IN THE COURT OF APPEAL OF NEW ZEALAND

CA223/2015
[2016] NZCA 454

BETWEEN	RAE BEVERLY ADLAM Appellant
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 First Respondents
AND	HELEN MARIA SAVAGE AND RAELYN ARIHIA PEITA AS TRUSTEES OF THE OTONGA WHĀNAU TRUST Second Respondents
AND	HUIA ANN PACEY, JOHN TIONGA SAVAGE, LAWRENCE TE AOKAHARI NIAO, REGINA VICTORIA RINTOUL AND SAMUEL KELVIN BARNES AS TRUSTEES OF THE MATATĀ PARISH 39A 2B 2B 2A AHU WHENUA TRUST Third Respondents

Hearing:	11 May 2016
Court:	Ellen France P, Randerson and French JJ
Counsel:	J R Billington QC and L M Van for Appellant D G Hurd and D S Dowthwaite for First, Fourth and Fifth-named First Respondents P J Andrew for First, Second and Fifth-named Third Respondents
Judgment:	22 September 2016 at 2.30 pm

JUDGMENT OF THE COURT

A **The cross-appeals are allowed.**

B **The orders of the Māori Appellate Court revoking the decision of the Māori Land Court ordering Ms Adlam to account to the Matatā Parish 39A 2A Ahu Whenua (Bath) Trust for the $11.2 million Geothermal Developments Ltd (GDL) profit and remitting the proceeding to the Māori Land Court to determine what portion of the GDL profit is the property of the Bath Trust are set aside (the first cross-appeal).**

C **The order of the Māori Land Court that Ms Adlam is to account to the Bath Trust in the amount of $11.2 million is reinstated.**

D **By consent, the order of the Māori Appellate Court remitting the quantification of interest on the TG2 royalties to the Māori Land Court is set aside (the second cross-appeal).**

E **By consent, interest on the TG2 royalties as at the date of the Māori Appellate Court judgment is fixed at $1,547,519.41.**

F **Ms Adlam must pay costs to the respondents (one set of costs for the first, fourth and fifth-named first respondents and one set for the first, second and fifth-named third respondents) for a standard appeal on a band A basis together with usual disbursements as follows. First, Ms Adlam must pay costs on this basis on the appeal up to the point of abandonment and (to the first, fourth and fifth-named first respondents only) on the second cross-appeal up to the point of agreement; and, secondly, Ms Adlam must pay costs on this basis on the first cross-appeal. We certify for second counsel.**

G **Costs in the Māori Appellate Court are to be revisited in light of this judgment.**

REASONS OF THE COURT

(Given by Ellen France P)

Table of contents

Introduction

[1] This appeal arises out of the development of two power stations on Māori freehold land at Kawerau in the Bay of Plenty.

[2] The first of the power stations, known as TG2, was developed in the early 1990s. It is located on a block of land known as the Bath block. The second power station was commissioned in September 2008 by Geothermal Developments Ltd (GDL) a company established by the appellant, Rae Beverly Adlam. The GDL power station is also located on the Bath block but it draws its geothermal resource from a well known as KA24. The well is located on an adjacent block of land known as the Farm block.

[3] Both the Bath block and the Farm block are administered by separate Ahu Whenua Trusts, known as the Bath Trust and the Farm Trust respectively, although there is commonality in the beneficial ownership and in the trustees between these two trusts. The first, fourth and fifth-named first respondents (the first respondents) comprise three of the four surviving trustees of the Bath Trust. The third respondents are trustees of the Farm Trust.

[4] Ms Adlam was a trustee of the Bath Trust until her suspension from that office by the Māori Land Court in 2008 and then her removal in 2014. Ms Adlam was not a trustee of the Farm Trust. She received just over $2.44 million in royalties from the TG2 power station. In 2010 Ms Adlam made a profit of $11.2 million from the GDL power station when she sold her shares in GDL.

[5] Proceedings were brought in the Māori Land Court to recover the money Ms Adlam received from the GDL power station.[1] When the matter came to be heard in the Māori Land Court in October 2012, Ms Adlam admitted she had acted in breach of her duties as trustee of the Bath Trust.

[6] Judge Coxhead in the Māori Land Court concluded that no claim had been properly pleaded by the Farm Trust against Ms Adlam for breach of fiduciary duty.[2] The hearing in the Māori Land Court accordingly focused on the quantum Ms Adlam owed to the Bath Trust in relation to the two power stations. The Māori Land Court ordered Ms Adlam to pay the Bath Trust the sum of $2.44 million in relation to the TG2 power station and to account to the Bath Trust for the sum of $11.2 million in relation to the GDL power station. The Judge also dealt with the quantification of interest on the sum relating to the TG2 power station.

[7] Ms Adlam appealed. The Māori Appellate Court set aside the order requiring Ms Adlam to account for the $11.2 million and remitted the matter back to the Māori Land Court to determine what portion of the profits should be disgorged to the Bath Trust.[3] The Māori Appellate Court also remitted the question of the quantification of interest back to the Māori Land Court.

[8] Ms Adlam appealed to this Court against other orders made by the Māori Appellate Court and the first respondents cross-appealed. Prior to the hearing, Ms Adlam abandoned her appeal. At the hearing, it was agreed the first respondents' second cross-appeal, on the quantification of interest relating to the TG2 power station, could be allowed by consent. Accordingly, the issue for determination on

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1 The proceedings were brought by the second respondents who were the trustees of the Otonga Whānau Trust, which is a beneficial owner in the Bath and Farm blocks.

2 *Savage v Adlam – Lot 39A 2A Parish of Matatā and Lot 39A 2B 2A Parish of Matatā* (2014) 95 Waiariki MB 176 (95 WAR 176) [the Māori Land Court judgment].

3 *Adlam v Savage* [2015] NZAR 746 (MAC) [the Māori Appellate Court judgment].

this appeal is whether Ms Adlam should account to the Bath Trust for the $11.2 million in profits or whether the Māori Appellate Court was right to remit the question back to the Māori Land Court to determine what portion should be disgorged.

Factual background

[9] We can deal briefly with the TG2 power station given there is no dispute about that. As the submissions for the first respondents record, the TG2 power station utilises geothermal wastewater supplied from what was the Kawerau Pulp and Paper Mill. Under a lease between the Bath Trust and Bay of Plenty Energy Ltd, who operates the power station, an access fee was payable to the Bath Trust along with royalties on the power produced. The TG2 power station began to operate in October 1993. From that point until 2008 Ms Adlam received, as trustee of the Bath Trust, fees and royalties totalling over $3.5 million. She appropriated this money for her benefit. After deducting GST and other taxes, it is common ground Ms Adlam received the sum of $2,440,149 from the TG2 project.

[10] As we have foreshadowed, the GDL power station was also built on the Bath Trust land. It uses geothermal energy from the well on the adjoining land owned by the Farm Trust. The energy was piped from that well across the lands of both the Farm Trust and the Bath Trust with wastewater from the process taking the reverse course before being reinjected into the ground on the property of the Farm Trust. The power station and the pipeline across the two blocks of land are shown on the map that is attached as Appendix 1.

[11] The GDL power station was developed by a company called Orda 9 Inc (ORDA9), a subsidiary of an Israeli company Ormat Technologies Inc (Ormat), in conjunction with GDL. Ms Adlam was initially the sole shareholder and director of GDL. This power station project depended on a lease granted by the Bath Trust and the Farm Trust in favour of GDL.

[12] To understand the manner in which Ms Adlam profited we need to note that in September 2005 Ms Adlam entered into sale and purchase and shareholder agreements with ORDA9. As the Māori Appellate Court recorded, under those

agreements Ms Adlam agreed to sell shares in GDL to ORDA9 but she kept an option to repurchase the shares once the power station was completed.[4] The sale and purchase agreement was conditional on various matters including Ms Adlam providing evidence to ORDA9 that GDL had an agreement to lease the land on which the project was to be built. Ms Adlam later reported that the lease had been signed by both the Bath and the Farm Trusts. The lease was noted in the Māori Land Court on 28 September 2006.[5]

[13] On 7 May 2007 Ms Adlam transferred 49 per cent of the shares in GDL to ORDA9. After the power station was built, on 23 February 2009, Ms Adlam transferred the remaining shares in GDL to ORDA9. About a year later, on 13 January 2010, Ms Adlam entered into an agreement with Eastland Group Ltd (Eastland) to buy back all of the GDL shares from ORDA9 and to onsell them to Eastland for around $40 million. On 13 January 2010 ORDA9 transferred all of the GDL shares to Ms Adlam and Ms Adlam then transferred those shares to Eastland. It is from these transactions that Ms Adlam made the profit of $11.2 million from the GDL development.

[14] As the written submissions for the first respondents record, it is not now necessary to say much about how the Bath Trust's agreement to the lease was obtained. That is because it is accepted Ms Adlam breached her fiduciary obligations to the Bath Trust and must account for the profits. It is, as Mr Hurd for the first respondents submits, useful still to say a little about the meeting on 10 September 2005 of the trustees of the Bath Trust, which was important in terms of obtaining consent to the lease. We adopt Mr Hurd's summary of the key points.

[15] First, the meeting date was some nine days before the date on which Ms Adlam signed the agreement for sale and purchase with ORDA9. But there was no disclosure by Ms Adlam to the meeting about the terms of that agreement including her sale of shares in GDL and, importantly, her option to repurchase the shares.

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4 The Māori Appellate Court judgment, above n 3, at [22].
5 At [23].

[16] Secondly, in answer to a question from one of the trustees about the necessity for legal advice, the minutes of the meeting record that Ms Adlam effectively brushed this aside, saying, "[n]ot necessary unless there is no trust in what I say." In a similar vein, when asked about conflict of interest, the minutes record that Ms Adlam said, "[i]t would come into effect if I do not declare all my interests."

[17] Thirdly, Ms Adlam rejected a suggestion a group could undertake the project development. The minutes record she said she did not "have confidence" she would be able to set up with a group and that she needed "full control". She drew in aid her credibility with Ormat.

[18] Finally, one of the trustees asked for time to review the documents including a summary of the lease terms. The minutes note Ms Adlam responded that "time was of the essence and she needed to have the documents signed" on the day of the meeting. In fact, the lease was not signed until 31 May 2006.

History of the proceedings

Māori Land Court

[19] By the time the case was heard in the Māori Land Court there were two issues relating to the Bath Trust. First, whether Ms Adlam should receive a developer's fee or allowance and, secondly, whether the profits from the GDL power station should be apportioned.

[20] On the first issue, Judge Coxhead concluded there should be no developer's fee or allowance because the "seriousness of the blatant breach", the sums involved, and the length of time the beneficiaries had been deprived of their funds outweighed the factors supporting a fee or allowance.[6]

[21] On the second issue, the Judge found that Ms Adlam "made the entire profit in breach of the fiduciary duty she owed to the Bath Trust" and there was no apportionment to be made between Ms Adlam and the Bath Trust.[7]

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6 The Māori Land Court judgment, above n 2, at [85].
7 At [195]–[196].

[22] It followed, Judge Coxhead said, that Ms Adlam was liable to account to the Bath Trust for the whole of the profits from the GDL development.

Māori Appellate Court

[23] Before the Māori Appellate Court the principal issue was whether the Māori Land Court was right to order Ms Adlam to account for all of the GDL profit to the Bath Trust. The Māori Appellate Court concluded this was an error. That was because the assets of both trusts had contributed to the GDL profit. Accordingly, the Court said:[8]

> 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.

[24] Because the question as to how much of the $11.2 million profit was the property of the Bath Trust had not been undertaken, quantification of Ms Adlam's liability to the Bath Trust was remitted to the lower Court to decide.

Was there an issue to be determined about the trusts' contributions to the GDL profit?

Ms Adlam's case

[25] On behalf of Ms Adlam, Mr Billington QC submits that the Bath Trust's acceptance that the Farm Trust has an interest in the profits is an acknowledgment from the Bath Trust that it is receiving more than the profit attributable to the breach.

[26] Next it is submitted that the centrality of the lease of both blocks to the project means not all of the profit can be attributed to the Bath Trust. Rather, the assets of both trusts contributed to the profit. Accordingly, there is a need for some apportionment. Otherwise, the submission is, the judgment against Ms Adlam in the Māori Land Court has a punitive effect and the Bath Trust is unjustly enriched to the detriment of the Farm Trust and/or Ms Adlam.

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8 The Māori Appellate Court judgment, above n 3, at [74].

[27] The extent of that apportionment has never been addressed because there was no pleading of any breach by the Farm Trust. Ms Adlam maintains there was no breach vis-à-vis the Farm Trust and, if there was, then she would be entitled to an allowance. In that context, Mr Billington says that the various authorities shed some light on apportionment where there are mixed sources of the profit and on the need for a causal link between the profit and the breach.

The respondents' position

[28] The Bath Trust supports the approach taken by the Māori Land Court. That position, in turn, is supported by the Farm Trust. As between themselves, the Bath Trust and the Farm Trust have agreed to sort out any sharing of the profit. They have also agreed to seek the approval of their arrangements from the Māori Land Court and return to that Court if resolution becomes problematic.

Our assessment

[29] As we shall explain, we consider that the Māori Appellate Court has erred in its approach to the causal link required and that the arguments for Ms Adlam conflate the question of the causal link with apportionment.

[30] It is useful, in considering the approach to causation and apportionment, to keep in mind that an account of profits requires "the defendant to pay to the plaintiff the net profits derived from the defendant's breach of duty".[9] In other words, an account "is measured by what the defendant has gained".[10] The purpose is "restitutionary not penal"[11] so "the focus is on disgorgement of profits, properly analysed".[12]

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9 Terry Sissons "Accounting for profits" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 895 at [31.1.1].

10 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [17] per Elias CJ.

11 *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615 (HC) at 629; and see *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 287 ALR 22 at [533].

12 *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5 at [68], citing *Chirnside v Fay,* above n 10, at [142] per Tipping J.

[31] Professor Peter Devonshire explains that causation has a "limited"[13] role in the context of an account of profits bringing "to the fore equity's policy objective of deterring temptation and removing any economic benefit of exploiting a position of trust".[14] Professor Devonshire says it must nonetheless "be demonstrated that there is *some* causal link between the gain and breach of duty".[15] The fiduciary's duty to account is linked to profits attributable to the breach, not for "all profits" the fiduciary ever made from any source.[16] The key question is whether the profit was made within the scope of the defendant's duty.

[32] In its discussion of the causal link the Māori Appellate Court commenced by, correctly, noting that there must be a causal link between the gain and the breach of duty.[17] But the Court went on to describe the necessary link as that between "the fiduciary's breach and the principal's property".[18] The Court observed:[19]

> 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.

[33] The Court said the key was for the Court to disgorge the gain "attributable to the *trust property*" and that account "renders to the principal any profit made with *his or her property*".[20] That is true in a broad sense but the causal link required is that between the gain and the breach of duty.

[34] In its focus on the contribution of the principal's property, the Māori Appellate Court relied on the following passage of the judgment of Elias CJ in *Premium Real Estate Ltd v Stevens*:[21]

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13 Peter Devonshire "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Syd LR 389 at 394.
14 Peter Devonshire *Account of Profits* (Thomson Reuters, Wellington, 2013) at 64.
15 Devonshire, above n 13, at 395.
16 *Murad v Al-Saraj* [2005] EWCA Civ 959 at [62]; and *Estate Realties Ltd v Wignall*, above n 11, at 631.
17 The Māori Appellate Court judgment, above n 3, at [53].
18 At [56].
19 At [56].
20 At [76] citing *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [32] per Elias CJ.
21 At [55]; and *Premium Real Estate Ltd v Stevens,* above n 20 (footnotes omitted).

> [32] 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 had not occurred, as compensation does. Instead, it strips gain attributable to the trust property or properly to the account of the principal.

[35] The focus in the passage cited is on the causation requirements of an account of profits as compared to equitable compensation. Elias CJ said that an account "strips gain attributable to the trust property or properly to the account of the principal". The Māori Appellate Court has focused on the first part of that statement and not the second. In our view, the focus on the impact of the source of the profits in this case has led to the erroneous reasoning that if some portion arises from use of the Farm Trust assets then that portion is not recoverable by the Bath Trust.

[36] In some cases, there will be a question about the impact of a fiduciary mixing trust assets with his or her own assets. That was an issue in *Rainbow Corp Ltd v Ryde Holdings Ltd*.[22] In his written submissions, Mr Billington cited from the discussion of that case set out in *Equity and Trusts in New Zealand*.[23] This Court in that case referred to *Lupton v White*[24] for the proposition that: [25]

> … if a fiduciary mixes trust assets with his own the onus is on the fiduciary to distinguish the separate assets and, to the extent that he fails to do so, they belong to the trust.

[37] That is not, however, the present case.

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22 *Rainbow Corp Ltd v Ryde Holdings Ltd* CA102/91, 25 September 1991 at 13 cited in Sissons, above n 9, at [31.4.2].

23 Sissons, above n 9, at [31.4.2].

24 *Lupton v White* (1808) 15 Ves Jun 432.

25 *Rainbow Corp Ltd v Ryde Holdings Ltd,* above n 22, at 13; and see *Ryde Holdings Ltd v Rainbow Corp Ltd* PC50/92, 15 November 1993.

[38] Mr Billington also referred to *Foskett v McKeown* in the context of cases dealing with "competing claims on the same fund".[26] In our view Judge Coxhead was correct to distinguish *Foskett* on the basis that case concerned equitable tracing and not an account of profits.[27] In issue was whether the beneficiaries of the trust were entitled to a pro rata share of the relevant proceeds. Again, that is not the present case.

[39] The correct approach is apparent when the case is analysed by reference to the relevant breach. Although the pleadings are not very clear, evidently the operative breach is the conflict of interest, self-dealing and Ms Adlam's failure to disclose the arrangements that led to profit. The causal link between that breach and the profit is clear. The first respondents in their written submissions put the point well when they state:

> The causal requirement is clearly met in this case because, … it is common ground that, but for the breach, the lease would not have been secured; without the lease, the power station would not have been built; and, without the power station, there would have been no profit. This is not a case where the profit arose irrespective of the fiduciary's breach or was in any sense a distant consequence of the breach. Unlike *Warman*[28] the one-off profit derived here (from the ultimate sale of shares in GDL) does not cause difficulties of assessment such as for how long the profits of a continuing business should be regarded as attributable to a fiduciary breach involved in its formation or acquisition.

[40] As Mr Billington submits, both the Bath and Farm blocks were a necessary part of the arrangements. But in a causal sense the contribution of land from the Farm Trust is neither here nor there. That is because the causal link in issue is that between the breach, namely, the conflict of interest, self-dealing and failure to disclose, and the gains derived from that, namely, $11.2 million. The key point is that, but for Ms Adlam's breach of duty, the lease would not have been secured and the power station would not have gone ahead. It follows that absent any apportionment, as properly understood, for any contributions by her, Ms Adlam is obliged to disgorge the entire profit.

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26 *Foskett v McKeown* [2001] 1 AC 102 (HL) at 120.
27 The Māori Land Court judgment, above n 2, at [188].
28 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

[41] A means of checking this analysis is to ask whether requiring Ms Adlam to account for the entire profit is consistent with the non-punitive purpose of an account of profits. The order of the Māori Land Court requires Ms Adlam to disgorge the profits she made in the course of her breach. It does not punish her by depriving her of profits legitimately obtained. It is not relevant that this might be seen as a windfall gain for the Bath Trust.[29] The Bath Trust's acknowledgement that it will reach some arrangement in relation to some of this gain with the Farm Trust does not alter the analysis.

[42] The Māori Land Court considered whether there was profit arising from the breach to which Ms Adlam was entitled for her own account. The Court also had evidence on behalf of Ms Adlam from Patrick Brown, a chartered accountant and business adviser. He assessed the respective contributions of the Farm block and the Bath block as 85 per cent and 15 per cent respectively.

[43] Judge Coxhead observed that the onus was on Ms Adlam to differentiate between profit made in breach of duty and profit that did not result from the breach. The Judge did not consider Ms Adlam had shown what part of the profit was attributable to her efforts rather than her breach. The conclusion was that all of the profit was made in breach of Ms Adlam's fiduciary duty to the Bath Trust. As Judge Coxhead put it:[30]

> [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.
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> [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.

[44] There is no challenge to this finding that all of the profit was made in breach of duty. Rather, Ms Adlam argues there had to be a prior inquiry to determine the portion of the profit that reflects the Farm Trust's contribution of its assets.

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[29] *Crampton-Smith v Crampton-Smith,* above n 12, at [73].
[30] The Māori Land Court judgment, above n 2.

[45] The role of apportionment properly so-called is to prevent the plaintiff recovering what justly belongs to the defendant.[31] In *Murad v Al-Saraj,* Arden LJ said that the profit obtained from a breach of trust always has to be defined and the defaulting trustee is not to be stripped of profits to which he or she was always entitled for his or her own account.[32] Apportionment in that sense is not the issue in the present case. Rather, the question is whether what Ms Adlam has to disgorge is different where the breach of duty is to one trust, the Bath Trust, and the resulting profits are sourced from the assets of two trusts.

[46] We have not found any authority that deals with this situation. But, on a first principles analysis, it seems to us that the only unusual aspect is that the second trust, the Farm Trust, is a party to the proceedings. This is no different from any other account of profit claim where there is a breach of duty to one party, the plaintiff, and the profits made by the defendant in the scope of their breach are sourced from the assets of third parties as well as from the assets of the plaintiff. Courts are not concerned in a situation such as the present with the relative contributions of the assets as that is not the causal link required.

[47] It is possible that the position may have been different if both the Bath Trust and the Farm Trust had established a breach in the Māori Land Court and shown that the profits came within the ambit of both breaches. The Court may then have had to resolve their respective entitlements in some way as between themselves but that is not the present case. In the circumstances, there was no issue of apportionment arising that required further consideration in the Māori Land Court or any need for prior inquiry into the respective contributions of the trusts' assets.

Summary of conclusions

[48] Our reasoning can be summarised in this way. First, the focus is on an account of profits attributable to the breach of duty. A breach of duty was admitted in respect of the Bath Trust but not in respect of the Farm Trust because the Farm Trust did not bring a proper claim. The necessary causal link is established

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31 Sissons, above n 9, at [31.4.2].

32 *Murad v Al-Saraj,* above n 16, at [85] cited in *Chirnside v Fay*, above n 10, at [36] per Elias CJ; and see Sissons, above n 9, at [31.4.2].

because the lease necessary for the power station to proceed would never have been entered into but for the breach (conflict of interest, self-dealing and failure to disclose). It does not matter that a third party's assets may have contributed to the arrangements entered into in breach of duty. Ms Adlam's claim to an apportionment by reason of her own contribution to the profit was rejected and that finding is not challenged on appeal. As it happens, the Bath Trust is willing to recognise a contribution by the Farm Trust as a third party but this does not alter Ms Adlam's liability to account to the Bath Trust. It follows that the first cross-appeal succeeds.

[49] We add that there are also discretionary factors telling against a further hearing in the Māori Land Court. First, we were told that Ms Adlam prepared a brief of evidence for the hearing in the Māori Land Court but late in the piece she chose not to give evidence. The decision not to give evidence and the rejection of her argument based on Mr Brown's evidence about apportionment tells against Ms Adlam being given another opportunity to advance evidence on this topic.[33]

[50] Secondly, this matter has been on foot for a number of years now. Just prior to the hearing in this Court, Ms Adlam made an offer to pay $2.44 million plus interest (from $5 million of the $11.2 million) to the Bath Trust. Although the Bath Trust has continued to receive rental, it has received nothing in the way of a return of profit since the breach.

Result

[51] The cross-appeals are allowed. The orders of the Māori Appellate Court revoking the decision of the Māori Land Court ordering Ms Adlam to account to the Matatā Parish 39A 2A Ahu Whenua (Bath) Trust for the $11.2 million GDL profit and remitting the proceeding to the Māori Land Court to determine what portion of the GDL profit is the property of the Bath Trust are set aside (the first cross-appeal).

[52] The order of the Māori Land Court that Ms Adlam is to account to the Bath Trust in the amount of $11.2 million is reinstated.

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[33] See *Crampton-Smith v Crampton-Smith*, above n 12, at [70].

[53] By consent, the order of the Māori Appellate Court remitting the quantification of interest on the TG2 royalties to the Māori Land Court is set aside (the second cross-appeal).

[54] By consent, interest on the TG2 royalties as at the date of the Māori Appellate Court judgment is fixed at $1,547,519.41.

[55] The parties agree costs should follow the event. The parties also agree it is appropriate for Ms Adlam to pay costs on the appeal up to the point of abandonment. That is appropriate as some costs were incurred. For example, the first respondents prepared the case on appeal. The same position applies to the second cross-appeal. Submissions addressed that point so, although it was resolved by the time of the hearing, costs were incurred.

[56] We make an order that Ms Adlam must pay costs to the respondents (one set of costs for the first, fourth and fifth-named first respondents and one set for the first, second and fifth-named third respondents) for a standard appeal on a band A basis together with usual disbursements as follows. Namely, we make an order that Ms Adlam must pay costs on this basis on the appeal up to the point of abandonment and (to the first, fourth and fifth-named first respondents only) on the second cross-appeal up to the point of agreement and on the first cross-appeal. We certify for second counsel.

[57] Costs in the Māori Appellate Court are to be revisited in light of this judgment.

Solicitors:
Anthony Harper, Auckland for Appellant
Dowthwaite Law, Rotorua for First, Fourth and Fifth-named First Respondents
Wackrow Williams & Davies Ltd, Auckland for First, Second and Fifth-named Third Respondents

Appendix 1