than in the case before me. One of the selling trustees was interested beneficially under the settlement of which the purchasers were trustees; indeed, the property sold and bought was a house, which was purchased at his request as a resident for himself and his wife." I can make available *Hickley* if it's going to be of assistance to the Court. In *Hickley* there were two interests which this trustee, the selling trustee, had

in the purchaser trust. One was a contingent interest in the reversion. So if somebody else didn't survive then he had it, and the other was that if, in fact, a property, a residential property as purchased, then he and his wife would have the right to live in the property. So those, in my submission, are very tangible interests, beneficial interests, but they were held to be, I'd describe as limited, and not to result in any invoking of the self-dealing rule.

So, I'm sorry to be quoting cases from the 1800s, but that's where one sometimes has to begin with some of this material. But, in my submission, that is authority to the proposition that if the only issue one is talking about is a beneficial interest, then if it is limited, and one can debate what "limited" is but it gets some clarification from the facts of *Hickley*, then that, in itself, is not sufficient to trigger the rule.

The other part to the exception is that the trusts don't share trustees and of course in this case they do share trustees. But, of course, as we've already discussed, the access, sharing trustees, is not in any sense doesn't give rise to prohibited conflict. So the exception, as it's framed, we don't fit squarely within, but the reason we don't fit squarely within it is eroded in the case of the requirement for two trustees by the effect of section 227A(2) and then one gets down to debating what is a limited beneficial interest. But in my submission –

GLAZEBROOK J:
What are the trustees that are shared, is that just Mr Eru? Sorry, have I got that right, no, the other, Ms Emery?

MR HURD:
Ms Emery, no, Ms Emery's only problem –

GLAZEBROOK J:
Oh her husband, that's right.

MR HURD:
– with her husband. Ms Fenwick was a common trustee in Tikitere and Paehinahina Mourea as well as having her beneficial interest in her family, beneficial interest.

BLANCHARD J:

I noticed that when Justice Chitty's decision in *Farrar* went to the Court of Appeal at the very end of the judgment of Lord Justice Lindley, for what was a pretty strong Court, he does appear to approve *Hickley v Hickley*. He also mentions *Guest v Smythe* Law Rep. 5 Ch. 551. Have you looked at that?

MR HURD:
No I have not Your Honour, and we probably should have, I'm sorry. It's referred to, I think, *Guest v Smythe* in, and I think it's *Lewin* extract with a reference to it, and I think it may have actually come down in a different direction in *Hickley*, but certainly *Hickley* was, as I say, approved in *Farrar*. But again if that assists the Court we can make that available.

So what we're saying is in terms of established exceptions, we don't fit four square within that, but we are pretty close to fitting within it, if one takes account of the statutory provisions that we've been discussing. The other exception that I just want to mention is that which is set out at 45(d) of our submissions and that is where the trustee has not placed himself or herself in a position of conflict of interest but has been placed in a position expressly or by necessary implication by the settler or the terms of the trust. Now again I can't suggest that we fit four square within this exception. It's an exception that's actually been used, where it has been used mainly in respect of superannuation or pension funds, where one ends up with a requirement that to be a trustee you might need to be a member with a plan, or you might need to be the employer if you're an employee, an employer's representative, and what's been said is, well, obviously that gives rise to a potential conflict but that is something which is inherent in the nature of the plan and its requirements. Now here what we have is a bit different to that again. The conflict here arises by lineage not by anything else. It's not something that these people have gone out and acquired and therefore become conflicted, and trustees of these trusts are appointed by the Court, albeit having heard the views of others. So presumably the Court, and the Courts, the Māori Land Court has the records of ownership of all beneficial owners of all trusts in its area, know only too well that these people actually have interests in several trusts. So it's not, as I say, clearly within the exception as it's expressed but it has certain elements of that. That what has arisen is really a consequences of the nature of ownership and the Court having, notwithstanding that, appointed these people as trustees. I don't think I can take that issue further than that but again it seems to me that if one were looking for some established and principled exception, which one can draw some analogy with, that is one.

Now that then I suppose takes me to what I'd call broader policy issues about what rule ought to be applied and in my submission what one should really be concerned about here is what is the appropriate response by equity to a conflict, if this is a conflict, which has occurred in this case. Is the appropriate response to throw the baby out with the bathwater as it were and say, well that's it, unless there are conflicting equities, roll up, any one of the 1200-odd beneficiaries can come along and seek to avoid it, and that's it, or whether one should be saying, well all right, we've got an issue, we need to consider the issue, we need to look at the transaction, we need to look at the circumstances in which it occurred, we need to look at whether this trustee improperly took advantage of that interest in some way, or whether this is a transaction that actually ought to proceed because the Court might decide that it's in the interests of the beneficiaries as a whole.

Now the difficulty is exaggerated in this case by, again, the number of beneficial owners. One of the 1222 can put their hand up and say, we want it avoided thanks. What about all the other beneficial owners? What about their interests in all of this. They may have a range of views. I know my friend in his submissions almost sort of conveys the impression that there's a homogenous view of beneficiaries as a collective, that they don't like the transaction. That's, there's clearly a range of views by owners. But in our submission this is the sort of scenario that cries out for the Court being able to have a look at the matter in the round and decide is this something which, notwithstanding the way in which it's been arrived at, ought it proceed. Now in part, of course, the Māori Land Court did that at great length. What it didn't do, and my friend Mr Geiringer was quite correct, although the timing is slightly different than he suggests in his submissions, but what, in fact, happened was part way through that hearing the Court decided, and both parties agreed with it, that it should not be required to actually form a view on whether this was a good transaction commercially or a bad transaction. So that part of the exercise I can't say had been undertaken because it wasn't. it was a very strange point for the Court to have reached and one that caused me some irritation simply because I'd already cross-examined Mr Michener for about a day or more on his lengthy affidavits, which were addressed to why the transaction was such a terrible transaction.

BLANCHARD J:

Are you saying the matter should go back to the Māori Land Court?

MR HURD:

I'm saying if we come within the exceptions that I'm talking about, if you take the view it's voidable, then the right course would be that it would have to go back to the Māori Land Court, but for that, what I call a holistic examination, not simply to decide whether there's competing equities.

GLAZEBROOK J:

Is there a – do the cases say there's a holistic look at it? Because, I mean one of the difficulties with saying you look at whether it's a good transaction or a bad transaction is you have the Courts substituting the views for the trustees who are the ones who are supposed to be making that decision. So isn't it just, even under the authorities that you look at, whether there was an improper dealing in the sense of perhaps difficulties in respect of consideration. It's just that the idea that you go back and the Court then decides whether commercially this is a good transaction or not is not, it doesn't seem to me to be the right view.

MR HURD:

Well first of all the term "holistic" is mine, I'm sorry, I'll put my hand up for that. The view I have taken is that if the Court is to be put in the position of having to decide whether, notwithstanding a conflict, the transaction should proceed, it will need to form some view about the nature of the transaction and – because that would be part of what's before it, and I know my friend in his submissions suggests that's inherently difficult or something for the Court, but the reality is that an option that it was open to the trustees, and pity help as it may well have been the better option given that five years later where we've ended up, would have been to have gone to the Court before they did this transaction and said can you please, this is what we're proposing to do, can you please approve it, and that is one of the clear exceptions to the rule if you do that. Now if they had done that the Court would have had to make exactly that sort of assessment and would have to form a view –

WILLIAM YOUNG J:

Well would it necessarily have said, this is the best deal, or would it have said, this is an acceptable deal and there's no procedural impropriety?

MR HURD:

I think the latter rather than the best deal.

WILLIAM YOUNG J:

There's obviously a sort of a rather intangible issue that it's pretty difficult to deal with in terms of the interconnection with this tribal claim.

MR HURD:

Yes, yes. It seems to me that what the Court would be doing would be to form a view that this is a transaction which notwithstanding the conflicting interests, was a proper, one that could properly be arrived at by the trustees.

McGRATH J:

Is that a convenient time?

MR HURD:

Yes it is.

COURT ADJOURNS: 11.36 AM

COURT RESUMES: 11.54 AM

MR HURD:

Yes, may it please the Court. Can I just begin by trying to tie up some loose ends that were left from this morning. We've obtained a copy of the two option and royalty agreements in unredacted form, albeit that it's on an iPhone so we've tried to do our best to decipher them. But the position that my friend, Mr Geiringer indicated to the Court concerning the purchase price for exercise of the option is correct, each one, it's $1. Your Honour Justice Blanchard I think asked about the timing of payments if the royalty option were chosen by Paehinahina Mourea and the way that works is there's $500,000 payable within 20 business days after Paehinahina gives notice of its intention to exercise the royalty option. There's a further 500,000 payable 20 business days after the financial close in respect of the first facility to be constructed, and there's $1 million to be paid within 20 business days after the commissioning date of the first facility.

BLANCHARD J:

So both of the agreements were in pretty much the same form as regards the royalty arrangements?

MR HURD:

No. Because the MAWT option in royalty agreement doesn't contain up-front payments at all, if the royalty option's elected. It provides that a royalty is to be agreed, and there are parameters given for that royalty that's –

BLANCHARD J:
This is the one where the Trust is actually elected to take royalties?

MR HURD:
Correct, yes.

BLANCHARD J:
So there's no up-front payment on that.

MR HURD:
No up-front payment. The royalties are to be agreed, but they are to be calculated on the basis of a return of 17.5% on the total value of the project which also of course equates, I think, with the option, the share option, was 17.5% if they elected that.

I was asked, I referred to the Court of Appeal having mentioned in the context of 227 and 227A whether 227 was, as it were, an adjunct to 227A at, and the reference I was asked for is at paragraph 99 of the Court of Appeal's judgment, page 152 of volume 1 of the case on appeal.

Now in what I've discussed with Your Honours so far, one matter I've omitted to mention and need to mention is that of course as well as the Act there was a Trust order which I ought to take Your Honours to. In fact there are a whole range of trust orders that have been adopted at various stages, but for the matters I think which I just want to draw Your Honours' attention to we can deal with them more by reference to what I'll call the "original order" which is 1999 and which appears at volume 2 beginning at page 159 of the case on appeal, and if I can take Your Honours to page 164, and this is clause 4, which specifically addresses personal interest of trustees and which largely replicates 227A(2), but it's appropriate that I mention or I take Your Honours to that.

WILLIAM YOUNG J:
Sorry, what page?

MR HURD:

Page 164 of volume 2, and it's clause 4. And –

BLANCHARD J:

Am I right in thinking that that doesn't contain the exception?

MR HURD:

No, I've noticed that. I'm not sure quite what one's supposed to make of that, but in my submission the Act would override in any event.

Now just on the same page, clause 6, which sets out a procedure under the heading, "Protection of minorities," and provides a way in which a minority or a concerned beneficial owner can deal with any concerns, firstly, by requisitioning a meeting, and then there's reference to applying for a review under the Act, and that was one of the remedies which the original applicants here sought so that this Act and reflected in the trust order provides what in our submission are very extensive and easy review remedies for beneficial owners.

And also while I am addressing this trust order, can Your Honours go to page 165, clause 7, and this concerns general meetings. And there's an obligation to hold annual general meetings every five years, which one might think is a bit of a contradiction in terms, but that's the way it works. But it's relevant to something that arose earlier when there was some discussion as to the basis upon which voting takes place or is counted, and you'll see that at 7A(2) the matter's to be determined by a show of hands, and then there's a quorum requirement which has been extremely problematic, as you will have seen from the Māori Land Court's judgment for this and other trusts, to actually get a quorum of 10% is notoriously difficult and a whole lot of meetings have been inquorate in the strict sense. But 7 seems to confirm that decisions at general meetings are purely by show of hands by numbers of persons present, not on the basis of beneficial ownership.

Now, I've taken Your Honours through on this second issue the proper, what I submit should be the proper role of the self-dealing rule and the extension of it, and we had talked about the exceptions, and I think at the adjournment I'd come to the point of saying that really, from a policy point of view, the issue should surely be what is the appropriate response of equity if there is a breach of trust, and we had then discussed the two alternatives or what I have suggested are the two alternatives that

adopted by the Court of Appeal and the alternative that I have proposed, and in the course of discussion about that I think it was Your Honour Justice Glazebrook questioned the reference to holistic and just what was the nature of the examination that would take place. Can I just refer Your Honours quickly to tab 5 in our casebook, which is *Lewin on Trusts* extracts and it's, what I'm arguing for is perhaps best summed up at 20.89, paragraph 20.89, and it's the portion of the paragraph, it's been talking about an exception, and then it says, "Where this exception to the self-dealing rule applies, the transaction concerned is freed," no, I'm sorry, Your Honours, I've taken you to the wrong passage, let me – although it actually refers to the point anyway, at the end of 20.89, because it –

McGRATH J:
89, was that?

MR HURD:
Yes, because it states the two alternatives, and the second one it describes as, "Under which any less severe rule under which the burden of supporting the transaction is thrown on those seeking to uphold it."

GLAZEBROOK J:
It's really what they have to the show I was more interest in.

MR HURD:
Yes, and – well, yes. And can I just refer you back to 20.60A, paraphrases it in this way, at the end of the last sentence of 20.60A, "Sometimes the conflict operates merely to impose a burden on the trustee to prove that the –

BLANCHARD J:
Sorry, which paragraph are you now reading from?

MR HURD:
20.60A, it's back –

GLAZEBROOK J:
Page 470.

McGRATH J:

Page 470, yes.

MR HURD:

And you see the last sentence there, “Sometimes the conflict operates merely to impose a burden on the trustee to prove that the transaction in question was fair and reasonable and that he took no advantage of his position as trustee,” and that's the process I’m talking about.

GLAZEBROOK J:

Sounds as though sometimes they’ve got to do more – oh, I see, that's sometimes other than the voidable nature of the transaction.

MR HURD:

Yes.

GLAZEBROOK J:

Okay, thank you.

MR HURD:

Now, coming back then to the policy reasons why one should adopt one remedy rather than the other, certainly it’s our submission that there are a range of them which, at least in this context, support the approach that we urge. The first is, obviously, the nature of these trusts, the diverse nature of ownership, the multitude of individual interests that there are, which need to be considered properly. There’s also what we’ve talked about generally, but it appears from the Act the extensive powers of review that the Court, the Māori Land Court, actually has, the availability of remedies, and of course if there’s been a breach of trust we’re not suggesting that the beneficial owners are without any remedy. Obviously if there was an advantage gained by a trustee then he would be accountable for that in the ordinary course. But what we’re saying though is, what isn’t necessary and isn’t appropriate is the sort of blunderbuss approach involved in the traditional rule of simply saying, “Well, it’s void,” unless there are some conflicting equities, that that simply isn’t necessary, it’s not justified in terms of the conflict we’re talking about and it’s inappropriate given the interests that are involved and the nature of these trusts.

Now, that I think is probably as far as I need to take it in terms of those aspects. I had started my address thinking that I would briefly summarise where I was going to, but as sometimes happens I think I've actually addressed most of what I sensibly would want to cover.

Can I just though just deal with a couple of other issues finally? There is a difference in approach between my friend and I concerning this appeal, which really is the extent to which this is really essentially just an issue of law on, or issues of law on established facts and the extent to which one needs to get into the whole substrata of facts here. Our position is, as I've explained it, that we see it really as essentially a legal –

McGRATH J:
Yes.

MR HURD:
– two legal issues, and so we haven't sought to get into the great mass of facts, that I think it's proper to say that we take strong issue with some of what my friend has included in his submissions. I think my preference would be if the Court wants to hear from us that we deal with that in reply once we've heard him –

McGRATH J:
Yes.

MR HURD:
– but certainly in our submission those are not matters that the Court needs to get into and many of them we would say are irrelevant to the issues before us.

Now, unless Your Honours have any other questions for me, that's really what I wanted to say to Your Honours, but I'm obviously free to deal with anything else.

McGRATH J:
Thank you, Mr Hurd. Now, Mr Geiringer, if you would prefer to address us sitting down and you can put yourself in front of a microphone that's all right with us.

MR GEIRINGER:

No, I'm not so unhealthy, I just, my ears are a little clogged, so I was worried that I would miss things, I've been missing a lot in private conversations over the last day or so, but actually the acoustics and the magnification in this room are just so magnificent that I've heard everything a lot clearer than I've heard anything all week. So I'm not really suffering at all Your Honour, I don't want to pretend otherwise. If I could just have a moment to assemble some things. I've brought up this because we were delving into matters that went beyond the bundle, but thank you, Your Honour, for the kind consideration.

Your Honours will have had an opportunity to review the brief submissions. I'd like to begin, while they're fresh in my mind and while they're fresh in Your Honours' mind, just rebutting a couple of points raised by my learned friend that are not otherwise addressed in my submissions.

The first is in relation to Ms Fenwick's family interests, my learned friend suggested that, what does "family" mean, it could mean anything, we don't have it from the judgment, and I do accept that the judgment records that there's a "family" interest, it doesn't further elaborate. But the evidence that was before the Judge, which was I hasten to say not controversial, it wasn't contradicted by Ms Fenwick, was that we're talking immediate family. So we are talking – in particular my understanding is the reference to immediate family was a reference to her brothers and sisters. So we're talking about her immediate nuclear full blood family, and it's nothing more vague and nebulous than that, and that immediate family has a 20% interests in one of the trusts, and as you have heard that trust had an option to receive $2 million in payments. It doesn't, it didn't exercise that option, it exercised the option instead to get an interest in the company undertaking the power plant project.

This brings me to my second point which is that the respondents are in a difficult position here and they want the Court to take account of that difficulty. The appellant has, and the previous trustees who were with him as parties in the Courts below, have informed the beneficiaries through meetings that they're no longer following the agreement in the exact form that is before Your Honours and quite clear evidence of this is the percentage that my learned friend admitted to now being in the hands of the Paehinahina Mourea Trust, which is 65%, and you'll note that the agreement gave them an option for 50%. So somehow the agreement has been varied and it's now, their holding is now actually at 65%, that's registered in the Companies Office,

and that's something that the appellant trustees have been open about. But otherwise the appellant trustees have refused, point blank refused, to let the beneficiaries know anything more about the new arrangements.

So here we are, we're discussing arrangements that are no longer quite in place. To what degree they're not in place, I don't know, my clients don't know, and all of the criticism that the Māori Land Court made of the trustees in finding in their favour, nonetheless Judge Harvey was very critical of the way that this had been handled, and pointed out the transparent nature, for example, of the Paehinahina Mourea Trust in handling the exact same transactions, and gave very optimistic and reassuring noises, the Judge did, of how this was all going to change in the future. Well nothing has changed and here we are in a world with somewhat different agreements, I don't know how much, my clients don't know how much, and it's all still being done in secret.

So if the suggestion is that somehow this court is able to see these agreements as being so clearly transparently not impeachable, that instead of referring the matter back to the Māori Land Court they can simply allow the transactions to stand, well what transactions are being allowed to stand, we don't know, and this Court doesn't know.

GLAZEBROOK J:
That wasn't Mr Hurd's submission. He accepted that it had to go back if his second alternative applied.

MR GEIRINGER:
Well that was one of the two options on the appeal, I'll take that exceptions from my learned friend graciously. The next point is in relation to meetings. My learned friend is not quite right. He rightly points to the clause in the deed about meetings and how they are conducted, but that's only a limited facet of how these meetings are – a limited example of how these meetings are conducted. Meetings under the Act are regulated. They are governed by a set of regulations called the Māori Assembled Owners Regulations 1995. Those regulations require that there be a record taken of everyone in attendance and their shareholding and the quorums of meetings held under the Act, and through those regulations, are set by reference to shareholding, for example, the base quorum is for 40% of the beneficial ownership in shares, as well as at least three owners. For specific purposes, such as alienation, there is a

raised threshold, so a quorum is raised to 75% of shareholding, again with at least three people being there. So, yes, there is a rather lax voting method under the deed, but that reflects the fact that the beneficial owners have no powers under that deed, so we're not talking about making substantial decisions on the directions of the Trust and doing it all by show of hands, because the owners just have no such power. All they can do is decide whether or not to receive the accounts or not receive them, or indicate their preference to the direction that the Trust is going, if they happen to be asked, or to acknowledge their dissent, there's no, will we do this or, will we do that, and, let's now take a vote and determine it in accordance with ownership, and that's not there because there are no such powers. And my learned friend is referring to the meetings that you will see in the evidence or referred to by the Judge, and again those are meetings that are made under specific sections of the Act, where all that is required is to gauge the general support of the owners, so the Act says words to the effect of, does the variation in the trust or the appointment of a new trustee have a sufficient degree of support from the owners, it's very vague language and it's been given equally vague interpretation by the Courts in that the beneficiaries have no power, they could vote 90% against the variation, but that doesn't mean the Court won't grant the variation, all it means is that they will, through that 90% vote, realise that is the level roughly of the support of the beneficiaries. Therefore that translates equivalently to a rough voting mechanism, namely a show of hands, but that's –

O'REGAN J:

But is there something which says there's a poll taken?

MR GEIRINGER:

For specific purposes. So, for example, for alienations in leases. If they're actually going to sell some of the land permanently, then the Act and the regulations require not only quorum to be of a certain level but also the votes in favour to be at a certain level, and that's fixed by the vote. So they're, in a meeting under the regulations, once you've ascertained who's there and what the shareholding is you'll take the vote for a specific purpose to which the Act applies and you'll record exactly who voted and what their shareholding is, and these meetings tend to be taking place in the courthouse itself, and they will actually record what percentage voted for the motion and whether it was sufficient for the purpose of the Act. But that's for specific purposes under the Act. So the point is it's not a general statement of, these

meetings are always done in this lax way, and it depends on the purpose, it depends on the Act. And it's lax where it's appropriately lax, given what's being asked.

That leads me on to the next meeting point, which is that it's not accepted that it's impossible for these meetings to be held quorate, and what you saw in the evidence and discussed in the judgment is that –

O'REGAN J:
Are we talking about meetings of beneficiaries or trustees?

MR GEIRINGER:
Meetings of beneficiaries, meetings of the owners. The quorum was set at 10%, and you'll see the figure. And we had two meetings that were highly criticised that were held by the trustees, and there were problems identified before the Judge that these were very badly advertised, they used the wrong name of the Trust on some adverts, they put the wrong date for the meeting on some adverts, and they didn't alert anyone to what was being discussed in the meetings.

O'REGAN J:
How does this help us decide what the powers of the trustees are in a conflict?

MR GEIRINGER:
Well, the meetings that were advertised by the trustees and were incredibly badly represented, they were in the order of 10, 11 of 17 people I think at the two, and they were very inquorate. But when the Court said, "We need to have a meeting," and it was advertised properly in a manner agreed through the Court, there were actually far more than the quorum turned up.

O'REGAN J:
Yes, but how does that help us understand as far as the Trust –

BLANCHARD J:
How does this bear on the issue?

MR GEIRINGER:
So the point is that – okay, so I will pin it back, but if you allow me, Your Honour, it gets back to – let me start it in this way. No, the case law does not support, as my

learned friend I think acknowledged, it's his word, it doesn't support an holistic approach, where the Court just sits back and says what's generally right, that's not there in the case law in my submission. But what does come out very consistently and strongly in the case law is that we're talking about equitable remedies and that equity concerns reality. So, for example, Justice Thomas in the case you've been referred to, the *Jones v AMP Perpetual Trustee Company NZ Limited* [1994] 1 NZLR 690, that's tab 12 – I won't take Your Honours to it – but the situation there, Your Honours will remember, is a subsidiary company resting the investments of the pensioners with the company in investments run by the parent company, and the suggestion was that this was a self-dealing or a conflict. Justice Thomas says – well, first, there's no, we're talking about companies and we've got a company structure and so if you go by strict company identity there is no such breach of the rules of equity. But then what he says is, he makes it clear in the correct circumstances that would not mean that this Court would not, regardless, interfere, "We would look beyond, we would be willing to look beyond the corporate veil if the reality of the situation was that the ethical duties and the equitable duties that existed were not being followed." But as a matter of fact the reality in that situation is there was no such conflict and there was no such breach or advantage or the equitable duties. So the same is reflected in the *Public Trustee v Cooper,* Hart J, unreported, 20 December 1999 decision, quite expressly, talking about looking beyond the technicality and the equity, and it's reported, it's also very strong in the *Tito v Waddell* decision, which is all of course dicta, the Court acknowledges at the beginning, that it's found that there is no equitable relationship at all, but it goes into what the law would be if there was an equitable relationship. But as the Court makes it very clear there, it talks about reality, so for example in the *Tito v Waddell* situation we're talking about the ocean island, the Banaba people and their relationship with the various countries, Britain, Australia, New Zealand, but also with the relationship with the Crown in right of the islands – I forget the Crown, I forget the name of the Crown pacific islands to which that island was a part –

BLANCHARD J:
Gilbert Islands.

MR GEIRINGER:
Gilbert Island, sorry, Your Honour.

BLANCHARD J:

Now Kiribati.

MR GEIRINGER:

Yes. And the point is that His Honour says it's not enough to say that there's a technical conflict between the Crown in one capacity, having a duty in another capacity, having an interest, you've got to look at the reality within the Crown of who has those interest and who has those duties. And so he looks at the, His Lordship looks at the duties and says that those duties and interest are actually held by different aspects of the Crown. So there's two aspects to the equitable decision, there's a general conflict point and then there's a self-dealing point, and on the self-dealing point he says if there was an equitable relationship here he would have in fact found in favour of the plaintiffs, but on the general conflict point he finds against them, even on an equitable basis, because equity looks through the legal situation to the reality on the ground and whether the interest and duties that are being protected by equity are in fact in jeopardy, are in fact being disadvantaged by what took place. So I'm accepting that equity is quite capable of looking at reality and not being bound to look at the technicalities of who was involved and what role they filled and therefore – so, in answer to Your Honour O'Regan's question, which was some time ago now, where I'm coming to with this and the whole meeting point is what did take place in this case, how does it relate to the exceptions that are already recognised at law, how does it relate to the equities that are at issue and are they in jeopardy, were they disadvantaged, and therefore should the Court allow some exceptions, some new exception or some existing exception, and where I get to with the meeting is one fundamental problem for the appellant in this case is the behaviour of the appellant and his colleagues –

O'REGAN J:

But isn't that for the Māori Land Court if we sent it back to them. We can't resolve that here. What we're deciding is, is there a bright line rule which says it's voidable, or does someone have to do a merits assessment. This Court isn't going to do the merits assessment.

MR GEIRINGER:

No.

O'REGAN J:

We can't, so it will have to go back to the Māori Land Court to do that.

MR GEIRINGER:

No. I'm suggesting that, I'm vigorously submitting that there shouldn't be, is not and shouldn't be, some general merits assessment that applies to all cases, and I'll get to the reasoning in that in a moment, but I say that –

O'REGAN J:

Well that's all you have to do.

MR GEIRINGER:

Well the alternative that my learned friend is putting up is that it's close, it's either in an exception or it's very close to an exception, and so maybe it should be allowed under one exception or some variation of one.

O'REGAN J:

Yes, but you're saying that as a matter of law, not on the facts of this case. It's just saying trusts of this kind, interests of this kind and trusts of this kind should be recognised as not being subject to the bright line rule. So he's not saying because what people did in this case is that way, he's just saying that's the rule we should apply. It's a question of law, it's not a question of the facts of this case.

MR GEIRINGER:

Well the reality is that there isn't a bright line rule if you step back and take account of all the exceptions because as, the passage my learned friend quoted, yes there is something that is stated on its face to be a bright line rule, but it's riddled with exceptions. These are exceptions that have been developed by the Courts to do exactly what my learned friend wants, says he needs to achieve for his clients which is to vitiate what would otherwise be the hard application of a bright line rule where the circumstances don't justify that application.

BLANCHARD J:

Can I suggest that they're really not exceptions. They're illustrations that there is a bright line rule where a trustee is buying from the trust, in substance. Where that's not the case then the Court necessarily has to look at whether the transaction should stand, it doesn't strike it down automatically as it would do where the trustee is buying from the trust, and what we have, and have been called exceptions, is a

series of illustrations and you've, types of fact situations like this will keep cropping up.

MR GEIRINGER:

I'm accepting that – I accept that that's the case. I accept that there is a need for these if not exceptions to interpretations of the rule that says that these things on particular facts fall outside it. The difference between my learned friend and I on this is whether that falls back on one overarching merits test, that the Court can say in all circumstances, on any facts, we're just going to sit back and take account of all of the merits and therefore decide it doesn't fit within the rule, or whether the exceptions need to be carefully carved out because when one assesses those exceptions, or those variations of a rule, or colours on the rule, they show that the rule in essence doesn't or shouldn't apply. That's the difference. And the problem I say for my learned friend's position is that he can't get within any exception that's recognised, and he can't get there for good reason, and the result should not be let's send this back to the first Court to do an overarching merits test. The result should be there is no possible exception that you fall into that would justify going back and doing such a merit assessment.

O'REGAN J:

That's an argument for the bright line rule. You're just saying the bright line rule applies.

MR GEIRINGER:

I'm saying that the bright line rule has a large number of nuances that are recognised by the Court, none of which apply in this case.

O'REGAN J:

But if you're asking us to do the merits assessment you're flogging a dead horse because we're not going to do it.

MR GEIRINGER:

I'm not asking this Court to do a merits assessment, and it's not a position to do a merits assessment because it doesn't even have the evidence in relation to the merit of the transaction before it.

O'REGAN J:

Well doesn't that suggest that the Māori Land Court should do it?

MR GEIRINGER:

Well if there is a basis for saying that a general merits assessment should be done, let me get out with it, my point in relation to the meetings is that in all of those cases where the Courts describe it as being not a case of self-dealing but a question mark over fair-dealing, one of the fundamental elements is that the trustees have been open with the beneficiaries about what they were doing.

WILLIAM YOUNG J:

But can we make a finding relevant to the point at issue now, that the trustees' conduct in relation to meetings puts them outside an exception?

MR GEIRINGER:

We do have findings –

WILLIAM YOUNG J:

I know you've got some findings but they weren't really with respect to this issue. Because in the Māori Land Court you weren't seeking rescission. Your client wasn't seeking rescission.

MR GEIRINGER:

No, the rescission came up –

WILLIAM YOUNG J:

In the Māori Land Appellate Court.

MR GEIRINGER:

– in the course of the proceedings, in the course of the discussion with Ms Aikman. The –

WILLIAM YOUNG J:

Sorry, just pause there, not until the Māori Land Appellate Court stage, is that right?

MR GEIRINGER:

No it was before the Māori Land Court, what happened was that the applicants, represented by Ms Aikman, were asking for the trustees to be removed, the new

trustees to be appointed, for there to be a Court, the correct words are escaping me, but an assessment of the trust and its activities, and that the question rose in that discussion as to what effect that could possibly have on the agreements that had already been entered into, and Mr Hurd's position was an assessment in the future, or decision of the trustees in the future, could not possibly affect the validity of the agreements that had already been entered into. Ms Aikman's position was simply that that is a matter that the new trustees that I'm asking you to appoint will have to assess. She didn't forcibly argue it in either direction. She said, that's not something that's being requested, it's not something that you can say for certain that these agreements could not be invalidated, that's something that the new trustees need to have an opportunity to consider and explore and in my submission Ms Aikman's position in that respect was right but what the Judge did is, without that issue being formally before him, made an express finding that these agreements could not be invalidated despite all of his other findings. So when we got to the Court of Appeal it was, this is how it came about, and no we didn't ask in the first Court for a finding that these agreements were invalid, but what we're asking this Court to do is to say that the Māori Land Court got it wrong to say that they cannot be made invalid. And we do need to go back to the Māori Land Court for a number of assessments because we've accepted throughout that this issue will depend on the interests of innocent third parties. We say that there are no innocent third parties and there is no obstacle for the Court voiding these agreements. But that's not something that there's been any finding on. That's not something that the supposed third parties have had an opportunity to come to the Court and have their say on, so if there is somebody out there who believes that they would be harmed by that, and are innocent in terms of trust law, the Court shouldn't be voiding the agreement without having heard from them. That's something I accepted in front of the Court of Appeal and that's a fundamental why it must, must go back to the Māori Land Court. So we are going back on the decision of the Court of Appeal, we are going back to the Māori Land Court, and we are, at least, looking into the existence of innocent third parties. The question is, does the Court also then do a general merits test and –

WILLIAM YOUNG J:

Why do you say it doesn't. Do you say the self-dealing rule applies?

MR GEIRINGER:

I say that the trustees in this case are a world away from the behaviour of the trustees in any of the cases in this casebook that describe, where the Court says that the self-dealing rule or the fair –

O'REGAN J:

So you're saying it applies then?

MR GEIRINGER:

I'm saying it applies.

GLAZEBROOK J:

So you say that you have to be open with the beneficiaries before you come within an exception because I very much doubt that's the case because in the pension funds I very much doubt anybody goes to all of the beneficiaries and says here's this one particular transaction we're doing, they just get on with it.

MR GEIRINGER:

That's right, you're right Your Honour but I am referring that to the elements of what they call the fair-dealing rule which is described by some as an exception, others by a separate rule or others as a colour on the first rule, it doesn't really matter.

GLAZEBROOK J:

Well I think it is accepted, it was accepted by Mr Hurd that this doesn't easily come within a fair-dealing rule, it's just an exception – well he doesn't accept that there's a conflict but let's leave that aside because of the – so let's, on his second argument he is accepting there's a conflict and he says, "The automatic". Well this is my understanding. So on a second argument, assuming there's a conflict which he doesn't accept but assuming there's a conflict he says that you shouldn't automatically set aside the transaction.

MR GEIRINGER:

No the –

GLAZEBROOK J:

And he accepts it is not fair-dealing because if it was fair-dealing there would not be a conflict.

MR GEIRINGER:

- no, it's – so my point about the openness is to say it doesn't come within fair-dealing. The AMP ruling was a different issue. There the Court with Justice Thomas giving the decision, found that in fact there was no conflict. There was an issue that Mr Carruthers raised in that case about whether the parent company was charging any fees because it wasn't charging fees for the administration of those assets and he said that meant there was no conflict. I believe the decision of the Court didn't quite accept that basis but did accept that there was. Whilst that didn't in itself get rid of any conflict, there wasn't as a reality any conflict between the vesting of these assets with the parent company for it to manage through its pension schemes and the obligations of the subsidiary company to protect the interests of the pensioners, it just wasn't. So it's not a case of there was an exception of the fair-dealing, it was a case of there wasn't a conflict at all.

O'REGAN J:

So you are saying if one –

McGRATH J:

So you are accepting that your argument is based on the self-dealing rule being applicable. Now Mr Hurd has provided for us, a discussion of the cases indications of flexibility in particular situations and says he can bring this case within those situations. Now I think that you are going to help us most if you can address his argument in that respect, focussing on the legal issues, the legal argument that he has raised.

MR GEIRINGER:

Well maybe I am misunderstanding his argument. He drew attention today to two exceptions in particular but he also accepted that neither of them actually apply. One of them doesn't apply in my submission on either element, that was the exception where you don't have trustees in common and it is essentially a de minimis interest and the problem here is that they do have trustees in common. I understand my learned friend's argument that he says that is in any case ousted by section 227A but also it is not a de minimis interest.

GLAZEBROOK J:

No but that wasn't what the passage says. The passage says, "Unless it is a de minimis interest you have to justify it." So it assumes and I think accepted by Mr Hurd that Mrs Fenwick's interest at the least was not de minimis and therefore she, as a trustee would have to justify the transaction, not on a general merits basis but on the fair and reasonable and that she took no advantage of her position as trustee, that was my understanding of his argument.

MR GEIRINGER:

If I am getting this right that was a reference to a passage in *Lewin*, that if you look at the citations that *Lewin* refers to, some of which you have in the bundle, they are all references to the fair-dealing rule.

McGRATH J:

You are going to, you are sort of giving a sort of an encapsule, a very summary response. We need you to focus your argument on what Mr Hurd said and to give us your answer and that is really all we need from you. You have got to oppose his argument directing what you say to that and then we can, I think make progress if you do that. But you can't just do it in a quick summary form. So take us to the passages concerned and give us your answers, so far as you wish to.

MR GEIRINGER:

Perhaps if I step back into my submissions which – and we can skip over the factual backgrounds which Your Honours will have reviewed.

McGRATH J:

Yes.

MR GEIRINGER:

But just to draw your attention there was a question about who was a trustee of which trust and that I have set that out clearly with some bold names on page 3 of my submission at paragraph –

GLAZEBROOK J:

Sorry I had forgotten that, just momentarily when I was asking the question but I know it is there.

MR GEIRINGER:

So just for your assistance, I won't go through that. As to whether or not there was a conflict at all, do Your Honours need me to go into the argument that, relevant to that is the conflicts in relation to the advisers to the trustees who told them that they ought to be entering into this agreement. Is that a point we are still –

McGRATH J:

For myself I don't see that we are going to be assisted by your going into the position of advisers. That is a general view, so you can move on from that.

MR GEIRINGER:

The question of whether 227 and 227A form a code that deal with all situations of conflict.

McGRATH J:

Well you have heard the discussion about that argument so if you want to make any general points, do, but I don't think you need go, just bear in mind what the Court itself has put to Mr Hurd.

MR GEIRINGER:

Yes. If I could just add to that the following brief points then.

McGRATH J:

Yes.

MR GEIRINGER:

My learned friend made the point that they can't have been meant together to act in the way that I suggested because 227A was an addition to the Act whereas 227 was in the Act from its inception. My answer to that is that 227 has the effect that I describe in my submissions, irrespective of 227A. It doesn't need 227 to be useful to trustees to get rid of the requirement to act unanimously but having had – with that rule in place and then bringing in the requirements of 227A which free the trustees up to be trustees in circumstances of conflict, whether common or would otherwise require them not to be trustees, then that's able to dovetail with section 227A which enables, which facilitates that by allowing them to act as a majority. And that is all I mean in my submissions, I don't mean to suggest any other overarching intent for these two sections to have been designed to operate together.

BLANCHARD J:

Have you looked at the Parliamentary materials at all?

MR GEIRINGER:

Yes I went into *Hansard* to try and see, I ended up finding nothing that I thought supported my learned friend and nothing of sufficient particularity that assisted me to rebut it. I mean my general point about this not being a code is it doesn't say it is a code, it doesn't work as a code for all trusts in terms of the whole section and there is nothing on the face of those sections that compels one to conclude it is a code and in my submission the Court of Appeal was right to say what this is, is it changes the common law to the extent that it is required to be changed by the words of those sections but it doesn't do any more than that and there is nothing on the face of the sections to suggest otherwise.

And I have put in my submissions what an effect it would have, if it were a code and the most startling in my submission is the idea that the *Boardman and Phipps* [1966] UKHL 2 circumstances would no longer be regarded as conflict.

McGRATH J:

I think that you have answered the question. What you are saying is that there is nothing in the legislative history in *Hansard* or select committee report that throws any light on the provision.

MR GEIRINGER:

I didn't find anything that I thought was of assistance Your Honour.

McGRATH J:

That's fine, that may well. Is there anything further you need to say about then about the code, we have read your written submissions of course.

MR GEIRINGER:

The – one more point raised by Justice Blanchard was the fact that the wording in the trust deed is different and I am not going to accept my learned friend's position that it doesn't matter because in any case the statute overrules that. I don't think that is correct in terms of trust law. The trust deed or trust order is able to vary the rules and obligations the powers of trustees and the duties of trustees. That's universally

accepted. There would have to be some inconsistency that undermined the purposes of the Act. So where the Act says, it is okay to keep acting keep even though you're a trustee of another trust, and the trust deed says, "Well, for this trust it isn't," I, in my –

GLAZEBROOK J:

But then it doesn't say that does it? It doesn't say it's not okay, it just doesn't mention whether it's okay or not.

MR GEIRINGER:

Well, no, it does in effect, because the way it works is you have a, first, an exemption that says that you can keep being a trustee despite conflicts, provided that in relation to those conflicts you don't participate. It's a question of whether you're allowed to participate.

WILLIAM YOUNG J:

But doesn't that really go back to the underlying equitable principles as to whether being a trustee of another trust is a disqualifying interest?

MR GEIRINGER:

Yes. And you have to look at the reality. And if I could address you very briefly on the reality. And I think the words that jumped out at me most startlingly from the decisions in the bundle was from this – I'm going to say this wrong – this *Whichcote v Lawrence* (1798) 3 Ves Jr 740 case, that's at tab 2, but it's the words of a witness –

GLAZEBROOK J:

Tab 2 of…

MR GEIRINGER:

Of the appellant's, the first respondent cross-appellant's on appeal casebook. I'm going to quote a witness, because it was, it jumped out at me as one of the clearest explanations in any of the case law of the problem. This is in the, where the facts are set out at the start. It talks about the trustee, the impugned, trustees whose actions were impugned, has bought a lot, three lots, of the Trust property, and he's confronted by somebody who gave evidence, and the witness says that he confronted the trustee and said, "You can't be purchaser because when you're a

trustee your job is to get the highest price, and when you're a purchaser your job is to get the lowest price –

WILLIAM YOUNG J:
But we know that, I think.

MR GEIRINGER:
Right, well –

WILLIAM YOUNG J:
I mean, isn't that *Keech v Sandford* and…

MR GEIRINGER:
Sorry. It is, it's startlingly obvious. But, in my submission, it's equally obvious in the facts of this case. And if we focus on Paehinahina Mourea and the problem for Ms Fenwick, we have there somebody who is found by the judgment fully participating in the discussions and voting on the decision of Tikitere Trust. And yet, you know, and what they're doing is they're negotiating, amongst other things, and this is made more clear by the fact that it's now shifted, what percentage of shareholding is Paehinahina Mourea going to end up with, or what quantum of up-front payment is it going to receive? And here we have at the table somebody whose immediately family was going to receive a 20% interest in that, and personally a 5% interest. So in terms of the up-front payment, Ms Fenwick was going to pocket $100,000 roughly of that money, and here she is –

O'REGAN J:
Yes, but she wasn't going to – it wasn't being paid by the Trust though, was it?

MR GEIRINGER:
Well, that's a matter of debate. Certainly it was going to, unquestionably it was going to end up being, coming from the assets of the company.

O'REGAN J:
So it's not like a purchase from a trust, where the trust itself is paying money to the trustee?

MR GEIRINGER:

No, but here is Tikitere at the table, and what they want is for their percentage to be as large as possible and for Paehinahina Mourea to be as low as possible, and what they want is for the royalty payments to be as low as possible so the residual income of the company, which they will own the rest of, will be as high as possible. And in amongst them is a trustee participating in their discussion who on every point has the opposite interest personally. So the reality of the situation is that Ms Fenwick, her personal interest was for the up-front payment to be as high as possible, and that was the reverse of the Tikitere interest, and her personal interest was for the percentage to be as high as possible, and that's the reverse of the Tikitere interest, and that's the reality of the equity.

BLANCHARD J:

I think I noted somewhere that Tikitere was actually going to guarantee the company's performance.

MR GEIRINGER:

Yes. I mean, this was the argument in, between the experts, is that there was a enormous, according to my clients' experts, there was an enormous jeopardy on the part of the Tikitere Trust and eventually the beneficiaries, in relation to all sorts of things. If this power company didn't immediately start generating large sums of money, the Tikitere Trust could be in trouble, and particularly could, under the terms of the agreement, lose the shareholding that they had and the ongoing interest that they had. So, yes, the up-front payment, there was somebody in the Green, the former Green Energy, who turned up and said, "Well, we'll meet that." Somebody had to meet it, because otherwise the deal couldn't have gone ahead, but as you've heard from my learned friend there was then going to be a payment at the time that the power company went into operation, and shortly after the power company went into operation another payment again. And unless the power company was able to meet those through its income, the terms of the agreement were that the defaulting party, which would have been Tikitere, could have lost its interest in the company. So what the experts for my clients said to the Court was, "On the assumption that this works wonderfully and generates large sums of money from the beginning, what the experts for the other side are saying are true. But if that doesn't happen, what could very easily happen is a few days after the power company has started business, there's a call on these funds, the funds can't be met, Tikitere loses its interest, and

for the next, the remainder of the 52 years, Tikitere has lost all of its rights over the land for nothing, it gets nothing."

BLANCHARD J:

But if you're looking at the question of whether it's appropriate to set aside, you wouldn't I imagine look at the situation at the time, you'd look at the situation as it had transpired, otherwise it starts to get very artificial. In other words, you wouldn't set it aside because something terrible could have happened, if it's become clear that that didn't happen.

MR GEIRINGER:

Well, I mean, it hasn't become clear, it certainly hasn't become clear, because the power plant is not in operation and is not…

BLANCHARD J:

Yes, but would you answer the question.

MR GEIRINGER:

Yes, yes, I agree. The Court – whoever makes that assessment would have to make it predicting, making reasonable predictions into the future about what was likely.

BLANCHARD J:

Looking at the situation as it is now?

MR GEIRINGER:

Yes.

BLANCHARD J:

Thank you.

MR GEIRINGER:

But the situation as it is now is that all of these matters are still up in the air. But the – I think it's time I move on to what I'm saying in my submissions in relation to whether or not the merits assessment should apply at all.

McGRATH J:

Now whereabouts are you in the submissions then?

MR GEIRINGER:

This is the section starting on page 13 –

McGRATH J:

Right.

MR GEIRINGER:

– at paragraph 52.

McGRATH J:

Is that a convenient point to…

MR GEIRINGER:

This is a good breaking point, if we're going to break.

McGRATH J:

How much longer do you think you'll be?

MR GEIRINGER:

I suspect easily under 30 minutes.

McGRATH J:

Good, right. We'll adjourn to 2.15.

COURT ADJOURNS: 12.58 PM
COURT RESUMES: 2.15 PM

McGRATH J:

Mr Geiringer.

MR GEIRINGER:

Thank you Your Honours. If you permit me just 30 seconds to re-orientate my submissions and then I intend to just give you five points which I say, say that there should be no general merits rule and I think that answers the second question that the Court is seeking an answer to. The re-orientating is this. My submission where we have got to in this case is that there are no forgive me the use of the word

"exceptions" but however one analyses the nuances on the rule or exceptions. There are no exceptions to which the appellant can even claim to fit. My learned friend points to the fact that the deed can allow breaches of the rule, that's true but this one doesn't allow a breach in the way that it happened in this case. And my learned friend points to this rule about conflicting trustees and de minimis and again it just doesn't apply. So eventually he has to fall back on there being some general merits rule and my position is that the statement in *Lewin* is mistaken and if you go to the citations, it is actually a reference to the fair-dealing rule which again my learned friend doesn't fit into.

So again what he is asking the Court ultimately to do is to decide that there should be some general rule that in all cases the Court can fall back on a general merits assessment. So here are my five reasons why I say that the Court should not do that.

Firstly, and these are reflected roughly unless I say otherwise in the written submissions, these are starting in paragraph 62 but to put them very briefly. Firstly, the damage is already done. What the beneficiaries are entitled to is trustees who turn an independent mind, a mind that is unfettered by conflicting duties and conflicting interests to their interests and to make decisions to act in their best interest and I have put in the submissions the quote from the *Re Thompson* decision that is in the appellant's case book. But the point is that that is what the beneficiaries are entitled to and once we have reached this point that is what the beneficiaries have already lost.

This leads on to the second point, the second point is this. When it gets back to the Court and this is what I am talking about at 64 in the submissions. When it gets back to the Māori Land Court and they are asked to do a merit assessment, the task is virtually impossible for that Court. What is the test for that Court. Is it that the transaction looks okay-ish, that you know it could be worse. Is it one that they might enter into? Is it one that some reasonable person might enter into? If that is all it is, then it does not give the beneficiaries what they were entitled to under the trust which was somebody determined to try and get the best deal for them. Now we accept that the trustees might not always succeed in that, there is always a possibility that the trustees will enter into an agreement that is not ideal, of course but what the beneficiaries are entitled to is trustees striving for that, striving for the best deal.

So the Court may say, 65% for Paehinahina Mourea, well that is not so bad, a reasonable person might agree to 50% but that is not the issue. The issue is acting in the best interests of these clients, would these trustees have agreed to that and that is something that is virtually impossible for the Court to assess.

That leads on to the third point and the third point is that it creates an almost impossible burden for the applicant who is claiming that their interests have been breached. The applicant turns up to the Court, what do they need to show in order to get this agreement voided? What we can show and is indisputable is that there was this breach of trust, that there were these conflicting interests and that the interests, that the agreement did have the capacity to favour the conflicting interests. So for example Ms Fenwick was entering into an agreement where she had it within her power to favour her personal interests over the interests of the trust. Now Ms Fenwick has already turned up to this Court and I have no doubt she will do so again and say, "Your Honour please believe me, I entered into this agreement thinking that what I was doing was right for the trust. So therefore don't void this agreement." Well is that enough and what are the appellants, what are the respondents supposed to do in response to that. It is not enough in my submission because when she made that agreement she had these conflicting personal interests. When she discussed and persuaded her colleagues to enter into this agreement, she had those conflicting interests. She may well have legitimately thought that she was doing the best for the trust but she thought that in the context where she also had playing in her mind, her personal interests, how much she would personally get from this deal from the counterpart to the agreement.

If you transpose it to a Judge situation albeit Judges are under a duty to avoid appearances of bias which is not identical to a situation of conflict. It is the circumstance where the Judge has a reason to decide the case other than on the basis of the evidence before him. We don't allow the law to enquire into whether he did actually he or she actually did favour those other interests and one of the reasons we don't require that in the law is because it is essentially impossible for the applicant to prove, how am I, for my client, supposed to establish that Ms Fenwick not only had this conflicting interest, not only entered into an agreement that her conflicting interest, her personal interest was able to benefit from it. But also entered into an agreement that favoured that interest more than she should have if she hadn't that agreement.

O'REGAN J:

I don't think anyone is asking you to do that. That is not what Mr Hurd suggested. He said the inquiry by the Māori Land Court should be as to whether with the burden being on the trustees, as to whether it was an appropriate transaction for the trust to enter into. It has got nothing to do with what Mrs Fenwick thought or didn't think.

MR GEIRINGER:

When will it be appropriate and when will it not be appropriate. Would it be appropriate if she would have entered into a different agreement had it not been for her interests and how do we establish that.

O'REGAN J:

That is not the issue. The issue is, is this a deal which objectively is a good deal for the trust.

MR GEIRINGER:

Well a good deal or –

O'REGAN J:

And that is for the trustees to establish, you are not being asked to establish anything.

WILLIAM YOUNG J:

If you look at the passage from *Lewin* at 20.76, page 478.

GLAZEBROOK J:

478 of?

WILLIAM YOUNG J:

Lewin, it's tab 5.

GLAZEBROOK J:

Tab 5, thank you.

WILLIAM YOUNG J:

And you look at, so just the last paragraph of that section. It is quite a complex sentence, it seems to say, well if the interest is de minimis well you don't worry about

it that, “But that any interest then imposes a burden on those seeking to uphold the sale to show it was proper and reasonable to the selling trust and the trustee of the selling trust who is beneficially interested took no advantage of his position as trustee.”

MR GEIRINGER:
My submission you –

WILLIAM YOUNG J:
There is a case cited but I don’t think we have got it, is it *Hickley v Hickley*.

MR GEIRINGER:
No we don’t have that, it is not one I have reviewed but it was referred to for our *Farrar v Farrars* decision. Interpreting case law as this Court is very familiar and I apologise for saying something that is again grandmothers and sucking eggs. Interpreting case law has got to be done in the context of the case and in the context of the facts and statements of Judges; you can’t take them out of context and treat them as you would legislation. In my submission you have got to look at the cases that are referred to and they have been presented here as best they can in my submission for the appellant but they don’t cut it. If you compare this case to the facts of any of those in this bundle, where the Court found that it was not necessary to apply or not correct to apply the full weight of the self-dealing rule or the fair-dealing rule. They are a world away from the facts of this present case. You are talking about trustees in general who have taken, who have gone out of their way to establish mechanisms to protect against a known or a potential conflict of interest where they have entered into agreements where there is an abundance of reason why, even though they might have peripherally an interest, what’s being done is obviously in the best interests of the beneficiaries, and generally speaking they have come to the Court and the case is cited before the transaction has gone through and said to the Court, “We know that there is a potential problem here, we’ve done all of this to avoid it, we’ve got all of these really good reasons for saying that maybe there isn’t a problem, and we want the Court to agree with that.”

GLAZEBROOK J:
But the principle can’t be that the exception is only if you’ve got a really good case.

MR GEIRINGER:

No.

GLAZEBROOK J:

Because if there is an exception, you must be able to then go and show you've got a really good case or not, and if you don't, well then the transaction will be set aside. So Mr Hurd's principle doesn't say that in every case it will be upheld however badly the trustees have acted.

MR GEIRINGER:

The next point, in my submission, is in answer to that. What Mr Hurd is asking for is to bypass all of these narrow exceptions with their elements to have a general exception. In my submission there is no need for it. Because there are all sorts of mechanisms available to trustees behaving properly to fall within all of these rules and all of these exceptions.

WILLIAM YOUNG J:

But this, when this section say, "Well, the sensible thing for the trustees to do is to get a direction of the Court," but if they haven't got a direction of the Court, which is the sensible thing to do and is the protection, then there's this assessment that's required.

MR GEIRINGER:

The cases that I've settled where they've not gone ahead of, the cases that – sorry, let me start that horrible sentence again. The cases in support of these propositions where they have not gone ahead of time to the Court are cases where they do fit within the strict elements of these nuances or these exceptions to the rules, they're not cases where they fall outside of all of those exceptions and yet the Court is invited to do a general merit assessment. There is no support, in my submission, in any of this case law for any general merits test, and I'm afraid this is not in my submissions, but it would be my understanding that it would also be unique in comparable jurisdictions to have a general merits rule. Certainly the Australian High Court has cited and applied the *Tito v Waddell* and the *Thompson* case. The American system has a, half the states have a code which implements the same rule, even stricter. The other half implement common law, and I'm not an American law expert, from the best of my enquiries they all have exceptions of varying degree in the same way that we have exceptions, but none of them have opened the door for a

general merits review. The Hong Kong Court again has applied the *Thompson* and *Tito* decisions, and I had a great deal of difficulty trying to understand and ascertain the Canadian position, but from the best of my ability it seemed again to be the same. There's nowhere that I've been able to find, and certainly nowhere in any of the cases cited or any of the authorities referred to in these materials that I've reviewed, is there any support for a overarching general merits review. And the reason why, in my submission, is going back to the first point. The first point is that the damage is already done, except in these exception cases the damage isn't really done, not to any legitimate degree. All of these exception cases are cases where you can say, "Well, come on, in reality the trusts, the beneficiaries have been protected as far as they could possibly be reasonably be expected to be protected through the trustee system." I mean, for example, the fair dealing rule, where the transaction has happened openly and honestly with the beneficiaries being fully informed about the process, so the beneficiaries have the ability to partake in that process and put their hands up and raise issues where there is a problem, and then years down the track somebody turns around and tries to undo the transaction and the Court says, "Look, there was no real benefit, they were trying to do their best, they told you all about it at the time, so why are you now asking us to undo it under this strict rule and we're not going to." But that makes sense, it makes sense in terms of what the beneficiaries were entitled to within the trust system and what they actually got. But none of that, this case doesn't get anywhere near any of that, it's the complete opposite, it's trustees in secret misleading the Court to try and facilitate their agreement, albeit the lower Courts have decided that they didn't need to do so. But nevertheless they did do that, they did turn up to Court and tell the Courts that they had supportive trustees from meetings that had never happened they went out of their way to keep the material from the trustees, they made decisions where there wasn't a de minimis protection where they –

O'REGAN J:

But you – save this for the Māori Land Court. It's not going to affect the decision we have to make.

MR GEIRINGER:

Well, the problem with the de minimis – with a merits review, a general rule that says that in all cases the Court can overrule all of these considerations in a merits review is, in my submission, it just blows apart the protection, there is no longer any protection, there is no longer any strict requirement on the trustees to behave

properly. They can behave in secret, maybe you'll never even discover that they did it because there's no law requiring them to, at the end of the day they can come before the Court and convince the Court that what they did was reasonable and so it should stand.

McGRATH J:
That's your impossible burden point.

MR GEIRINGER:
Yes.

McGRATH J:
Okay. Now what's that, bring you to the fourth point?

MR GEIRINGER:
I've already done my fifth point, which is the comparable jurisdictions, and my last point and my fourth point was the fact that there's no need. This Court does not need to create this huge change, in my submission, to the present common law to accommodate reasonable behaviour from trustees. Any reasonably behaving trustee had several methods to make these decisions in a way that did not offend against the rule. As my learned friend says, the deed can allow the decisions to be made. In this very case the trustees came before the Court four times and asked for variations to the trust order to enable the investment that they wanted to make. They could have come before the Court and said, "We'd like you to vary the trust order to enable us to make this decision, realising that we've otherwise got a problem." They could have used the mechanisms in the Act to have the relevantly conflicted people stand aside.

GLAZEBROOK J:
Well, I'm not sure they could have asked to be able to make the decision despite the conflict, could they? They could have asked the Court to sanction the transaction.

MR GEIRINGER:
They could have asked the Court to sanction the transaction. They could – well, they could have asked the Court to vary the trust deed, firstly, so that it reflected the Act and said that they could make decisions, even though they were trustees of another trust.

GLAZEBROOK J:

Well, at common law they probably could anyway without the beneficial interest, but in many cases.

MR GEIRINGER:

In many cases – I'm not sure that this case does fall within that exception, because here, I mean there was a real conflict between what they were needing to achieve for the other trusts and what they were needing to achieve for their own trust – well, for the, sorry, for each of the two trusts. The interests of the two trusts were genuinely in conflict, so, I mean, when somebody turns up to –

GLAZEBROOK J:

Well, they'd need to, the point you were making was that they could have had the sanction of the Court but they – I was just saying I didn't think they could have the sanction of the Courts to act and make a decision despite conflict.

MR GEIRINGER:

I agree with that, Your Honour. Sorry, I didn't mean to contradict that, it's obviously correct. They could have stood aside as trustees and what – in one or more of their positions – and in fact my understanding is that now Ms Fenwick has done exactly that and she says she did it for exactly that reason. So she's now no longer a trustee of this trust. My previous understanding, I think I said in a memo to this Court, was that she was unwell, but she's filed an affidavit in a, was it…

McGRATH J:

Look, we needn't –

MR GEIRINGER:

But anyway…

McGRATH J:

– get into the detail.

MR GEIRINGER:

But she's done exactly that –

McGRATH J:

You've made the point that this can be done by other ways and so, you say, there's no need for us to develop another way, another exception or illustration of how it can be done.

MR GEIRINGER:

They could have acted in an open way. As to Paehinahina Mourea, as noted by this Judge in this very case, with the same conflict problems on their face, but they operated in an entirely different way. They were very transparent with their beneficiaries, they told them what they were doing, they held meetings and discussed it, the people who had conflicts identified it and didn't participate in the discussions, and they achieved all of the same results.

McGRATH J:

We're heading off into the facts again, Mr Geiringer. It's really, the point you're making is there's no need, and that's really sufficient supported by saying there are mechanisms in the Act that can enable them to do this sort of thing.

MR GEIRINGER:

Yes, thank you. And to the degree that they apply there are a number of exceptions that allow, at least some of these trustees to have made the decisions that they did if they fit within those other exemptions.

McGRATH J:

Yes.

MR GEIRINGER:

Your Honour those are my points as to why there should not be an over-arching general merits test which is the answer to the second issue. Your Honour I do wish to raise quickly the matter that was in the costs memo that was handed up. I won't dwell on it, it's apparent on the face of the memo but the issue is that it was previously indicated to this Court by the appellant that he was going to seek to have the funds, trust funds fund his legal costs and it was raised by the respondents that if the test applied that allowed him to do so, then it would equally apply for them and the trust ought to be funding both sides or neither and we had a hearing in front of the – a judicial telephone conference in front of the Māori Land Court and the Māori Land Court agreed and the Māori Land Court cited New Zealand authority

which cites chancery's authority to support that proposition. So the appellant decided not to apply for funding from the trust but what we discovered later is that he has instead arranged for funding from TGPL which is the company whose existence –

McGRATH J:
From…

MR GEIRINGER:
From the Tikitere Geothermal Power Limited, the company whose creation is in dispute which is an asset of the trust. So in essence he is getting funding through trust funding but without needing to take it to the Court and get a Court order to authorise the funding.

O'REGAN J:
Well it is not an asset of the trusts. I thought the trust only owned 35% of it.

MR GEIRINGER:
But now, well, we have discovered now it owns, yes. It is an asset of the trust but not solely of the trust.

O'REGAN J:
Well it is not an asset of the trust, the trust owns 35% of the company, the company isn't an asset.

MR GEIRINGER:
Okay the 35% shareholding is.

O'REGAN J:
It has a 35% interest in the entity paying the costs.

MR GEIRINGER:
Yes, sorry I apologise Your Honour.

O'REGAN J:
But that party isn't a party to this appeal.

MR GEIRINGER:

No it is a party that would cease to exist, at least in its present form, could cease to exist in its present form depending on the result of the appeal.

O'REGAN J:

We can't make orders against them can we?

MR GEIRINGER:

No, and I am not asking Your Honours to. I am suggesting that there are two fair situations and one is where both sides are fending for themselves and the other side is where both sides are being funded by the trust and what we have got is that the trustee and the director of TGPL has used that position to enable his side to be funded and the other side to be not funded.

O'REGAN J:

But we can't tell the company whether it should pay or not pay because it is not a party to the appeal.

MR GEIRINGER:

I would agree with that Your Honour. You could tell the trust to fund both sides equally.

WILLIAM YOUNG J:

We could in a cross award. And I suppose we could, theoretically do so ahead but I mean it is a bit after the fact now.

MR GEIRINGER:

It is a little bit after the fact. The situation with the respondents is that they have been told by the Ministry of Justice that they have been granted legal aid but there is confusion over who is allowed to stand in my position and argue the case and therefore Sir, it is still unclear whether there is actually going to be any payment. But even if there is payment the situation is that the respondents will be expected to repay it, it will be treated as a loan. So at the end of the day it is going to have to come out of their pocket and the simple submission is that if this is a case which ought to have been argued before this Court in the interests of this trust, then the trust can and should under the law pay for the cost of both parties.

WILLIAM YOUNG J:

So this is a request for an order for costs when we come with a judgment, that requires them, the respondents' costs to be paid from the trust.

MR GEIRINGER:

Irrespective of a result by the trust.

WILLIAM YOUNG J:

Okay I understand that.

MR GEIRINGER:

I take on board the Chief Justice's note, I forget the case. - that I am obliged to raise these matters with you now instead of waiting for the case to be resolved and then raise them –

McGRATH J:

Yes, we understand that.

MR GEIRINGER:

– which is why I'm wasting your time with this, or using your time with it.

McGRATH J:

No, you're not wasting our time.

O'REGAN J:

But as you asking for just an order for costs in this Court or right up through the whole process?

MR GEIRINGER:

Only in this Court. The respondents – the situation, as I understand it, Your Honour, is that the Trust has been meeting the costs of the appellant at the previous stages, and that was at a time when there were a majority of trustees who decided to use their power as trustees to make their decision, and that's a questionable decision but not one I'm asking to be reviewed here. For the respondents, they were funded by a thing called a "special fund" in the two steps that are within the Māori Land Court system and by legal aid in the Court of Appeal, and there's been no award for costs

in any Court, despite the results given where the funds have been coming on for both sides. And again, we've got a grant of legal aid so – I'll leave it there, Your Honour.

That is it, except one thing. I received some instructions at lunchtime, I won't both you with the detail unless you want it, and that is I was told that the deed for Paehinahina Mourea has a different voting system, I haven't seen it. But it became an issue raised by Your Honours as to whether the fact of a five or 20% interest was relevant to voting, and my learned friend pointed to the clause in the Tikitere vote deed as to voting, and I'm told that Paehinahina Mourea is different. So if it is of relevance to Your Honours' decision, you may wish to ask the parties for a copy and I'd certainly be happy to assist with that if my learned friend would also.

McGRATH J:
Well, we may do that, but we won't do it immediately.

MR GEIRINGER:
Thank you, Your Honour.

McGRATH J:
Mr Hurd.

MR HURD:
Your Honours, I don't wish to take a great further of your time. I think you've heard the arguments back and forth, and much of what my friend has talked about was in his written submissions anyway. So if I can just deal as quickly as I can with matters which I think are still, or need some response.

The first thing is that Your Honours have heard a lot about the alleged facts and you've, various of Your Honours have commented on whether this is the place to deal with those, and I'm not going to ask you to deal with those in this place. What I would say though is that in many ways what my friend has been arguing is an excellent, further excellent reason why the sort of inquiry I'm talking about and advocating ought in fact to take place, because all of those facts would be before the Māori Land Court if it was to review the matter in the way that we urge. What in fact is being said here is that in some way one prejudges the facts and decides that because the facts are said by one side to be so terrible we shouldn't have an inquiry

into the facts. What I would say is that the parties' interest can only be served by an inquiry into the facts.

The second point is that, I think it was His Honour Justice Blanchard who commented earlier about whether these, what we've called "exceptions" were really exceptions at all, rather than instances, on particular facts. Our position is that there is a strict rule, but that the strict rule ought to apply only to what is in form or substance a sale by the trustee to himself, and outside of that the appropriate response is one which has regard to what has in fact occurred and, the onus being on the trustee, decides whether the trustee has discharged the onus – this is assuming a conflict of course has been found – the trustee bears the onus of demonstrating to the Court on inquiry that that is what ought to occur, that the transaction ought to remain.

GLAZEBROOK J:
So if you sell to another trust of which you're a beneficiary, you say the strict rule doesn't apply.

MR HURD:
Yes.

GLAZEBROOK J:
Well why would that be the case, so you just impose a trust in the middle of which you are a trustee and you are home and hosed. So what is the, because here you were selling, the trust was selling shares in the company at the very least wasn't it.

MR HURD:
It was granting rights for somebody to acquire shares in the company, yes.

GLAZEBROOK J:
Well selling shares in the company in all but name isn't it.

MR HURD:
Yes. But first of all the trustee isn't selling its asset as such other than its asset being shares, it is not selling any interest on the land.

GLAZEBROOK J:
But shares, it is selling shares on a company, that's an asset of the trust.

MR HURD:

But it is selling shares, not to itself but to a whole, maybe hundreds of a trust of which there are hundreds of beneficial owners. That is a long way from the true self-dealing rule.

GLAZEBROOK J:

So it has to be 100% yours or 50% yours or 30% yours.

MR HURD:

In substance, yours. Not just that you have some small interest.

WILLIAM YOUNG J:

So the one man company is accepted, say a one man company is accepted as a self-dealing rule.

MR HURD:

Yes that is the perfect example.

GLAZEBROOK J:

So what is the authority for that?

MR HURD:

Well we have said in the submissions I think – we have referred to the one or to the company exception and that's where one sees the one man company position.

GLAZEBROOK J:

So it is either to you personally, to a one man company, but anything else it is open slather, is that the?

MR HURD:

Well it is not open slather. All that is being said is, in what circumstances is the result of this conflicting interest such as to mean, good bad or indifferent the transaction is able to be avoided at the instance of any beneficiary without any investigation of the transaction's worth or otherwise. We are not suggesting it is open slather at all or free home, or home free.

GLAZEBROOK J:

So just what? It is only where it is selling to the person or a one man company.

MR HURD:

Or in substance the person. So for example if it was sold to a trust of which the selling trustee was the sole beneficiary for example, that would clearly be in substance, self-dealer. But not, the problem about all of this is where do you draw the lines but in our submission that is where the lines ought to probably be drawn and that is the principle way to draw them. Which doesn't as I say, mean that everybody is off scot-free in terms of the errant trustees because then they have to esteablish that the transaction is one which ought to be upheld and given effect to and that is the substantial onus on them.

McGRATH J:

So you are saying though, it is really substance or form, a sale to oneself, if the fair-dealing rule applies to that.

MR HURD:

The self-dealing rule applies to that, yes.

O'REGAN J:

And when you say the burden is on the trustee. Is that a burden to show that to the Māori Land Court exercising the jurisdiction of a High Court as the supervisor of trusts or is it some statutory jurisdiction under the Te Ture Whenua Māori Act?

MR HURD:

No I think the former because although there is a statutory jurisdiction to review, it seems to me that what the Māori Land Court would be doing is really within – I referred to it earlier – section 273 of the Act which gives them the powers that the High Court would have in matters of trust general.

O'REGAN J:

The extract that Justice Young took us to from Lewin talked about the burden being on the trustees to show that the transaction was, I think, viable in some way but also that the trustee had not –

MR HURD:

Taken advantage –

O'REGAN J:

- taken advantage of the position. Do you accept that?

MR HURD:

I do and that's an essential part of the test.

GLAZEBROOK J:

Yes although that was actually just under a heading of sales with a common trustee, so there was no question of beneficial interest.

WILLIAM YOUNG J:

I think they talk about beneficial interest in the passage.

GLAZEBROOK J:

I don't think so.

McGRATH J:

Paragraph 20.

O'REGAN J:

7.6 it was.

GLAZEBROOK J:

Oh a limited beneficial interest.

O'REGAN J:

Yes.

GLAZEBROOK J:

But you see that's the difficulty with saying that if there is a limited beneficial interest is different from it being a total self-dealing rule isn't it. I mean a de minimis, nobody seems to be worrying about it.

MR HURD:

It's not de minimis, it's limited.

GLAZEBROOK J:

Well, yes, but you say it has to be a hundred percent –

MR HURD:

Or in substance a hundred percent, yes.

GLAZEBROOK J:

Well, but that's more than a limited beneficial interest. So it's not set aside under the self-dealing rule really because the trustee has a limited beneficial interest. But it doesn't say that it is not set aside if – it is only set aside if it's a hundred percent dealing, which is what your submission is.

MR HURD:

What I'm saying is that, and what I've, as I tried to say to Your Honours earlier, there are two ways, in my submission, one can approach this argument. One is to say let's make a decision of principle and say, "This is where the full-blown rule applies and outside of that we do the exercise we argue for." The alternative is to approach it through exceptions. But, either way, we say that the end result ought to be that if one were to do it on a principle basis the only cases where the absolute rule must certainly be applied, and one couldn't seriously contend otherwise, is the true in form or in substance, selling to yourself, that outside that the right answer and the right response for equity is to be prepared to say, "You, trustee, come along here and convince us that despite all of this, this is a transaction we ought to, it ought to stand, and –

GLAZEBROOK J:

It's just that it doesn't seem to be backed up by the *Lewin*, because they say that only applies where there's a limited beneficial interest.

MR HURD:

Well, that's one of the so-called exceptions. But in my submission that's not the only instance in which one would conduct the sort of inquiry I'm talking about.

WILLIAM YOUNG J:
I think the Hickley in *Hickley* cases –

MR HURD:
Yes.

WILLIAM YOUNG J:
– as described in the *Farrar* case was rather more than limited.

MR HURD:
Indeed.

WILLIAM YOUNG J:
I mean, although they approved *Hickley v Hickley* in *Farrar*, they did say it was a more difficult case.

MR HURD:
Yes, they did.

So, that's the way we say the lines ought to be drawn. But my friend had raised his five points against this approach. Some of them I think I've already dealt with, but one was that the damage has been done. Well, certainly there's been a decision, which it's now assumed was made in circumstances where there was a conflict of interest. But the real point is what is now to be done? We are where we are. Certainly there were alternative for these trustees, they could have come to the Court, they could have absented themselves. They didn't. That's the reality we're faced with. And the question is, is the appropriate response to that now to simply say, "Right, over, any one of these 1200-odd beneficiaries can have it avoided." And we say, "No, the right answer is we can have all of these issues out, the Court can decide whether, having considered those issues, the trustees have persuaded it that it ought to uphold this transaction." And one of those factors is whether, as His Honour Justice O'Regan put to me before, whether – and we certainly accept – is whether the trustees actually took some improper advantage of their position in making the decision they did. So we say that, in terms of the damage being done, we are where we are and we've got to deal with what we've got.

I'll just look at the rest of it. The almost impossible burden, I think, has already been dealt with in terms of onus and so forth, and what I said earlier about one of the very options which it said the trustees could have taken, and clearly they could have, is to have gone to the Court and the Court would have had to make exactly the same sort of assessment. Except now, of course, if the Court has to make the assessment we're talking about, the trustees actually have a positive onus to show that nevertheless the transaction ought to stand.

My friend suggested that we're really asking the Court to bypass the narrow exceptions. We've referred to two exceptions, neither of which we are able to say we are absolutely foursquare within, but we say we're close to. But of course we, in our submission, there's no reason, and it's equitable jurisdiction, why the Court should take the view that the exceptions are closed for all time. It ought to be able to look at the transaction and say this, look at what happened and say, "This is what we ought to do."

Unless Your Honours have anything more for me on those matters, I'm content to leave it there.

Can I just deal quickly with the costs issue that my friend has raised? And the first I knew about that was when I got to Court this morning and saw the memorandum – well, though it's fair to say my friend had raised earlier a concern about costs. My position first of all is that if there's some suggestion that there's been a bit of some shenanigans here to try and cut one side out of funding, that's not accepted at all. What in fact occurred, as I understand it, and I wasn't involved in the other proceeding my friend's talking about that they had a telephone conference in. But, as I understand it, what occurred is that TGL decided, and bearing in mind that it's 65% owned not by Tikitere but Paehinahina, that it had sufficient interest in the outcome of this appeal that it was appropriate to fund it, and in my submission that was a decision that was open to it.

In terms of whether any order ought to be made in favour of my friends, I will leave that with the Court, I don't think it's appropriate that I start advocating one position or another on that, except to say that I had understood that legal aid had been granted so I thought that in fact had cured the issue. If there's still an issue then I accept that it's a live one for the Court. But certainly in my submission what was done by Tikitere Geothermal Limited was something they were entitled to do and it's a commercial

decision for them. But if the Court thinks that some consideration needs to be given from the Trust to my friends clients, then I leave that to the Court to decide, it's not for me to deal with it.

Now, unless Your Honours have any other question for me…

McGRATH J:
No, it seems not.

Thank you, counsel, for your assistance in this matter. We will reserve our decision.

COURT ADJOURNS: 2.57 PM