I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE TAIRĀWHITI
In the Māori Appellate Court of New Zealand
Tairāwhiti District

A20220008669
APPEAL 2022/6

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Wharekahika A47
I WAENGA I A *Between*	APIRANA HENDERSON Kaitono pīra *Appellant*
ME *And*	ASHLEY BROOKING Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	8 November 2022, 2023 Māori Appellate Court MB 40-79 (Heard at Gisborne)
Kooti: *Court*	Judge Armstrong (Presiding) Judge Ware Judge Stone
Kanohi kitea: *Appearances*	J Kahukiwa for Appellant L Hemi for Respondent
Whakataunga: *Judgment date*	9 February 2023

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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He kōrero tīmatanga
Introduction

[1] Apirana Henderson is the chairperson of the Wharekahika A47 trust.[1] He is one of six trustees. Two of his fellow trustees are his brothers.[2] He has provided services to the trust. Although the trust order for the trust does not expressly authorise it, he has received $15,000 in payments for those services. He participated in and voted on trustee decisions that authorised these payments. So did his brothers.

[2] The Māori Land Court determined that, in participating in the trustee decisions approving payments to himself, Apirana Henderson breached numerous trustee duties and s 227A of Te Ture Whenua Māori Act 1993 ("the Act"). This section prohibits a trustee from voting or participating in the discussion on any matter concerning payments to themselves. These breaches of trustee duties were sufficient for the Court to remove Apirana Henderson as a trustee per s 240 of the Act.

[3] Apirana Henderson appeals the Māori Land Court decision. He says that the trust order for the trust impliedly authorises payments to trustees. Further, he says that he and his brothers were entitled to participate in the trustee discussion and vote to approve payments to him. He says the Māori Land Court misdirected itself by finding that he had breached his trustee duties and s 227A of the Act and he disputes that there are sufficient grounds to remove him as a trustee.[3]

I ahatia?
What has happened?

[4] Much of the background to this appeal is uncontested. Relevantly for our purposes:

(a) Apirana, Ned and Victor Henderson are brothers. They comprise three of the six trustees of the trust. Apirana Henderson is the chairperson.

(b) Apirana Henderson completed work on the trust land up to the end of 2018. This work benefited the trust.

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1 The trust manages the Wharekahika A47 block, which is located near Hicks Bay on the East Coast of New Zealand. The block comprises 1,174.4148 hectares and has 364 owners.
2 Ned Henderson and Victor Henderson.
3 Notice of Appeal dated 10 June 2022.

(c) In recognition of this work, Apirana Henderson prepared a document that included a trustee resolution to authorise the payment to him of $10,000.[4] He signed this document. So did his brother, Ned Henderson.

(d) Apirana Henderson continued to provide services to the trust. In 2019 he put a proposal to the trustees for him to live in the house located on the Wharekahika A47 block and continue to provide services to the trust. The trust's solicitor at the time advised that the proposal should be modified and then approved by the owners of the Wharekahika A47 block, because the proposal involved Apirana Henderson (as a trustee) benefiting from trust property. The solicitor also advised the trustees to seek directions from the Māori Land Court seeking approval for the proposal. This proposal was signed by four trustees on 8 May 2019, including Apirana Henderson himself and his brother, Ned Henderson. Contrary to the solicitor's advice, the owners did not approve the proposal before it was signed and no directions were sought from the Māori Land Court.

(e) In May 2021, Steuart McClutchie proposed that the trust pay Apirana Henderson a further $5,000 for his services to the trust. Apirana Henderson prepared a report in support of this payment. His brothers Ned and Victor Henderson also supported it.

(f) The trustee decisions to authorise the payments to Apirana Henderson in 2018 and 2021, and to adopt the farm proposal in 2019, were not made at properly convened trustee meetings.

(g) Apirana Henderson organised insurance cover for the trust. In doing so, the insurance policy covered some of his personal assets.[5] He subsequently removed these personal assets from the insurance policy.

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[4] This document is dated 16 November 2018 and was signed by trustees Ned Henderson, Steuart McClutchie, Ashley Brooking and Apirana Henderson on 19 November 2018. Trustees Rawiri Ruru and Victor Henderson did not sign this document.

[5] The trust's insurance policy included cover for Apirana Henderson's two private vehicles, two trailers and

Ngā take
Issues

[5] Apirana Henderson accepts that he has received payments from the trust while holding the position as trustee and that he participated and voted in the trustee discussions to authorise those payments. He further accepts that the trust order for the trust does not expressly authorise those payments. However, he says that the payments are impliedly permitted by the trust order and were properly authorised by the trustees. Even if wrong on these points, he says that the circumstances surrounding the payments do not constitute sufficient grounds to remove him as a trustee of the trust.

[6] Accordingly, the issues to determine are as follows:

(a) Does the trust order for the trust impliedly authorise payments to the trustees?

(b) Assuming the trust order authorises payments to the trustees, were the payments to Apirana Henderson properly authorised?

(c) If the payments were not properly authorised, are there sufficient grounds to remove Apirana Henderson as a trustee?

Te take tuatahi: Ka whakamanahia te utu o ngā kaitarati e te ōta tarati?
Issue 1: Does the trust order for the trust authorise payments to the trustees?

[7] Apirana Henderson relies on three clauses in the trust order to say that it impliedly authorises payments to trustees. Clauses 2, 3 and 4 of the trust order provide:

> 2. The Trustees shall have power to use, occupy and manage the land vested in the Trustees and to that end to do all or any of the things which they would be entitled to do if they were the beneficial owners of the land PROVIDED HOWEVER: -
>
> (a) That the Trustees shall have no power to mortgage or sell the land or any part thereof.
>
> (b) That the Trustees shall not lease the land or any part thereof other than in accordance with the provisions of subclauses (n) or (p) of Clause 3 thereof.

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his boat.

(c) That forthwith upon the death or resignation of a Trustee the surviving Trustees shall apply to the Court for the appointment of another Trustee.

3. The Trustees shall have such powers and authorities as are necessary for the effective performance of the trusts herein contained including power: -

(a) To use occupy and manage the land or any part thereof for agricultural pastoral forestry or horticultural purposes, including the use of the land or any part thereof for the growing of permanent horticultural crops by the Trustees themselves or in conjunction with any other person or persons upon such terms for the growing utilisation or sale of the crop as the Trustees may consider appropriate.

…

(n) To grant licences to occupy to such individual equitable owners who wish to build dwellings on the land of such parts of the land for such purpose at such rent and subject to such covenants and conditions as the Trustees may determine.

…

4. The Trustees shall apply the revenues arising from the operations of the trust in paying the costs of administration of the affairs of the trust and in furtherance of the objects of the trust including: -

(a) Payment of the costs and disbursements of and incidental to the making and prosecuting of the application to this Court for this order or in making a refund to any person who may have paid the same.

(b) Payment of title charges, if any.

(c) Setting aside reserves for contingencies or capital expenditure or for retaining in an accumulated profit account any portion of such money which the Trustees shall think it prudent not to pay under the next succeeding subclause.

(d) Payment of so much of the residue from time to time as the Trustees may in their absolute discretion determine to the equitable owners in accordance with their several shares PROVIDED HOWEVER: -

(i) That the Trustees shall be at liberty to pay such money to the Maori Trustee for distribution to the equitable owners if the Maori Trustee is willing to do so, and

(ii) If the Trustees shall make any such distribution then the Trustees shall not make payment to any equitable owner whose share will be less than $5.00 but shall accumulate the amounts payable to that equitable owner until the amount so accumulated exceeds $5.00 and then pay the same to that equitable owner.

[8] Mr Kahukiwa, as counsel for Apirana Henderson, made extensive submissions on the meaning of these clauses. In summary, he argues that:

(a) The trust order is to be interpreted broadly in the same manner as a contract.

(b) The cases that deal with the interpretation of trust orders for pension schemes are illustrative, as those schemes share similar characteristics as Māori freehold land ownership.

(c) It is common ground that a trust order can expressly authorise payments to trustees.

(d) Authorisation for payments to trustees can be implied by the circumstances, particularly when beneficiaries are appointed to act as trustees. Such an authorisation is available here, because the objects of the trust (as ascertained by reference to the Preamble to the Act) include the occupation of the Wharekahika A47 block by beneficiaries, which extends to a trustee who is also a beneficiary being paid to live on the block. Further, when the relevant clauses of the trust order are read together, it is possible to read in a permission to pay trustees.

[9] Mr Kahukiwa further says that the trust order includes a direction for the trustees to work the land themselves. When the trustees act as so directed, he argues that the beneficial owners would be unjustly enriched by that work if the trustees are not properly remunerated for it. He says that because the trust order directs the trustees to work the land, the Court must necessarily read into the trust order an authorisation for trustee payments for that work.

[10] Mr Kahukiwa also ran an alternative argument if the Court determines that there is no implied power in the trust order to pay trustees. He argued that the doctrine of equitable accounting should apply. This would require an accounting exercise to determine the extent to which the payments to Apirana Henderson were simply reimbursements of expenses he has incurred on behalf of the trust. Under this equitable doctrine, Mr Kahukiwa says Apirana

Henderson should be entitled to reimbursement of those expenses, but not any excess payments.

The law

[11] When considering payments to trustees, the starting point is that trustees act gratuitously. They serve in an honorary position. They are not entitled to be paid as of right. They are not entitled to receive payment from the trust fund for their services unless it is authorised by the trust order. The Trusts Act 2019 codifies these principles. Under that Act, trustee duties include the duty not to act for their own benefit, the duty to avoid conflicts, the duty not to profit, and the duty to act for no reward.[6]

[12] It is accepted that the trust order for the trust does not expressly authorise payments to trustees. Whether such a power can be implied by the words of the trust order is an exercise in interpretation. The relevant interpretative principles were summarised in *Holland v Jonkers* as follows:[7]

> (a) In general, trust deeds are construed as per the ordinary rules of contractual interpretation.
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> (b) More specifically, deeds are to be interpreted from a standpoint that is practical and purposive, rather than detached and literal. The factual matrix within which the relevant trust was formed is relevant. Trust deed provisions are to be interpreted objectively in the context of the whole document, relevant statutory background and factual matrix.
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> (c) A Court, when interpreting a trust deed, is required to construe each provision according to its natural meaning and give provisions "ample operation" rather than approach interpretation in a narrow way or limited by reference to historical presumption.
>
> (d) The test of what is intended by the settlor or in the reasonable contemplation of the parties is an objective question, to be answered by ascertaining the actual meaning of words used in their context. The search for intention in relation to trusts, as with contracts, is for the intention as revealed in the words used by the parties. The expressed intention of the parties is to be found in the answer to the question, "what is the meaning of what the parties have said?", not to the question, "what did the parties mean to say?"
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> (e) Interpretation of trust deeds should be tailored having regard to the type of trust involved. In particular, interpretation should reflect the modern

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6 Trusts Act 2019, ss 31, 34, 36, 37.

7 *Holland v Jonkers* [2021] NZHC 3469, at [109].

> commercial context of many trusts. Energy trusts have been recognised as having a commercial aspect that is relevant to matters of interpretation.
>
> (footnotes omitted)

[13] We also take guidance from the rules of contractual interpretation for implied terms. The Supreme Court in *Bathurst Resources Limited v L & M Coal Holdings Limited* recently confirmed the following relevant principles:[8]

> (a) The legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome.
>
> (b) The starting point is the words of the contract. If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.
>
> (c) While the task of implication only begins when the court finds that the text of the contract does not provide for the eventuality, the implication of a term is nevertheless part of the construction of the written contract as a whole. An unexpressed term can only be implied if the court finds that the term would spell out what the contract, read against the relevant background, must be understood to mean.
>
> (d) As with the task of interpreting a contract, the inquiry for the court when considering the implication of a term is an objective inquiry – it is the understanding of the notional reasonable person with all of the background knowledge reasonably available to the parties at the time of contract that is the focus of this assessment. The court is tasked with the role of constructing the understanding of that reasonable person.
>
> (e) Thus, the implication of a term does not depend upon proof of the parties' actual intentions, nor does it require the court to speculate on how the actual parties would have wanted the contract to regulate the eventuality if confronted with it prior to contracting.
>
> (f) The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.
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> (footnotes omitted)

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8 *Bathurst Resources Limited v L & M Coal Holdings Limited* [2021] NZSC 85, at [116].

Kōrerorero
Discussion

[14] In general, the trust order interpretation arguments raised on behalf of Apirana Henderson are strained. We do not accept that there is an implied power in the trust order to pay trustees for the following reasons:

(a) Clauses 2, 3 and 4 of the trust order are not unusual. In combination, they grant the trustees all necessary powers and authorise them to pay trust expenses. There is nothing in the language used in these clauses to suggest that trustees can profit from their position or act for reward.

(b) Specifically, there is no magic in granting the power to the trustees to work the land themselves in clause 3(a) of the trust order. This power is coupled with a power to work the land in conjunction with others. The power is unremarkable given the nature of the land and the purposes to which it may be put. It certainly does not in any way authorise payments to trustees.

(c) Moreover, the wording of clause 3(a) of the trust order does not direct the trustees to work the land themselves. It simply grants them the power to do so. If they choose to exercise that power, they are not released from their fiduciary duties to the beneficial owners of the trust. If the trustees decide to work the land themselves, they must not breach their trustee duties in doing so, including the duties to not act for their own benefit, to not profit and to act for no reward.

(d) In applying a contractual interpretation lens to clauses 2, 3 and 4 of the trust order, the starting point is that, because the trust order is silent on the payment of trustees, it does not provide for it. Implying into the trust order a power to pay trustees is not necessary to spell out what the contract, read against the relevant background, must be understood to mean. Having regard to that background, mindful of the long-standing legal principle that trustees are not entitled to be paid, a reasonable person would not imply into the trust order a power to pay

> trustees. Ultimately, it is simply not strictly necessary to imply this power into the trust order.

[15] Although not argued before us, s 28 of the Trusts Act 2019 is relevant. It confirms that the default trustee duties set out in that Act must be performed unless modified or excluded in accordance with that Act. These include the trustee duties not to exercise power for their own benefit, to avoid conflict of interest, not to profit and to act for no reward. In light of this clear statutory indication that these duties apply unless expressly modified, it is difficult to accept that they can be disapplied by implication.

[16] Mr Kahukiwa argued that the Māori Land Court did not undertake a fulsome examination of the relevant clauses of the trust order. To an extent, we agree. The relevant analysis is contained in one paragraph. But that is all that was required. We concur with that examination and the conclusion that there is no implied power in the trust order for trustees to remunerate themselves.

[17] Nor do we accept the alternative argument that the doctrine of equitable accounting applies. While not abandoning this alternative argument altogether, Mr Kahukiwa acknowledged that his arguments turn mainly on an implied power in the trust order to pay trustees. We are not prepared to invoke the doctrine of equitable accounting here for two reasons. First, it was not pleaded before the Māori Land Court or in the notice of appeal. Second, at no stage has Apirana Henderson sought reimbursement of trust expenses incurred by him.

Te take tuarua: Nei e whakamanahia te utu o ngā kaitarati, i whakamanahia tōtika ngā utu o Apirana Henderson?
Issue 2: Assuming the trust order authorises payments to the trustees, were the payments to Apirana Henderson properly authorised?

[18] Given our conclusion that there is no implied power in the trust order to pay trustees, it follows that the payments to Apirana Henderson were in breach of trust. Therefore, we need not consider whether those payments were properly authorised.

[19] That said, if a power to pay trustees can be implied here, that power must still be exercised properly and prudently. The Māori Land Court noted the flaws in the process to

approve payments to Apirana Henderson.[9] Those flaws include that Apirana Henderson was actively involved in promoting and approving these payments and that they were authorised without a full trustee meeting or directions from the Court. We concur with those identified flaws. Accordingly, even if a power to pay trustees can be inferred here (which we do not accept), it was not exercised properly or prudently.

[20] This issue on appeal also raises important questions about how sibling trustees are to act in their capacity as trustees. Mr Kahukiwa invited us to conclude that, because the Māori Land Court appoints all trustees to all ahu whenua trusts, when it appoints sibling trustees it necessarily waives any expectation on those trustees to manage conflicts that may arise due to their familial relationships. This aspect of the appeal warrants further commentary.

[21] It cannot be the case that, in appointing siblings as trustees, the Māori Land Court somehow releases those trustees from their duty to avoid conflicts. Firstly, the duty to avoid conflicts is a default duty in the Trust Act 2019 that must be expressly modified and therefore cannot be negated by implication. Secondly, the Court appoints sibling trustees reasonably frequently, particularly for whānau trusts. Practically, unless it is obvious, the Māori Land Court is not required to inquire into and is unlikely to know whether trustees are siblings. For this practical reason alone, it cannot be said that the Māori Land Court releases sibling trustees from the trustee duty to avoid conflicts.

[22] More fundamentally, the suggestion that sibling trustees of Māori land trusts are not required to avoid conflicts simply because the Māori Land Court knows they are siblings is jabberwocky. There can be no implied authorisation for sibling trustees to breach the duty to avoid conflicts simply because they are appointed by the Court.

Te take tuatoru: Ki te hē te whakamana o ngā utu kua utua, he take nui noa atu kia tauwehetia a Apirana Henderson hei kaitarati?
Issue 3: If the payments were not properly authorised, are there sufficient grounds to remove Apirana Henderson as a trustee?

[23] We have agreed with the Māori Land Court that the payments to Apirana Henderson were not authorised by the trust order. We must now consider whether the decision of that

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9 See, for example, *Brooking v Henderson – Wharekahika A47* (2022) 110 Tairawhiti MB 238 (110 TRW 238), at [97] to [99].

Court to exercise its discretion to remove him as a trustee was correct. As with any review of the exercise of a discretion, appeal rights are limited. Apirana Henderson must show that the Māori Land Court made an error of law, took into account an irrelevant consideration, failed to take into account a relevant consideration, or was plainly wrong.[10]

Te Ture
The law

[24] Trustees are removed by the Court per s 240 of the Act. This section was amended in 2020. The amendment came into effect on 6 February 2021. This Court has not yet considered the import of these amendments. We must therefore do so.

[25] We start with the position prior to 6 February 2021. The previous version of s 240 provided as follows:

> **240 Removal of trustee**
>
> The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—
>
> (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
>
> (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[26] The law under the old s 240 was reasonably settled. The key principles were as follows:

(a) The Court applied a two-stage approach when determining whether a trustee should be removed under s 240.[11]

(b) Firstly, the Court determined whether the trustee had failed to carry out their duties satisfactorily.[12]

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10 *Kacem v Bashir* [2010] NZSC 112 at [32], and *Faulkner v Hoete - Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17), at [11].
11 *Rameka v Hall* [2013] NZCA 203.
12 *Rameka v Hall*, above n 11.

(c) Secondly, the Court turned to consider whether it should exercise its discretion to remove the trustee.[13]

(d) The prerequisite for removal was not simply failure or neglect of duties, but failure to perform them satisfactorily.[14] That required the Court to undertake an assessment of the trustee's performance having regard to the standard duties of trustees as well as broader considerations relevant to the Māori Land Court.[15]

[27] Section 240 now reads as follows:

> **240** Removal of trustee
>
> (1) The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied that—
>
> (a) the trustee has lost the capacity to perform the functions of a trustee; or
>
> (b) the removal is desirable for the proper execution of the trust, and 1 or more of the following grounds for removal are met:
>
> (i) the trustee repeatedly refuses or fails to act as trustee:
>
> (ii) the trustee becomes an undischarged bankrupt:
>
> (iii) the trustee is a corporate trustee that is subject to an insolvency event:
>
> (iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances.
>
> (2) A trustee has lost the capacity to perform the functions of a trustee, for example, if the trustee—
>
> (a) is subject to an order appointing a manager under section 31 of the Protection of Personal and Property Rights Act 1988; or
>
> (b) has a trustee corporation managing the trustee's property under section 32 or 33 of that Act.
>
> (3) A person may no longer be suitable to hold office as trustee, for example, because of the following conduct or circumstances:

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13 *Rameka v Hall*, above n 11.

14 *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7); *Perenara v Pryor – Matata* 930 (2004) 10 Waiariki Appellate MB 233 (10 AP 233); *Apatu v Puna – Owhaoko C Block* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34).

15 *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7).

(a) the trustee is convicted of an offence involving dishonesty:

(b) it is not known where the trustee is and the trustee cannot be contacted:

(c) the trustee is prohibited from being a director or promoter of, or being concerned or taking part in the management of,—

(i) a company under the Companies Act 1993; or

(ii) an incorporated or unincorporated body under the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.

[28] The Māori Land Court has analysed the new wording of s 240 as follows:[16]

(a) The Court must first be satisfied that one or more of the grounds for removal listed in s 240(1)(b) has been met. That list is prescriptive.

(b) One of those grounds is that a trustee is no longer suitable to hold office because of his or her conduct or circumstances. This ground is wide in scope and ambit. This wide-ranging ambit is necessary to allow the Court to consider the range of conduct or circumstances that may result in a trustee being unsuitable to hold office.

(c) Section 240(3) sets out examples of conduct or circumstances that mean a person may no longer be suitable to hold office as a trustee. The examples are a guide and do not form an exhaustive list.

(d) If the Court is satisfied that one of the grounds in s 240(1)(b) has been met, the Court must then consider whether removal is desirable for the proper execution of the trust. This involves an exercise of discretion and the kaupapa of the Act, as set out in the Preamble and ss 2 and 17, must be taken into account.

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16 *Gray v Paikea - Otara 5D2* (2022) 252 Taitokerau MB 210 (252 TTK 210); *Wynyard v Waata - Manawakore C1 and D* (2022) 247 Taitokerau MB 4 (247 TTK 4); *Nikora v Trustees of Tuhoe - Tuhoe Te Uru Taumatua Trust* (2021) 252 Waiariki MB 157(252 WAR 157); *Rihari v Auckland - Takou* (2021) 240 Taitokerau MB 42 (240 TTK 42); *Bloor v Karaitiana - Runanga 2E* (2021) 259 Waiariki MB 286 (259 WAR 286).

(e) Despite the amendments to s 240 in 2020, the earlier principles concerning removal of trustees continue to apply, including:

(i) Removal is a serious step and is not undertaken lightly;

(ii) The trustee(s) at risk must be properly notified in advance;

(iii) Technical breaches of trust and governance instruments may not lead to removal unless the trust assets have been put at risk or there has been serious loss or malfeasance; and

(iv) Generally, the Court must be satisfied that there is evidence of real abuse, failure or malfeasance and the absence of any tenable defence.

[29] Determining the import of the new wording of s 240 of the Act is an exercise in statutory interpretation. Determining the ambit and scope of s 240 is an exercise of statutory interpretation. Section 10 of the Legislation Act 2019 sets out the general principles of statutory interpretation and provides that the meaning of legislation must be ascertained from its text and in light of its purpose and context.[17]

[30] In *Commerce Commission v Fonterra Co-operative Group Ltd*, the Supreme Court made the following comments with regard to statutory interpretation:[18]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

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17 Section 10 of the Legislation Act 2019 replaced s 5 of the Interpretation Act 1999, which was repealed on 28 October 2021 by s 6 of the Legislation (Repeals and Amendments) Act 2019.

18 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, at [22].

Kōrerorero
Discussion

[31] We begin our analysis by considering the new wording of s 240 of the Act and its application. We then apply that new wording to this case, in the context of the limited appeal rights where discretion is involved.

How should s 240 of the Act be applied?

[32] There is no discussion in the Hansard debates regarding the intent of the amendments to s 240 of the Act that came into effect on 6 February 2021. We find no assistance there.

[33] The wording of the new s 240 of the Act closely mirrors the wording in s 105 of the Trusts Act 2019, which provides for the removal of trustees. The wording of s 240 of the Act and s 105 of the Trusts Act 2019 is similar, but not identical.[19] The key point for our purposes is that judicial commentary on s 105 of the Trusts Act 2019 will be relevant to the application of s 240 of the Act. That said, s 105 of the Trusts Act 2019 has not yet been considered judicially. We are the first to enter that fray.

[34] Our focus is on s 240(1)(b) of the Act. It is clear that the grounds for removing a trustee listed in s 240(1)(b) are prescriptive. The Court must first be satisfied that one of those grounds is met. We observe here that two grounds are met by fact and two grounds require an assessment by the Court. The two grounds that are met by fact are when a trustee becomes an undischarged bankrupt and when a corporate trustee is subject to an insolvency event.[20] Once those respective facts are established, the grounds are met. The other two grounds require assessments as to whether a trustee repeatedly refuses or fails to act as a trustee or whether the trustee is no longer suitable to hold office because of their conduct or circumstances.[21] The latter ground is relevant here.

[35] To determine whether a trustee is no longer suitable to hold office, the Court must first identify the relevant trustee conduct or circumstances. Once those facts are identified,

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19 For example, s 240 of the Act grants a power to remove trustees to the Court and s 105 of the Trusts Act 2019 applies to a person who has that power through the terms of the relevant trust.
20 Te Ture Whenua Māori Act 1993, ss 240(1)(b)(ii) and (iii).
21 Te Ture Whenua Māori Act 1993, ss 240(1)(b)(i) and 240(1)(b)(iv).

the Court must consider whether those facts render a trustee as no longer suitable to hold office. This is an exercise of discretion.

[36] To assist the Court in the exercise of this discretion, s 240(3) helpfully provides some examples of conduct or circumstances that may render a trustee no longer suitable to hold office. Mr Kahukiwa submitted that these examples are illustrative and set out the bounds of what may constitute unsuitability to hold office as a trustee. It follows, he argued, that conduct or circumstances that are not synonymous with these examples will not constitute sufficient cause to remove a trustee from office. Moreover, because these examples refer to dishonest conduct or complete abdication of office, Mr Kahukiwa argued that Parliament has now set a higher removal threshold than that which existed prior to the 2020 amendments to s 240 of the Act. While the point was well made, we are not able to agree with it. Firstly, we agree with the various Māori Land Court decisions that the s 240(3) examples are a guide and do not form an exhaustive list. Secondly, s 23(1) of the Legislation Act 2019 confirms that examples do not limit a statutory provision.

[37] It is clear that once one of the s 240(1)(b) grounds are engaged, the Court must then decide whether it is *desirable* to remove the relevant trustee for the proper execution of the trust. This too is an exercise of discretion.

[38] The word "desirable" is used a number of times in the Act.[22] Relevantly, in most instances it appears in the phrase "necessary or desirable".[23] An immediate observation can be made here. Because s 240 of the Act does not use this phrase, the test for removal of a trustee is desirability, not necessity. This interpretation is supported by the Law Commission's recommendation in favour of the word "desirable" rather than "necessary", as it gives those with the power to appoint and remove trustees the discretion to consider whether removal of a trustee is the best course of action in the circumstances.[24]

[39] Otherwise, there is little guidance in the Act as to what is meant by "desirable" as it appears in s 240. The Oxford Dictionary defines desirable as "wished for as being attractive,

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22 Te Ture Whenua Māori Act 1993, Preamble and ss 37, 97, 133, 137, 185, 218, 230, 240 and 326C.

23 Sections 133 and 240 of the Act use the word "desirable" and do not use the word "necessary". Section 137 of the Act uses the phrase "clearly desirable". All of the other sections of the Act in which the word "desirable" appears use the phrase "necessary or desirable".

24 See Law Commission *Review of the Law of Trusts – A Trusts Act for New Zealand* (NZLC R130, 2013) at [8.20].

useful or necessary".[25] The Oxford Thesaurus sets out synonyms for the word "desirable" as "advantageous, advisable, wise, sensible, prudent, helpful, useful, beneficial, expedient".[26] The courts have historically assessed applications for removal of a trustee on the basis of whether that course of action would be to the advantage, advisable, prudent or expedient for the proper execution of the trust and the beneficiaries as a whole.[27] We see no reason to depart from this approach.

[40] Accordingly, we summarise the approach to remove a trustee as follows:

(a) First, one of the grounds in s 240(1)(b) must be met. If a trustee becomes an undischarged bankrupt, one of the grounds is satisfied simply by that fact. If a corporate trustee is subject to an insolvency event, one of the grounds is satisfied simply by that fact. The remaining two grounds in s 240(1)(b) require an assessment by the Court.

(b) If the ground relied on is s 240(1)(b)(iv), the Court must assess the trustee's conduct or circumstances. Following that assessment, the Court must determine whether, based on that conduct or those circumstances, the trustee is no longer suitable to hold office as trustee. Making this determination is an exercise of discretion. But it is not the end of the matter.

(c) The examples in s 240(3) of when a person may no longer be suitable to hold office as a trustee do not limit s 240(1)(b)(iv), which remains wide in ambit and scope to "allow the Court to consider the range of conduct or circumstances that may result in a trustee being unsuitable to hold office."[28] This approach is consistent with how examples in legislation are to be interpreted, per s 23 of the Legislation Act 2019.

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25 *Concise Oxford English Dictionary* (Oxford University Press, 2012).
26 *Oxford Thesaurus of English* (Oxford University Press, 2009).
27 *Wallace v Naknok* [2012] NZHC 382, (2012) 3 NZTR 22-005, at [10]; *Hall v Radich-Chaytor* [2020] NZHC 409, at [46].
28 *Rihari v Auckland - Takou* (2021) 240 Taitokerau MB 42 (240 TTK 42), at [29].

(d) If one or more of the grounds in s 240(1)(b) are met, the Court must then assess what is desirable for the proper execution of the trust. What is "desirable" does not mean what is necessary, and whether removal is "desirable" requires taking into account the broader circumstances of the trust, the land, the owners, and the principles and kaupapa of the Act. Ultimately, removal of a trustee must be to the advantage, advisable, prudent or expedient for the proper execution of the trust and the beneficiaries as a whole.

Was the decision to remove Apirana Henderson correct?

[41] Turning to the present case, the Māori Land Court determined that removal of Apirana Henderson was desirable having regard to the repetitive nature of his breaches of his trustee duties.[29] Those breaches included failing to adhere rigidly to the terms of the trust, breaching the duty not to make any profit from being a trustee and to act without being paid, and breaching the duty not to exercise a power of a trustee directly or indirectly for the trustee's own benefit.[30] The Court also found that he had breached s 227A(2) of the Act. All of these breaches were based on findings that Apirana Henderson participated actively in the decisions to approve payments to himself, such payments not being authorised by the trust order.[31]

[42] We see no error in the approach taken by the Māori Land Court. The Court thoroughly assessed the relevant conduct and circumstances of Apirana Henderson and identified the aspects of that conduct and circumstances that would render him no longer suitable to hold office as a trustee. The Court identified three breaches of trustee duties and a breach of s 227A of the Act. Although the Court did not expressly say so, it is trite that by breaching these duties, the Court considered Apirana Henderson as no longer suitable to hold office as a trustee. The Court then turned to the second stage of the inquiry and the question of whether it was desirable to remove him for the proper execution of the trust.

[43] In moving to the second stage of the assessment, the Court expressed the view that removal was desirable because of the repetitive nature of his breaches of trustee duties. This

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29 *Brooking v Henderson - Wharekahika A47*, above n 9, at [114].
30 Above n 9, at [102].
31 Above n 9, at [96]-[101].

conclusion was open to the Court on the facts, after taking into account all relevant considerations. No irrelevant considerations were entertained. The Court was not plainly wrong. The decision of the Māori Land Court to remove Apirana Henderson must therefore stand.

Te Whakataunga
Decision

[44] The appeal is dismissed.

[45] As both parties received Special Aid, costs lie where they fall.

I whakapuaki i te 1.00pm i Te Whanganui-a-Tara, te tuaiwa o ngā rā o Hui-tanguru i te tau 2023.

M P Armstrong (Presiding)	T M Wara	D H Stone
JUDGE	**JUDGE**	**JUDGE**