

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 40/2007**

BETWEEN                      GEORGINA KAIN, GEORGE HARRY  
   COUPER KAIN, GEORGE CHARLES  
   KAIN, GEORGE THOMAS CARLTON  
   KAIN AND GEORGE MICHAEL KAIN  
   First Appellants

AND                              GEORGE THOMAS CARLTON KAIN  
   Second Appellant

AND                              JONATHON RHODES HUTTON  
   First Respondent

AND                              WILLIAM ALEXANDER XAVIER  
   COUPER  
   Second Respondent

AND                              ANNETTE ELIZABETH COUPER  
   Third Respondent

AND                              WAYNE KEITH STARTUP  
   Fourth Respondent

AND                              GEORGE THOMAS KAIN  
   Fifth Respondent

AND                              MARY HUTTON  
   Sixth Respondent

Hearing                      10 June 2008

Court                          Elias CJ  
   Blanchard J  
   Tipping J  
   McGrath J  
   Anderson J

Counsel                      J S Kós QC, J V Ormsby and J W A Johnson for Appellants  
   M R Camp QC for 2<sup>nd</sup> Respondent  
   R A Osbourne for 6<sup>th</sup> Respondent

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**CIVIL APPEAL**

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**10.00 am**

Kós May it please the Court I appear with my learned friends Mr Ormsby and Mr Johnson for the appellants.

Elias CJ Thank you Mr Kós, Mr Ormsby, Mr Johnson.

Camp If the Court pleases, I appear for Mr Couper.

Elias CJ Thank you Mr Camp.

Osborne If the Court pleases, I appear for Mrs Hutton. My learned friend's submissions indicate I have adopted his submission incorrectly Ma'am. I have referred to the fact that I appear also for Mrs Hutton who has no role in this appeal. So I only appear for the third respondent.

Elias CJ Thank you. Yes Mr Kós.

Kós If the Court pleases I have prepared a skeleton argument and also a diagram which shows the relevant transactions which are under challenge in this appeal. In accordance with the notion that it is a skeleton, I can say that although I understand from the Court, from the Registrar, that we have a reserve day and could press past one your Honours for two days not just one, it is certainly the intention of all counsel to try and dispose of this matter in the course of a day, subject only of course to your Honours' enthusiasm for interrogating counsel.

Elias CJ Yes well perhaps I should indicate that we won't be able to sit after 4pm today and so it may be necessary to go into tomorrow but we are grateful for the indication that you will try and complete during the day.

Kós I think even before 4 o'clock Ma'am we should be so, as I say subject to the caveat I mentioned a minute ago. Now your Honours will now have in front of you

Elias CJ How are we to take that?

Kós You mostly see how I take and receive it. I have provided for your Honours a skeleton argument in a diagram and can I start with just a couple of opening observations before I go to the skeleton. This appeal challenges two dispositions of assets by the trustees by what has been called the old Mangaheia Trust, pursuant to powers expressed or implied in that trust deed. Prior to those dispositions, the appellants were discretionary objects of capital under the trust, they were also default takers of capital under that trust. The capital of the trust comprised two substantial farms, the Mangaheia Farm which is some 6600 acres in the Gisborne area, Tologa Bay area, and the Ponui Farm 1900 acres in the Hawkes Bay area, and of course there was stock on both farms. That is essentially the capital of the trust. And, as I say, the appellants were

discretionary objects of capital under the trust and default takers of capital.

Following the dispositions, the appellants' interests were eliminated and the capital was resettled on new objects, including persons who are not objects of the original trust. The dispositions occurred simultaneously on the 19<sup>th</sup> of July 1999, and it may be useful at this point to look then at the diagram which shows the two dispositions. All of the events identified on the diagram were the events that occurred on the 19<sup>th</sup> of July 1999. The first thing that occurred was the formulation of a new Mangaheia Trust with Mr Hutton and Mrs Couper and Mr Startup as the trustees of that. The old Mangaheia Trustees retired and Mr Hutton, Mrs Couper and Mr Startup were appointed trustees to the old Trust as well as of course being trustees to the new.

Elias CJ Can you just remind me, where in the case on appeal do we find the old Trust deed. I am sorry I should have flagged it but I haven't. Volume 3 is it?

Kós It is in Volume 3, the blue, do you have the same colour coding I have Ma'am. It is blue I think. Yes

Elias CJ I don't seem to have a volume, of course here it is.

Kós Yes page well I think the numbering we had better use is the bottom right hand corner. Page 560.

Elias CJ Thank you, yes that's fine.

Tipping J We are using the numbers in the bottom right hand corner are we?

Kós Yes we are Sir. We could try and be ambidextrous, I could use both occasionally. The consistent series right through the volumes is the bottom right hand corner. And looking at the chart, you will see on the right hand side, sorry on the left hand side, the old Mangaheia Trust which is the document we have just looked at, and it identifies there the first box should be discretionary objects of income, I'm sorry the words "objects of income" have fallen out. And then the next class, default takers, and then capital discretionary objects and default takers. Now as a result of the dispositions that I have mentioned, and in particular the second disposition which we will come to in a moment, all the red references, all those interests, were eliminated.

The first transaction was the Ponui appointment and we see that in the middle of the page at the top, where approximately a quarter of the assets of the trust, the Mangaheia Trust, being shares in Ponui Farm, were appointed to Mrs Couper and the appointment is to be found at page 616 of that same volume, and then were vested by transfer contemporaneously into a new trust, the Annette Couper Ponui Trust, which you see at the top right hand side, the objects of which were

entirely different from the objects, or largely different I should say from the objects of the old trust.

McGrath J The others are significant there aren't they, because it seems there was a huge flexibility in who the objects of the Ponui Trust could be?

Kós Absolutely Sir.

McGrath J It is not just the family.

Kós No it is not just family. No I mean if one looks at the objects Mrs Couper we see, it was an object of that trust, and she was a discretionary capital object as we see in the old trust, because there she is in black in the list of discretionary capital objects. She wasn't a default taker. But the others, the daughters, the siblings, the parents and all the other interests including companies, trusts and charities, were entirely novel. So it is the first transaction, that was exercised by way of a power of appointment and the objection to that power of appointment by the appellants is that it was a fraud on that power because of the introduction of new objects and that was the finding that Justice Panckhurst made, overturned in the Court of Appeal, it is Justice Panckhurst's conclusion that we seek to support here.

The second disposition was the resettlement of the remaining assets of the Mangaheia Trust, the shares in Mangaheia Farms Limited, and that was transferred by way of an advancement via a deed poll. The deed poll which we will be looking at I imagine in some detail is in the blue volume at 613. And if we look at that document for a moment, this is the document that affects the transfer of the remaining assets to the new trust. And we see at page 614 the provision of the deed is all there on one page.

Tipping J There is no cross-appeal is there on this

Kós No.

Tipping J No, so we can take it that it is accepted that it is an invalid exercise of a power of advancement but Mr Camp is presumably going to try and support it on the same basis as the Court of Appeal

Kós That is the way I take it. In other words, Mr Camp's argument will be that if this wasn't an advancement, because that was invalid, then it could be done by way of appointment, and so what he seeks to do is have this Court substitute a different power for the one that was exercised by the trustees. Now I say a different power from the one exercised, because when one looks at this document, one sees that what they were clearly trying to do was exercise the power of advancement, the implied power of advancement found in section 41, the Trustee Act. How do we see that? First of all we see that in Recital C it refers to the old trust providing statutory powers of maintenance and advancement contained

in the Trustee Act, with a proviso that the proviso in section 41(a) is omitted, but that doesn't matter here.

Elias CJ So you are at page 620?

Kós 614 Ma'am, the deed poll.

Elias CJ Oh yes thank you. I was looking at the top ones.

Kós Ah sorry yes. So you will see the Recital C Ma'am which refers to the statutory powers of advancement and then in D the trustees in reliance on the decision in *Pilkington* in the House of Lords have determined to resettle the trust fund in the new trust principally for the benefit of Annette Couper and the grandchildren of Janet Richmond Kain. And then in the operative part below, in pursuance of the powers of the trustees under the old trust deed, and I suggest to you that that must be a reference back to the powers referred to in Recital C because they are the powers that are recited. The trustees resettled the trust fund and the whole trust fund is hereby transferred to and resettled in the new trust.

Tipping J Well it is pursuant to the powers to resettle.

Kós Well yes I will come to that. There are no express powers to resettle. And so the ordinary means of resettling a trust, there are two. First an express power to resettle and there is none here. And secondly, I will also come to that also in a moment in the skeleton, and secondly by the exercise of the power of advancement.

Tipping J Well resettlement doesn't envisage a partial distribution I wouldn't have thought.

Kós No. That of course is part of what has already occurred because there has been a partial distribution, the first in time was the Ponui partial distribution, followed then by this, the

Tipping J Well if this is to be valid at all, it has to be valid I would have thought under the powers that were exercised for the Ponui transaction.

Kós And the powers exercised in the Ponui transaction were clearly an appointment.

Tipping J And an advancement of the date of distribution, pro tanto.

Kós Yes. But it is clear, with respect, that the powers at least that are recited in the deed, and when we look at it we look at the legal advice that was received by the trustees before they exercised this power, what was contemplated, the power contemplated and intended to be exercised was a power of advancement. And my submission will be that it is no part of equitable jurisdiction for a Court to correct the power that has been exercised when the parties, when the trustees intend to exercise one

power and cannot validly do so the Court doesn't then say well we will substitute another power for that.

Elias CJ Well it is a fairly unattractive technical argument though, is it not?

Kós The argument I am advancing Ma'am.

Elias CJ Yes.

Kós It is a very conventional equitable argument. I imagine it has only become conventional by reason of it being seen to be attractive previously. It is absolutely clear when one looks at the authorities that the Courts in a situation where there has been non exercise of a power that might have been available, the Courts do not say we will substitute the exercise of that power for it. What they do is to say the original exercise of the power is invalid, it is avoided, the property goes back to the trustees and they must reconsider and exercise the power, the correct power, if they wish to do so.

Elias CJ Why don't you look at the substance of what was done.

Kós That is the substance.

Elias CJ What they called it?

Kós What they called it, yes.

Tipping J Is there not power in some circumstances to rectify, but I don't understand there is any application to rectify the deed poll.

Kós None here.

Tipping J You can get at it I understand even with a deed poll where there is no direct other party, through an application to rectify.

Kós That is so but the fundamental argument that we make in relation to relief is the proper course here, particularly given the overall circumstances which we will talk about, including the conflicts of interest associated with the exercise of powers here by the trustees, for instance, it is clear for instance when one looks at the effect of the transactions that have occurred on the diagram page, that there has been a preference to Mrs Hutton. Mrs Hutton was the wife of the trustee, Mr Hutton, who exercised the power. There has also been a preference to Mrs Couper, and Mrs Couper was at least a participant in the resettlement of Mangaheia, although she did not participate in the Ponui appointment, so she participated in the transaction in the second disposition but not the first. So in those circumstances looking at the substance, in my submission the conventional equitable approach which is that the misuse of the power is void, the property returns to the trust from which it came, and it is then for the trustees to exercise the correct power, if they wish

to, in light of the circumstances then before them. It is the proper course.

If there is a single text that best characterises the argument for the appellants, it is that appears in paragraph [27] of the judgment of the Court of Appeal, not in this case, but in *Wong v Burt* which is in the large bundle of authorities at paragraph [27] which is page 95. And there the Court of Appeal which included

Elias CJ        Sorry what tab?

Kós                Tab 15 Ma'am. And there the Court of Appeal, which I see numbered one of your Honours present, said at paragraph [27] that there is a fundamental juristic principle that any form of authority may only be exercised for the purposes conferred and in accordance with its terms. This principle is one of general application. Now I submit to the Court that that is the underlying theme in this case. We say that the powers purportedly exercised to effect the two resettlements were not validly exercised for those purposes, and that the resulting transfers from the old Mangaheia Trust are void. If the trustees of the old Mangaheia Trust, and the trustee is now the Public Trust so it is an independent trustee, if they see that it is appropriate to appoint to the objects of the old Mangaheia Trust which include Mrs Couper, they can do so, they can do so by the exercise of a power of appointment. But it is not for the Court to substitute its judgment for those of trustees, that is the authority which I will take the Court to.

Blanchard J    I am getting a little confused here because you are jumping around between fraud on power and inappropriate exercise of power of advancement. As I understood it, you are attacking in relation to Mangaheia the three-quarters of the pie-chart, the exercise of the power of advancement but I didn't understand that you were saying that there was a fraud on a power there.

Kós                No I am not.

Blanchard J    So I think you have got to approach your argument stage by stage rather than muddling it all up.

Kós                I am advised Sir. I was simply trying to deal with these things collectively by way of opening. I am now going to turn in the skeleton to Mangaheia itself. Let me now do that. Turning to the skeleton argument, it is submitted at the first paragraph that the old Mangaheia Trust contained no express power to resettle. This is the matter I discussed with your Honour Justice Tipping a moment ago and in that respect it can be contrasted for instance with the new Annette Couper Ponui Trust entered into on the 19<sup>th</sup> of July 1999, which contained an express power to resettle, and I have given the page reference there. Clause 4 of the old trust does not contain a power of advancement. Power of advancement if it exists here is one that isn't implied by statute

under section 41 of the Trustee Act. And powers of appointment and powers of advancement are materially different in my submission.

Blanchard J Well page 574, it is set out there. It picks up section 41 but it doesn't expressly, with the usual omission.

Kós I am sorry you are quite right Sir. It is an express power within the trust.

Tipping J It doesn't actually matter which it is does it?

Kós No it doesn't matter no.

Tipping J It doesn't matter which it is.

Kós Unless section 41 were excluded altogether.

Tipping J Quite.

Kós Now the submission I make at 2, is that the power of advancement in the old trust deed could not be used to effect the resettlement under the deed poll. It is clear in my submission, for the reasons we have seen, that the trustees intended to exercise the power of advancement in section 41. We have looked at the deed poll. It is also worth looking just for a moment in the blue volume at the legal advice that was received by the trustees, in fact were received by Mr Couper who initiated the resettlement from Sainsbury Logan on the 5<sup>th</sup> of March 1999, and that is at page 593 in the bottom right hand corner.

Tipping J Is this common ground that we can look at this is it?

Kós Yes it is. It was discovered.

McGrath J And what was that page number again?

Kós 593 Sir.

Tipping J I don't think it matters myself what legal advice they got. They clearly haven't got any power to do what they did. The question is whether or not it is right to, as it were, bring them up by another route.

Kós Yes I would agree with your Honour subject to one caveat, which is that equity looks at the intention of the appointor, and so it is relevant to see what the intention is.

Tipping J But it is not in dispute is it, that Mrs Couper was not an object. She was not entitled, and there was no consent anyway.

Kós Correct.



Tipping J So the only way this can be saved I would have thought is by some mechanism such as appeal to the Court of Appeal.

Kós Yes.

Tipping J And Mr Camp presumably doesn't dispute that.

Kós As I understand it.

Tipping J Because there is no cross-appeal.

Kós As I understand it, which would, on that basis, then deal with 2.2, 2.3, 2.4 and 2.5 of the outline. Because I understand that is uncontroversial.

Tipping J Yeah, well I am not wanting to sort of cut you short Mr Kós but I mean it seems quite plain that it is undoubtedly so.

Kós Well the Court has such [inaudible] as they wish of those particular paragraphs, but it is clear, the power of advancement could not be used in this case. Two points, I am sorry there are two points. The first is the power of advancement was intended to be used and secondly could not be used. So then the question is, moving to 3, whether this could be saved in the way that the Court of Appeal saved it, which was in effect to say that the resettlement of Mangaheia, the three-quarters of the pie, could in effect and should in effect be treated as if it were done in the same way as Ponui. That is to say by the exercise of the power of appointment in favour of Mrs Couper, followed then by an advancement under section 41 or under the express clause. In my submission it could not be so done for the reasons that are set out in paragraph 3. Firstly, it is clear that the trustees did not intend to exercise the power of appointment.

Tipping J Well it could have been that way. The question is whether the Court can treat it as having been done that way.

Kós Yes that's right.

Tipping J Isn't that the crunch?

Kós I agree.

McGrath J Sorry Mr Kós can you just come back, just tell me essentially the flaw in the reasoning of Mr Weir's in advancing *Pilkington's* case.

Kós Yes. The flaws are really, *Pilkington's* case can be used, an advancement can be used to resettle a trust provided that the resettlement is only on objects of the power of advancement.

McGrath J And outsiders can come in as long as it is incidental or is that not

- Kós Purely incidental.
- McGrath J Purely incidental. And is that the reason why you say *Pilkington's* is of no assistance because this was not an incidental incorporation of the outsiders' objects.
- Kós Entirely. Now Mr Weirs, to give Mr Weirs credit at least for the first stream of his advice which we see at pages 595 to 596, said that he believed that the method, at paragraph [441] at the bottom of the page 595, we believe that the method of resettlement utilising section 41, and he could of course have referred to the express clause that your Honour Justice Blanchard referred to, and relied on *Pilkington's* case as permissible in the case of *Mangaheia*. We do not believe, however, that it will be safe to resettle on a new trust which included beneficiaries who were not beneficiaries of the existing trust. And then to ram it home "in other words, we do not think it safe to resettle on a trust with an expanded class of beneficiaries". So, so far, 10 out of 10 to Mr Weirs. The problem comes later on when, for reasons we don't know, on the next page Mr Weirs has prepared a suit of documents, which he encloses in his letter of 19<sup>th</sup> July 1999, which include precisely this resettlement on a range of objects beyond the scope of the original objects of the *Mangaheia* Trust. So that is where the flaw entered into the picture.
- Now at 3.1 of the skeleton and I wanted just to emphasise two points. The first is I have said there contrast the Ponui transaction, which is at page 617 of that volume, in my submission it is clear the trustees did not intend to exercise the power of appointment because had they done so they would have undertaken exactly the same form of transaction that they did for Ponui.
- Tipping J Well it was fundamental that you had to have an advancement of the date of distribution which they clearly did not do for this purpose.
- Kós Yes. They could have appointed to Mrs Couper and then exercised the power of advancement in relation to her. That is what they did for Ponui. It is expressly not what they did for *Mangaheia*. The other matter I wanted to draw attention to in paragraph 3.1, there is the reference there to *Gosset's Settlement* and I don't need to take the Court to that authority, except to say that the point there made by the Master of Rolls Sir John Romilly, was that one should give the Court should give effect to the expressed intention, and that one should not substitute one power for another. That was a similar case where a power of advancement had been used but the transaction would have been better effected by way of a power of appointment. And Sir John said in that case "the expressed intention must be given effect to.
- Secondly, at 3.2, in my submission the transaction and form and substance is at complete odds with an appointment absolute to Mrs Couper followed by an advancement under section 41. The operative part refers to resettlement and to a transfer to a resettlement in

the new trust. In my submission it is clear in that situation that the power to appoint could not have extended to a new trust with different objects, it couldn't have been a legitimate exercise of a power of appointment. That is reinforced by the next point which is that the grandchildren of Mrs Kain, who are objects of the new trust,

Elias CJ Sorry that last is a stand-alone point really. It is not really contingent on accepting the form in which the parties have expressed themselves.

Kós I agree Ma'am. I don't want, I have never argued in any Court I think, at least not since I was about 25, that form should prevail over substance. I learned that very early. But what is clear at least is that intention prevails.

Elias CJ Yes.

Kós And that is slightly different from a question of mere form but you are absolutely right in respect the second point is a stand-alone one. So is the third. Which is that if a power of appointment was exercised in this case, it couldn't have been exercised because it can only be exercised in relation to objects of the power of appointment, and plainly that grandchildren of Janet Kain were not such objects. We see that by looking at the diagram. The grandchildren of Janet Kain were only, as we see under the old trust, discretionary objects of income. They were not, they had no interest in relation to capital either expectancy or entitlement. And both the deed poll and certainly the new Mangaheia Trust had the effect of exercising, if this was to be or could be a power of appointment, of exercising that power of appointment, that substituted power, in favour of new objects.

The fourth point at 3.4, is that the power of appointment was not exercised absolutely for Mrs Couper, and we have looked at the discovered legal documents, the legal advice, the discovered documents show neither a sale by Mrs Couper to Mangaheia and an acknowledgement of debt, or a payment by direction with a gift, the effect of which would have been to have incurred a gift duty liability in excess of \$750,000, given the value

Tipping J Well they did it by one step and you can't really treat them as having done it by two steps.

Kós Well that is my submission.

Tipping J There is all sorts of ramifications.

Kós Yes, it would be, apart from being I mean because we are dealing here with new objects, if this was permissible as an appointment as opposed to an advancement, then we would be dealing under the second transaction with a fraud on a power as well. Because it would be expressly for the benefit of new objects. It would also be a denial of the interests of the

revenue in relation to gift duty. So there are all sorts of issues here. Now that in itself a good reason why the Court shouldn't step in and act as substitute trustees and re-arrange the transaction but rather follow the conventional course which is to avoid the transaction and give the trustees an opportunity to reconsider their position, which will include if they wished to appoint to Mrs Couper how they went about it.

Tipping J I am not entirely clear in my mind Mr Kós, and no doubt you will be coming to this, the precise mechanism by which the Court of Appeal deemed this to have been done.

Kós Well I

Elias CJ It is not very clear.

Kós No I have spent hours looking at this and I am not clear either I am afraid.

Elias CJ Paragraph [88].

Tipping J Well I thought you might be able to shed greater light on it than some.

Elias CJ Mr Camp might be able to.

Kós I think that would be the appropriate course and I will reply as may be appropriate. The fifth point I make at 3.5, is that if the power of appointment had been exercised, then the interests of Mrs Couper and the grandchildren would have been fixed, and they would no longer have been discretionary beneficiaries and yet when one looks at the deed poll, the document at page 614, it is clear on the deed poll they were considered to be discretionary beneficiaries. That is clear, for instance, in Recital D where the resettlement is of the trust fund and the new trust principally for the benefit of Annette Couper and the grandchildren of Janet Richmond Kain, who are discretionary beneficiaries under the old trust. That is the really the same point again, the earlier point again. Clearly the intention here was an advancement not an appointment.

Elias CJ Discretionary objects. Sorry I am just thinking.

Kós Sorry what I said discretionary beneficiaries.

Elias CJ Well I mean it is appropriate too, but it is may be

Kós I would normally use, with respect, the expression your Honour has, which is discretionary objects, but the recital there refers to discretionary beneficiaries, I think that's how

Blanchard J I think that is the way everybody talks about them in this country.

Elias CJ I always talk about them as objects.

Kós Well

Elias CJ I am not in this country.

Kós Either way, it probably has the same result. The next point, I don't think I am going to trouble the Court with *Re Moon*. If my friend makes some point of *Re Moon* I'll come back to it but in my submission he has misconstrued that case in his submissions. What Lord Esher said at page 286 is very clear. There's no inconsistency in this case between the recitals and the operative part. But if my friend submits that there is, well I will revert to that topic. *Moon* is an authority which has precedence.

Tipping J You can resettle pursuant to a power of advancement.

Kós Absolutely.

Tipping J That's the point isn't it.

Kós Yes.

Tipping J Well we'll wait to see what the counterpoint is.

Kós That's right. You can. It is a much more complicated process to resettle by way of a power of appointment. It has to be done in two steps. Whereas the power of advancement can be done in one step as a result of *Pilkington*.

Elias CJ It's not part of your argument that, you say that you can resettle by power of advancement in reliance on *Pilkington's* case.

Kós Yes.

Elias CJ Quite different circumstances but it's not part of your case that you're arguing in fact that that case should be confined at all because it's not necessary for you to go there.

Kós No, not at all. It's a very broad power and it could have been used provided that Mr Weir's advice in his original letter of advice to Mr Couper had been followed. Which is to say to confine the exercise of the power of advancement to the objects of that power and that the objects of a power of advancement are persons entitled. And as I go on to say I think a little later, in fact I've already skipped over it. The irony in this case is that the only persons entitled as at the 19 July 1999, the only persons who could have been the subject of the exercise of were the appellants. Because they were the only persons entitled as at that stage.

Tipping J They had the default interest in capital.

Kós Yes.

Elias CJ There had to be an appointment.

Kós There had to be an appointment.

Elias CJ Yes.

Kós Yes, to go past them. At 3.6 I submit that if clause 4 had been exercised it followed by then an exercise of the power of advancement either under the express provision or s 41. The trustees would still have needed the written consent of the appellants which was not given and in my submission the Court's consent cannot be granted retrospectively. This is a matter that is covered in my principal submissions at paragraphs 47 to 52. Again the point is an academic one as it was in relation to the power of advancement because there is no prior appointment at all in my submission.

The next point I make is that there must be a triggering event for property rights to pass under trustee powers. In this case the triggering event will be the exercise of the trustees' discretion in relation to the power being exercised but they did not exercise that discretion under the power of advancement. And I've referred there by way of analogy to the judgment of the High Court, Your Honour Justice Tipping in fact, in the *Motor Wix* which dealt with the rights of first refusal.

Tipping J That's struggling a bit isn't Mr Kós.

Kós Well what appealed about that authority Sir was that it was the expression "triggering event".

Tipping J Oh, I see.

Kós Resulting in a right that was therefore a right in property.

Elias CJ There's no appointment unless property passes is there.

Kós There's no property passing unless there's an appointment.

Elias CJ But an appointment is a conferral of property.

Kós Yes it is. It's the creation of an entitlement to property.

Elias CJ Yes, I just don't see that notions of triggering events really, it's the substance that you're looking at.

Kós Yes.

Elias CJ Did the property pass through appointment.

- Kós                    That's right but there must, the triggering event is the appointment, nothing more than that.
- Blanchard J        But here there's an additional complication that because of the peculiarity of this deed, the date of distribution had to be shifted first.
- Kós                    That's, yes that's a good point. I'm sorry, it's not one I've addressed. The date of distribution would have to be moved forward.
- Blanchard J        I don't recall ever seeing a deed with a provision like that. It struck me as very strange but I don't have vast experience.
- Elias CJ             But if you appoint and property passes you have moved the distribution forward.
- Blanchard J        Well I'm not sure that that's so with the way this deed goes.
- Tipping J            No, that's what I was getting at when I said they hadn't advanced the date of distribution.
- McGrath J          You could appoint without in fact the date of distribution having arrived and still be a valid appointment but it would only take effect surely when the date of distribution did arise.
- Tipping J            That may well be right.
- Kós                    If that's so then one would have to be, again it comes back to the question of intention. In the pure exercise of a power of appointment, if we imagine there had been one at all, then the question will be, was that a double act. Did that both move forward the date of distribution and appoint capital, or did, as Your Honour Justice McGrath suggests, only do the second.
- Elias CJ             But hang one, wouldn't it *pro tanto*, in respect of the property that was transferred, move the date of settlement, move the settlement date forward but as to the balance that property would still be held, if there was any, that property would still be held on the same trusts.
- Kós                    Provided it was clear that the trustees, in exercising the power, that being the triggering event, had intended the property to move at that point in time as opposed to the point in time directed by the deed.
- Elias CJ             But isn't that what appointment is. Sorry this is what I said before and I might be quite wrong about this, I had understood that appointment was that the transfer of the property.
- Kós                    No, not necessarily. An appointment can be either contingent or vested.
- Elias CJ             Ah, yes.

Blanchard J Here arguably there was no power to make an appointment of capital unless you'd moved the date of distribution first.

Kós You would need.

Blanchard J I don't know that I'd want to get too hung up on that point but there it is.

Kós Yes the difficulty is of course it's relatively easy for me to try and analyse the Ponui appointment, where there actually is an appointment, and I can talk to Your Honours about what that appointment did.

Blanchard J They moved the date of distribution there.

Kós Yes they did. What we're dealing with here is a notional substituted exercise of the power of appointment by the Court of Appeal. And I've no idea how to construe that, whether it involved, it must have involved, necessarily by the Court of Appeal approving the transfer, a moving of the date of distribution but that doesn't receive a line of discussion.

Tipping J I thought the way this deed was structured that the appointment could only take place on the date of distribution. Hence if you want a partial appointment you have to pro tanto advance the date of distribution. And that's exactly what they did for Ponui, all other issues on Ponui aside.

Kós Yes.

Tipping J So this is what I was trying to get at Mr Kós when I said a few minutes ago that they didn't advance the date of distribution so they couldn't have been purporting to exercise the power of appointment. Because it was only exercisable on the date of distribution as I read the deed.

Kós Well the point is well taken in relation to the exercise did occur which appears on any view to be an exercise of the power of advancement in any case.

Tipping J Well quite but.

Kós If it were a power of appointment then it certainly doesn't undertake the change of the date of distribution which is referred to in the middle, well at the end of the clause on the middle of page 566. And that's where there is a proviso that the trustees can in their discretion from time to time by deed appoint a date or successive dates of distribution of the whole or any part of the trust fund earlier than the date before said, which is 2050.

Tipping J But this is another issue for the Court of Appeal's method.

Kós Yes. And it's one which I'm sorry to say has received no attention whatever in the submissions of myself or indeed anyone in this case.



- Tipping J The Court of Appeal's view must imply that the Court can advance the date of distribution. I'm sorry to use the word advance in two senses. But bring forward the date of distribution.
- Kós Bring forward, yes.
- Tipping J Now there may be, but I know of no authority that goes that far.
- Blanchard J I doubt that the Court thought it was exercising the power of appointment.
- Tipping J Well it was deeming the trustees to have exercised it in a way which implied, is the better way of putting it, I agree.
- Kós Yes. And that leads then to the next point that I make in my submissions in fact, which is that at 4, my submission of equity does not here, that is to say in these circumstances, treat as done what was not done. And that's for a variety of reasons. The first is that to do otherwise cuts across the settlor's intentions and the trust deed under which the settlor has conferred property rights on certain individuals and not on others. And provided different powers and different discretions to be exercised in relation to different individuals. And it's fundamental that those powers must be exercised correctly when property rights are being removed, the point in a sense made by the Court of Appeal in *Wong v Burt* with which I began today.
- The second point is that equity does not intervene to exercise a power that has not been exercised. This is the matter I was addressing with Your Honour the Chief Justice earlier. And in my submission the authorities are very clear when one looks at *Halsbury* and at *Farwell*.
- Elias CJ Do we have *Farwell* in the authorities.
- Kós Not in the bundle but I've got copies.
- Elias CJ I've got a copy thank you.
- Kós Those are the relevant references. One of the features of powers is that although it seems to sporadically produce books by Lords of letters of the 19<sup>th</sup> century - *Farwell* is father and son over the course of the last century and Professor Thomas in the 1990's. The actual principles don't seem to change very much. So the principles in *Farwell* in 1916 are precisely the ones set out in *Halsbury* in 1998. And what the authorities there say in a nutshell is simply this, that equity does not grant relief for the non-exercise of a power unless that has been caused by the fraud of the person thereby benefiting. What it means is that if a power has been used which could not validly be used, the exercise of that power is void, the property reverts to the trust from which it's deemed never to have left, and it's then for the trustees to exercise afresh their powers.

Elias CJ I don't have any trouble with the propositions here. My concern is that it would be open to the Court to say, although the trustees didn't invoke that power, that is the power that they have exercised, looking at the matter as one of substance. Now do I understand that these authorities say no, they have to be consciously invoking the particular power.

Kós Yes.

Elias CJ Alright.

Kós Because in my submission one starts, and this is for instance the effect of decisions like *Gossett* and *Re Lawrence* which is not in the bundle but which is referred to in the outline, which say, one looks at the power that has been purportedly exercised, that the trustees thought they were exercising. Was that or was that not valid. If not valid, then the Court doesn't say, well there's another power in the suite of powers available to trustees which could be exercised in lieu.

Tipping J You see in some leads express reference to a purported power and then it says and all other powers us enabling or something like that but there's nothing like that here is there?

Kós No it's a very old-fashioned form of deed, and I suppose the power your Honours is referring to is in fact quite an old-fashioned expression as well.

Tipping J Well yes.

Kós But it's not found in this one.

McGrath J What's the mischief Mr Kós are there different considerations if the power of advancement is used or as opposed to the power to appoint? You have got these propositions from old cases and respected old text but can we just come to the substantial mischief.

Kós The substantial mischief is that if the power of appointment was used it could not be used to resettle for the benefit of non-objects of the original trust. The power of appointment could only be used for the benefit of the original persons who are objects of the trust.

McGrath J You are really saying that power could not be used at all.

Kós Couldn't be used in this way.

McGrath J But if we had a case where one of the powers was on the face of it used because the deed says so, but another power could have been used. The other power could have been used, what's the real mischief in sort of saying well let's treat the matter as having been the subject of the exercise of that power. I mean at the different considerations that trustees have to take into account, that I think must be the crucial aspect.

- Kós Well the power of advancement can only use for the benefit of the objects for power of advancement, that's a more limited class, because they must be persons entitled, in this case the power of advancement could only be used the 19 July 1999 for the benefit of the appellants, and no one else.
- Anderson J There are three things that would have to occur to lawfully achieve what they purported to achieve. The first is there would have to be an appointment of Mrs Couper under the first part of clause 4.
- Kós Yes Sir.
- Anderson J Then there would have to be a deed accelerating the date of distribution pursuant to the penultimate proviso in clause 4, then there would have to be a new deed with Mrs Couper as the settlor.
- Kós Yes, I agree.
- McGrath J But that's the mischief is then the consents that would otherwise be required, don't have to be sought of you.
- Kós Yes, but it's more than that with respect. The mischief here is that one cannot go from red to green across the diagram.
- Elias CJ Well you couldn't use the power of advancement and more directly there wasn't an appointment.
- Kós Yes.
- Elias CJ Whether or not they thought they were using their power of appointment, but there wasn't a power appointment.
- Kós Yes and I say as a matter of equitable principle that's it but if I have to address mischief, which you Honour Justice McGrath wants me to address, then the mischief here is the conversion from red to green. In other words it is by this transaction, including an appointment in a single transaction, not three, as your Honour Justice Anderson posited, to have moved to a position where the red are eliminated and the green are introduced.
- Tipping J Although I think also Mr Kós part of the mischief without prejudice to that is that the trustees discretions, different considerations could well come to bear as to whether they should exercise it as a discretionary power, discretionary trust power like this, depending upon which power they are purporting to exercise.
- Kós That is so, and in addition to that point, there is the point I raised before about the question of conflict. Is it appropriate for instance, for trustee Mr Hutton to participate in the appointment in favour of his wife, an appointment which gives, sorry I beg your pardon that's the second step,

well the appointment would be to Mrs Couper and it would be then a matter for her, and it would have to be her freewill alone without any pre-consideration or involvement of the trustees for her to then appoint to other persons.

Elias CJ But that's way downstream, you don't need to go there on your argument.

Kós Correct. At the moment what I do have is a transaction which is by one power but not the power that could have been used, without the other supplementary elements or essential elements that your Honour Justice Anderson identified and which has the effect of preferring the wife of one of the persons exercise of the power, and indeed the trustee Mrs Couper herself exercising the power. It's notable for instance, and I will come back to this point, but it's notable that when the Ponui appointment at the top of the page was conducted, where there was an appointment directly to Mrs Couper, she did not participate in that decision. Let me show you that, it's at page 616, bottom right hand corner, and that is the deed of appointment of partial distribution of the Ponui transactions, the one at the top of the page, of the quarter of the pie, and at recital F it records that the beneficiary who was Mrs Couper.

Elias CJ Sorry just noting in terms of the discussion it is participated that has gone on, that this is a partial distribution.

Kós Yes, because it is only a part of the assets, or part of the capital.

Elias CJ Yes, my point being though that it is a distribution, it's advancing the distribution.

Kós Yes I am sorry, that's quite so.

Tipping J Are you referring to recital F.

Kós Yes I am, although if you are just taking your Honour Chief Justice's point, if one looks at D and E one sees there the and also operative Part 1, one sees that in that case there was an express exercise of the power to advance the date of distribution. So that is absolutely clear in relation to this transaction.

Blanchard J So they knew how to do it if they wanted to do it?

Kós Yes.

Tipping J Well it does seem bizarre that they chose a different route.

Anderson J A bet each way.

Tipping J Yeah for Mangaheia, and Ponui and now they are being told they got that Mangaheia wrong, but we will treat them as if they have gone the other

route, which they deliberately didn't take, for some reason, we don't quite know why do we?

Kós But again one has to assume that was done deliberately, and so the question is, is it appropriate for a court, the Court of Appeal in this case to repair what is such a different transaction by determination by attention, and if we see that in relation to conflict that Mrs Couper has declared to her co-trustees her interest and has consented to her decision being taken by them, and the offer to part c14 has the same effect. So coming then to the question of mischief, had there been an appointment in this case, and assuming the appointment were only to a proper object which Mrs Couper could have been would she have been an appropriate person to participate in that, well clearly not on the approach that was taken on the Ponui deed. So again the question comes, who should make that decision. Should the Court make it and assume it's simply being Mr Startup in this case, or is it Mr Startup and Mr Hutton. And the position now of course is that both the old trusts and the new trusts remain extant, and the trustees have all changed by consent, so the trustees are now the Public Trust. The Public Trustee I think in Christchurch, somewhere, the Public Trustee, Auckland I gather. Thank you.

Open at my skeleton at 4.3 at my submission equity will repair the defective exercise of a power only if the defects are not of the essence or the power, that is to say they don't involve the granting of relief that defeats the intention of the donor of the power, now what that means in my submission is that the power to repair is used very sparingly and the authorities that are referred to by my friend and some which I refer to there like *Eardley Wilmot* a case which involve a slip. *Eardley Wilmot* was a case where a power of appointment had been exercised, but the exercise on the power of the appointer referred to a deed in 1819, whereas the fact the one he meant to refer to was in 1839.

Tipping J Well that's a classic rectification case.

Kós That's exactly right.

Anderson J The position here is that you have three crucial documents all executed on the same day. One taking route A and one taking route B. It must be assumed that for reasons we don't know, a deliberate decision was made in route A not to go route B. And we don't know why they did that and we shouldn't impute to them an intention which was plainly contrary to what they actually intended.

Kós Yes well I am gratefully adopt that.

Anderson J I am just trying to summarise your argument

Kós Well I gratefully adopt that argument.

Tipping J It always sounds better when it comes from the Bench.

Elias CJ Not always.

Kós That's one of the tragedies of being counsel. And at 4.5 I refer to the issue of conflicts and I need not traverse that again. So at this point I can really sum up my argument in relation to Mangaheia and it is simply in five to say that the transaction should be set aside, the trust property treated as if it had never left the Mangaheia Trust. The reality is that in this case neither power could be utilised in this case, to affect the resettlement that has been affected. You could not go from red to green by either method. The new independent trustee, the Public Trust can consider whether an appointment with the certain Mangaheia assets to Mrs Couper is justified. In light of the other provisions that she has received, which I note and my friend has forgotten to refer to them in his submissions, the 51% of the Hukanui farm and 50% of the Pinecroft farm and Ponui is retained that are other assets sourced from trust farms that she has received. And that if your Honours please is all I want to say at this stage on Mangaheia and I turn then to the, it was convenient to deal with it second but it was actually the first transaction, the Ponui appointment is a more confined point, and I approach it in this way. I first say that that's contrary to my friends submissions, there is no pleading issue regarding Ponui. My friend has forgotten, I think and certainly refer to in submissions, that Mrs Couper herself put the validity of the Ponui distribution in directly an issue in her counterclaim, and I have given reference there.

Tipping J Did she ask for a declaration that it was valid?

Kós Yes she did. The plaintiffs pleadings sought this, and I have given the Court reference to the relevant references of the plaintiffs pleadings, sought the setting aside of the Ponui resettlement on the basis that it was not permitted by the original trust. From my submission that was perfectly adequate by way of pleading to raise the question of validity of the particular appointment. The next thing I go to is what is meant by, fraud on a power. The equitable fraud of course is not the same as tortious or criminal fraud and fraud on a power can be committed by an honest trustee, which is clearly what happened in *Wong v Burt* because no one could have been more honest than Mr Burt in that particular case, but nonetheless he committed the equitable offence.

Tipping J It would be better to rename it misuse of a power or something like that wouldn't it.

Kós Yes I agree. I mean one reason why *Wong v Burt* one wonders what Mr Burt must have thought, having been declared to have committed a fraud, and but clearly, it's a different species.

Elias CJ Fraud on the power.  
McGrath J It's an ultra vires concept.

Kós Yes entirely. It's a bit like the discussion we had before about discretionary objects and discretionary benefits. The general public understands the word fraud and doesn't go much beyond that to the associated words on a power. It I may take the Court to *Wong v Burt* which is in the principal bundle of authorities at tab number 15.

Elias CJ Do we have *Vatcher v Paull* in the authorities.

Kós You don't but I have a copy of that available for the Court, if the Court would like it.

Elias CJ No that's fine.

Kós The importance of *Vatcher v Paull* is though that it's, what it does say in this Privy Council decision from the Island of Jersey, which I believe has some authority, but that's not quite as much in this Court as it would have below, *Vatcher v Paull* says that the question is whether the exercise or the power has been done for the single purpose of benefiting objects of the power or for other purposes as well, so it maintains a high standard. It allows not add mixture for purposes. You can't have good purposes and bad purposes, you got a bad purpose and that's it. That will be the argument between my friend and I today I am sure.

Tipping J Any substantive bad purpose other than merely incidental is rendered ineffective.

Kós That's my position.

Tipping J Yes well I will need some help here Mr Kós as to this heavy focus on intention and purpose, signal that.

Kós Thank you.

McGrath J There has been further discussion of course when cases like *Burton* come to play don't they?

Kós *Re Burt v Wong*.

McGrath J *Re Burton*. It's not the final statement of the proposition, *Vatcher v Paull*

Kós No.

McGrath J There's been further elaboration of it..

Kós There has and the difficulty one has is that one looks at the case law it seems to wax and wane across a period of two centuries. *Vatcher v Paull* is the direct descent of a case called *Dorbney* in 1813. *Dorbney* is said one purpose only is allowed and that is to benefit objects.

- Tipping J There are other cases that say if the person in the middle, if you like, you understand what I mean by that. He and Mrs Couper. If she is completely and utterly comfortable and not overbroad or anything like that to do in one step what could have been done in two is not bad.
- Kós Yes. That is so but that argument I make Your Honour to the Court on that is that is looking at the wrong person.
- Elias CJ That is what?
- Kós It's looking at the wrong person. The question is not the appointee but the appointor.
- Blanchard J But the appointee's view on what is being done for her benefit must have some influence.
- Kós Well, let me run through the argument in perhaps the order it comes and I'll take Your Honour through that.
- Elias CJ Just um, because it is a loose thread, somewhere in the materials there is an indication and I have looked at the evidence that the original settlor said that his intention was to preserve the farming properties into the future for future generations.
- Kós Yes and also for Mrs Couper and her daughters.
- Elias CJ And also for Mrs Couper and her daughters?
- Kós Yes.
- Elias CJ Right, I just had wondered whether that intention, the first part of it, could be said to be consistent with the Trust set up?
- Kós I make nothing of the point. It could be said to be inconsistent but the, one of the things that has bedevilled this case and has fortunately fallen away long before we got to Your Honours, is the fact that there were multiple trusts here, different rafts of objects all in this together. So that when Mr Couper was saying that he intended the farms to be preserved or the properties to be preserved for the benefit of future generations it's not clear which trusts he would be talking, he would be talking generalities.
- Elias CJ Yes.
- Kós But in relation to this Trust when he talked about Mrs Couper and her daughters, it was clear he was talking about this Trust because this was the principal Trust in which Mrs Couper had any interest at all.
- McGrath J Mr Kós, just coming back to your point 8, the focus on whether there is an intention which is bad, if one of the appointors had intentions to



secure another benefit, the point I am making is that some of the latter cases do rather look for the focus of what was the real purpose and intention of the appointor and was that for the benefit of a named object and it, these cases seem to suggest a more general view should be looked at rather than, if you like very particular view of each element that's taken in *Vatcher v Paull* because that may be against you if at the end it can be argued by the other side that the reality of this matter is that there was an intention to benefit Mrs Couper.

Kós And the question would be, though in that context whether the benefit of non objects which in this case include Mrs Couper's daughter but also the other person identified in the top lefthand box in the corner of the diagram

Tipping J The companies etc.

Kós Yes, were merely incidental.

Tipping J Well they certainly apparent, if they were going to take the high ground they certainly took high ground here.

Kós Yes, well submission is that they were not merely incidental to the purpose of benefiting Mrs Couper but the manifest purpose went beyond Mrs Couper to these particular objects and why one can say that in my submission, with some confidence, is because this was all done as a single transaction. It wasn't a case where there was an appointed Mrs Couper and she was left to her own free will as to what to do.

Tipping J I understand that but I think at some stage you will have to take us to the deed for the trust concerned and looking at the sort of powers that Mrs Couper has, almost in relation to her rather discretionary beneficiaries. There is something in there isn't there that says she can take them out. I don't necessarily want you to go there now but I think that the points you have just made, that there are some special considerations in relation to this trust deed that I think we will have to be familiar with.

Kós I have looked at that point, if I might just have a look at that now and see. The deed itself is found at page 578 and 7(1)(b) is the clause that Your Honour was thinking of. Perhaps before we get to 7(1)(b) we should just note who the relevant persons are. At the bottom of page 580, the discretionary beneficiaries are the settlor, which is Mrs Couper, the final beneficiaries at the top of the next page are defined two thirds of the way down, they are her children, four daughters, then we have siblings, parents, [inaudible] is grandchildren, then any wife or husband at the time being of any beneficiaries, that was for instance Mr Couper himself. Persons who lived with the beneficiary, trusts, companies, charities and anyone then specially introduced under clause 7.1(a). This is the deed in modern form.

Tipping J Almost a general power of point.

Kós Yes.

Tipping J It's so wide.

Kós Yes, yes it is. It's such a wide special powers to verge on generality.

Tipping J On being general.

Kós Yes.

McGrath J With the power of removal in conjunction with all of this, almost one could say colloquially to put the argument against you, it's almost as though it was left to her alone to decide these things, the bequest was to her alone.

Kós Yes that's, that's an argument that hasn't been raised. I'll need to think about that.

Blanchard J It's certainly the way I saw it when I read it.

Elias CJ If it's a general power of appointment it is property in her hands.

Tipping J To appoint herself. But of course the appointor under this trust are the trustees.

Kós That's right. But the power to appoint to remove is reserved to settlor.

Tipping J Is reserved to the settlor.

Kós That's in 7.1.

Tipping J Yes. Do you say the

Kós Power to appoint under 7.1(a) and to remove beneficiaries 7.1(b) is reserved for the settlor.

Tipping J She remove all beneficiaries herself?

Elias CJ Yes.

Kós Ah, she can remove all beneficiaries other than the final beneficiaries. So she cannot remove her daughters who are the final beneficiaries.

Tipping J But she could confine the discretionary beneficiaries to herself.

Kós She could define the discretionary beneficiaries to herself, that's true.

Blanchard J So it's very much her trust. I find this part of your argument pretty weak I am bound to say.

Kós Well that's a direct assessment.

The Court Laughter.

Blanchard J For the reason being this seems to me to be her trust.

Anderson J A vehicle by which she can use the money that has been appointed to her.

Blanchard J And there's plenty of old authorities which I would have thought would uphold doing it in this way, benefiting the object by benefiting the people the object has as members of the family.

Kós Well this is a point of novelty to me I am afraid. It's not something which has been averted to say, I need to respond to it I think carefully.

Blanchard J Well it kind of leaps off the page when one reads the trust.

Kós Yes, it kind of does if you're not immersed in several years of this matter I am afraid.

Elias CJ Is it then important to your argument that the final beneficiaries were not objects of the initial trust and could not be removed by the settlor, so it's not a general power of appointment that she has.

Kós It's certainly important from the sense that they clearly are objects of the – I think there are two points. The first is Your Honour's one, which is that because she can't remove the final beneficiaries they clearly remain objects of the appointment.

Blanchard J But there are plenty of cases, some of considerable antiquity where it's been considered that an appointment which includes children is for the benefit of their parent.

Kós That is so if it is done incidentally as opposed to directly I think.

Blanchard J Oh no, no I don't think so at all.

Elias CJ That is a slightly different point though. That's a very valid point and you need to address that. I was rather still thinking about that if this had been a power in which, if this a mechanism unto which she could take the whole property at her option, then really all you would be contending against is the manner of ownership, the form in which property had been appointed to her. The only circumstance which it seems to me changes that, is that she can't remove the final beneficiaries. But that's where you need to deal with Justice Blanchard's point.

Kós Yes I collide with that proposition which I recognise. I've seen it myself in the authorities.

- Blanchard J There's another point. If you look at 7.1 she has power to appoint or remove trustees. A classic method by which one controls trust. There are constraints on that obviously but, if her co trustees are not prepared to administer the trust in a way in which she feels comfortable with, she would have considerable ability to remove them and replace them with people who she felt more comfortable with.
- Kós I think the reality, if the Court pleases, is not having considered the significance of 7.1(b) in conjunction with the point that Your Honour, Justice Blanchard makes which is that if the sole appointments, sorry the sole object or invariable object of the power that cannot be removed is a child, which is the position in terms of 7.1(b) because it only refers to discretionary beneficiaries and the only final beneficiaries are her children.
- Tipping J I don't think the beneficiaries are the object of the power are they? The objects of the power must be the discretionary beneficiaries, that is, they're the final beneficiaries, the default people.
- Kós Yes although they are I think more so to be treated objects of the power because they have a contingent or indeterminable interest as opposed
- Tipping J I think they have a contingent interest and that goes back to your earlier point and there can be no doubt about this method of the position of final beneficiaries, but they are not objects of the power it seems to me if they are not actually in that list.
- Kós Yes well that is not a helpful argument against my argument because that raises a further difficulty, clearly.
- Tipping J I started this year running by taking you up on the *Vatcher v Paull* proposition, one of the intentions is to secure a benefit from person of the object of the power. That is suggesting is that is a bit out of date now but you've got to look at the reality and the reality is whether the benefit is for the object. Now in this case Mrs Couper and it seems to be looking at the matter broadly in those terms, you do have to take account of the trust. Now this is assuming that you are successful on your argument that this was all fixed up as one transaction on which I would have thought you had a fairly strong argument but when you come back to it, isn't the modern approach to look at the reality as to whether the overall disposition is for the benefit of the object and not for the others who happen to have been incorporated into trusts that gives effect to it.
- Kós I accept that and I would have answered that by saying yes but in this case you have a range of, such a range of discretionary objects that clearly if it's all part of one transaction, then this is the exercise of the power that goes beyond the objects of the original trust on the power, the difficulty I have is the one
- Elias CJ She's in control.

Kós She's in control.

Elias CJ She's totally in control and so the only way really that your argument has any legs is if the final beneficiaries, if that circumstance takes it beyond the, makes it fraud on the power, and that is a very difficult argument for you to make since there are grandchildren.

Tipping J Well in clause 6.1 it makes it a very theoretical proposition.

Blanchard J Yes.

Kós Said in the sense that their interest is clearly determinable.

Blanchard J Silent beneficiaries don't get anything for 80 years if the trustees decide otherwise.

Kós Yes unless that date of distribution is advanced.

Blanchard J Yes.

Elias CJ So this is really only a form in which property appointed to her will be held it seems to me.

Blanchard J You have to have final beneficiaries in order to have validity in the trust and it would be ridiculous for her to be a final beneficiary because she was never going to be alive in 80 years time.

Kós Yes.

Tipping J This is something that could have been done without question with an interval of three months. What they have done is compressed and I have to say Mr Kós that I think the substance of this is that she was clearly, never mind what the intentions were re appointor, the only worry I would have if there was any suggestion that the arm had been put on to her so to speak to agree if you like to the onwards settlement that is involved in this, so wasn't really her free will and choice.

Kós Yes.

Elias CJ But it is her property.

Blanchard J Why would you strong arm her into

Tipping J I'm not suggesting there is any such here

Kós I think what the Court has identified is an argument which hasn't been identified at any stage before and certainly not in written arguments here, which is that in substance it is as if the appointment was to her given her ability to remove those other objects.

- The Court Yes, yes.
- Tipping J Well it's certainly not an argument raised in terms against you, to be fair to you.
- Kós Yes and to be unfair to me, it's something I probably should have identified by reference to that particular clause. But I think facing it, it becomes academic having to argue beyond to the next point I was going to raise which is, it's not just a question of strong armings but free will in this context means whether there is a legal or moral expectation that she will act in a particular way, but that's beside the point I think in light of where we've got to.
- Tipping J I think it has to be because the impression I have, she wasn't cross-examined or there was no suggestion from others and brothers which the Chief Justice has said, it's counter intuitive anyway. Because there was nothing wrong with it from her point of view, she had the effect of it all in her own hand.
- Kós Not in light of the analysis that is given now. It's clear I think that on the evidence he didn't have to be cross-examined in relation to the question of what her intent was or expectation was because Mr Hutton had already given evidence which I have summarised in 10.2 of the outline, where he said that what he does in effect is, in his evidence, is to confirm the existence of a scheme. But this will not avail me in light of the fact that if there was such a scheme well it went effectively no further than her. I think I
- Elias CJ Sorry, may it help you a lot in your other argument because this route was chosen to benefit her and the outcome in the other transaction was simply to remove a class of objects, the benefit already having or substantial benefit already having been conferred.
- Kós Yes as I think on the face of matters at least, at least an arguable form or power to engage in an appointment as part of a single transaction, so an appointment plus a resettlement where that includes beneficiaries including discretionary beneficiaries who are other than the original objects of the power of appointment. But I can't I think realistically unless I receive any signal from my left, argue beyond the reality here that it is most unlikely I will persuade this Court that there is a fraud on the power when in fact the power to correct the position was in her hands in any event.
- Tipping J 8.1 doesn't exactly help you either Mr Kós on this unfortunate analysis for your point of view. I mean there's belts and braces all over this, which means she could have ended up with all this back in her own hands if she wanted to.
- Kós Yes subject of course to the fact the power there is vested in the trustees.

Elias CJ She controls the trustees.

Kós Yes, well that's true.

Elias CJ Would it be helpful if we take the morning adjournment now Mr Kós.

Kós I think it would be most helpful. You may not hear much from me afterwards, thank you.

### **Morning Adjournment 11.21am**

### **Court Resumes 11.40am**

Kós I'm grateful for the interval, in words of the authority Monty Python, The Black Knight in the Holy Grail, I'm not quite dead yet.

Kós Let me see if I can refocus the argument and see if I have any part of me still alive. There are four points. The first is that what we are concerned with here is the intent of the appointor, that is to say the trustees. And if they had an intention to benefit non objects then that is a bad exercise of the power. If that was an actuating factor in the exercise of the power of appointment, it is a bad exercise. Secondly, there is nothing looking then at the position of the appointee here, Mrs Couper. There is nothing giving her primacy except her ability to remove other beneficiaries, that's important but it doesn't give her primacy.

Blanchard J And the trustees.

Kós And the trustees. But it doesn't give her ab initio primacy amongst beneficiaries. It does not mean that she is ab initio the sole beneficiary.

Anderson J Well that line of argument requires an examination of the nature of benefit. She's gone from benefit to primacy, different animals.

Kós Ah, yes but my, let me run the four arguments out and see if we can work our way through them. The third point is, in light of the powers in the trust deed, is there actually an expectation on the part of the appointor, I'm looking at the intention of the appointor, that Mrs Couper would not benefit any of the discretionary beneficiaries, in other words, to put it another way, was there actually any expectation that she would exercise the power to remove other beneficiaries.

Elias CJ Why does that matter?

Kós Because, this comes to my fourth point.

Elias CJ Oh.

Kós Because clearly there was a trust established for the benefit of others besides objects of the power. They are named as beneficiaries, they were

referred to in the transactions that preceded the exercise of the appointment and the relative evidence is referred to in 10.1, 10.2 and 10.3 of the outline. Clearly, therefore, looking at the intention of the trustees, the intention of the appointor, which is the proper party to look at from the perspective of fraud on a power, there was an intent to benefit those persons. There is potentially a saving, but that doesn't mean the saving comes through the ability to rectify that by removing all those foreign objects. But that does not mean that there wasn't an intent on the part of the appointor to exercise, to confer a benefit on non objects. And in my submission it is as simple as that. That is the requirement for fraud on a power.

McGrath J Back to *Vatcher v Paull*, that is the proposition.

Kós Yes, its back to *Vatcher v Paull*. You look at the intention of the appointor.

Tipping J Well that is where you and I had a little dialogue Mr Kós and I signal that I am not sure that it is sound to put everything on that because I am trying to get to the vice that this doctrine is really designed to prevent and I would have thought it was to stop people who are a legitimate object of a power, being as it were prevailed upon as part of a composite transaction, to benefit a non object.

Kós No I think that's, I think with respect that is looking again at the wrong person. It is not appointee focused. The doctrine is appointor focused.

Tipping J Well that is why I am debating with you whether that is entirely correct, whether that should be the position. Such a heavy focus on the appointor's

Elias CJ But even if it is on the appointor, on your argument it is to use the appointee to achieve the object. So isn't it really the same, don't those two things come together.

Kós I don't think they do, with respect, because the issue is whether, the reason you focus on the appointor is because it is the appointor that has the power to transfer the property out of the trust. So, therefore, one focuses on the trustee and what the question is in transferring the property out of the trust by the exercise of the power of appointment, are they benefiting proper objects, let's to say the beneficiaries, the existing objects, or are they seeking by that course to benefit others. If they appoint in favour of an appointee, and a range of other objects which clearly in this case were charities, and companies and other persons

Elias CJ Unspecified charities.

Kós Yes unspecified.



- Tipping J But what can you, Mr Kós, if a potential valid appointee comes to the appointor and says look I understand you are considering appointing in my favour, rather than doing that I would like you to appoint directly to a trust which I am going to set up for the purpose.
- Blanchard J Certainly of a standard family trust.
- Tipping J Now there are early cases, one of them is by the name of *Goldsmids*, *Goldsmids* as they became, where exactly that happened and that was held to be valid. I don't say exact, I don't think it was a case of a person actually approaching the appointor but that in substance is the nature of the transaction. Now how can one reconcile that with the heavy focus on the appointor's purpose. The appointor's purpose was to get the asset directly to the non object but, in effect, at the request or with a completely free concurrence of a valid appointee.
- Kós That is where the question becomes "is there a transaction between the appointor and the appointee which represents a scheme by which others are also to benefit".
- Blanchard J But if it is all being done for her benefit and she is benefiting from the inclusion of the non objects, because then members of her family and any charity that she is interested in, then that is being done for her benefit.
- Kós But if the deed provides and it is part of the purpose to effectively transfer in the single bargain these other objects, then that effectively takes the property away from the existing range of objects and confers it on a new range of objects. And it is not saved by the fact that she can rectify the position by removing
- Blanchard J Well it seems to
- McGrath J It is more than a saving provision. She has control and that seems to me is a very important and distinct element in relation to all of the cases that you are relying on.
- Blanchard J I take a power of persuading that this isn't done for the benefit of Mrs Couper.
- Tipping J The fact that it may actually ultimately in physical terms benefit others, the doctrine isn't so narrow that the money has literally got to go into the pocket of a valid appointee, is it. Even if that appointee wants the money to go straight onto someone else. I am trying to unshackle this in my head, what you might call the rather, you are quite right when you say there has been a shift over two centuries. The very early cases I think are more liberal. Then in the second half of the 19<sup>th</sup> century we got this rather more rigid formulaic. Everything turns on intent of appointor. Contemporaneity was a vice. And I just think that is getting too formulaic.

- Kós Yes the question, again it comes back to the question of the transfer of property from existing objects to new objects and whether the trustees, whose obligations are in relation to the existing objects, by the transaction they undertake with the appointee, are in effect going to benefit persons who are strangers to the existing trust. Now that, in my submission, must follow when you have the range of objects that were provided for in this trust. I don't accept, with respect, I cannot accept that there was this argument that the range, the fact that you have a wide range of beneficiaries in this case means that all you are doing is benefiting Mrs Couper. If that was so, then there should have been simply an appointment to Mrs Couper.
- Anderson J [inaudible] advised then to set up the trust on these terms.
- Kós Precisely and she could have done so. Because she has done it in consequence of a scheme with the trustees. That is the evidence of Mr Hutton.
- Tipping J What about the creditor cases where it is a valid appointment to pay money directly to a creditor of an appointee, to stop him from going bankrupt or being struck off a professional, there are cases, as I recall, under this sort of heading. Well clearly the direct benefit is to the creditor. But the very strong indirect benefit is to the valid appointee.
- Kós It is an equal benefit to the appointee. In a sense that is just a post-box.
- Tipping J It discharges an existing indebtedness.
- Kós So clearly in that situation it does benefit the appointee.
- Tipping J But I am just struggling for some sort of touchstone that doesn't appear formulaic. You seem to be, with respect, to be taking or advancing the proposition that if there is any physical potential benefit to a non object. Physical in the sense of cash or an asset. That invalidates
- Kós I say, and I said at the outset of this argument, that it would turn on the question of whether *Vatcher v Paull* and *Topham* remained regardless of being the correct authorities in this Court. It turns on whether the intent of the appointor is to benefit others apart from the existing trustees, sorry existing beneficiaries or objects, giving the trustees' obligation to those existing objects.
- Blanchard J It all depends on what you mean by benefit.
- Kós Yes I understand that. That is the question Justice Anderson put to me before. And what that means, in my submission, is to confer in effect property or an expectation of property being transferred from the existing trust to those persons. If the trustees did not expect that Mrs Couper, as the appointee, would, if they didn't, well if they intended only to benefit Mrs Couper, then the appointment should have been to Mrs Couper and

only otherwise a narrow range of potentially incidental beneficiaries such as the children. The authorities for instance suggest that to benefit parents is not a benefit to an appointee. So it's a narrow range.

Blanchard J Well if that authority I would say that is ridiculous. It would obviously be of benefit to be able to transfer some of your wealth to a parent in certain circumstances. Similarly with siblings.

Kós But the issue is whether the appointor should be party to that arrangement. That is the issue.

McGrath J But what do you say about, let's use your term "saving potential", I don't like the term but what do you say about that. I mean the reality being that if that is what she decides she wants to do is the qualification. It is not

Kós And that takes us back to *Vatcher v Paull* and I suspect that it probably should take us to about the end of this discussion but what *Vatcher v Paull* says and what *Topham* says is that you look at the intent of the appointor and in that situation my submission is that you would not expect the benefit not to be conveyed to the third party in that context. The appointor, having made provision for others, would not expect that Mrs Couper would exercise her powers under section 6 and 7 and so restrict the range of potential beneficiaries as to cure or save the appointment.

Blanchard J Probably didn't expect also that she would exercise her powers to actually make distributions to parents and siblings if they didn't need it.

Kós But that is clearly my submission. A benefit depends on those strangers

Blanchard J It is a real benefit to her to have that ability if she wants to do it.

Kós She would have the ability of the appointment to her alone.

Tipping J Mr Kós I think

Blanchard J No no no. She would then run up against problems of gift duty. This is a very sensible mechanism for enabling her to benefit members of her family when they need it.

Elias CJ It is a holding mechanism, it is a way of holding property that is conveyed to her.

Blanchard J The old cases on what is a benefit simply don't wash in modern society. One has to look at what, at how things are structured in a modern society in order to determine what modern society would regard as a benefit.

Kós That is certainly I understand the proposition but the other way of looking at it is to say that that is in effect the trustees exercising a power

to expand the existing trust by the inclusion of additional beneficiaries which they simply do not have the power to do.

- Blanchard J Well that is the argument.
- Elias CJ Well it is a question of whether it is a fraud on the part, whether it is outside the scope of the power of appointment.
- Kós That's right, which in my submission must be used for the benefit of the existing objects.
- McGrath J To what extent can we take into account that in modern society it is considered convenient for fiscal reasons to hold property in a trust, to hold property that is earning income in a trust? I am not talking obviously death duties out of it by the time this matter was settled but it now it enables income to be spread around.
- Kós I don't think with, I can't immediately see how that would alter the application of the doctrine. The question is here whether in effect the trustees are bound by duty to benefit the existing objects.
- Blanchard J But there are English cases where the beneficial effects of what was done when one looked at capital transfer taxes, capital gains taxes, that was all taken into account in deciding what was beneficial.
- Kós Yes I understand that and that must be so but does it alter the fundamental proposition about how a power of appointment in a trust may be exercised in terms of the scope of persons who may be the beneficiaries thereof.
- Blanchard J I can't see why not.
- Kós Well that is clearly the difficulty I am confronting your Honour in the argument.
- Anderson J Can I just suppose the trustees said to the potential appointee, we are going to appoint this to you. Jolly good says the prospective appointee, my accountants tell me I should put in a trust, that is the sensible way to avoid all sorts of problems. I want you to send it straight into that trust. Oh no I couldn't possibly do that, that's a fraud on a power. It is nonsense when you put it like that.
- Kós No but the difference there is whether it is dictated by the trustees or dictated by the appointee. In this situation the evidence was that Mr Couper, the settlor, talked to Mr Hutton and said that he wanted provision to be made for Mrs Couper, who was an object of the power, and Mrs Couper's daughters, who weren't. Mr Hutton says in his evidence, and that is set out at paragraph 10.2, that the documents were set up to achieve that purpose. That is the situation then where the form was mandated by the trustees, the appointor, as opposed to the appointee

simply taking and whether, either immediately or a period of time afterwards, choosing to hold them in a different form.

- Anderson J But the appointee was perfectly happy with that.
- Kós Absolutely. The question and I say that is the issue on which my argument turns. It stands or falls on whether you look much beyond the appointor to the appointee, to the appointee's circumstances and whether the appointee's powers in effect here can be said to be restrictive of the range of objects.
- Anderson J It does seem with respect more a case of form over substance, particularly when one looks at the family relationships.
- Kós Well I can see how your Honour would say that but, in my submission, if one doesn't take a strict line of this, then what one is doing is mandating a form of variation on the existing trust.
- Anderson J Well I can see how you can see that too.
- Kós Yes.
- McGrath J I can see certainly understand the need to maintain a strict line in this area but the question is whether in fact, given the power, to my mind the power that Mrs Couper has in the whole thing, and the discretion she maintains in respect of strangers who have come in, doesn't mean that looking at it realistically this is for her benefit rather than theirs in any significant measure.
- Kós Yes that would effectively enable what I call a saving clause to permit therefore a wide resettlement on non objects on the basis that the appointee could always exercise that power to reconstrain that range. Now that is the advice of the, the advice of the approach on my submission.
- McGrath J I don't think we are opening a lot of floodgates if we took that approach Mr Kós.
- Kós Well I suppose the reason for that is probably that the principles in relation to fraud on a power are well understood and are well observed so in the ordinary course powers of appointment are exercised in a limited fashion. In the ordinary course the power of appoint is made to the appointee and the appointee is given full authority as to what they do.
- McGrath J You see a lot more consistency in the huge number of cases here than I do I would have to say.
- Kós Well the principle is simple enough in the sense that the conveyancer, who is advising or preparing the documents, knows not to engage in a

combined transaction in which other persons who are strangers to the trust benefit from it.

Tipping J How big an interval do you have to have?

Kós It is not so much, the interval is in the mind of the appointor. It is necessarily a temporal question.

Tipping J No but if you appoint to the appointee directly and he or she on the same day with your knowledge settles to a trust including original non objects, that is going to be attackable to.

Kós No. The authorities are clear on that and that is the passage from *Thomas* that I have cited.

Elias CJ Well it is critical to your argument that he intended to benefit her daughters' non objects.

Kós And yes Ma'am, and actuated the trustees in that motive. So the settlor, Mr Couper, the settlor of the original trust, had that intention, it didn't matter if Mr Couper had that view, he didn't matter, he wasn't the appointor. The appointor was the trustees, or early trustees.

Elias CJ But you really can't, it seems to me, call in aid the companies and the charities and so on. It really does seem to come down to the fact that he intended to benefit the daughters and the argument is the very narrow one, or the judgment is a very narrow one, of whether intending to benefit her daughters is an incidence, is an incident of benefiting her.

Kós Yes.

Tipping J Yes well that certainly sharply focuses. Are you saying that the original settlors' declared intent carries through to the appointee trustees

Kós Yes I do.

Tipping J becomes their intent and that is so patent that, although there may have been some indirect benefit to Mrs Couper from that, it should be deemed outside what is allowed.

Kós Yes because the documents were prepared for Mr Couper originally and then as we see in the final letter from Mr Weirs accompanying to the trustees.

Tipping J Well I think that is the best possible way it can be put, with respect, that there was a clear intent throughout to benefit non objects, viz the daughters and the benefit to them is not such as is overwhelmed, if you like, by the benefit to their mother.

- Kós It may indeed be that the what I call the saving approach, it may result, as your Honour the Chief Justice suggests, in the exclusion of the companies and the charities and anyone else added on the basis in the sense the trust
- Elias CJ They are not there, until she identifies, they are not there.
- Kós But what is clear is that she would be highly unlikely, and the appointor would consider it highly unlikely, given the circumstances in which the appointment was established, that she would exercise those powers to remove, for instance, her daughters for whom the thing had been established in conjunction with her and also, for instance, her parents.
- Tipping J It could be tested I suppose by saying what would have happened if the settlement was solely for the benefit of her daughters. Is that a big enough benefit to a non object to, as it were, overwhelm the incidental or indirect benefit to the mother. I know that is not what has happened but I am just trying to explore this question of sort of completing benefits, if you like. What I and I see the force of that Mr Kós, but what is wrong with it if it is wholly with her concurrence. In other words, she says oh that is a jolly good idea, this will save me a lot of hassle, it will save me the task of setting up my own trust.
- Kós What it is effectively doing is expanding the range of the existing objects.
- Tipping J It may be but what is wrong with that if that is exactly what she would have done had she got it absolutely.
- Kós Well we don't know the answer to that but we do know that if that approach is right then the doctrine of fraud on a power simply has no substance.
- Tipping J Oh yes it does. It has substance where like the case where they said you can have a thousand pounds, we will appoint you a thousand pounds, provided you appoint to so and so five hundred of that.
- Kós But let's take *Wong v Burt*. In that particular case there was a power to appoint capital to the mother. The mother was concerned that some of her grandchildren were disadvantaged because the will trusts provided for capital to be, sorry income to go to the children of live, sorry only to live children and one of her children had pre-deceased her.
- Tipping J No substitution, that was the problem wasn't it?
- Kós Yes. Now in that case, in that case notwithstanding the fact that the appointment, the capital could have been appointed to her absolutely, the \$250,000 could have been appointed to her absolutely and she could then have lent it separately and distinctly to the children. But withstanding that fact and notwithstanding the fact that it was clearly for her benefit for her benefit to do so, the Court of Appeal concluded that that was

fraud on a power. Now you can't, in my submission, desegregate the settlor's, the trustees' intention, the appointor's intention in that way.

Elias CJ But this is different. It seems to me that you are placing a huge amount on the settlor's stated intention and we haven't got into the differences between objective intention and motive in this in any event. But the reality is that she controlled it. She could just take the lot herself. She could exclude the daughters. She was wholly in control. And that must bear on what the effect was and in the end, when you are looking at fraud on a power, objective effect must be pretty important.

Kós Yeah, in *Wong v Burt* the intent was, the patent intent was to benefit the children, the grandchildren who were non objects. In this particular case the patent intent was

Elias CJ But was achieved. That couldn't be undone. Here she was given the ability to follow through on that motive but she was equally given the ability to deny it.

Kós Well that becomes a very difficult distinction in my submission because it does have the effect of treating that power as a saving power and the question we have been looking at fraud on a power and its conventional focus on the intention of the appointor. Does the appointor seriously expect that that saving will be used. In other words, that the patent provision for daughters and siblings and parents will be so.

Elias CJ Aren't you past the intent by that stage. The intent is the structure he put in place, that is what been, that is what is carried in. As to his expectations about how it might be used, it seems to me that you are past all of that.

Kós Well that intent covers a wide range of potential objects, as we have already discussed. So if the saving clause doesn't bite, then in my submission the prima facie position applies which is that one assumes that by making that provision the benefits will be conveyed. Clearly she can do that; clearly she can exercise a power to exclude it. But that is ex-post factor.

Blanchard J Well we don't know what Mr Couper's views, if they are to be attributed to the trustees, were of all the powers that were given under the new trust deed. One therefore simply reads them and says well there they are.

Kós Well Mr Couper's intentions, to some extent, are probably less material than Mr Hutton's.

Blanchard J Yes. I accept that. But we don't what his views of those powers were either.

Kós That's true. All that there is



Blanchard J Why were they put there if they were never intended to be used, might be the question.

Kós Well what Mr Hutton said was, this is in the green volume, at pages 493 on, at paragraph 85 he says that Mr Couper had expressed a wish that Mrs Couper be looked after and he also told me he wanted to provide for Mrs Couper's children. I knew this had also been the wish of Mr Dixon, who was then a trustee. At 87 he refers to the fact that Mr Couper had asked Sainsbury Logan to draw up the documents. He received the documents and read them, discussed them with Mr Startup and Mr Couper, and referred them to Chapman Tripp for their advice. And then at 89 he talks about the documents and the order in which they were to take effect, including the deed of appointment and partial distribution, which is the second bullet point, and then he says that these four documents were intended to give effect to two separate transactions, the first to the shares in Ponui transferred to Mrs Couper who would then settle these into a new trust. So what is clear is that he had received the documents; he considered the documents, took legal advice on the documents and understood that they would be dealt with in a single package. In other words, there was no expectation that there would be an appointment to Mrs Couper and Mrs Couper would then sit around thinking about what she might do with it.

Tipping J The initiator of this proposal was Mr Couper, so the trustees were in effect doing his bidding.

Kós Well they say, if you look further down paragraph 90, he said he thought he exercised his discretion appropriately and not under dictation. It is certainly not submitted here

Tipping J No no, not to that extent but clearly he, the genesis of it came from Mr WAX Couper.

McGrath J This followed a discussion that Mrs Couper had had with him, didn't it.

Kós I am not certain about that.

McGrath J There is something in someone's submissions about, that took me to a passage I think in her evidence.

Blanchard J But he clearly thought that Mr Couper was wanting to benefit Mrs Couper. If you read on, "I took account of the wishes of Mr Couper. On my reading of that deed Mrs Couper was a discretionary beneficiary and I was not surprised Mr Couper might wish to see her benefit".

Kós Yes. Well I

Blanchard J So he saw this as a way of benefiting her.

- Kós Well I don't doubt that. That's, she clearly was a power, an object of the power of appointment, and the power of appointment was exercised for her. The objection is only that others also are named. I can't take the argument beyond the point I have taken it to. It depends on an application of *Vatcher v Paull*, it depends on also saying that one should have a reasonably straightforward rule as opposed to one that permits, for instance, a resettlement on a range of objects that then in effect saves it by having a power vested in the appointee to eliminate other non objects of the original power. That is the argument.
- Tipping J Well on this concept of benefit, I wonder whether there is anything to be derived from section, not directly of course, from the way benefit has been approached in relation to the section 64(a), which is the section allowing variations of trusts to take place, if generally to the benefit of and so on, where a fairly expansive view has been taken in the authorities of what constitutes benefit. Now that being a sort of general policy, admittedly from the legislature, in that area, I wouldn't have thought the two areas were that far removed from each other to make it inappropriate to rely to some extent on the connotations of what amounts to benefit.
- Kós But there is a fundamental difference. And the fundamental difference is that in the 64(a) cases beneficiaries, whose interests are diluted, can appear and be heard, and on the application. Whereas in this case, what is done is simply done by feat of the appointor.
- Tipping J And the Court has to approve on behalf of beneficiaries so not born or not sui juris. Yes that is a valid point Mr Kós certainly.
- Kós If your Honour pleases I think that is probably as much as I want to say on Ponui.
- Elias CJ Thank you very much Mr Kós. Yes Mr Camp.
- Camp It may be convenient to say a few words about Ponui seeing that that is the fresher argument at the moment.
- Elias CJ Yes.
- Camp Just to pick up a question that Justice Blanchard had just asked, and that my learned friend addressed, of whether, he said we don't know what Mr Couper thought of the Annette Couper Ponui Trust Deed, and perhaps nor the trustees. That reference that my friend had just taken you to which was volume 2, page 495. Mr Hutton's evidence makes it plain that the Annette Couper Ponui Trust Deed is not in the bundle of documents that is in front of the High Court. So we have no evidence whatsoever of anybody's view about the terms or powers that that trust deed has. That reference is immediately underneath, in paragraph 89, underneath the listing of the documents it says "the shares in Ponui were to be transferred to Mrs Couper who would then settle them into a new trust (that new trust is not included in the bundle).

- Tipping J Well that seems extraordinary in retrospect.
- Camp Yes it does.
- Blanchard J How did it get in front of us.
- Camp I think it got put in for the Court of Appeal because by then the argument that emerged in closing in the High Court required that the document actually be looked at. But it wasn't the subject of evidence in the High Court because it wasn't there. And I stay with that issue
- Elias CJ But the circumstances of the execution were the subject of evidence.
- Camp Yes Ma'am. Oh yes I am not saying that. The structure of the transaction was understood but Justice Blanchard's question we don't know Mr Couper's view of the breadth of the terms of the Ponui Trust. I am simply saying we don't know anybody's, because it wasn't there and I point to Mr Hutton's evidence. And I will just stay with that evidence issue briefly because, in my submission, it does come down to a question of what were the trustees' intentions in effecting this transaction. Now the objective reality is quite plain that Mr Couper has expressed the view that he would like to benefit his wife and that he would like to see his stepchildren benefited as well. That is Mrs Couper's children. It is beyond belief that Mrs Couper would not wish to benefit her own children but what is now being put forward is a proposition that she was somehow strong-armed into benefiting her own children under this trust.
- Tipping J I don't think that was being advanced. I used that expression as a situation that might cause concern but I don't think Mr Kós adopted that proposition at all.
- Camp Well in my submission it is necessary for him to say that the trustees had an intention to benefit non objects that made his a fraud on the power. And that was not pleaded; it was not the subject of evidence; it wasn't put to any of the trustees nor was it put to Mrs Couper. If the topic had been live, it is beyond question that Mrs Couper would be saying of course I wanted to benefit my children. All the members of this Court have been saying isn't that the most natural response that you could imagine to somebody saying I intend to exercise a power of appointment in your favour. She says good, can we put it in a trust for me and the kids. That is the essence of this transaction.
- Elias CJ But the argument is that it is not her intention that matters in this and there is a clear intention expressed in the evidence, on the part of the trustees to benefit the daughters who were not objects. That is the argument.
- Camp Yes I will come to that part of it but it would have been answered had there been a pleading raising the question of, as between you Mrs Couper

and the trustees, is that effectively an illicit bargain that you have struck that I will only exercise this power if it is done in this area. That would have been addressed. The reason why it wasn't addressed is the absence of pleading. As to whether

Tipping J But the intent in one sense clearly was to benefit non objects because that was the natural consequence, at least the potential to benefit, was the natural consequence of the structure. So the fact that it wasn't put doesn't seem to me to be, your argument surely lies elsewhere that there is nothing wrong with that.

Camp I will come to that Sir but just as a preliminary, in my submission the cases that the Court of Appeal referred to at paragraph [112] are on all fours with this situation where trustees or persons with the ability to exercise a power to appoint know full well that in the single rolled up transaction they are benefiting (a) the object; and (b) non-objects. And they say, there's a list of authorities that I'll take you to, they say, the courts of equity have always treated that as a situation where because of the concurrence of the object of the power, with the transaction that's occurring, it's to be treated as (a) an absolute appointment to the object of the power and (b) a resettlement on what can include non-objects.

Tipping J Is this at [112]?

Camp That's paragraph [112] of the Court of Appeal's judgment Sir which I.

Tipping J Well this is *Goldsmid* for example.

Camp Yes Sir and I put in a supplementary bundle because I realised subsequently that neither the appellants nor respondents had put in those cases that are seen at [112]. And I've also put in what may well be the source page from a text on *Thomas on Powers*. I've put that in the supplementary bundle at tab 6 and it's the last page in it, numbered 48. And if one goes to that supplementary bundle tab 6 page 48 and looks at footnote 66.

Elias CJ Sorry which is it?

Camp This is the supplementary bundle Your Honour. It's called Second, Third and Sixth Respondents' Supplementary Bundle. Last page under tab 6.

Tipping J What case are you referring to?

Camp I'll go to the text in a moment Sir. But if one looks at footnote 66, you will see the cases that the Court of Appeal set out in paragraph [112] including *Goldsmid*, *Thomas v Simpson*, *Daniel v Arkwright*, *Foot and Purdon's Estate* and *Birley*. And because I also refer to a *Langston* doctrine in the other bundle, I just note at this point that that footnote cross-references back to a paragraph.

Tipping J Just pause please I'm sorry. We've got in your tab 6 is it? There's no identification of where this comes from in the bundle.

Elias CJ It's *Thomas* is it?

Camp It's *Thomas* Sir and it should.

Tipping J Aren't you supposed to put the source of it?

Camp Yes.

Blanchard J Well he did actually.

Camp Well it did on the front page Your Honour.

Blanchard J There's an index.

Tipping J Oh is there an index I'm sorry. So this is *Thomas on Powers*.

Elias CJ Mr Camp I read the Court of Appeal paragraph [112] and I read this paragraph or the text to footnote 66 as dealing with the absolute appointment immediately followed by a settlement by the appointee.

Camp No Ma'am. Well, the cases referred to in the footnote are not doing that. The cases are very largely those of a single transaction.

Elias CJ Are they.

Camp Being treated.

Elias CJ As if it were two.

Camp As if it were the two.

Elias CJ I see.

Camp Yes.

Tipping J *Goldsmid* was a single transaction whereby the appointment was directly to the trustees of the settlement, not via the object. But this shows that the question of whether it's one or two transactions is a very artificial way of looking at it in my view when one looks at the substance of what's happened. And whether it's done on the same day as two transactions or on the same day as one I would have thought it would be very odd if that drove the outcome.

Camp In my submission yes, and that's why if I just go to that main bundle of authorities of mine Sir. I had included the other *Thomas* reference. The topic arises twice in *Thomas*. It's the same topic. The first time it's in chapter 4 on the rule against perpetuities and the second time is the one

we've just looked at which is the fraud on a power. But I've put in in that main bundle of authorities at tab 11, I've put in a passage which is about the doctrine in *Langston v Blackmore* and this is the paragraph 433 and when we were just looking at the supplementary bundle I was mentioning that the footnote we were looking at there referred back to the same paragraph. And It says, reading from under the heading "Doctrine in *Langston v Blackmore*", "When the donee of a special power of appointment executes an instrument in exercise of the power, with the concurrence of an object of the power to whom the donee might validly appoint the whole of the property, and the instrument provides for the settlement of that property (say, upon that object for life, remainder to such wife as he should marry, with remainder to his children, and for want of children ultimately to other persons), such an appointment is not necessarily open to objection on the ground of remoteness, nor indeed on the ground that it may introduce persons who are not objects of the power. The appointment will be held, if the facts warrant it to be in substance an appointment to the object absolutely, followed by a settlement by him to those particular trusts." And then the next piece is about mainly authorities on land.

And footnote 90 then sets out cases which include two of the cases that are in the other *Thomas* reference that we earlier looked at, that's *Thomas v Simpson* and *Daniel v Arkwright* which are also the Court of Appeal's paragraph [112] cases. Now I'm only saying that to lock together the two passages and to say that regardless of whether in modern times the issue of benefit is now looked at with rosier spectacles, this line of authority which is perfectly old, certainly accepts that you can in a single transaction benefit non-objects so long as it is done with the concurrence of the object of the power.

- Tipping J      Yeah that's the last line of the citation isn't it, provided the object's concurrence to the appointment.
- Camp            Yes.
- Tipping J      That seems to me to be the key point. It must be a free, unoverborne concurrence.
- Camp            Yes, yes. In my submission there's absolutely no evidence here that this was other than the free and full unfettered wish of Mrs Couper and it stands to reason that when it's her children that we're talking about, why on earth would there be. So that's why I say that there was a real onus on the appellants if they wanted to advance this at trial to get it out into the open because it cried out to be addressed specifically in evidence. Because of the way it emerged it simply wasn't. That shouldn't be taken to my disadvantage. I don't accept that the matter is live because Mrs Couper sought a declaration of validity. She wasn't seeking that against a fraud on the power pleading, there simply was no fraud on the power pleading, and she can't be.

Elias CJ        Why did she need a declaration of validity then?

Camp            Mr Osborne is perhaps the person that best addresses that. I imagine that once the main pleading has put in issue the validity of the transaction and it did, in paragraph 66 of the second amended statement of claim it said, “These two transactions are invalid because they were done at the dictation of Mr Couper. And they were unreasonable because they cut out the Kains.” So there was a pleading.

Elias CJ        Can you take us to that, I'm sorry, I haven't looked at it, I should have.

Camp            Certainly.

Elias CJ        Just give me the reference.

Camp            That's in folder 1A at page 135 and I will take you briefly to it. It says, under the heading Mangaheia Settlement at page 135 the foot of the page. “On 3 November 1999, the First, Third and Fourth Defendants purported to distribute all the shares in Ponui (an asset owned by the Mangaheia Trust) to Mrs Couper; to resettle the balance of the assets into a new trust with Mrs Couper and her children as beneficiaries to the exclusion of the plaintiffs.”

                    Now I'll take you onto the relief sought in a moment, but that is the whole of the pleading relating to Mangaheia until we get to the relief part. It doesn't actually even mention the Annette Couper Ponui Trust. And it never does later on. Now when we get to.

Elias CJ        Well that's what is referred to in 66(b) isn't it.

Camp            Distributing the shares to Mrs Couper is. But that's all it says.

Elias CJ        Oh I see, of course, yes I see.

Camp            It doesn't say.

Elias CJ        Yes, it doesn't deal, yes.

Camp            The second half, yes. There is then in the relief sought at 144, “Fifth Cause of Action – Mangaheia Resettlement”. “The decision of the First, Third and Fourth Defendants to distribute and resettle was not permitted because it did not confer a power to add beneficiaries; decision dictated by Mr Couper which the trustees did not make personally; and made in bad faith; unreasonable because no real or genuine consideration of the plaintiffs; made partially and with bias.

                    Now that doesn't actually even use the word Ponui.

Elias CJ        No but it is dealing with both the resettlement and the distribution.

Camp It was treated as such.

Elias CJ Yes.

Camp So yes it was accepted that there was some sort of a challenge.

Tipping J Was there particulars given or sought of bad faith.

Camp No, no there wasn't.

Tipping J Well you're vulnerable to anything that came along that would remotely.

Camp Your Honour this was filed on the day the hearing started.

Tipping J Well I'm not interested in that Mr Camp.

Camp No.

Tipping J If this was the pleading.

Camp Yes.

Tipping J And there were no objections or no requests, aren't you better off in the broader highway that there was nothing wrong with this transaction anyway.

Camp I'd certainly not eschew it Sir. But I simply say that the pleading deficiency should rest on the appellant.

Tipping J Well any evidentiary lack I don't think can be called against you. I'd be with you that far but frankly I don't think this is a case for minute examination of the pleadings.

Camp Fine.

Tipping J One would hope not at this level.

Camp No.

Anderson J The challenge is to the decision, not to the appointment.

Camp Yes.

Tipping J Well that's it. I mean my blood pressure rises every time I look at the pleadings in this case, so perhaps that's why I'm sort of self-protecting.

Camp No, not at all. No, no. Well we actually asked for a pleading to be filed because there had been some points of claim given that didn't seek relief and we said.



Tipping J Any lack of evidence on the subject I agree can't be counted against you.

Camp Thank you Sir. Yep, leave it at that. I do say that primarily this is Mrs Couper benefiting because she controls.

Tipping J That's your primary submission.

Camp That's my primary submission. I actually think that takes strength from what I was just covering about those passages from *Thomas on Powers* where non-objects are treated as being able to participate because the rolled up transaction with the concurrence of Mrs Couper is seen as a two-stage process.

Elias CJ Well in your case you don't really need to point to any actual concurrence because you can infer it because she has the power to do what she likes.

Camp Well, yes, yes.

Elias CJ I mean in cases where in fact property has been alienated to non-objects through the transaction, it may be necessary to go rather further in showing that the object concurred. But in this case it would seem really not necessary.

Tipping J No beneficial interest passed under this transaction to a non-object.

Camp No.

Tipping J They simply became the potential recipients of largesse.

Camp Yes, yes Sir, I accept that Sir. Yes.

Tipping J That really it seems to me with respect is the kernel of your clients' case. Now I'm not saying that I'm necessarily agreeing with it but that has to be the kernel doesn't it.

Camp Yes, yes.

Tipping J That your client, sorry, Mrs Couper had reserved to herself complete flexibility including vesting the whole lot on herself.

Camp Mm, yep. And she did actually give evidence that she considered it appropriate as a transaction so that she's not silent on it in that sense.

Tipping J No.

Camp But Your Honour I think that's.

Elias CJ Have you given us the reference to that evidence. Don't take time now but.

Blanchard J Is it the piece that's quoted by the Court of Appeal.

Camp Yes it is.

Elias CJ Right thank you.

Camp I have given you the reference actually in my submissions.

Elias CJ Yes, yes.

Camp Unless Your Honours think there's more I should assist on Ponui, I'll turn to Mangaheia, in case there's something I should say on Mangaheia.

Elias CJ Yes perhaps you should.

Tipping J Well I think there might be Mr Camp.

Camp Yes I gained that impression Sir. I have to accept as a starting point that, as Justice Anderson and others have observed, here are two transactions where we've just looked at the Ponui one so we understand exactly what was being done and the sequence of it. And the trustees in the Mangaheia one have done something different. And they've talked of s 41 and they've talked of *In re Pilkington*. And they've talked of the power of advancement. And then they've carried out a transaction. And it's quite likely that, unless one follows the Court of Appeal's rationale on how s 41 could be used, that otherwise the s 41 route here could have difficulties.

Tipping J Well you're not challenging the Court of Appeal's, no.

Camp No I haven't cross-appealed. I'm supporting the Court of Appeal Sir.

Tipping J Well you're supporting what they did ultimately.

Camp Yes.

Tipping J But you don't challenge that this, to be justified all, you have to deem them to have gone down another route.

Camp That's right Sir although in the alternative the Court of Appeal says, you can do it under s 41 but that's only as an alternative. The primary proposition the Court of Appeal has picked up and expounded is that this could be done under clause 4.

Blanchard J Are you saying they could do it under s 41.

Camp I'm saying the Court of Appeal says that Sir, yes, and I support it yes.

Blanchard J Well we might need to hear you on that.

Camp Yes, sure. Well I.

Blanchard J It seems to me that's got considerable difficulties.

Camp Thank you.

McGrath J Clause 4 was your alternative argument in the Court of Appeal was it not.

Camp Clause 4 was my primary argument in the Court of Appeal Sir.

McGrath J Primary, okay.

Camp I said, look this is what they wanted to do. The issue should be, have they got the power to do it and is it proper for the Court to validate what was a meritorious transaction.

Tipping J Well they certainly had the power. The question is whether they should be deemed to have exercised it.

Anderson J When they deliberately didn't.

Tipping J When they deliberately didn't go the Ponui route.

Camp It's unfortunate that there is the Ponui route sitting there.

Anderson J On the same day.

Camp To cause that sort of contrast. But if one is looking to whether one validates this transaction then the first starting point is yes they have the power.

Blanchard J We can't validate it, it's either valid or it isn't.

Camp Okay, sorry, misuse of the word. Hold it to be valid. But the starting point is that they have the power. And I'm not saying this then is a sort of a mitigation plea, hearts and flowers thing, but both courts below have said it was an entirely proper exercise of the power to look at one of the farms being used for Mrs Couper's primary benefit because ironically, with the multiplicity of trusts that had existed and the multiplicity of beneficiaries, the vast majority of these farms did not provide for Mr Couper's wife to be a beneficiary. So this was the only one where it was likely. And the other ones are and were primarily, well had the Kain children and/or grandchildren as discretionary beneficiaries. But the point is in none of them does Mrs Couper feature in a significant way.

And just to clear up one matter in Mr Kós's skeleton at paragraph 5.1, he said that the provision Mrs Couper is to receive includes 51% of Hukanui. That's not so. The judgment in the High Court was that a

transaction under which Mr Couper had been going to transfer the 51% of Hukanui which he owned.

Tipping J Well look that's got nothing to do with the present issue.

Camp Alright.

Tipping J It's just what the new trustee might be able to do if coming at it afresh.

Camp Yes, alright. Well all I'm saying is that it was a very proper transaction for the trustee to embark on and in my submission there's nothing wrong in that situation with the Court then seeing whether there is a way in which it can be said that the trustees (a) have the power and under this document have in fact used that power.

In my submission the, I'll just turn to my friend's, clause 4 is plainly wide enough to allow for there to be an appointment in favour of Mrs Couper. An issue then arises whether this deed is utilising clause 4 and in my submission it's not inappropriate to read it as using clause 4 because the operative part of the deed says that it relies on the powers that the trustees have.

Tipping J To resettle, not to distribute. I find it extraordinary that if they were intending to exercise their powers under clause 4 they would not have included it somewhere in the deed poll. They've gone to a lot of trouble to include s 41 and *Pilkington*. It's quite unusual in my experience to have reference in a recital to a deed to a decision of the Court.

Camp Yes.

Tipping J So if that's what they were about Mr Camp, why on earth would they not say, pursuant to the powers vested in us in clause 4 of the said trust deed. I mean it's elementary.

Camp Well one's entitled to just look at the operative part of the deed as being the power Sir.

Tipping J But there you've got problems because of the word "resettled". This is not a resettlement of the trust.

Camp Well Sir under the paragraph [112] cases that the Court of Appeal refers to in *Ponui* that we were talking about before, a single transaction which benefits non-objects of the power is to be seen as both an appointment and a resettlement by the object of the power.

Tipping J Not a resettlement, a settlement.

Camp A settlement by the object of the power. So that legally the route is available and what Your Honour is saying is that you're not attracted to finding that it's open because of the words that have actually been used.

Tipping J      What I would be more sympathetic to is not to pretend that that's what they were trying to do, but to say that they've clearly not used a power available to them but they can after the event be taken to have done so in order to validate.

Camp            Well, yeah. I'm more than happy to put it in those terms Sir because maybe that, because that's what I was meaning to do in saying that because.

Tipping J      Well that's not how I heard you.

Camp            I'm sorry.

Tipping J      I heard you as trying to persuade me or us that really this is what they were about.

Camp            Well no, I'm saying that, I mean what they were obviously about we shall never know because there was no evidence on the topic.

Blanchard J    Well pretty obviously they were trying to exercise a power of advancement.

Camp            Well they were trying to benefit Mrs Couper is the broader way to put it Sir.

Anderson J     But they give her no control whatsoever. You're forced to argue that they have effectively appointed to her but the terms of the appointment give her nothing except an expectation under the rearranged deed and in that way it's fundamentally different from the Ponui set-up. She's not a settlor under the new deed, the new trust.

Camp            No, she is the primary beneficiary so-described isn't she.

Anderson J     Well she's a beneficiary.

Tipping J      Well look, what's your best case or best authority for saying that when trustees have fired a shot down route A which fails, they can, provided they have the power to achieve their object down route B, the Court will treat them as having taken route B. Because that really is I think the distance you have to go.

Camp            Yes.

Tipping J      Because you're not going to persuade me that they intended to use their powers under clause 4. Against what they did in Ponui, it's made the more vivid by Ponui. But it's pretty plain even on the face of the deed poll.

- Camp Well can I start at my friend's 4.2 in his skeleton. Because he says there equity does not intervene to exercise a power that has not been exercised. And refers to *Breadner v Granville-Grossman* which is at tab 16 of his authorities. I don't know that we need to go to it as an authority but it is authority only for the proposition that equity does not intervene to exercise a power that does not exist. Not that has not been exercised. What happened in that case was that the trustees had to have exercised a power that they had by a specific date and they got it wrong by a day. They were a day late in trying to exercise it. And no-one quite knows why. But the counsel in that case argued that even when the power had expired, there could be an extradition to the doctrine of *In re Hastings Bass* to say, well if they had exercised it this is what they would have done.
- Blanchard J What is the doctrine in *In re Hastings Bass*.
- Camp Well we'd better go to the case Sir, it's tab 16 of my friend's cases. Otherwise I'm likely to embroider rather than take Your Honour directly to it. Page 543 Your Honour of the judgment and I apologise, it's not my photocopying but I apologise for it. Paragraph 62 is vaguely visible about a third of the way down the right hand page. And it says, "So far as the present case is concerned, the most important point about the *Hastings-Bass* principle is that it has been developed and explained as a principle whereby the courts will hold to have been ineffective something which the trustees have in fact done. In this case, by way of contrast, Mr Warren's argument would involve."
- Blanchard J Could I suggest you go back to paragraph 58 because my eye goes over there and I think he's saying what the principle is.
- Camp Oh sorry Sir.
- Elias CJ It's an emerging principle.
- Camp Yes. Yes it's "an emerging principle which may be applied to exercises of powers by trustees, and it has obvious affinities to the much more developed area of principle in which courts will apply when judicially reviewing the exercises of statutory powers by public authorities. If trustees, in exercise of one of their express powers, take an action which on the face of it falls within the letter of the power, the action may nevertheless be held to have been ineffective if (1) the trustee fails to take account of something which they ought to have taken into account or (2) the trustees take into account something which they.
- Blanchard J So it's not about savings.
- Tipping J No, it's bringing sort of public law concepts a little bit into trustee law.
- Blanchard J It's just not relevant here.

Tipping J Yes.

Camp Well what I was advancing Sir was that in that paragraph 62 the counsel was advancing a new principle or an extradition of a principle in *Hastings Bass* is how it was being put to the Court and the Court said, no, once the power of the trustee is dead and gone, there is no authority that will allow it to be revived. So I don't accept.

Tipping J Well it's the reverse of *Hastings Bass*.

Camp Yes. So I don't accept that.

Elias CJ You can't come to a result that the Court thinks would be reasonable. Is that what it is?

Camp Yeah, well it's, if we're staying with Monty Python skits, it is a dead parrot.

Elias CJ Yes.

Camp And that's all it is.

Elias CJ Deceased.

Camp Yes.

Anderson J Mr Camp could you help me with this please. If I understand you correctly you're saying that the trustees could have achieved the same result by way of an appointment and then a subsequent deed.

Camp Yes.

Anderson J But under the new trust, the settlor is not the appointee but Mr Couper. So the implication must be that if it's been an appointment, it's been appointed to him and then he's set-up a new trust. There's nothing that gives her anything except a potential interest under the trust as reformed. So it is nothing more nor less than a resettlement for which there has to be some authority. And it can't be an authority based on an appointment.

Camp Well Your Honour I have to argue that clause 4 is wide enough to allow of that and that this deed has to be seen as (a) an appointment and (b) inferentially advancing the date of distribution in relation to the assets that are included in this particular settlement.

Anderson J But clause 4 wouldn't allow an appointment of Mr WAX Couper would it.

Camp Ah, no.

Anderson J Yet he's the settlor in terms of the new trust.

Camp Yes. Which looks wrong Sir. But it's.

Tipping J And is wrong.

Camp But if one looks to the effect of the transaction, it is to take the asset out of the Mangaheia Trust and to put it into a new trust which.

Anderson J As beneficiaries who were not in the original trust.

Camp Yes and Mrs Couper who was.

Elias CJ And excludes beneficiaries who were.

Camp Yes, which is exactly what you would do if you were exercising a power of appointment in favour of a specific individual.

Anderson J Well let's see how that would work then. Let's say we want to achieve this result. And a result equivalent to what we've done. We will appoint to Mrs Couper. Then Mrs Couper will set up a trust where she is the settlor and has all the settlor's powers. But that's not what you've got. You've set up a trust where Mr Couper is the settlor with all the settlor's powers to remove trustees and all the rest of it.

Camp I accept that the easy answer is that if you want to do this transaction you do a Ponui.

Anderson J Which would have a different settlor and therefore a different beneficiary.

Camp I appreciate that but the misnomer of Mr Couper as settlor is unfortunate but it doesn't.

Blanchard J I don't think it's a misnomer at all. It's merely the vehicle. The transfer is not to Mr Couper. The transfer or the appointment if there was one is to the new trustees, Hutton, Mrs Couper and Startup.

Camp Yes thank you.

Blanchard J The role of Mr Couper was simply to set up the vehicle which was to be the recipient.

Camp Yes, thank you for the suggestion.

Anderson J If you could change the trustees you have power to remove them.

Blanchard J Exactly. There may be problems with it as a vehicle but I don't think the fact that he was the, it could have been a solicitor who set it up.

Anderson J Yes, true.



- Camp It may be that the draftsman was recollecting that Mr Couper was the settlor of the original trust, which he was. I'm not trying to get any further into the draftsman's mind but I just note that that was the case. But yes the point I was trying to develop is that in a sense that's merely a notional vehicle. What we get at the end of the transaction is a trust in respect of which Mrs Couper is said to be a primary beneficiary and then I accept that it goes on to add her children who are non-objects of the previous power. And at that stage I revert to the paragraph [112] line of authority that we've talked about, as did the Court of Appeal, to say, with concurrence, that's okay.
- Blanchard J We've moved somewhat away from the point that you were addressing and that is that you need to point us to an authority that where a power, and in this case a power of advancement, has purported to be exercised, and that's invalid, that you can go to another power that you find somewhere else and say, well it's legitimate to treat them as if they had exercised that other power. What's your best authority for that proposition? Because it seems to me that you have to advance that proposition in order to succeed.
- Camp Yes I accept that I'm one step back from the situation where a trustee doesn't refer to a power and the authorities that then say, that's fine as long as they've got the power, it doesn't matter that they don't refer to it. What Your Honour's putting forward to me is the proposition that they may have referred to other powers but still have this power available.
- Blanchard J Yes.
- Camp And in that situation is it satisfactory. Maybe I'll look over lunch Sir and just tell you what the best is because we are within a couple of minutes of that. But the.
- Tipping J I suspect there isn't one, that's the problem Mr Camp. You must know this is your problem. If you had one, surely you'd have it now.
- Camp Well Sir what was going through my mind was something that's similar to the *Hastings Bass* proposition. There are cases which have said that where you're exercising a power, and you have either power one or power two available to you, then you can't be treated as having used power two when you've said you've used power one if you should have considered different things were you in fact using the other power.
- Blanchard J Yes.
- Camp That is if you took into account wrong things or failed to take into account right things because you were using power one instead of power two. Now I'm fairly sure that there is authority to that end Sir. And my submission is that there is no difference whatsoever between the matters that need to be considered by these trustees under the powers that are

referred to in the deed or under clause 4 including an advancement of the date of distribution. Because the sole issue here is whether it is fair and just for the trustees to favour Annette Couper at the expense of the Kain children. And the evidence is quite clear that that was in the minds of the trustees and that they have looked at the degree of benefit that the Kain plaintiffs got from the other trusts of which these people were trustees and came to the view that it was right and proper that there should be an exercise of the power in favour of Mrs Couper.

- Elias CJ      Which power.
- Camp          Power number two.
- Elias CJ      Power of appointment.
- Camp          Yes, power of appointment.
- Tipping J     If you are extinguishing contingent beneficial interests.
- Camp          Yes.
- Tipping J     Should you not do it properly.
- Elias CJ      Carefully.
- Camp          Carefully and properly might be different issues.
- Elias CJ      Properly is probably better.
- Camp          No, no, I was just splitting them to refer to one at a time.
- Tipping J     Well pick them off one at a time if you like.
- Camp          I'm sure Your Honour will.
- Tipping J     If you're treating the Chief Justice's question as first.
- Camp          Yes certainly. Carefully in my submission was answered by going through the evaluative exercise, the analysis of what is fair and proper. That's all I was assuming was involved in that as opposed to the issue of properly which I took to be the form.
- Elias CJ      They don't need to resettlement to benefit Mrs Couper. They can appoint to her. What they've achieved is taking out some of the objects of the trust.
- Camp          Well that would be done Ma'am if they appointed, full stop.
- Elias CJ      But they didn't. That isn't what they've done. And I'm not so fussed about the fact that they didn't say, here we are exercising a power of appointment as opposed to a power of advancement. I'm puzzled how

you can say that what they did was an appointment. Anyway perhaps we should take the adjournment now. Or do you want an answer to your question.

Tipping J Oh no, no.

Blanchard J Well I want an answer to my question which is logically prior. But the Chief Justice has highlighted another difficulty. If you persuade us on the prior point you've then got to persuade us that this was a proper appointment.

Tipping J I would like with my brother Blanchard, as I think I hinted several minutes ago, your best authority for doing what you're asking us to do, or supporting the Court of Appeal. I mean.

Elias CJ You've got to explain what the Court of Appeal did.

Tipping J Well let's give him the benefit of all reasonable. Some aspects of the reasoning are a little elusive but in essence they said look if you'd done it Ponui it would have been alright so we'll treat you as done it Ponui. I think you said that yourself. Now can you do that. What's your best authority.

Camp Yes, thank you Sir.

Elias CJ We'll take the lunch adjournment now thank you.

**Court adjourns 12.58 pm**

**Court resumes 2.16 pm**

Elias CJ Yes Mr Camp.

Camp Thank you Ma'am. I was invited to deal with the issue of the trustee using one power when another power is available and what the line of authorities might be and if I could start by referring to Tab 1 of my bundle of authorities which is House of Lords *Cunningham v Anstrother* it's not directly answering the point but one can see from the headnote per Lord Chelmsford that the donee of a power may execute it without referring to it and without taking the slightest notice of it providing the intention to exercise it. Now I know Sir but I have got to start and that's at page 233. All it's saying is that if intention is clear you don't need to have referred to a power at all.

Anderson J It's a bit like the lady who was surprised to learn she had been speaking praise all her life without realising it.

Elias CJ No, no it was a man.

Camp Well I don't have a submission to make.

Elias CJ But hang on, that isn't in this case is it?

Camp No it's not Ma'am it's just a start – it's the neutral position. It's saying if you don't say anything at all and you have the power.

Elias CJ Yes. Yes you don't say here I go exercising this power of appointment if you are unmistakably exercising the power of appointment.

Camp Yes if you have the power and that can be seen to be the intention.

Elias CJ Yes.

Camp So that's the starting point and that's all. Second I go to my paragraph 18 of my written submissions where I refer to *Eardley Wilmot* which is at tab 5 of the bundle but I don't think we need go there as *Eardley Wilmot* is very short and I set it out in my submission. What I set out in *Eardley Wilmot* and my friend referred to this.

Tipping J Paragraph what sorry?

Camp 18 Sir of my written submissions.

Tipping J Yes.

Camp And I have said four lines down that Justice Merkel had referred to *Eardley Wilmot* as early authority. There the testator recited his power under a settlement in 1819 to charge 5,000 pounds amongst his children. He had no such power by that settlement but did by a resettlement of 1839. I just pause at that point to say that if one describes yourself as having a power under a settlement of 1819 when you've actually got it under a resettlement of 1839 then it's really being rather kind to it to describe it as an inaccurate and incomplete description. It's not a description of the power that you have. Because you're saying I have this power under a settlement of 1819 well you don't. And the master of the roll is nonetheless held and this is the piece I have set out, it's effectively the full test of the judgment.

It is an inaccurate and incomplete description of the power; but he had power to dispose of 5,000 pounds and he intended to dispose of it. Is it to fail because he does not properly describe the instrument under which he derived it. I think not and I should be overruling many cases if I so held.

Now I don't have the many cases available to me in the course of the luncheon adjournment but I do submit that *Eardley Wilmot* is really authority for saying that when one describes one power that has another power then the Courts will uphold the exercise of the power that is not described. It's really not accurate.

Elias CJ It's only the source of the power that is misdescribed.

Camp Yes.

Elias CJ I mean the power is the same power.

Camp Yes. Yes I accept that Ma'am but it is in a different document.

McGrath J Aren't we in the category that you are referring Justice Merkel to as qualifying that statement. Mainly reliance on the head of power which is materially different from the power conferred.

Camp Well that is the next state I got to Sir.

McGrath J Okay.

Camp Because then I turn to Justice Merkel and I have said there and this is in the appellant's casebook at tab 6 is the Collins passage which referred to and it's more appropriate to go to that one. It's tab 6 page 247 where the extract appears and it's probably best to start at line 45 on page 247.

There was a case involving a earlier trust deed and a later trust deed in relation to pension fund rights or death benefits and as it happened there were different considerations that might well need to be taken into account under the second of the documents and the trustees have said they were acting under the first of them. The judgment says at 36:

Counsel for the trustee contended that the fact that the trustee and the tribunal made a decision under the amended deed is not fatal as even a wrong reference to the power will not prevent an exercise of a power from being valid if the intention to exercise the power is otherwise clear.

Elias CJ The power, the power.

Camp The power yes. It can be accepted that an incorrect or incomplete description of the power exercised is not fatal if the intention to exercise the power is otherwise clear. However, a quite different situation arises where the exercise of the power relies upon a head of power which is materially different from the power conferred and that's the piece I set out in my submissions.

It then goes on in the circumstances of the present case I am satisfied that I need go no further than decide, as I do, that the differences to which I have referred might be material to the issues which arose for determination by the trustee and the tribunal. And that was because the two deeds had different matters that might be taken into account by the trustees when deciding how to exercise their discretion. Now our Court of Appeal said at paragraph 84 of the Judgment that they did not see the reference to section 41 and the deed and I'll turn

- Elias CJ I've got a question mark beside this paragraph so I will be grateful if you could explain it to me.
- Camp Paragraph 84. I didn't have a question mark next to mine but there we are. They have said that "We do not consider that the power specifically relied on in the deed poll s 41 is materially different to clause 4. Both clause 4 and s 41 give the trustees an absolute discretion to advance capital. Section 41 then has some limitations on it that clause 4 doesn't. And the trustees shouldn't be held to a higher standard than clause 4. Now first of all before I explain.
- Elias CJ What does that mean? The trustees should not be held to a higher standard than what was agreed in the deed.
- Camp First of all Ma'am in my submission what they are doing is examining the question of whether section 41 and clause 4 are materially different heads of power and they are saying that they don't believe that they are and my submission is they are right to do that.
- Elias CJ Yes. They are both powers of advancement.
- Camp Well they are both – well clause 4 isn't the power of advancement so much as a power of appointment with the ability to advance the date of distribution.
- Elias CJ Yes, sorry, yes.
- Camp But nonetheless to achieve the same end so to speak.
- Elias CJ Yes, but section 41 is a power of advancement.
- Camp Yes it is and it has, it's a bit ring fenced in that if you are operating under section 41 you must get consent of prior interests and or if you had section 41 in it's pure form you could only go so far as half the interest.
- Elias CJ Yes.
- Camp Which this deed modifies. So they are saying that sure section 41 lets you do the same transaction and principle in more constrained circumstances than clause 4 does but if you're looking at the essential nature of what it is that is being done under either the then same sort of thing is being done and therefore it is the same sort of power.
- Anderson J Only in relation to advancement, not in relation to appointment because there is no power of appointment under section 41 and it's the appointment aspect of course that is crucial.
- Camp Well yes Sir but it achieves exactly the same end in the sense that if under section 41 you advance half of the funds to Mrs Couper and you do

so with the consent of the Kain beneficiaries then the fund has been advanced.

Anderson J Except you didn't have the consent here.

Camp No, no because one wasn't going under section 41 with its more constrained limitations. One was doing it under clause 4.

Anderson J Getting back to the difficulty that I raised with Mr Kós that on the same day you have two quite distinct routes taken and in relation to this particular trust they took route A and not route B deliberately. And yet your argument requires us to impute an intention to take route A whereas they deliberately assume route A.

Camp In my submission I would draw a distinction between process and substance and say that yes I accept that the process set out in the document points to a different route but it doesn't alter the nature of the intention which was to pass the Mangaheia property into this trust for the benefit of Mrs Couper and that's what they intended to do.

Anderson J That's significantly different from the case you referred to a moment ago where a particular power was intended to be exercised and it was just misdescribed or the origin of it was misdescribed. Here we have an intention not to use a particular power but a different one.

Camp Well the Court of Appeal says that the mere misdescription of – the fact that section 41 is mentioned when clause 4 exists is not a material misdescription of the power à la Justice Merkel yardstick and therefore that misdescription should not defeat their intention to vest it in Mrs Couper.

Anderson J But I, perhaps you could help me with this. In all probability two different routes were taken because two different results were intended. In one there was an intention to put all the benefit in the hands of the appointee, in the other there was an intention not to put all the benefit in the hands of the suggested appointee but to retain much of the control in the hands of the original settlor and trustees. Different results and that's why you get different instruments.

Camp Well Your Honour it would of – with the benefit of hindsight just looking at the Ponui transaction it would have still been possible by using the Ponui route to have just had a somewhat modified new trustee in the Mangaheia transaction in comparison to the Ponui one.

Anderson J Well they could have used the Ponui process for the whole lot.

Camp Yes, yes.

Anderson J But they didn't.

- Camp No but if we are just talking about, is the driver of this desirability of different degrees of control, then that control issue is just in the way the words of the Ponui Trust and or the new Mangaheia Trust.
- Anderson J It's more substantial than that in the Ponui Trust and Mrs Couper became effectively the owner of the fund and the controller of the fund. But in the Mangaheia one she didn't.
- Camp Yes, yeah.
- Anderson J But you want the Court to treat it as though she didn't. Assume it was valid, completely different result from the Ponui result.
- Camp In my submission that doesn't mean the powers under clause 4 differ from the powers under section 41 which is the point we are talking to.
- Anderson J Depends how they're exercised in what the outcome is.
- Camp Yes. Well yes we haven't been focussing on the content, the different content of the two trusts as somehow validating the one and not validating the other. There's nothing wrong in my submission with the Mangaheia Trust as, if what had happened had been an appointment under clause 4 to Annette Couper absolutely and the settlement of Annette Couper of a fund for Mangaheia into the Mangaheia Trust as it presently stands.
- Anderson J Then it would have been vulnerable to an argument of fraud on a power.
- Camp Well there we get back to does it matter if they are done three months apart.
- Blanchard J Well no. There is a more fundamental problem is the one Justice Anderson is pointing out that it's not a trust that Mrs Couper controls but also there are other beneficiaries who are not in the new Ponui Trust. There's Mrs Hutton and there is the grandchildren of the Kains.
- Camp Yes well.
- Blanchard J So it's much harder to argue that it is all for the benefit of Mrs Couper. She doesn't control it and there are people who are not her immediate family.
- Camp Yes, at that point Sir I go back to the paragraph 112 Authorities that the Court of Appeal relies on and say that where there is a rolled up transaction which benefits non objects then the Court treats it as being A an absolute appointment and B a resettlement for the benefit of the object and the non objects and that's that *Langston* series of cases that the Court of Appeal relies on. My submission



Blanchard J You may need to take us to that to demonstrate a case which has some similarity of fact. But just before you do and in relation to paragraph 84 of the Court of Appeal, would you look at the second sentence of that paragraph please.

Camp Both clause 4 and section 41 give the trustee an absolute discretion to advance capital.

Blanchard J Now aren't they. Isn't the Court of Appeal appearing there to treat clause 4 as a power of advancement.

Camp Well Your Honour it is a power of advancement in its effect in the sense that you are able.

Blanchard J Well no it's not. The power of advancement is a power to advance to someone who has a vested or contingent interest in the capital. That's not what clause 4 empowers in relation to Mrs Couper who had no vested or contingent interest in the capital.

Camp Yes it maybe a terminology thing Sir but if one goes back to say paragraph 79 talking of clause 4 it says the ability for the trustees to advance capital is further emphasised by another part of clause 4 that says.

Blanchard J Well that's just another example of the same error.

Camp Yes, what I am suggesting is that it may be just a matter of terminology because what does happen under clause 4 is sure, you have to select the person under the power of appointment but with A appointment and B ability to advance date of distributions so that one could take a part of the trust fund and have the effect of advancing it to a particular individual by appointing them under clause 4 in advancing the date.

Blanchard J You advance something if you bring forward an entitlement. That's the meaning of the word advance.

Camp Yes.

Blanchard J Mrs Couper had no entitlement to be bought forward.

Camp No but it was possible under clause 4 to A appoint her and thereby create an entitlement and B advance the date of distribution under clause 4.

Blanchard J No, hang on that's a different use

Elias CJ A different power and indeed both powers are contained in clause 4 aren't they. It looks to me there's been some **muddlement** here. It's a bit odd to say section 41 is not materially different to clause 4 when clause 4 includes the reference to the power in section 41 so they are two different powers being referred to. So to say that the power of

appointment which is also contained in clause 4 must be equivalent to section 41 seems very odd.

Camp Well in my submission, what they are saying is that for these purposes, that's for the purposes of looking at the particular transaction because obviously clause 4 is capable of having more things done under it than can be done under section 41.

Elias CJ But it's sloppy really to talk about clause 4, that's what I am really trying to suggest. You have to look at the powers that are conferred and are being exercised.

Camp Yes.

Elias CJ And there is a power of advancement which is obtained under clause 4 by reference to section 41 modifying section 41 and there is a power of appointment.

Camp Well there's no doubt that at 77 the Court of Appeal is saying that clause 4 contains a power of appointment and then in 78 says it has the power to advance the date of distribution and having listed out those two 79 then describes the ability for the trustees to advance capital. Now in my submission that may be a looseness of language because it seems to me that at 79 they are simply describing in proceed what they've already described in 78 and 77. So it may be in using that expression the ability of the trustees to advance capital that looks like it's meaning a power of advancement when in fact it's just a rolled up effect of 77 and 78.

Elias CJ Where do I find this hotchpot clause. The setting out of power 79 which paragraph is it.

Camp It's clause 4 of volume three Ma'am of the original deed.

Elias CJ Yes I am looking at

Camp It's 565.

Tipping J It's after and it is declared and provided that.

Blanchard J Yes.

Elias CJ Ah yes.

Tipping J That's the expressed hotchpot version. But there is also a power of advancement in the powers provision.

Camp Yes there is Sir that modifies section 41.

Tipping J The fundamental problem I have with all this Mr Camp is that in this field these documents were documented with a fair eye to precision of language, or attempts at it. There a fundamental difference between an

advancement and distribution and one just cannot properly use the word advancement for what is actually a distribution because the advancement carries the hotch potch notion, the distribution

- Elias CJ            It may too.
- Tipping J            It may too by definition but it would not ordinarily unless there was an express hotch pot provision. So when they talk about advancement I just think it is very difficult to argue that empowerment of advancement properly understood is materially the same as a power to distribute earn. I have a simple mind Mr Camp but it just seems to me to be completely contrary to all the understandings of terminology and the use of terminology in this whole area.
- Camp                 Your Honour in the sense I have addressed that with Justice Anderson before only to say that in my submission if the outcome of the use of the power is a similar outcome then one can say that for that purpose of that outcome the powers are similar not materially different.
- Tipping J            Well the Court of Appeal said they were not materially different.
- Camp                 Yes well that's the Merkel formulation.
- Tipping J            They may not be materially different in ultimate effect.
- Camp                 Yes.
- Tipping J            But they are materially different as powers.
- Camp                 Yes.
- Tipping J            And your saying if the ultimate effect is the same.
- Camp                 Yes.
- Tipping J            Well they have gone down this other route.
- Camp                 Well no Your Honour, yes I do but with this qualification that if the considerations that you should have to take into account were different then that
- Tipping J            Wholly different. To exercise a power of advancement is a wholly different exercise from deciding whether or not to make a partial distribution or to a point or by means of an appointment. It is a partial distribution by means of an appointment.
- Camp                 I'm probably not putting it clearly enough Sir but if the criteria or matters that you should take into account as a trustee were different for the one track to the other track then I would accept that there was a material difference.

- Elias CJ But there may well be. Because a power of advancement is a power to benefit in response to a need. Whereas a power of appointment doesn't require any such assessment does it, it's just, you can have this.
- Camp Well in my submission in our fact situation we just have the issue of advantaging the wife of the settlor Mr Couper and disadvantaging those who by that transaction cease to qualify.
- Elias CJ Why is there a need to advantage her by advancement rather than by appointment?
- Camp Well there wasn't, the driving intention, the driving principle was to let her have the benefit of the farm. Now all I am saying is there's no different considerations. You're going to cut up the Kain plaintiffs no matters which way you do it and that's the only – the only competition of practical note really is between Mrs Couper and all her children on the one hand and the Kain plaintiffs on the other and that would be the same whether you are doing a section 41 or a clause 4 and that's what I say the Court of Appeal were saying.
- Blanchard J Well I wondered and I don't know whether there is any substance in this thought whether the choice of advancement as the route to do it was first thought because they didn't realise that you couldn't make an advancement to her. They probably made the same mistake as the High Court Judge did but whether it was also done because of a recognition that Pilkington seemed to have loosened up the rules concerning vesting in or benefiting non objects.
- Camp Yes, incidental.
- Blanchard J Well, yes. As compared with the rules applying to powers of appointment. In other words it might have been a deliberate choice to go the advancement route.
- Camp Yes, I think I probably did have the same thought Sir but, the problem I have is that the paragraph 112 cases about a rolled up transaction benefiting non objects is quite old law. So that without Pilkington in place a Ponui transaction could still have achieved the same end for Mangaheia if that route had been followed.
- Elias CJ But Pilkington though was about if they wanted to advance monies to – it was a child wasn't it?
- Camp Yes. Yes it was.
- Elias CJ Then they had to set up a trust mechanism, they couldn't just pay it to the child. I mean it just seems to be miles away from the effect of what is achieved here and the purpose of a power of advancement.

- Camp Yes. No sorry, in terms of Justice Blanchard raising Pilkington and the prospect of what drove the draughtsmen, it was the case that Pilkington sort of relaxed their prospect of incidentals being included within the advancement and not – meaning that it would get struck down so that Mrs Couper’s children might arguably have sneaked in under a Pilkington approach to advancement save for the fact that as you say, section 41 wasn’t available.
- Blanchard J But if they did deliberately choose that route in order to get a particular advantage, it seems to me inappropriate for a court to say that failed because they didn’t have power to do it, never mind they could have gone another route, one they eschewed.
- Camp Yes. Well all I submit is that one looks at what was trying to be achieved, which was the benefiting of Mrs Couper and children and say that was not a materially different outcome and effect and that therefore the power that they did have should be seen as the one that they were entitled to rely on.
- Elias CJ Was I too hasty to say that there is a hotchpot clause in respect of appointments as well as advancements here because
- Camp I think there is just
- Elias CJ because if it doesn’t apply to appointments
- Camp Yes that one applies to appointments
- Elias CJ Oh that one applies to appointments. Yes
- Camp That’s what the Court of Appeal is saying.
- Elias CJ And the other one I think s 41 brings it in in terms of advances, yes I was just wondering whether there was a difference in effect.
- Camp The reason they mentioned it in 79 was to say that they weren't that sure that re-settlement could occur without the consent of Mrs Couper because the hotchpot seems to count against the ability to re-settle because of Henry Morris’s limitations on the words in all respects. I have answer the question, well I have replied to the question that was asked of me before lunch and if there are no other questions on that part of it then I should move to supporting the Court of Appeals decision that s 41 route is available in the alternative, because that is where the judgment next goes.
- Tipping J Having said that it wasn’t, there was no power of advancement.
- Camp Pardon Sir.

- Tipping J Having said, the Court of Appeal this is, that there was no power of advancement, did they then say there was in the alternative a power of advancement?
- Camp I didn't think so Sir, I thought that they said in the first place that you could get home a transaction could be validated by looking at it as the exercise of the power under clause 4 together with the consent of Mrs Couper fullstop.
- Tipping J But you would only need to do that if there was no power of advancement. Because they would have...perhaps I better let you get out of it.
- Blanchard J And if you could do that there was no need for the power of advantage, it goes in a circle.
- Tipping J I just can't understand this. But anyway you will know doubt try and shed some light.
- Elias CJ Before you pass on, can you just explain to me your understanding of paragraphs, first the relevance of the consideration in paragraph 87 of the Court of Appeal decision and then what they meant by paragraph 88.
- Camp The argument being advanced to the Court of Appeal was that the power of advancement to s 41 could not be used to benefit Mrs Couper because she was not entitled to income and there the proposition was that because the substance of the transaction necessarily required what was effectively an appointment in favour of Mrs Couper, because that's how the transaction should be seen, once one sees that line in place, then she does have a sufficient interest to qualify in income terms under s 41, sorry in capital terms under s 41, because of the decision made to appoint. And therefore the argument that she.
- Blanchard J But if there was a decision made to appoint, then you could see it under clause 4, I can't understand how you get to s 41. I appreciate this is the Court of Appeal's argument, not your's Mr Camp.
- Tipping J But you are espousing it aren't you.
- Camp Yes, well I am supporting it Sir.
- Anderson J So what they are saying in effect is well, she wasn't appointed, but because she could have been, it might possibly have been, we will treat her as some of his entitled in terms of s 41.
- Tipping J That with great respect is nonsense. I mean you can't say, she's either entitled under s 41 or she isn't. Now it's clear, she isn't, you can't hypothesise that if certain things had happened which would have removed the need to make the power, to exercise the power of

advancement anyway, she therefore becomes entitled. That's just with great respect, both circular and odd.

Camp That's a kind way to put it.

Tipping J I have got a huge question mark, like the Chief Justice's question mark. I have got a huge question mark on both sides of this paragraph. And please try and justify it if you can Mr Camp, but on the face of it it's just a dog chasing it's tail.

Camp Well I accept that it's all a rolled up transaction so to speak, because it is all done in the one. But necessarily the Court of Appeal's argument, proposition, has to start with saying that the trustees are making the decision to appoint in favour of Mrs Couper and if they stop at that point and say now she has an interest and therefore she qualifies in terms of s 41, so that being the case the route we will take is the s 41 route under the power of advancement now that the doors open.

Tipping J She would have qualified if something had happened which would have removed the need to exercise the power at all.

Blanchard J What kind of appointment was it that hypothetically was being made.

Camp One that recognised the existence of the deed that we are talking about. That is they have decided it's going to be done on the day in the one document and they are saying that our powers are wide enough for us to select Mrs Couper and then to go down s 41 track.

Anderson J Why.

Camp That seems to be what they are saying.

Elias CJ That would not have achieved what they achieved because as Justice Anderson has said it would have entailed passing over a control they wish to retain. So the effect of what they did was to take out some objects and to bring in some other objects, otherwise it remains the same. So it's a re-settlement.

Camp Yes

Anderson J And they describe it as such in the deed poll.

Tipping J That is a very illuminating word actually. That's what they thought they were doing without any power.

Camp It's bizarre if they had said settlement then that point wouldn't arise.

Tipping J Re-settled.

Camp No no, but if they had said settlement in that point.

- Anderson J I think reality is a re-settlement but it brings in someone who was not an object in the original trust.
- Camp I don't want to be the one chopping and changing but if I do jump back to the previous argument, then under the paragraph 112 cases that's permissible. It's only now that I am moving onto this.
- Anderson J In certain circumstances.
- Camp In certain circumstances, it's just now that I am moving onto s 41.
- Tipping J But if this new trust has been established, yes I am looking at 88, if hypothetically this new trust has been established to enable Mrs Couper to be a final beneficiary in it, then ex-hypothesise surely, the asset, the subject of the power of advancement, is already vested in the new trustees. Then they come back and say they are in effect sort of seeking to do it twice.
- Elias CJ It's just boot straps.
- Camp Yes what you are saying is the old trust already dead, so the s 41 can't possibly get off the ground.
- Blanchard J The dog very nearly caught up with it's tail.
- Tipping J Yes it was having a good chomp at it and as I say nearly got there. But it's just with great respect, it just doesn't work. The hypothesis damnifies the need to make the power of advancement at all, because you have already, on the hypothesis, achieved what you have set out to achieve.
- Camp I don't know that I can support it otherwise than by saying, that you have to just look at it as a, I have got all of these powers and when I start this is the position I start from when I finish that's the position I finish on. Rather than breaking it into boxes and saying sorry you have already shut that door.
- Tipping J But if this precedent, if we were to endorse this precedent you would get people claiming to be entitled by some extraordinary sort of boot straps argument. As I say, you are either entitled or you are not. You can't be hypothetically entitled.
- Camp Yes I don't think I can take it further really Sir.
- Tipping J It's a very difficult thing to try and
- Anderson J To be contingently entitled [inaudible] but you can't be only potentially.
- Tipping J Well you can't be entitled on hypothesis.



Camp Well Justice Tipping's proposition is that by the time you are entitled then the s 41 powers dead.

Elias CJ Yes in respect of the old trust.

Camp In respect of the old trust.

Tipping J There are all sorts of things with respect that are wrong with this reason.

Camp Well Sir that was the Court of Appeal's alternative basis for upholding the transaction.

Tipping J Well it's yours too, and you are not abandoning it. But you can't press it any further.

Camp No I'm not, no I don't think I can take it further Sir, but I am not abandoning it. Sir that's Mangaheia unless your Honours wish to hear it further. Those are my submissions.

Elias CJ Thank you Mr Camp. Mr Osborne you weren't intending to address us were you.

Osborne No I don't intend to follow the benefit of discussions with Mr Camp.

Elias CJ Thank you. Yes Mr Kós.

Kós Thank you your Honours. Might I make four points about Pouni and two about Mangaheia. In relation to Ponui and fraud on a power the focus is on intention not effect, and that is so no matter which century and which swinging back and forth between centuries and authorities we apply. The effect of and that's the first one I want to make, the focus is on intention. The next question is what is the significance of concurrence of the object. In my submission the concurrence of the object in the transaction is not a relevant consideration *Wong v Burt* is the authority for that. The real question is whether the object is free to act as she pleases, or whether a legal or moral duty to the appointor, to apply for non-objects exists as the appointor intends. I will come back to that point in a moment because I want to take your Honours to a passage from Thomas and my friend didn't go to and which assists I understand this rolled up case that he was dealing with a rolled up settlement. The third point I just want to touch on briefly is this, in the trustee the settlor sets the rules. The settlor defines by the entry into deed the extent of the power or scope, not the power to appoint. So to allow an object to concur with forming a trust is tantamount for saying that a trust that says pay to X is in effect saying pay to X or for the benefit of X. Now the Court of Appeal in paragraph 81 referred to the *Morris* decision. It was by reason of the application the *Morris* decision that it was considered that the power to appoint in this case did not extend to appointment onto trusts. In other words the appointment had to be for the benefit of the object, not a trust more generally for the benefit of associated persons or incidentally effective or

beneficial persons. So if one by looking at the supposed concurrence of the object allows what is a narrow power to become a broader power, a power to settle on trusts as here for the benefit of others, and that is a fundamental change to the approach that conveyances have taken according to authority. Now my friend Mr Camp made quite a lot of the *Goldsmids* line of authorities these are the rolled up double settlements. And in a sense those authorities can be seen to be inconsistent with the application of fraud on a power in the purer *Vatcher* and *Topham* approach which I contend for. But it is I think worth and taking a moment to look at what Professor Thomas has to say about that, at the very dying section of my friend's supplementary bundle, in fact it dies incompletely because there is a word missing which I will have add it.

Elias CJ Supported is it.

Kós Yes that's it. Yes well all the excitement now has gone from my territory to reveal that word. But I think with your Honour Chief Justice got to the text around about paragraph, foot note 66. Can we go beyond that. Looking at these cases because 66 is the one that deals with the *Goldsmid* case, the other ones referred to in paragraph 112, Professor Thomas goes on to say the mere existence of a contract or bargain between appointor and appointee for a settlement is not enough to avoid the appointment: it must be shown that, but for the contract or bargain, the appointment would not have been made. Thus, an appointment made in favour of a non-object may in exceptional circumstances, be upheld if it is made with the consent of an object, whether the subject-matter of the power be property in possession or reversion. Here's the important point. The question in each case is what character, in what character does the appointee take the property, now that's Professor Thomas lifted that straight from the judgment in *Birley v Birley*. In what character does the appointee take the property. The appointment is in substance for his absolute use and benefit the appointment is good. But if the appointers purpose is to affect distribution amongst persons not object to the power, the appointee merely being a conduit the appointment cannot be supported. In the submission I make in relation to that is that this is in this case precisely a conduit case where Mr Couper's intent to provide for objects and non-objects was completed in a transaction as he intended, affected by documents prepared by his solicitors and approved by the trustees and immediately settled by Mrs Couper on trusts and on objects. It is completely unreal to imagine that she would exercise her power to eliminate some of the listed non-objects, given her relationship with them. The counter of the very point that Justice Tipping put to my friend Mr Camp. So that's the point I want to make in relation to Ponui, there are really two points, one was a conveyancing point and the second one was the significance and concurrence. In relation to Mangaheia, I simply wanted to make one point to your Honours and it is this, the cases that my friend relied on, cases like *Eardley Wilmot* and *Collins*, are cases that deal with an intended power mis-described. They are cases that are similar to any equitable case concerning rectification. Where the intent is to use a particular power but it's just been mis-described. But here the

intent and the power coincided it was just that the power was wholly inapplicable. So the proper way to look at the question of the power of appointment, is that it was a power not exercised, not that it was exercised by substitution or by some kind of well unstated intent, and so it falls within the principles described in the relevant passage from Halsbury that deals with non-exercise of powers and that is in the reissue of volume 36 at paragraph 961 and what the learned editor there says is in general equity will not grant relief against non-execution of a power as distinct from defective execution even if it occurred through accident or mistake and the only exception identified to that is if the reason for the non-execution or non-exercise of the power was as a result of the fraud of a person benefited by the non-exercise. So my submission the failure in this case to exercise the power of appointment was (a) adverted to because of deliberate intent to exercise the power of advancement and (b) the authorities are such that a court thence step into what is not a misdescription or rectification case and say well here is another power that can be exercised instead.

Anderson J That's just because the Court would then be exercising the powers that only the trustees can properly exercise.

Kós Yes and that is so and then the position would be what are the relevant considerations that would apply and as I think was identified in discussion with my friend Mr Camp a moment ago, considerations that apply as between an advance and appointment are very different. They involve different classes of person and different considerations and in relation to appointment if what was intended here was a resettlement then it wasn't just a question of an appointment, there were three powers that will need to be exercised, the power to bring for the date of distribution, the appointment and then the distribution. So it's a mighty raft of powers that are to be exercised in substitution, not just one.  
If your Honours please.

Elias CJ Thank you Mr Kós. Thank you counsel for your submissions. We will take time to consider our decision.

**Court Adjourns 3.05pm**

