consider whether there was a reasonable probability that the result of arbitration would be beneficial to the *cestui que trusts*, and, if he thought there was no such probability that he should decline to enter into any such agreement, and that he is not compelled to enter into it, but was bound to exercise his discretion before doing so. I think, therefore, that the award is void on the above ground. I think, also, that, if and so far as the regulations under the Act of 1887 conflict with this construction of section 7 they are *ultra vires*. I think, also, the award is void on the ground that it directs a lease for thirty years to be granted, when the Crown grant limits the power of leasing to twenty-one years. Section 4 of the Act of 1881 validates the grant, and the restrictions on alienation contained in it. By section 8, the power of leasing given to the trustee is subject to such restrictions. That part of section 8 was repealed by section 3 of the Act of 1884; and by section 5 of that Act the Public Trustee has, subject to the provisions of the Act, and to any conditions, limitations, or restrictions attached to any reserves, a power of leasing. By the 8th section of the Act of 1884 there is a power of leasing agricultural land for thirty years. By section 5, however, of the Act of 1884, the power of leasing of any particular reserve is not only subject to the provisions of the Act but to the restrictions attached to such reserve; and in the present case there is a restriction to twenty-one years, which thus, by the terms of the Act, controls the more extended leasing power given by the Act itself. As I consider the award to be thus radically bad, there is no need to consider other minor objections to it.

Court of Appeal, Wellington: Te Moauroa and Others v. *The Public Trustee and Another.*

JUDGMENT OF DENNISTON, J. (delivered 23rd May, 1891).

THE first point to be determined is whether section 7 of the Act of 1887 compels the Public Trustee to accept the surrender and grant the new leases in such section mentioned. In determining this it is necessary to look at the state of the law which the section purports to alter. Section 13 of the Act of 1884 undoubtedly gave the Public Trustee a discretion. Although the section is very clumsily worded, it is clear that the surrender and the new lease were to be contemporaneous. The lessee intimated his desire to surrender. If the lessee, the Natives, and the Public Trustee came to terms for a new lease, the execution of such lease operated as a surrender of the previous term. Except as to one proviso, the section amounted to no more than clearing away any possible doubt as to the power of the Trustee to accept surrenders of existing leases. The proviso referred to is that by which it is provided that in any new lease the rental is to be computed on the improved value of the land. This proviso is obviously in favour of the Natives.

We then come to section 7 of the Act of 1887. The first observation that suggests itself is that if, as contended by the plaintiff, the only object of the amendment was to get over the difficulty of getting the Natives to agree, such object could have been effected very simply by making their consent unnecessary, and leaving their interests in the hands of their trustee. Has, then, the Trustee a discretion? It is, I think, obvious that, as in the other section, the power to accept a surrender must depend upon the agreement as to a lease. It is, I think, also obvious that the discretion, if any, must be exercised before the arbitration. A discretion to be exercised by one only of the parties, after the terms of the proposed contract have been settled by arbitration and the expense incurred, would, I think, be absurd. It would, indeed, be inconsistent with the very idea of arbitration, which is to take the matter out of the hands of the parties. If, then, there is any discretion, it must, I think, be a discretion on the part of the Trustee to determine whether it is in the interests of the Native lessors to accept a new lease in lieu of the one proposed to be surrendered. And in this connection it may be noticed that to compel a trustee to submit the interests of those he represents to arbitration is in itself unusual. (See Attorney-General *v.* Fish.) Such a provision is in itself a fetter on the discretion of the trustee. If the only object of the section was to enable the Trustee to decide as to whether a lease would be beneficial, he would do so better if unhampered with the restriction. But the provision in the section which seems to me most decisive on the point is that which declares that in the new lease the rental is to be computed on the value of the land less the value of the improvements. This is a distinct fetter on the discretion of the parties, and a fetter imposed clearly in the interests of the lessee. It can, of course, only apply to lands which have been improved. In many, I should think in the greater number, of the original leases from the Natives there would be no provision for valuation of improvements. At the end of the existing term the