IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT

A20140005924
APPEAL 2014/1

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal against orders of the Māori Land Court made on 17 April 2014 at 95 Waiariki MB 176-229 in relation to Lot 39A Sec. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No. 2A Parish of Matatā blocks
BETWEEN	RAE BEVERLY ADLAM Appellant
AND	HELEN MARIA SAVAGE and RAELYN ARIHIA PEITA as trustees of the Otonga Whānau Trust First Respondents
AND	JOHN TIONGA SAVAGE, LAWRENCE TE AOKAHARI NIAO, PATRICK MAYNE SAVAGE, SAMUEL KELVIN BARNES AND TAMATI DRAWBRIDGE as trustees of the Matatā Parish 39A 2A Ahu Whenua Trust Second Respondents
AND	HUIA ANN PACEY, JOHN TIONGA SAVAGE, LAWRENCE TE AOKAHARI NIAO, REGINA VICTORIA RINTOUL and SAMUEL KEITH BARNES as trustees of the Matatā Parish 39A 2B 2B 2A Ahu Whenua Trust Third Respondents
AND	GEOTHERMAL DEVELOPMENTS LIMITED Fourth Respondent

A20140007400
APPEAL 2014/4

IN THE MATTER OF	A cross appeal against orders of the Māori Land Court made on 17 April 2014 at 95 Waiariki MB 176-229 in relation to Lot 39A Sec. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No. 2A Parish of Matatā blocks
BETWEEN	JOHN TIONGA SAVAGE, PATRICK MAYNE, SAMUEL KELVIN BARNES and TAMATI DRAWBRIDGE as trustees of the Matatā Parish 39A 2A Ahu Whenua Trust First Cross Appellants

A20140007492
APPEAL 2014/5

IN THE MATTER OF	A cross appeal against orders of the Māori Land Court made on 17 April 2014 at 95 Waiariki MB 176-229 in relation to Lot 39A Sec. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No. 2A Parish of Matatā blocks
BETWEEN	HUI ANN PACEY, JOHN TIONGA SAVAGE and SAMUEL KELVIN BARNES as trustees of the Matatā Pairsh 39A 2B 2B 2A Ahu Whenua Trust Second Cross Appellants

Hearing:	11-12 August 2014 (Heard at Rotorua)
Court:	Deputy Chief Judge C L Fox (Presiding) Judge D J Ambler Judge S R Clark Judge S F Reeves Judge M J Doogan
Appearances:	Mr John Billington QC and Mr Daniel Hughes for Rae Beverly Adlam Ms Terena Wara for the Otonga Whānau Trust Mr David Hurd and Mr David Dowthwaite for the trustees of Matatā Parish 39A 2A Trust Mr Peter Andrew for the trustees of Matatā Parish 39A 2B 2B 2A Trust Mr Patrick Mulligan for Geothermal Developments Limited
Judgment:	26 March 2015

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] The proceedings in the lower Court and the present appeals concern whether the appellant, Rae Beverly Adlam (Ms Adlam), is entitled to retain the substantial profits and income she received from spearheading the development of two geothermal power stations on Māori freehold land at Kawerau, in the Bay of Plenty.

[2] Ms Adlam was instrumental in the development of two power stations. The first was developed between 1992 and 1993, and is known as the TG2 power station (TG2). The second was commissioned in September 2008 by Geothermal Developments Limited (GDL), a company established by Ms Adlam. Both power stations are located on a block of Māori freehold land know as the Bath block.[1] In addition, the GDL power station draws its geothermal resource from a well (KA24) located on an adjacent block of Māori freehold land known as the Farm block.[2]

[3] The Bath block and Farm block are administered by separate ahu whenua trusts known as the Bath Trust and Farm Trust respectively.[3] The blocks share substantial commonality of beneficial ownership and Ms Adlam is closely related to the owners.[4] A majority of the trustees of the Bath Trust are also trustees of the Farm Trust. Ms Adlam was a trustee of the Bath Trust during the period in which the two power stations were developed. She has never been a trustee of the Farm Trust though she worked closely with that trust in relation to the GDL development.

[4] Ms Adlam received several million dollars of profit and income from the two power stations. She received $3,584,323 in payments between 1993 and 2009 in relation to the TG2 power station. In 2010 she made an $11,200,000.00 profit from the GDL power station when she sold her shares in GDL.

[5] In 2007 the trustees of the Otonga Whānau Trust, who are beneficial owners of the Bath Trust and Farm Trust, sued Ms Adlam in the lower Court to recover the money she

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[1] Lot 39A Sec. 2A Parish of Matatā (Bath block).
[2] Lot 39A Sec. 2B No 2B No 2A Parish of Matatā (Farm block).
[3] Lot 39A Sec. 2A Parish of Matatā (Bath Block) administered by the Matatā Parish Lot 39A2A Ahu Whenua Trust (The Bath Trust) and Lot 39A Sec 2B No 2B No 2A Parish of Matatā (Farm block) administered by the Matatā Parish 39A2B2B2A (The Farm Trust).
[4] The Bath block has 74 beneficial owners. The Farm block has 84 beneficial owners.

received from the two power station projects. Ms Adlam denied any liability for her role in the two developments right up until the commencement of the hearing in the lower Court.

[6] At the commencement of that hearing Ms Adlam admitted she had acted in breach of her duties as a trustee of the Bath Trust. Consequently, the hearing in the lower Court focussed on the quantum Ms Adlam owed the Bath Trust in relation to the TG2 and GDL developments. As far as the Farm Trust was concerned, Ms Adlam continued to deny any liability to that trust.

Judgment of the Māori Land Court

[7] In relation to the TG2 power station, Ms Adlam and the parties in the lower Court agreed that she must account to the Bath Trust for a net figure (after GST and tax) of $2,440,149.00. However, she argued she was entitled to a developer's fee or allowance to be deducted from that sum for her skill and enterprise in advancing the development.

[8] Judge Coxhead declined Ms Adlam's claim to a developer's fee or allowance. He ruled that Ms Adlam must compensate the Bath Trust for the entire sum of $2,440,149.00 plus interest at 5% from 12 July 2007, being the date of the commencement of the proceedings, to the date of judgment (totalling $823,550.29).[5]

[9] In relation to the GDL power station, Ms Adlam accepted she was liable to account to the Bath Trust for part of the GDL profit. Consistent with her stance in relation to the TG2 project, she also argued for a developer's fee or allowance in relation to the GDL project. As for the Farm Trust, she denied any liability to that trust: she was never a trustee, and she disputed she owed or had breached any other duties to that trust. She also disputed that any claim had been properly pleaded in the lower Court in relation to the Farm Trust.

[10] As Ms Adlam was only liable to the Bath Trust in relation to the GDL profit, she argued that the Court was required to determine how much of the GDL profit related to the Bath Trust as opposed to the Farm Trust. She could only be held liable for the amount that

[5] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust - Lot 39A Sec. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No. 2A Parish of Matatā* (2014) 95 Waiariki MB 176 (95 WAR 176) at [181], [225] – [226].

related to the Bath Trust. If the Court did not make that determination, the Bath Trust would recover profits that did not belong to it. This is the major issue on appeal.

[11] Judge Coxhead concluded that a claim had not been properly pleaded against Ms Adlam in relation to the Farm Trust for breach of duty or equitable obligation. Therefore the Court was only concerned with quantifying Ms Adlam's liability to the Bath Trust. For the same reasons that applied to the TG2 project, Judge Coxhead rejected the claim to a developer's fee or allowance. Of most significance, Judge Coxhead ruled that Ms Adlam had failed to discharge the onus upon her to establish that apportionment of the GDL profit between the two trusts was required. Therefore he ordered that Ms Adlam disgorge the entire $11,200,000.00 profit to the Bath Trust.[6]

The appeal and cross-appeals

[12] Ms Adlam appeals the order that she disgorge the entire $11,200,000.00 profit to the Bath Trust. She argues that it is necessary for the Court to first establish what proportion of the $11,200,000.00 profit is attributable to the use of Farm Trust assets. That portion is not due to the Bath Trust. It is then necessary to establish who is entitled to that portion of the GDL profit, Ms Adlam or the Farm Trust. If the Farm Trust is entitled to a share of the GDL profit, should she receive an allowance for her skill and enterprise? In the absence of a properly pleaded claim on behalf of the Farm Trust, it was submitted that the proper course is for this Court to remit the matter back to the lower Court with directions to the Farm Trust to particularise and plead its claim.

[13] With respect to the TG2 development, the only substantive issue on appeal was the cross-appeal from four of the trustees of the Bath Trust concerning the date from which interest should run.[7] Ms Adlam seeks to uphold the interest award of the lower Court. In addition, Ms Adlam says the lower Court was wrong to characterise her breach of duty to the Bath Trust as "conversion".

[14] Four of the trustees of the Bath Trust filed a cross-appeal in relation to the award of interest. They say that interest on the income derived from the TG2 development should

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[6] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [220] and [224].
[7] *Memorandum of Counsel for Ms Adlam* dated 12 August 2014.

run from the date the cause of action arose, not the date when proceedings were first commenced. [8]

[15] A separate cross-appeal was filed on behalf of three of the trustees of the Farm Trust. They appeal the lower Court's finding that Ms Adlam did not owe a duty or equitable obligation to the Farm Trust in relation to the GDL profit. They also appeal Judge Coxhead's refusal to grant a remedy to the Farm Trust in that regard.[9]

[16] The appeal and cross-appeals were heard together.

Issues on appeal

[17] With regard to the $11,200,000.00 GDL profit, the issues on appeal are:

a) Given that assets of both the Bath and Farm trusts were used in the generation of the GDL profit, was Judge Coxhead wrong to order that the entire profit be disgorged to the Bath Trust only?

b) Was Judge Coxhead wrong to find that there was no properly pleaded claim on behalf of the Farm Trust and therefore no basis on which to find a breach of duty which would entitle the Farm Trust to a remedy?

c) If there was a not a sufficiently pleaded claim on behalf of the Farm Trust, can the trustees of the Bath and Farm trusts nevertheless be left to decide upon division of the GDL profit between the two trusts, with recourse to directions from the Court if necessary?

[18] With regard to the TG2 development, was Judge Coxhead right to conclude that interest should run from the date when proceedings were first commenced rather than from the date when the cause of action arose? We then consider the submission that he was wrong to characterise her breach of duty as "conversion".

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[8] *Notice of Appeal* dated 29 April 2014, Record of Appeal (ROA) at 28 to 35.
[9] *Notice of Cross Appeal* dated 16 June 2014, ROA at 36 to 40.

[19] Because of their significance we address the GDL issues first followed by the TG2 issues.

The Geothermal Developments Limited profit

[20] The principal issue on appeal is whether Judge Coxhead was correct in finding that Ms Adlam was required to disgorge the entire $11,200,000.00 profit from the GDL development to the Bath Trust only. We review the relevant factual background and then turn to the arguments on appeal.

Sale of GDL shares

[21] Ms Adlam used her company, GDL, as the vehicle to undertake the development of the GDL power station and to generate the substantial profit on the development. GDL was incorporated on 1 June 2005. Ms Adlam was the sole shareholder and director.[10] The construction of the power station was carried out by an Israeli geothermal power development company, Ormat Industries Limited (Ormat).

[22] On 19 September 2005 Ms Adlam entered into sale and purchase and shareholder agreements with a subsidiary of Ormat, Orda 9 Incorporated (ORDA9). Under these agreements Ms Adlam agreed to sell shares in GDL to ORDA9 and retained an option to re-purchase the shares once the power station was completed. The sale and purchase agreement was conditional (inter alia), upon Ms Adlam providing evidence to ORDA9 that GDL had acquired or entered into unconditional agreements to acquire:[11]

a) Legal and beneficial ownership or unlimited rights to use the KA24 well;

b) All resource consents necessary to extract geothermal fluid, drill wells, construct and operate the proposed power station; and

c) An agreement to lease the land on which the project was to be constructed.

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[10] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [23].
[11] *Affidavit of Taryn Tauhei Tuari* dated 18 August 2010, *Exhibit "C" and "D",* ROA at 1765 to 1809. See also *Bundle of Documents for the Applicant* dated 25 September 2012, ROA at 4371 to 4394.

[23] A single lease between the two trusts and GDL had in fact been finalised by late August 2005. In June 2006 Ms Adlam reported that the lease had been signed by the two trusts, and on 28 September 2007 the lease was noted in the Māori Land Court.[12]

[24] It is not entirely clear how Ms Adlam was able to satisfy ORDA9 that GDL had acquired ownership or unlimited rights to use the KA24 well. Nevertheless, that condition was apparently satisfied as the development went ahead using the geothermal resource from the KA24 well.

[25] On 4 May 2007 Ms Adlam transferred 49% of the shares in GDL to ORDA9.[13] The GDL power station was subsequently commissioned in 2008. The power station itself is located on the Bath block and draws its geothermal resource from the KA24 well on the Farm block. Thus, the GDL power station as a whole involves both the Bath and Farm blocks. However, as we discuss shortly, the two trusts and GDL never resolved between themselves what value or proportion of the overall project is attributed to each of the two land blocks.

[26] On 23 February 2009 Ms Adlam transferred the remaining shares in GDL to ORDA9.[14]

[27] On 13 January 2010 Ms Adlam entered into an agreement with Eastland Group Limited (Eastland) to buy back all of the shares in GDL from ORDA9, and to on-sell them to Eastland for $40 million. On 14 January 2010 ORDA9 transferred all the shares in GDL to Ms Adlam, and Ms Adlam then transferred those shares to Eastland.[15]

[28] As a result of these transactions Ms Adlam made a total profit of $11,200,000.00 from the GDL development.

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[12] TN 23273 see also *Will say statement of Bruce Carswell* dated 7 February 2011, ROA at 1250.
[13] *Brief of Evidence of Gavin Bradley Murphy* dated 12 October 2012, ROA at 743.
[14] *Affidavit of Taryn Tauhei Tuari* dated 18 August 2010, *Exhibit "E",* ROA at 1815.
[15] *Affidavit of Taryn Tauhei Tuari* dated 18 August 2010, *Exhibit "E",* ROA at 1816 and 1817 see also *Brief of Evidence of Gavin Bradley Murphy* dated 12 October 2012, ROA at 741 and 749.

Lease arrangements

[29] The proceedings in the lower Court included a claim against GDL in relation the lease between the Bath and Farm trusts and GDL**.**

[30] On 23 October 2012 the two trusts and GDL entered into a new lease to replace the original lease. That lease was subsequently registered with the Māori Land Court.[16] The execution of the replacement lease resolved the claim against GDL.

[31] Under the replacement lease the two trusts leased defined areas of the two blocks to GDL. The trustees of the two trusts are described as the "Lessor".[17] The lease provides for a rental income but does not stipulate how the income is to be apportioned between the two trusts. The original lease also did not apportion the income between the two trusts.

[32] At the time of the hearing in the lower Court the two trusts had yet to determine how they would share past or future rental income under the replacement lease. At that time the trusts did not have separate legal representation. When the matter came before us the trusts had separate counsel but still had not agreed how the lease income was to be shared between the trusts. Counsel indicated that the trusts would resolve that matter by agreement or failing agreement would seek directions from the Court.

[33] The fact that the majority of trustees on both trusts are the same people is a complicating factor to which we will return.

Submissions for Ms Adlam

[34] For Ms Adlam, Mr Billington QC argued that Judge Coxhead was correct to find that the Farm Trust had not brought a claim for breach of fiduciary duty by Ms Adlam. The Farm Trust's assertion that such a claim had been pleaded in the applicants' Third Amended Statement of Claim was incorrect. The Farm Trust made no pleading and neither did it seek any relief against Ms Adlam. It was submitted that Judge Coxhead was right to

[16] 64 Waiariki MB 35-105 (64 WAR 35-105) see also *First Memorandum of Counsel in Support of Application for Directions in Relation to Trust and Trustees* dated 23 October 2012, ROA 1702 – 1706.
[17] TN 24077. *Memorandum of a Lease for a Geothermal Power Station at Kawerau* dated 29 October 2012.

conclude that it was up to the Farm Trust to bring a claim and it had failed to do so. Accordingly, the Farm Trust cannot raise this issue on appeal.

[35] It was also argued that the lower Court was correct to find that Ms Adlam is not and never had been a trustee of the Farm Trust. Accordingly, Ms Adlam did not owe any duties to the Farm Trust. No evidence was presented on whether Ms Adlam was a de facto trustee, a trustee de son tort or a constructive trustee. Judge Coxhead was therefore correct to conclude that the existence of an equitable relationship giving rise to obligations had not been clearly established. No evidence was presented by the Farm Trust on the issue of an unconscionable bargain and neither was there any claim for relief by the Farm Trust on these issues. The matter cannot be raised on appeal. If the Farm Trust wishes to claim in its own right, the matter should be remitted for hearing in the Māori Land Court.[18]

[36] Ms Adlam does not contest the lower Court's finding that she had breached her duty to the Bath Trust. Neither does she challenge Judge Coxhead's refusal to grant her a developer's fee with respect to that part of the GDL profit due to the Bath Trust. She does however argue that there must be an inquiry into what proportion of the $11,200,000.00 profit was attributable to the Farm Trust assets. It is then necessary to determine who is entitled to that portion of the profit, the Farm Trust or Ms Adlam. If the Farm Trust is entitled to that share of the profit, it is then necessary to determine whether Ms Adlam nonetheless is entitled to an allowance for her skill and enterprise? These matters she argued need to be remitted to the lower Court for pleading and determination.[19]

Submissions for the Farm Trust

[37] Counsel for the Farm Trust, Mr Andrew, argued that claims on behalf of the trust against Ms Adlam for the unauthorised profit of $11,200,000.00 had been properly pleaded. Ms Adlam was an errant fiduciary who breached obligations to beneficiaries of both trusts. The unauthorised profit could not have been achieved without the communally owned assets of both trusts. The source of the fiduciary duties owed by Ms Adlam to the Farm Trust's beneficiaries lies in the trust and confidence reposed in her as a pukenga (authority figure/expert) and trusted business advisor of the Savage whānau (the beneficial

[18] *Synopsis of Submissions for Rae Beverly Adlam in relation to the appeal by the third respondents* dated 31 July 2014.
[19] *Memorandum of Counsel for Ms Adlam* dated 12 August 2014, Supplementary Record of Appeal at Tab 21.

owners of the land) on all commercial and financial issues pertaining to whānau lands, particularly geothermal matters.[20]

[38] It was further argued that the circumstances giving rise to the breach of fiduciary duties by Ms Adlam to the Bath Trust are virtually identical to those giving rise to the alleged breach of fiduciary duties owed to the Farm Trust. The fact that Ms Adlam was an express trustee of the Bath Trust only was no answer. She breached an undertaking to develop communally owned Māori lands for the benefit of the wider whānau.[21]

[39] Mr Andrew sought to uphold the finding of the lower Court that Ms Adlam must disgorge the entire $11,200,000.00 profit to the Bath Trust. He challenged the argument for apportionment of the profit between the two trusts as it was based on the assumption that Ms Adlam was entitled to the benefit of the contribution of the Farm Trust assets as if such assets were her own property.[22]

[40] Mr Andrew argued that Ms Adlam's appeal should be dismissed and that she should have no further say as to what becomes of the $11,200,000.00 profit. She should disgorge it all to the Bath Trust, and it would then be up to the Bath Trust and the Farm Trust to reach agreement on what is to happen to the disgorged profit.

[41] In the alternative, Mr Andrew argued that there was a sufficient basis in the pleadings and evidence for the Court below to make findings that Ms Adlam had breached equitable duties to the Farm Trust's beneficiaries and should account to them as well as the Bath Trust's beneficiaries for the $11,200,000.00 profit (on terms to be agreed between the two trusts).[23]

[42] As a further alternative, Mr Andrew argued that if this Court concluded that there was not a sufficient basis in the pleadings for such a finding by the lower Court, then the Farm Trust's claims should be remitted to the lower Court to be heard and determined. Mr

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[20] *Submissions on behalf of Huia Ann Pacey, John Tionga Savage and Samuel Kelvin Barnes as trustees of the Farm Trust* dated 5 August 2014, Supplementary Record of Appeal at Tab 8, at [5].
[21] *Submissions on behalf of Huia Ann Pacey, John Tionga Savage and Samuel Kelvin Barnes as trustees of the Farm Trust* dated 5 August 2014, Supplementary Record of Appeal at Tab 8, at [6].
[22] *Submissions on behalf of Huia Ann Pacey, John Tionga Savage and Samuel Kelvin Barnes as trustees of the Farm Trust* dated 5 August 2014, Supplementary Record of Appeal at Tab 8, at [7] and [10].
[23] *Submissions on behalf of Huia Ann Pacey, John Tionga Savage and Samuel Kelvin Barnes as trustees of the Farm Trust* dated 5 August 2014, Supplementary Record of Appeal at Tab 8, at [11]-[14].

Andrew made it clear that this option (as argued for by Mr Billington QC) was seen as a last resort, given that proceedings had been underway for more than seven years. Remitting back would was also, in his view, provide yet further opportunity for leverage by Ms Adlam, who does not come to equity with clean hands.[24]

Submissions for the Bath Trust

[43] Mr Hurd, counsel for the Bath Trust, also sought to uphold Judge Coxhead's order that the $11,200,000.00 profit be disgorged to the Bath Trust and that the trustees of the two trusts resolve for themselves an appropriate division of that profit. Failing agreement, the trustees would seek direction from the Court. Mr Hurd's position in relation to the substantive arguments and the relief on appeal was substantially the same as that of Mr Andrew on behalf of the Farm Trust.

Submissions for the Otonga Whānau Trust

[44] The Otonga Whānau Trust is a beneficial owner in both the Bath and Farm blocks. The trust seeks to uphold the judgement of Judge Coxhead and the order that Ms Adlam disgorge the entire $11,200,000.00 profit to the Bath Trust.

[45] Ms Wara, counsel for the Otonga Whānau Trust, argued that Judge Coxhead was right to find that apportionment does not apply in this case. Apportionment is an equitable remedy generally applied where a fiduciary has mixed personal funds with beneficiary funds. Ms Adlam failed to satisfy the onus upon her to demonstrate that she had applied personal funds and that apportionment should be made. She also sought to uphold Judge Coxhead's decision to refuse Ms Adlam a developer's fee in relation to the GDL profit.[25]

The law of account of profits: strict enforcement, the causal-link and apportionment

[46] Before turning to our discussion of the issues, we remind ourselves of the relevant legal and equitable principles.

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[24] *Submissions on behalf of Huia Ann Pacey, John Tionga Savage and Samuel Kelvin Barnes as trustees of the Farm Trust* dated 5 August 2014, Supplementary Record of Appeal at Tab 8, at [14] and [73].
[25] *Amended synopsis of submissions for the First Respondent* dated 7 February 2014, at [1], [39] to [43] and [51] to [67].

[47] Equity reserves its most severe sanctions for breach of an express trust by a trustee. The expectation that a trustee will be loyal to the trust and not place his or her personal interests above or in conflict with the trust is paramount.[26]

[48] The core obligations of a fiduciary are captured by the profit and conflict rules. A fiduciary is not permitted to profit from his or her office, save with the informed consent of the person to whom they stand in a fiduciary relationship. Neither must a fiduciary place himself in a position where a personal interest conflicts with duty to the trust.[27]

[49] In his text, Account of Profits, Peter Devonshire, summarises the strict application of these rules as follows:[28]

> The profit and conflict rules impose strict duties, which are not dependent on a requirement that the defaulting fiduciary acted in bad faith or consciously committed any wrongdoing. The mere fact of being placed in a position where duties are, or may be compromised, will suffice. The fiduciary is accountable regardless of whether the principal has suffered any loss. Nor does it matter that the principal would not, or could not, obtain the profit or that the conflict was more hypothetical than real. Liability arises regardless of whether the fiduciary's conduct could have been ratified by the principal, or that the principal, if fully informed, would have proceeded with the transaction in any event.

[50] The requirement to account for profits reflects a public policy interest in promoting the expectation that fiduciaries will conduct themselves "at a level higher than that trodden by the crowd." Strict application of the requirement to account is intended to deter others from like conduct.[29]

[51] Where there has been a serious breach of trust an expansive approach is taken. For example, in *CMS Dolphin Ltd v Simonet* the English High Court (Chancery Division) found liability not only for profits directly attributable to the breach of fiduciary duty, but also gains derived through contracts that "might not have been won, or profits made on them, without (for example) the opportunity or cash-flow benefit which flowed from contracts unlawfully obtained."[30]

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[26] Peter Devonshire, *Account of Profits* (Thomson Reuters, New Zealand, 2013) at 22.
[27] Devonshire, above n 26.
[28] Devonshire, above n 26.
[29] Devonshire, above n 26, at 26.
[30] *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (Ch) at [97].

[52] An account of profits strips a fiduciary of unauthorised gains. In a case such as this, where there has been a blatant breach of duty by Ms Adlam to the Bath Trust, the requirement to account for any profit realised follows as a matter of course.

[53] Even so, there must still be a causal-link between the gain and the breach of duty.[31] Accountability is limited to profits that are attributable to the breach. Devonshire comments:[32]

> When there is an egregious abuse of office, courts will sometimes take an expansive view of causally related gains. While the reach of accountability is extensive, it is not without limit. The authorities suggest that the duty to account for profits follows almost inexorably from the breach. However, even expressed in these terms, it is apparent that liability is not unconditional. **By definition, accountability is confined to gains attributable to the breach. Thus it must at least be demonstrated that there is *some* causal link between the gain and breach of duty. A fiduciary is not accountable for profits irrespective of their source.** (emphasis added)

[54] In *Maguire v Makaronis* the High Court of Australia, reviewed equitable remedies including an account for profits and observed that:[33]

> Different considerations arise where the plaintiff seeks one or other of the further remedies referred to by the Lord Chancellor in *Nocton v Lord Ashburton*, namely an account of profits, as a personal rather than proprietary remedy, or, as another personal remedy, compensation for that which the plaintiff has lost "by [the fiduciary] acting", to use the Lord Chancellor's phrase, in breach of duty. Likewise where what is sought is a proprietary remedy in the nature of a constructive trust. In these instances, there directly arises a need to specify criteria for a sufficient connection (or "causation") between breach of duty and the profit derived, the loss sustained, or the asset held.

[55] In *Premium Real Estate Limited v Stevens* Chief Justice Elias touched on this principle:[34]

> The equitable remedy of account renders to the beneficiary or principal any profit made with his property. Normal principles of causation applied in loss-based claims are irrelevant in remedy by way of account (although, as *Warman International Ltd v Dwyer* and *Chirnside v Fay* illustrate, profit may in some cases be only partly to the account of the beneficiary because of the application of other property or effort in obtaining it). The remedy of account does not seek to make good a loss measured against the position as it would have been if the breach not occurred, as compensation does. **Instead, it strips gain attributable to the trust property or properly to the account of the principal.** (emphasis added)

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[31] Peter Devonshire, *Account of Profits for Breach of Fiduciary Duty* (2010) 32 Sydney Law Review 389.
[32] Peter Devonshire, *Account for Profits* (Thomson Reuters, New Zealand, 2013) at 66 to 67.
[33] *Maguire v Makaronis* (1997) 188 CLR 449 at 468.
[34] *Premium Real Estate Limited v Stevens* [2009] NZSC15, [2009] 2 NZLR 384 at 400. Note the Chief Justice was in a minority on the quantum to be disgorged but the above statement of principle remains consistent with the approach of the majority.

[56] Thus, although the equitable remedy of account is not concerned with general law issues of causation of loss, it nevertheless operates on the basis that there must be a causal-link between the fiduciary's breach and the principal's property. We were not referred to (and nor have we found) any cases on all fours with the present case where a fiduciary breaches their duty to one trust and generates a profit that is sourced from the assets of two trusts. Nonetheless, the causal-link principle is clear from the authorities.

[57] Apportionment involves a different exercise from establishing the causal-link between profit and breach. In rare cases the Court will apportion between the defaulting fiduciary and the principal, profits earned in breach, from profits earned separately from any wrongdoing:[35]

> Apportionment is necessary so that neither party will have what justly belongs to the other. The plaintiff is entitled to recover only those profits gained from the defendant's wrongful conduct. It is generally not the case that the whole of the defendant's profit will be handed over. In *A-G v Guardian Newspapers Ltd (No2)* the defendant was required to account for a "due proportion" of the net profits made by the *Sunday Times*. *In Warman International v Dwyer* the High Court of Australia limited the account in a case of misappropriation of goodwill to 2 years, after which the profits of the new business were safely to be considered attributable to the defendant's own efforts in carrying on the business. In *Murad v Al-Saraj* Arden LJ emphasised that the profit from a breach of trust always has to be defined and that a defendant is not to be stripped of profits to which he is entitled on his own account. In *Chirnside v Fay* the Supreme Court held that the defendant was entitled to retain his half-share of the net profit in a property development joint venture, being profit he was entitled to on his own account because of the nature of the venture. According to the principle in *Lupton v White*, if a fiduciary mixes trust assets with his or her assets, the onus is on the fiduciary to distinguish the separate assets. To the extent that he or she fails to do so, the assets belong to the trust. The general rule is to be carried no further than necessary to do justice or to avoid injustice in the particular case. In areas of doubt, particularly where it results from the wrongful conduct of the fiduciary and where precision is not possible, the doubts will be resolved in the innocent party's favour.

[58] The ability to apportion is limited because otherwise it would offend principle by allowing a defaulting fiduciary to participate in the proceeds of his or her wrongdoing. It would also act against the deterrent principle underpinning account of profits. Devonshire identifies as a threshold requirement for apportionment an antecedent agreement between the fiduciary and the principal to share in any profits.[36]

[59] In *Warman International Ltd v Dwyer* the High Court of Australia said: [37]

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[35] Andrew Butler (ed*) Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [31.4.2].
[36] Peter Devonshire; *Account for Profits* (Thomson Reuters, New Zealand, 2013) at Chapter 4.2.3 at p 83.
[37] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 562.

> Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of a given case. However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make an allowance for skill, expertise and other expenses.

[60] And further:[38]

> It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own.

Discussion

[61] Ms Adlam generated the $11,200,000.00 profit from the sale of her shares in GDL. The parties agree that the assets of the two trusts contributed to the GDL profit. However, the value of the respective contribution of each trust to the GDL project and the resulting profit remains unresolved.

[62] Ms Adlam contends that the lower Court had to resolve the Bath Trust's contribution to the GDL profit in order to determine the quantum she owes the Bath Trust. However, the Bath Trust and Farm Trust say that Judge Coxhead's approach was correct, and that the two trusts can resolve between themselves how much of the GDL profit the Bath Trust must share with the Farm Trust.

[63] It must be remembered that the lower Court has not found Ms Adlam to be in breach of any duty to the Farm Trust, as the trust did not bring a proper claim.

[64] Mr Andrew on behalf of the Farm Trust sought to rely on the Third Amended Statement of Claim filed by the Otonga Whānau Trust. That trust is a beneficial owner of both the Bath and Farm trusts and by their final claim had pleaded various causes of action in relation to both the TG2 and GDL projects. Whilst the particulars include reference to various facts concerning the Farm Trust and reliance by those trustees on Ms Adlam, the critical fact remains that relief was only sought with respect to breaches of duty alleged in

[38] *Warman International Ltd v Dwyer*, above n 37.

relation to the Bath Trust. No relief was sought with respect to the Farm Trust and there was no separately pleaded claim against Ms Adlam made on behalf of the Farm Trust.[39]

[65] We therefore agree with Judge Coxhead that the Farm Trust did not bring a claim against Ms Adlam.[40] We are not persuaded by Mr Andrew's arguments that such a claim can be found in any of the pleadings against Ms Adlam.

[66] Exactly why the Farm Trust did not advance a claim in the lower Court is not entirely clear. But we sense that the situation was complicated by the underlying application being brought by beneficiaries of both trusts, by one counsel acting for both trusts, and by Ms Adlam admitting liability to the Bath Trust virtually on the eve of the trial.

[67] Regardless, Judge Coxhead was correct to conclude that the claims in relation to the GDL development only related to breaches of duty to the Bath Trust. There is therefore no basis for this Court to make any determination that Ms Adlam owed or breached any duties (whether equitable or otherwise) to the Farm Trust.

[68] The question then is whether Judge Coxhead was wrong to award the whole of the GDL profit to the Bath Trust. This is Ms Adlam's principal ground of appeal.

[69] Mr Billington QC argued that Ms Adlam was not required to account for profit attributable to use of the Farm Trust assets because she did not owe, and had not breached, a duty to the Farm Trust. Further, based on the available expert evidence of Mr Pat Brown, 15% of the GDL profit could be attributed to the Bath Trust and 85% to the Farm Trust.

[70] Judge Coxhead was clearly not persuaded by Mr Brown's evidence that the Bath Trust contributed only 15% to the GDL profit.[41]

[71] The learned judge reasoned that an account of profits requires apportionment between the errant fiduciary who breached the duty and the principal to whom the duty is

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[39] *Third Amended Statement of Claim* dated 13 March 2012, ROA at 1071 to 1093.
[40] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [144].
[41] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [180] and [193].

owed, and is not to be determined by considering the correct share of the profit between the two trusts.[42]

[72] Judge Coxhead went on to conclude that the entire GDL profit must be disgorged to the Bath Trust. Central to his finding was that Ms Adlam had failed to discharge the onus to distinguish between the profit made in breach of her fiduciary duty and the profit that did not result from that breach, that is, to satisfy the Court that apportionment was appropriate:[43]

> [194] The onus is on Ms Adlam to distinguish between the profit made in breach and the profit that did not result from the breach. This was not a joint venture. It is not clear what, if any, of Ms Adlam's assets were put towards the project, and the onus again is on her to distinguish any separate assets. Although an account for profit should not strip Ms Adlam of profits she is entitled to on her own account, Ms Adlam has failed to clearly articulate what part of the profit is solely attributable to her own efforts rather than arising out of her breach of fiduciary duty...
>
> [195] In my view, Ms Adlam made the entire profit in breach of the fiduciary duty she owed to the Bath Trust. No clear information to the contrary has been provided. She is therefore liable to account to the Bath Trust for the whole $11,200,000.00.
>
> [196] In my view, there is no apportionment to be made between Ms Adlam and the Bath Trust. I would only find apportionment applied in this case if part of the profit did not result from the breach and was in fact profit she was entitled to on her own account.

[73] We conclude that Judge Coxhead misdirected himself in his approach to addressing the GDL profit and in determining that the whole of that profit must be disgorged to the Bath Trust.

[74] The evidence clearly demonstrates that both the Bath Trust's assets and the Farm Trust's assets contributed to the GDL profit. It was necessary to determine the actual contribution of each trust. Judge Coxhead's principal error was to equate the exercise of assessing the two trusts' respective contribution to the GDL profit with the exercise of apportionment.

[75] The exercise required of Judge Coxhead was not one of apportioning the profit wrongfully earned by Ms Adlam from any personal profit she was entitled to retain. Rather, Judge Coxhead was required to undertake the preliminary exercise of determining

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[42] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [181].
[43] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [194] – [196].

the causal-link between the profit and the breach, that is: how much of the $11,200,000.00 was the Bath Trust's property? Disgorgement is based on the gain attributable to the *trust property* misused by the defaulting fiduciary. Identifying the trust property is therefore key to quantifying the appropriate remedy for the Bath Trust.

[76] Neither could Judge Coxhead avoid undertaking that exercise by relying on the failure of the errant fiduciary to satisfy the onus of proof to justify apportionment. This was not apportionment in its true sense. In a situation where a principal (the Bath Trust) and a third party (the Farm Trust) have joint or mixed assets that have contributed to a profit by an errant fiduciary (Ms Adlam), the Court must identify what proportion of the profit belonged to the principal. As Chief Justice Elias noted in the *Premium Real Estate* case, the equitable remedy of account renders to the principal any profit made with *his or her property*.[44]

[77] It is simply unsafe to assume that the whole of the GDL profit belongs to the Bath Trust. The question of what then happens to the share of the GDL profit that does not belong to the Bath Trust is not strictly speaking a matter that should concern the lower Court – at least in the context of how the current proceedings were advanced. The Farm Trust did not bring a claim against Ms Adlam.

[78] Of course, it would have been preferable if the lower Court had been presented with all of the issues including claims on behalf of the Farm Trust. Nevertheless the parties are in agreement that if the issue of the contributions to the GDL profit are to go back to the lower Court, then the Farm Trust should have the opportunity to bring its claim against Ms Adlam.

[79] As for the question of whether there was sufficient evidence before Judge Coxhead to determine how much of the GDL profit belonged to the Bath Trust, we do not consider there is any basis to disturb Judge Coxhead's rejection of Mr Brown's evidence. That outcome was entirely open to the learned Judge. Certainly Mr Billington QC did not seriously challenge Judge Coxhead's ruling in that regard. But that leaves a gap in the evidence that needs to be filled.

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[44] *Premium Real Estate Limited v Stevens* [2009] NZSC15, [2009] 2 NZLR 384 at 400.

[80] A further factual enquiry by the lower Court is required to establish what portion of the GDL profit is attributable to the use of Bath Trust assets. It is that portion only that must be disgorged as the remedy for breach of duty to the Bath Trust. That is the outcome Mr Billington QC argued for, and in doing so he accepted that the Farm Trust should have the opportunity to establish its claim to the balance of the GDL profit.

Conflict of interest

[81] Before turning to the outcome of this aspect of the appeals we address whether the current trustees of the Bath Trust and Farm Trust can be left to determine between themselves the division of the GDL profit or the rental income from the original and replacement leases.

[82] Clearly the lower Court is required to rule on the division of the GDL profit. That exercise is fundamental to quantifying Ms Adlam's liability to the Bath Trust. Further, Ms Adlam is entitled to participate in those proceedings. The extent to which she or the Farm Trust is entitled to the balance of the GDL profit remains unresolved

[83] However, there are two additional reasons why the current trustees of the two trusts cannot be left to decide how the GDL profit or the rental income from the original and replacement leases should be shared between the two trusts. First, the commonality of trusteeship gives rise to a conflict of interest that would prevent the current trustees from making a legally binding decision. Secondly, the fact that some trustees are beneficial owners in one or both of the blocks also generates a conflict of interest.

[84] At the time of the lower Court hearing Ms Adlam was a (suspended) trustee of the Bath Trust. The remaining trustees were John Tionga Savage, Lawrence Te Aokahari Niao, Patrick Mayne Savage, Samuel Kelvin Barnes and Tamati Drawbridge. Three of these trustees were also trustees of the Farm Trust, being John Tionga Savage, Lawrence Te Aokahari Niao and Samuel Kelvin Barnes. This means that only two trustees (Patrick Mayne Savage and Tamati Drawbridge) would not be conflicted by reason of dual trusteeship. The remaining trustees of the Farm Trust are Edward Aporina Russel Lanham, Huia Ann Pacey and Regina Victoria Rintoul.

[85] In addition, Patrick Mayne Savage is a trustee of a whānau trust which is an owner in the Farm Block, Huia Ann Pacey is an owner in the Bath Block, and Regina Victoria Rintoul is a trustee of a whānau trust which is also an owner in the Bath Block.

[86] On the crucial issue of how income and profits for the geothermal developments should be shared between the two trusts, these trustees cannot reconcile the conflict between their duties to the various trusts and beneficiaries or their personal interests as beneficial owners in either the Bath or Farm blocks.

[87] The legal principles in relation to trustee conflicts of interest in the context of Māori land were set out by the Court of Appeal in *Naera v Fenwick.*[45] The Court identified errors in the approach of the Māori Land Court and Māori Appellate Court in the consideration of the principles governing the circumstances in which an actionable breach of trust may arise in the context of an ahu whenua trust.

[88] The Court of Appeal stressed the importance of keeping squarely in view the prophylactic nature of the no conflict rule. On that basis, it is not open to the Court to consider the overall circumstances of the transaction or the fact that the overall outcome was not affected because the votes of the conflicted trustees did not affect the final outcome given the unanimous support of the other non-conflicted trustees. Once a conflicted trustee (or trustees) participates in decision making, the transaction is voidable. While acknowledging that this may give rise to administrative inconvenience because many trustees of Māori land trusts are likely to be conflicted, the Court of Appeal was satisfied that the Act provides appropriate tools for trustees to manage such conflicts.[46]

[89] In the present context a majority of the trustees of the Bath Trust and half the trustees of the Farm Trust are conflicted. That means that prima facie it would be inappropriate for those trustees to be involved in decisions concerning the allocation of the GDL profit or the rental income between the two trusts. This is a matter that the two trusts will need to reflect on with their advisers and which the lower Court may be required to address. We do not make any orders or directions in this regard, and merely draw the point to the attention of the parties and the lower Court.

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[45] *Naera v Fenwick* [2013] NZCA 353.
[46] *Naera v Fenwick*, above n 45, at [83]-[103].

Outcome

[90] We conclude that the issue of the quantification of Ms Adlam's liability to the Bath Trust in relation to the GDL profit must be remitted to the lower Court to determine. In doing so the Farm Trust is to have the opportunity to properly plead and particularise any claim it may have to a share in the GDL profit.

The TG2 issues

[91] We now turn to two issues concerning the TG2 power station. The first is the cross-appeal by some of the trustees of the Bath Trust against Judge Coxhead's decision concerning interest. We then address the point raised on behalf of Ms Adlam concerning Judge Coxhead's findings of conversion by Ms Adlam.

The interest award

[92] The TG2 power station is located on the Bath block. In 1993 the trustees of the Bath Trust entered into three agreements. The first was with the Crown regarding the supply of discharge waste geothermal water. The other two agreements were with the Bay of Plenty Electricity Power Board, one of which contained royalty clauses which provided for payments in relation to electricity generated by the TG2 power station.

[93] Under the royalty agreement Ms Adlam was paid $3,584,323.00 between 1994 and 31 March 2009.[47] She kept that money for herself. This was in clear breach of her duty as a trustee of the Bath Trust. The position taken at the lower Court hearing was that the amount to be disgorged by Ms Adlam to the Bath Trust was that sum less tax and GST payments, the net amount agreed upon was $2,440,149.00. The parties also agreed that the rate of interest should be 5% simpliciter.

[94] One of the issues Judge Coxhead had to consider was the date interest payments should commence. He decided that interest should be paid from 12 July 2007 to the date of judgment. He chose that date as it was the first date any formal step in the proceedings

[47] *Brief of Evidence of Judith Stanway* dated 12 September 2012, schedule, ROA at 1006.

was taken – when an application for injunction was filed.[48] He ordered that the amount of interest payable by Ms Adlam to the Bath Trust was $823,550.29.[49]

[95] In reaching his decision Judge Coxhead found that by signing documents in 1993, the trustees of the Bath Trust knew or ought to have known the nature of the royalty agreement and payments made, and they (other than Ms Adlam) had slept on their rights.

[96] The trustees of the Bath Trust appealed Judge Coxhead's interest award. They say that interest should have run from the date the cause of action arose – that being the dates upon which Ms Adlam received the royalties. The trustees of the Otonga Whānau Trust, being the applicants in the lower Court, have not appealed the interest award and abide the decision of the Court.

The submissions

[97] Mr Hurd, on behalf of the Bath Trust, accepted that Judge Coxhead's decision to award interest was a discretionary one and that if the trust is to be successful on appeal it needs to show one or more of the following:

a) That relevant factors were not taken into account;

b) That irrelevant factors were taken into account;

c) That there was an error of law;

d) That the decision was unreasonable (in the sense of being irrational); or

e) That the decision was plainly wrong.

[98] Mr Hurd focused on Judge Coxhead's findings that the trustees had signed documentation in respect of TG2. He says it was not the documents or their nature which caused loss to the trust. The point overlooked by Judge Coxhead was that the loss was

[48] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [110].
[49] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [228] and [229].

caused by the conduct of Ms Adlam in misappropriating for her own benefit money payable to the trust. Thus, the signing of the documentation by the trustees was an irrelevant consideration and the most that could be said was that the trustees could have been more active in following up what was happening to the money received by Ms Adlam.

[99] He also submitted that Judge Coxhead failed to take into account a number of relevant considerations. First, that the loss suffered was to the beneficial owners who had not caused or contributed to any delays. Second, that the true nature of what Ms Adlam had done (misappropriated trust money and used it for her own benefit) was not properly taken into account. Third, that any delay was caused substantially by Ms Adlam through her own wrongdoing, by her obstruction and by her resistance to requests for information.

[100] Mr Billington QC, for Ms Adlam, argued that Judge Coxhead's consideration of the trustees signing of documentation in 1993 was appropriate. Those trustees had capacity to sign on behalf of the Bath Trust and were acting inside the scope of their powers. As a matter of law, the current trustees were bound by the actions of the trustees at the time.

[101] He submitted that, given the history and nature of this trust, it was reasonable for Ms Adlam to have relied upon the authorisation of her co-trustees at the time, to sign the TG2 documents and to assume that the beneficiary groups represented by the respective trustees had been advised of the relevant arrangements. If those beneficiary groups had not been advised, Ms Adlam should not be held accountable for that.

[102] On the question of Ms Adlam's conduct, Mr Billington QC submitted that she had not charged a salary in respect of her efforts in generating the asset on the land and there were legitimate expenses which she could have claimed but did not. There was clear evidence before the Court that, but for her efforts, no asset would have been generated. If an allowance was not granted in relation to the TG2 project and an award of interest was backdated to 1994, that would be penal in effect. In those circumstances Ms Adlam would effectively be called upon to make good a loss without any recognition of her contribution towards the generation of the asset.

Does Section 24B of Te Ture Whenua Māori Act 1993 apply retrospectively?

[103] In reaching his decision on interest Judge Coxhead relied upon s 24B of Te Ture Whenua Maori Act 1993 (the Act), which reads:

> **24B Power to award interest on debt or damages**
>
> The court, in its proceedings, has the same powers to award interest on any debt or damages as the District Court has under section 62B of the District Courts Act 1947 in its own proceedings.

[104] In this case the first cause of action in relation to TG2 arose in 1994, the first step in the proceedings was taken in July 2007, and the initial statement of claim was filed in 2009.

[105] Section 24B was inserted into the Act by the Te Ture Whenua Maori Amendment Act 2011 (the Amendment Act). The date of assent of the Amendment Act was 15 September 2011.[50] Neither s 24B of the Act nor the Amendment Act 2011 is expressly of retrospective effect. Section 7 of the Interpretation Act 1999 provides that an enactment is not to have retrospective effect.

[106] A preliminary question of jurisdiction therefore arises. Was s 24B of the Act intended to have retrospective effect, and, does it apply to a proceeding pending or in progress as at 15 September 2011? This issue was not raised directly in the lower Court or with us. It appears to have been assumed by all concerned that s 24B of the Act is of retrospective effect. Nevertheless, it is an important issue that warrants our consideration.

[107] Sections 4, 6 and 7 of the Interpretation Act 1999 are relevant in considering this point and read as follows:

> **4 Application**
>
> (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless—
>
> (a) the enactment provides otherwise; or
>
> (b) the context of the enactment requires a different interpretation.
>
> (2) The provisions of this Act also apply to the interpretation of this Act.

[50] Te Ture Whenua Maori Amendment Act 2011.

…

6 Enactments apply to circumstances as they arise

An enactment applies to circumstances as they arise.

7 Enactments do not have retrospective effect

An enactment does not have retrospective effect.

[108] At common law there has long been a presumption against retrospectivity. That long-standing principle is now expressed in s 7 of the Interpretation Act 1999.[51]

[109] The High Court decision of *Art Deco Society (Auckland) Inc v Auckland City Council* contains a useful discussion of the Interpretation Act 1999 and the presumption against retrospectivity. [52] From that decision we glean a number of principles which we summarise as follows:

a) Sections 6 and 7 of the Interpretation Act 1999 do not create absolute rules, they do no more than continue the traditional, common law presumption that statutes are always speaking, and against retrospectivity;[53]

b) Section 4 makes it clear that if the words of an enactment provide otherwise, or the context of the enactment requires a different interpretation, an enactment may be retrospective. Thus, the presumption against retrospectivity must be considered against the words in the context of the Act;[54]

c) The presumption against retrospective operation of legislation is a well established common law principle and s 7 is a legislative statement of that basic principle. It is always open however to Parliament to enact a statute that is retrospective but that will usually require clear words to have that effect;[55]

[51] *Official Assignee v Petricevic* [2011] 1 NZLR 467.
[52] *Art Deco Society (Auckland) Inc v Auckland City Council* [2006] NZRMA 49.
[53] At [45].
[54] At [47].
[55] At [48].

d) The task of a Court in interpreting legislation which is said to be retrospective has not changed as a result of the enactment of s 7 of the Interpretation Act. If it is clear that Parliament's intention is that legislation is to have retrospective effect, then the Courts will find that to be the effect of the Act, even if there are no express words stating that the provision has retrospective effect;[56]

e) Ultimately the issue is one of construction, in which the plain words in the text of the section, the purpose and scheme of the legislation, and the overall fairness of giving a provision retrospective effect are relevant;[57]

f) A distinction can be drawn between a legislative change that affects existing rights and accrued interests, thus exposing someone to criminal or civil liability, and those legislative changes which have a prospective effect. Legislation which has a prospective effect changes the position for the future and does not affect vested interests in a negative way.[58]

[110] Importantly, when s 62B was inserted into the District Courts Act 1947 an express provision accompanied it stating that it was to apply to actions pending or in progress. Section 4(3) of the District Courts Amendment Act (No. 2) 1982 states:[59]

> (3) Section 62B of the principal Act (as asserted by subsection (1) of this section) shall apply to actions pending or in progress at the commencement of this Act as well as to actions commenced after the commencement of this Act.

[111] Thus, it is clear that s 62B of the District Courts Act 1947 was to apply retrospectively to actions pending or in progress. A similar provision was not included in the Te Ture Whenua Māori Amendment Act 2011. There are no decisions of the Māori Land Court or this Court on the effect and nature of s 24B of the Act. The commentary in *Hansard* is silent on this issue. Thus it falls to us to consider the point.

[112] We have looked closely at the Amendment Act. It contains a number of relatively minor amendments to the principal Act. In relation to s 24B, it is clear that its purpose was

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[56] At [50].
[57] At [51].
[58] At [57] and [59].
[59] District Courts Act (No.2) 1982.

to give the Māori Land Court the "same powers to award interest on any debt or damages as the District Court". The District Court's powers extended to actions pending or in progress. In our view s 24B of the Act equally applies to actions pending or in progress as at 15 September 2011. While it may have been preferable for the Amendment Act to have expressly said that, the authorities make it clear that retrospectivity is possible in the absence of express words. Furthermore, there is no unfairness in the lower Court having the ability to award interest in relation to claims pending or in progress as the award of interest involves an exercise of discretion, and the fairness or not of awarding interest prior to 15 September 2011 is a matter that can be addressed by the Court.

Section 237 of Te Ture Whenua Māori Act 1993 – trust jurisdiction

[113] Even if we are wrong concerning s 24B, s 237 of the Act has the effect of providing the lower Court with the power to award interest on a claim in equity.

[114] Section 237 of the Act bestows upon the Māori Land and Māori Appellate Courts the same powers and authorities as the High Court regarding trusts. It reads:

> **237 Jurisdiction of court generally**
>
> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Maori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.
>
> (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court. [60]

[115] Recently a different division of this Court considered the extent of the jurisdiction bestowed by s 237.[61] At issue however was whether or not s 237 permitted the Māori Land Court to grant equitable remedies for breach of trust or breach of fiduciary duties. The Māori Appellate Court, after referring to various superior court decisions, reaffirmed the extensive supervisory jurisdiction of the Māori Land Court with respect to trusts. Significantly, the Court also went on to hold that the Māori Land and Māori Appellate

[60] Court is defined in s 4 of the Act as "Court means, as the case may require, the Maori Land Court or the Maori Appellate Court or both."
[61] *Mikaere-Toto v Te Reti B and C Residue Trust* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249) at [26] to [30] inclusive.

Courts have jurisdiction "under s 237 of the Act to grant equitable remedies, including accounting for profit or equitable compensation".[62]

[116] In relation to the TG2 project, claims were brought against Ms Adlam that she acted in breach of trust. A claim of breach of trust is a proceeding in equity. Courts of equity have jurisdiction to award interest which is outside and additional to any statutory power.[63] Furthermore, Courts of equity are not limited to awards of interest simpliciter, they have jurisdiction to award compound interest.[64]

[117] *Day v Mead* was a case in which a client sued his solicitor under two heads, breach of fiduciary duty and negligence.[65] On appeal the question of interest was considered by Somers J, in particular by reference to s 87 of the Judicature Act 1908. That section provides for the payment of interest in proceedings before the superior courts. Somers J accepted the implicit assumption that s 87(1) of the Judicature Act 1908 applies in a case in which the proceedings were based in equity.[66]

[118] In summary:

a) Section 87(1) of the Judicature Act 1908 permits an award of interest on equitable compensation but only interest simpliciter;

b) Courts of equity have jurisdiction to award interest in addition to the statutory power contained in s 87(1) of the Judicature Act 1908;

c) Courts of equity have jurisdiction to make compound awards of interest.

[119] Accordingly, even if our interpretation of s 24B of the Act is wrong, we are satisfied that the Māori Land and Māori Appellate courts have jurisdiction to grant an award of interest pursuant to either s 87(1) of the Judicature Act 1908 or by invoking the equity jurisdiction available under s 237 of the Act.

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[62] *Mikaere-Toto v Te Reti B and C Residue Trust*, above n 61, at [35].
[63] *Rama v Millar* [1996] 1 NZLR 257 (PC).
[64] *General Communications Ltd v Development Finance Corporation of New Zealand* [1990] 2 NZLR 406 at 436 and *Equiticorp Industries Group Ltd (In Statutory Management) v The Crown (No 3) (Judgment No 51)* [1996] 3 NZLR 690 at 699.
[65] *Day v Mead* [1987] 2 NZLR 443 (CA).
[66] *Day v Mead*, above n 65 at 462, line 47 and 48.

Legal principles regarding the awarding of interest

[120] At paragraphs [95] – [98] of his decision, Judge Coxhead identified the correct legal principles applicable to the awarding of interest. The Court's power to award interest is discretionary. In the absence of any express limiting provision, the discretion is to be exercised as the justice of the case requires.[67]

[121] The purpose of the power to award interest is to properly compensate a successful plaintiff for its loss. The Court's basic approach is that a defendant, who has had the use of money that should have been available to the plaintiff should compensate the plaintiff.[68]

[122] On the question of the commencement date for interest, the relevant principles are:

a) There is no fixed rule;[69]

b) Generally, justice may require interest to run from the date the cause of action arose down to the day of judgment;[70]

c) It is not uncommon in tort cases to delay the running of interest until the date of issue of the proceeding;[71]

d) In cases where a plaintiff has "slept on its rights" without justification, it has been restricted to interest from the commencement of the proceeding.[72]

Discussion

[123] In applying the principles outlined above, we start with the proposition that justice may require interest to run from the date a cause of action arose. We think that is the

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[67] *Day v Mead*, above n 65, at 463 and *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 530.
[68] *Day v Mead*, above n 65, at 463 to 464.
[69] *Wilson & Horton Ltd v Attorney-General*, above n 65, at 530.
[70] *Day v Mead*, above n 65, at 463.
[71] *Wilson & Horton Ltd v Attorney-General*, above n 65, at 530.
[72] *Equiticorp Industries Group Ltd (In Statutory Management) v The Crown (No 3) (Judgment No 51)* [1996] 3 NZLR 690.

correct starting point in a case which involves a breach of trust. As Somers J said after considering the relevant principles:[73]

> Upon these considerations I would conclude that generally justice may require interest to run from the date the cause of action arose down to judgment, for it is from that date that the plaintiff's entitlement to the debt or damages arises.

[124] We accept that in Judge Coxhead's exercise of discretion it was open to him to depart from that starting point. Instead of awarding interest from the date the cause of action arose he decided on 12 July 2007, being the date on which the injunction application was filed with the lower Court. He decided to do so because the trustees of the Bath Trust had entered into and signed agreements (including a royalty agreement) in 1993 and had "slept on their rights". He found that in signing those documents the trustees understood the terms and conditions of the agreements, or if they did not, were acting contrary to their duties as trustees.

[125] However, a crucial distinction must be drawn between the inaction on the part of the trustees of the Bath Trust and the applicants in the lower Court (the trustees of the Otonga Whānau Trust). It is the trustees of the whānau trust, and not the trustees of the Bath Trust, who filed the proceedings. At paragraphs [105] – [107] Judge Coxhead discussed the role the applicants played and found that they had not sat on their hands. That is a conclusion with which we agree.

[126] Nevertheless, in reaching his decision Judge Coxhead failed to take into account a relevant consideration; that it is the applicants and the other beneficial owners of the Bath block who have suffered loss. The beneficial owners of the Bath block did not cause or contribute to any of the delays. The beneficial owners should not be penalised by any delay on the part of the trustees.

[127] Furthermore, Judge Coxhead failed to take into account that any delay in bringing proceedings was caused in large part by the actions of Ms Adlam. She did not supply information to the applicants when requested. She was obstructive when questions were asked of her concerning the TG2 project. She would obfuscate when queries were put to her. She actively dissuaded the taking of legal advice. Further, between 1999 and 2002 she

[73] *Day v Mead*, above n 65, at 463, line 30.

acted as the sole trustee: she would hardly have taken steps against herself during that period.

[128] We accept that Judge Coxhead did not give sufficient weight to the nature of Ms Adlam's conduct, which was a further relevant and significant consideration. The evidence clearly points to Ms Adlam controlling both the Bath Trust and the TG2 project. Her breach of trust was blatant and ongoing, and was only arrested when the lower Court granted an injunction against her in 2008. Ms Adlam retained for her own use money generated from power royalties that clearly belonged to the beneficial owners of the Bath block. She had the use of that substantial income stream since 1994. Only belatedly, at the commencement of the lower Court hearing, did Ms Adlam accept any liability on her part.

[129] Accordingly, in our view Judge Coxhead's interest award took into account irrelevant considerations and failed to take into account relevant considerations. Thus it must be set aside. In the circumstances it is appropriate that we address the correct approach to interest on the TG2 claim.

[130] In our assessment, the interests of justice demand that Ms Adlam pay interest on the money she wrongfully received from the date she received it, that is, from the date each cause of action arose.

[131] This was a case of a blatant breach of trust by a trustee with significant influence and control over the trust. The fact that Ms Adlam ultimately admitted liability does not reduce the severity of that breach. She kept for herself money belonging to the trust and its beneficial owners for a period of over 14 years from 1994 to 2008. The trust has not only not received that money, but has not had the *use* of that money for the entire period. It would simply be wrong for Ms Adlam to retain the benefit of the use of that money by not paying interest on it. Furthermore, it would be contradictory to allow Ms Adlam the benefit of the use of the money in recognition of her contribution to the TG2 development (as argued by Mr Billington QC) when Judge Coxhead quite properly ruled out any developer's fee or allowance, and Ms Adlam accepted that ruling.

Outcome

[132] The interests of justice require that Ms Adlam should disgorge all of the money she earned since 1994 from the TG2 power station and pay interest on that money from the date her breaches of trustee duties arose. We will order her to pay interest at the rate of 5% on those sums of money received by her since 31 March 1994.

Conversion finding

[133] In Judge Coxhead's discussion of whether a developer's fee or allowance should be granted to Ms Adlam he made two findings of conversion. Ms Adlam appeals those two findings.

[134] At paragraph [68] of his decision Judge Coxhead referred to the fact that the TG2 funds always belonged to the Bath Trust. He went on to say that:[74]

> … Ms Adlam received these as an act of conversion.

[135] At paragraph [81] Judge Coxhead said:[75]

> I agree that from 1993 until 2008, Ms Adlam converted to her own use the proceeds due to the Bath Trust, and in doing so deprived beneficiaries of the trust, significant entitlements.

[136] Ms Adlam takes issue with Judge Coxhead's findings of conversion. Mr Billington QC submitted that there is no tort of conversion of money, conversion does not lie for money taken or received as currency, and thus it was incorrect at law for Judge Coxhead to have made a finding of conversion. He also submitted that it was wrong to make a finding of conversion as it suggests some criminal wrongdoing on the part of Ms Adlam.

[137] We note that in the criminal context, persons can be found guilty of a criminal breach of trust when acting as a trustee of any trust:[76]

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[74] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [68].
[75] *Trustees of the Otonga Whānau Trust v The Trustee of the Matatā Parish 39A2A Ahu Whenua Trust*, above n 5, at [81].
[76] s 229, Crimes Act 1961.

> **229 Criminal breach of trust**
>
> (1) Every one is guilty of a criminal breach of trust who, as a trustee of any trust, dishonestly and contrary to the terms of that trust, converts anything to any use not authorised by the trust.
>
> (2) Every trustee who commits a criminal breach of trust is liable to imprisonment for a term not exceeding 7 years.

[138] In the civil context there is the tort of conversion however, money in the form of currency cannot be converted. The rationale being that money, as currency, cannot be recovered in specie.[77] Although money is generally intangible, an exception to this principle does exist when a plaintiff successfully alleges that a defendant has converted specific identifiable sums. In that context, the tort of conversion may be available to a plaintiff.

[139] Nevertheless, we note that conversion was never formally pleaded nor advanced by the applicants. As a matter of law, we agree with Mr Billington QC's submission that Ms Adlam did not tortiously convert monies to her own use. Judge Coxhead's findings of conversion at paragraphs [68] and [81] were therefore incorrect.

[140] We do not propose to say or do anything more on this point. While Judge Coxhead incorrectly labelled the actions of Ms Adlam as "acts of conversion", the underlying sentiment contained in those paragraphs is correct, which is that Ms Adlam retained for her own use, and failed to account for, monies rightfully belonging to the Bath Trust.

Orders

GDL profit

[141] Pursuant to s 56(1)(b) of the Act we uphold in part Ms Adlam's appeal and revoke the order made by Judge Coxhead at paragraph [235] of his judgment ordering Ms Adlam to account to the Bath Trust for the entire $11,200,000.00 profit.

[142] Pursuant to s 56(1)(e) of the Act we remit the proceeding to the lower Court to determine what portion of the GDL profit is the property of the Bath Trust and to award

[77] *Orton v Butler* (1822) 5 B & ALD 652.

that amount against Ms Adlam in substitution of the amount in paragraph [235] of Judge Coxhead's judgment.

[143] We accept that the Farm Trust should have the opportunity to properly plead and particularise any claim against Ms Adlam in relation to a share in the GDL profit. Should the lower Court make findings in favour of the Farm Trust, the lower Court will also need to determine whether Ms Adlam is entitled to a developer's fee or allowance. We otherwise leave it to the lower Court to set its own procedure in relation to the GDL profit issue.

TG2 interest

[144] Pursuant to s 56(1)(b) of the Act we revoke Judge Coxhead's orders:

a) At paragraph [228] that interest should be calculated from 12 July 2007; and

b) At paragraph [229] that interest in the sum of $823,550.29 be paid to the Bath Trust.

[145] Pursuant to s 56(1)(f) of the Act we order that interest be payable at the rate of 5% from the end of each financial year in which Ms Adlam received royalties to the date of this judgment. For example, in relation to the net sum received by Ms Adlam for the year ended 31 March 1994, interest is payable from that date to the date of this judgment.

[146] In order to arrive at the final interest figure an accounting exercise needs to be undertaken. Annual figures for the royalties paid to Ms Adlam for the period 31 March 1994 to 31 March 2009 are available.[78] From the annual figure available for each year, a deduction needs to be made for GST and tax. Once the net figure is arrived at, interest at the rate of 5% can be calculated to the date of this judgment.

[147] For example, for the year ending 31 March 1994 the Stanway spreadsheet indicates that the gross amount received by Ms Adlam was $68,207. From that sum an allowance for GST and tax should be deducted. Once the net figure is arrived at, interest can be

[78] *Brief of Evidence of Judith Stanway* dated 12 September 2012, schedule, ROA at 1006.

calculated on that sum at the rate of 5% from 31 March 1994 through to the date of this judgment.

[148] In each subsequent year a similar exercise needs to be undertaken through to and including the financial year ending 31 March 2009. Once the interest figure is known for each of the years between 31 March 1994 and 31 March 2009 they must be tallied to arrive at the total amount of interest to be awarded to the Bath Trust.

[149] The conclusion of this exercise is best left to the lower Court. To that end, pursuant to s 56(1)(e) of the Act we remit to the lower Court the quantification of the total interest. We leave it to the lower Court to set its own procedure as to the evidence it will hear. It may be possible for the parties to agree for one independent chartered accountant to provide the necessary calculation. If there is no agreement then the lower Court will need to set a procedure to finally hear and determine that issue.

Costs

[150] Pursuant to s 79 of the Act this Court has a broad discretion concerning costs. The authorities that have considered s 79 acknowledge the principle that costs normally follow the event and that a successful party should be awarded a reasonable contribution to costs that were actually and reasonably incurred.[79]

[151] In this case we are of the view that costs should lie where they fall. We say that for the following reasons.

[152] First, although Ms Adlam has had a measure of success concerning the GDL appeal, that success is offset somewhat by the fact that the Bath Trust has successfully persuaded us to overturn Judge Coxhead's interest award in relation to the TG2 project.

[153] Second, the proceedings were factually and legally complex. We note that before the lower Court the issues were constantly being redefined. Before us the issues on appeal

[79] *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216), *De Loree v Mokomoko – Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249), *Niao v Niao* (2004) 10 Waiariki Appellate MB 263 (10 AP 263), *Manuirirangi v Parininihi ki Waitotara Incorporation* (2002) 15 Wanganui Appellate MB 64 (15 WGAP 64) and *Riddiford v Te Whaiti* (2001) 13 Taiktimu Appellate MB 184 (13 ACTK 184).

were not completely clear until the second day of the hearing. That is not a criticism of those involved but merely reflects the complexity of the matter. The issues required full legal argument.

[154] Third, the GDL issue is not yet resolved. There will likely be three competing parties for that profit in the lower Court: the Bath Trust, the Farm Trust and Ms Adlam. The Farm Trust claims have yet to be formally pleaded let alone heard and determined. Whilst we acknowledge that the TG2 matter has been determined as to the principal amount to be repaid by Ms Adlam, the conclusion of the interest calculation also remains outstanding. Thus the proceedings are far from over.

[155] In our view the question of costs is best left to the lower Court to address once it has heard and determined all outstanding issues. As far as this Court is concerned, we make no order for costs.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

C L Fox (Presiding) **Deputy Chief Judge**	D J Ambler **Judge**	S R Clark **Judge**	S F Reeves **Judge**

M J Doogan
Judge