

IN THE MĀORI APPELLATE COURT OF NEW ZEALAND

A20140008837

UNDER Section 58, Te Ture Whenua Māori Act 1993  
IN THE MATTER OF Mohaka A4 Trust  
BETWEEN ARTHUR THORPE GEMMELL  
Appellant  
AND SAMUEL CARTER (COTTER) GEMMELL  
Respondent

Hearing: 12 November 2014  
(Heard at Hastings)

Coram Deputy Chief Judge C L Fox (Presiding)  
Judge S Te A Milroy  
Judge D J Ambler

Appearances: M J Wenley for the appellant  
B Fletcher for the respondent

Judgment: 08 May 2015

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Introduction

[1] Arthur Gemmell appeals Judge Harvey's costs decision of 7 July 2014 wherein Arthur was ordered to pay \$12,000.00 costs to his brother, Samuel Gemmell.<sup>1</sup> The costs order relates to Sam's 2009 application to review the Mohaka A4 Trust which gave rise to Judge Harvey's substantive decision of 9 September 2011.<sup>2</sup> Both Arthur and Sam had been trustees of the trust until 2005 when they were removed by Deputy Chief Judge Isaac (as he then was).<sup>3</sup>

[2] As this Court has noted on various occasions, a costs decision involves an exercise of discretion and consequently an appellate court may only intervene where there has been an error of law or principle, or irrelevant considerations have been taken into account, or relevant considerations have not been taken into account, or the decision is plainly wrong.<sup>4</sup>

[3] Arthur says the costs order is unjust, inequitable and wrong. He points out that he had been removed as a trustee in 2005 by separate Court proceedings, that the primary reason for the Court granting substantive relief in relation to Sam's review application was the dysfunction amongst the trustees between 2005 and 2011 (after he was removed), and that the grounds did not exist to single-out Arthur to pay costs when he is one of four surviving pre-2005 trustees and when the 2005 trustees are responsible for events between 2005 and 2011.

[4] Sam supports the costs order. He says he incurred legal and expert witness costs in bringing the review application and that Arthur's role as a trustee prior to 2005 was a factor in the Court granting substantive relief in its 9 September 2011 decision.

[5] As Judge Harvey observed in the lower Court, the Mohaka A4 Trust has been embroiled in various applications in the lower Court, this Court and the District Court in recent years, and the parties involved have incurred substantial costs. The present challenge to Judge Harvey's costs order requires an understanding of those related

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<sup>1</sup> Given the close relationship of the parties we refer to them throughout by their first names.

<sup>2</sup> *Gemmell v Gemmell - Mohaka A4 Trust* (2014) 32 Takitimu MB 174 (32 TKT 174) and *Gemmell – Mohaka A4* (2011) 11 Takitimu MB 86 (11 TKT 86).

<sup>3</sup> 180 Napier MB 153 (180 NA 153).

<sup>4</sup> *Muru v Te Aho - Maungatautari 4G Section IV* [2013] Māori Appellate Court MB 5 (2013 APPEAL 5), *Nicholls v Nicholls - Part Papaaroha 6B* [2011] Māori Appellate Court MB64 (2011 APPEAL 64).

applications. We therefore commence by discussing the background, to Sam's application and related applications in some detail before turning to the issues on appeal.

## **Background**

### *The land*

[6] The Mohaka A4 Trust is an ahu whenua trust that was constituted in 1996.<sup>5</sup> The trust administers the 528.8302 hectare Mohaka A4 block near Wairoa. At the time Judge Harvey issued his 9 September 2011 decision there were 38 beneficial owners.<sup>6</sup> The owners are all closely related members of the Gemmell whānau.

### *The trusts*

[7] Sometime in the early 1980s or possibly earlier (the date is not critical) members of the Gemmell whānau created a common law trust known as the Tauwhareroa Trust. The beneficiaries of that trust include some, but not all, of the beneficial owners of Mohaka A4. The Tauwhareroa Trust administered the Mohaka A4 block and that role continued after 1996 notwithstanding the establishment of the Mohaka A4 Trust.

[8] Arthur and Sam were trustees of the Mohaka A4 Trust from 1996 until 2005. Arthur was also a trustee of the Tauwhareroa Trust. The evidence before Judge Isaac in 2005 was that the Mohaka A4 Trust was dysfunctional, with Arthur and two of the other six trustees effectively controlling the trust's activities. Furthermore, from 1996 until approximately 2005 the Tauwhareroa Trust was effectively allowed to administer the Mohaka A4 block contrary to the Mohaka A4 Trust's role as trustee. The Tauwhareroa Trust received income due to the Mohaka A4 Trust but did not account to that trust for the money it received.

### *The 2005 applications*

[9] In 2005 a local farmer, Graham Ashcroft, applied to the lower Court for an injunction on the basis that he had a lease agreement in relation to the Mohaka A4 block.

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<sup>5</sup> 144 Napier MB 93 (144 NA 93).

<sup>6</sup> *Gemmell – Mohaka A4* (2011) 11 Takitimu MB 86 (11 TKT 86).

Judge Isaac granted an interim injunction on 6 April 2005.<sup>7</sup> However, following the substantive hearing on 3 May 2005, Judge Isaac concluded in his decision of 30 May 2005 that Mr Ashcroft did not in fact have a valid lease, dismissed the application and ordered Mr Ashcroft to vacate the land.<sup>8</sup>

[10] At the same time as Mr Ashcroft's application came before the Court one of the Mohaka A4 trustees, Bessie Phillips, brought applications to enforce the obligations of the Mohaka A4 Trust and for removal of trustees. Further, Neti Whatuira separately applied to replace trustees and appoint additional trustees. In the course of the hearing on 3 May 2005 Judge Isaac canvassed with the trustees the past arrangements between the Mohaka A4 Trust and the Tauwhareroa Trust in relation to administration of the Mohaka A4 block, and the dysfunction amongst the trustees. Ultimately, Judge Isaac removed all the Mohaka A4 trustees, namely, Arthur Thorpe Gemmell, Bessie Phillips, Nicky Gemmell, Paul Mutu Gemmell, Rihi Moore, Samuel Carter Gemmell and Thomas Gemmell.<sup>9</sup> Judge Isaac directed that a meeting of owners be held, to be chaired by an officer of the Court, where the owners were to consider nominating either a sole independent trustee, an independent trustee with advisory trustees, or owner trustees.

[11] Bessie and Neti's applications were concluded on 7 July 2005 with Judge Isaac appointing seven replacement trustees in respect of the Mohaka A4 Trust.<sup>10</sup> Arthur and Sam were not reappointed. The trustees appointed were: Richard Henare Gemmell, Steven James Gemmell, Rihi Patere Moore, Bessie Phillips, Querida Rewi, Claude D Gemmell and Neti Whatuira. Judge Isaac did not make any costs order.

#### *The 2008 applications*

[12] In 2008 an issue was raised with the Court as to whether the interim injunction of 6 April 2005 was still extant. Bessie had applied for the interim injunction to be discharged. In a ruling dated 16 May 2008, Judge Isaac determined that the injunction had already been discharged by his earlier decision of 30 May 2005.<sup>11</sup>

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<sup>7</sup> *Ashcroft v Phillips – Mohaka A4* (2005) 179 Napier MB 254 (179 NA 254).

<sup>8</sup> *Ashcroft v Phillips – Mohaka A4* (2005) 180 Napier MB 210 (180 NA 210).

<sup>9</sup> 180 Napier MB 153 (180 NA 153).

<sup>10</sup> 181 Napier MB 46 (181 NA 46).

<sup>11</sup> *Phillips v Trustees of Mohaka A4 – Mohaka A4* (2008) 195 Napier MB 137 (195 NA 137).

[13] In 2008 the new trustees of the Mohaka A4 Trust applied to the lower Court for an injunction requiring Bessie and her partner to remove themselves, their stock and their property from the Mohaka A4 block. In a reserved judgment of 26 February 2009, Acting Chief Judge Isaac (as he then was) granted the injunction against Bessie and her partner.<sup>12</sup> Bessie appealed the injunction to this Court. On 11 August 2009 this Court dismissed the appeal and on 4 October 2010 awarded costs of \$5,847.53 against Bessie in favour of the Mohaka A4 Trust.<sup>13</sup>

*The District Court proceedings*

[14] In 2007 the trustees of the Tauwhareroa Trust, Arthur and Neti, issued proceedings in the District Court against Sam claiming judgment, interests and costs in relation to a loan the trust had granted Sam in 2003. The fact of the loan was not disputed by Sam. However, Sam argued that he had a counter-claim against the Tauwhareroa Trust by way of a set-off arising from the money that trust had received on behalf of the Mohaka A4 Trust.

[15] On 22 October 2009 the District Court at Napier entered summary judgment against Sam in the total sum of \$18,245.65. However, at Sam's request, the Court granted a stay of execution of the judgment on the basis that the 2009 proceedings in the Māori Land Court (see below) would resolve issues to do with the amount of money the Tauwhareroa Trust owed the Mohaka A4 Trust, and would therefore answer Sam's counter-claim. Eventually, on 9 December 2013 the District Court lifted the stay of execution due to the inordinate delay in the issues underpinning Sam's counter-claim being resolved in the lower Court. Sam was still free to pursue his counter-claim but in the meantime the Tauwhareroa Trust was entitled to enforce the 2009 judgment.

*The 2009 applications*

[16] In 2009 a fresh round of applications were filed in the lower Court. Sam filed his review application (in respect of which the current appeal relates) together with a separate

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<sup>12</sup> *Phillips v Trustees of Mohaka A4 – Mohaka A4* (2009) 200 Napier MB 33 (200 NA 33).

<sup>13</sup> 14 Takitimu Appellate MB 152 (14 TTK 152); *Phillips v Trustees of Mohaka A4 – Mohaka A4* [2010] 2010 Māori Appellate Court MB 425 (2010 APPEAL 425).

application to partition his interests from the Mohaka A4 block.<sup>14</sup> In addition, Bessie applied to remove the trustees of the Mohaka A4 Trust.<sup>15</sup>

[17] Sam's original review application sought a review of the Mohaka A4 Trust without any specific relief. The grounds identified were:<sup>16</sup>

- (a) I am a shareholder in the Trust;
- (b) The trustees have allowed a situation to develop where there is a general failure to meet the standards of generally accepted accounting principles;
- (c) The trustees have allowed a situation to develop where there is confusion in trust documents;
- (d) The trustees have allowed a situation to develop where there is incorrect management of tax between the trusts; and
- (e) The attached reasons as set out in the letter dated 24 November 2008 by Lynda Smart Forensic Accountant;
- (f) In 1995 and repeatedly since then I have made a request to petition (sic) my shares out of the trust. No written response has been received from the trustees in that regard.

[18] The attachment referred to from Lynda Smart, Sam's forensic accountant, had been prepared for the purposes of the District Court proceedings and set out a number of factors that suggested that the Tauwhareroa Trust was holding approximately \$10,583.00 on behalf of the Mohaka A4 Trust. It also identified tax implications regarding the arrangements between the two trusts.

[19] The three applications initially came before Chief Judge Isaac on 4 February 2010.<sup>17</sup> The partition application was adjourned for an amended application to be filed. Bessie and Sam were directed to file detailed submissions and evidence in support of their respective removal and review applications. The focus of the discussion in Court was Bessie's application and Sam does not appear to have addressed the Court on that occasion.

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<sup>14</sup> A2009008507 and A20090013665.

<sup>15</sup> A20090014152.

<sup>16</sup> Application for Review of Trust dated 11 May 2009.

<sup>17</sup> 1 Takitimu MB 72-90 (1 TKT 72).

[20] On 16 September 2010 the three applications came before Chief Judge Isaac again.<sup>18</sup> The partition application was further adjourned. Mr Davies, counsel for Sam at the time, explained that Sam was seeking an investigation into the financial accounts of the Mohaka A4 Trust and that the question of how much the Tauwhareroa Trust owed to the Mohaka A4 Trust needed to be resolved. Sam had an interest in that issue not only as a beneficial owner of Mohaka A4 but also because he wished to claim a set-off in respect of the judgment the Tauwhareroa Trust had obtained against him in the District Court. Bessie's removal application was adjourned for the Mohaka A4 owners to hold a meeting to consider the appointment of an independent trustee to put the affairs of the trust in order. In respect of Sam's review application, Chief Judge Isaac decided to appoint an accountant to provide a report on the financial and accounting affairs of the Mohaka A4 Trust, and subsequently appointed Tarrant Cotter, accountants of Wairoa to undertake that task.

[21] On 5 August 2011 the three applications first came before Judge Harvey.<sup>19</sup> As far as Sam's review application was concerned, Mr Davies presented submissions and called Ms Smart as an expert witness to explain the accounting issues arising from the Tauwhareroa Trust receiving income on behalf of the Mohaka A4 Trust. Ms Smart made recommendations as to how the income should be addressed for accounting and taxation purposes. Gary Mayo, an accountant with Tarrant Cotter, also gave evidence on the financial transactions between the two trusts. A meeting of owners on 4 August 2011 had nominated five of the whānau to act as responsible trustees, while Sam's counsel advocated for an independent advisory trustee. Arthur briefly addressed the situation of the two trusts. In addition, the Court heard from Bessie and Neti.

[22] In the course of the hearing Judge Harvey signalled to the parties that notwithstanding that the meeting of owners the previous day had nominated further of the whānau as replacement trustees, he was minded to appoint an independent trustee to take over the trust. The hearing concluded on the basis that Judge Harvey would issue a decision the following week.

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<sup>18</sup> 5 Takitimu MB 7-25 (5 TKT 7).

<sup>19</sup> 11 Takitimu MB 1-47 (11 TKT 1).



*Judge Harvey's decision of 9 September 2011*

[23] Judge Harvey issued his substantive decision on Sam's review application on 9 September 2011.<sup>20</sup> He concluded that the grounds were made out to appoint an independent sole responsible trustee for the Mohaka A4 Trust, and appointed James Wahiao Gray of Rotorua to that position. It was intended to be a 12 month appointment. The basis for taking that step is set out in paragraphs [21] and [22].<sup>21</sup>

[21] The accounts and taxation position of Mohaka A4 Trust need to be satisfactorily resolved as soon as possible. The future use and development of the land also needs to be determined, sooner rather than later. While Ms Phillips claims it would be premature to consider tendering the land for lease, I do not agree. The previous lessee paid rental in excess of \$30,000.00 per annum. That is income the trust can ill afford to lose, especially when its tax position and other liabilities are not entirely clear.

[22] More importantly, having carefully reviewed the numerous files that are in existence for this land, due to the extensive history of the different sets of proceedings that the owners and trustees have brought before this and the Māori Appellate Court, I am not confident that the owners are sufficiently independent of the various issues challenging this trust at the present time to administer and manage the land at this juncture in the best interests of all the owners.

[24] In addition to the general difficulty the owners faced in acting independently as trustees, Judge Harvey concluded that the position of Bessie, who owed the trust a debt, was untenable. Further, although the 2005 trustees had stood down for re-election, Judge Harvey observed that the grounds were made out to remove them.<sup>22</sup>

[32] As I have said, I have taken it from the previous direction of Chief Judge Isaac and the fact that the trustees submitted themselves for re-election that they accepted his direction that they should stand down. Moreover, given the conduct of the trustees to date, and in particular regarding the use of the trust income by Tauwhareroa Trust, the failure to deal with the tax position of Mohaka A4 Trust and the failure to have proper accounts prepared, there is sufficient evidence before the Court to justify removal under section 240 of the Act in any event.

[25] Judge Harvey directed Mr Gray to address four matters:<sup>23</sup>

- (a) Resolving satisfactorily the completion of the annual accounts for Mohaka A4 Trust back to 2004 including treatment of any taxation liabilities;
- (b) Attending to the completion of audits of the annual accounts for the last five years;

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<sup>20</sup> *Gemmell - Mohaka A4 Trust* (2011) 11 Takitimu MB 86-94 (11 TKT 86).

<sup>21</sup> At [21] to [22].

<sup>22</sup> At [32].

<sup>23</sup> At [26].

- (c) Conducting public tenders for future use of the land;
- (d) Convening a general meeting of owners for the purpose of considering Sam Gemmell's application for partition.

[26] Judge Harvey also gave an opportunity for individuals to be nominated as advisory trustees. In other respects, the review application was said to be “dismissed”.<sup>24</sup> As far as the partition application was concerned, that was adjourned sine die. As for Bessie's application for removal of trustees, Judge Harvey saw no reason for the application to continue given the change in trusteeship but gave Bessie 30 days in which to make any further submissions on the point.

*The 2009 applications continue*

[27] Following Judge Harvey's decision of 9 September 2011 the three 2009 applications continued before the Court.

[28] In a subsequent decision of 8 February 2012,<sup>25</sup> Judge Harvey appointed Padre Gemmell, Samuel Gemmell, Clarke Gemmell and Joseph Gemmell as advisory trustees. Judge Harvey also issued directions to Mr Gray and the advisory trustees.

[29] By this stage Sam had filed his application for costs dated 12 October 2011.<sup>26</sup> He sought recovery of the accounting costs of \$7,726.94 and a “modest contribution” towards his legal costs of \$13,844.27. However, his application was unclear as to who he sought costs from. Judge Harvey directed Sam and his counsel to clarify that issue.

[30] In the meantime Mr Gray encountered ongoing difficulties in completing the tasks required of him by the Court. On 5 December 2012 Judge Harvey issued a direction addressing those matters.<sup>27</sup> Although Judge Harvey had dismissed the review application in his judgment of 9 September 2011, it somehow continued to be one of the applications before the Court.

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<sup>24</sup> At [40].

<sup>25</sup> *Phillips v Gemmell – Mohaka A4 Trust* (2011) 13 Takitimu MB 264-269 (13 TKT 264).

<sup>26</sup> A20110012019.

<sup>27</sup> 20 Takitimu MB 144-148 (20 TKT 144).

[31] The three 2009 applications came before Judge Harvey again on 7 March 2013.<sup>28</sup> In addition, there was Sam's application for costs and a new application by Bessie under s 67 of Te Ture Whenua Māori Act 1993 ("the Act") for a judicial conference in relation to a proposed application to sue the former trustees.<sup>29</sup> Judge Harvey clarified that Bessie's application to remove trustees had now been concluded. As for the costs application, Mr Davies clarified that Sam was seeking costs against the former trustees or those who were responsible for compilation of the accounts identified by Ms Smart as being defective.<sup>30</sup> Mr Davies' application did not expressly single-out Arthur for costs, and his oral submissions spoke of costs being awarded against the "former trustees" in general.

[32] The former trustees in attendance replied to the costs application. Neti opposed paying costs and pointed out that Sam was a trustee between 1996 and 2005 when the actions complained of arose. Querida Rewi and Claude Gemmell, who were appointed in 2005, opposed costs. Bessie considered the former trustees should be liable for Sam's costs, that is, Arthur, Neti, Claude, Kennedy Gemmell and Stephen Gemmell (the last two having died). Nicky Gemmell, a pre-2005 trustee, opposed paying costs. As for Arthur, he opposed costs as follows:<sup>31</sup>

**A Gemmell:** I wasn't part of the recent trustees but I agree with Claude and Nettie and that the responsibility should fall on that previous trusts and unfortunately Sam was a trustee at that time, Bessie was a trustee at that time, my brother Thomas was a trustee at that time, he has passed away. Motu Gemmell (sic) was a trustee at that time and he has passed away and his sister is here. Nicky is here and he was a trustee at that time, Rihi was a trustee at that time and she has passed away. What I am saying, Sir is that if you are suing the previous trustees, Sam was a trustee. He said he resigned but that is not recorded in the Court. He was still a trustee right up until those trustees had to step down. I agree with Nettie and Claude and I think that they shouldn't take the rap but a lot of this stuff that Sam is talking about is historical. That is all I have to say, Sir.

[33] Judge Harvey concluded the costs application on the basis that the former trustees would have an opportunity to file further written submissions. It was discussed again at a judicial conference on 5 June 2013.<sup>32</sup> Bessie queried the costs claim. Arthur advised that he wished to respond to further material relating to the costs claim. Judge Harvey gave him a further 14 days in which to file a reply. There was a wide ranging discussion regarding the historic issue of the Tauwhareroa Trust accounting to the Mohaka A4 Trust

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<sup>28</sup> 22 Takitimu MB 227-269 (22 TKT 227).

<sup>29</sup> A20120004723.

<sup>30</sup> 22 Takitimu MB 227 (22 TKT 227) at MB 231.

<sup>31</sup> At MB 237.

<sup>32</sup> 24 Takitimu MB 92-121 (24 TKT 92).

for income earned from the Mohaka A4 block. In addition, Mr Gray addressed his ongoing difficulties in performing his functions as sole responsible trustee.

[34] The final hearing of Sam’s review application took place on 3 December 2013.<sup>33</sup> Sam’s partition application was formally dismissed. As for his costs application, Mr Wenley appeared as counsel for Arthur and confirmed that the costs issue would be dealt with on the basis of the submissions filed. The hearing went on to address other issues raised by Mr Gray under Sam’s “umbrella application” (the review application) as well as other applications Mr Gray had filed. At the conclusion of the hearing Judge Harvey dismissed Sam’s review application with the proviso that a fresh application for enforcement of obligations could be filed if necessary.

[35] During the course of the hearing Judge Harvey discussed with Mr Wenley and Mr Fletcher, counsel for Sam, a recently filed application by Sam to seek a “declaration” pursuant to ss 18(1)(d) and 237 of the Act in relation to the \$10,000.00 loan from the Tauwhareroa Trust to Sam. We mention this application as it was addressed in an interim reserved judgment of Judge Harvey on 27 May 2014<sup>34</sup> wherein he discussed the various complications facing the Mohaka A4 Trust and the role of the Tauwhareroa Trust in administering the Mohaka A4 Trust’s land and funds. Importantly, in that decision Judge Harvey highlighted that various issues concerning the conduct of the former trustees of the Mohaka A4 Trust remained outstanding and would need to be addressed at some point in time in the future (though it is unclear through which of the various applications).

*Judge Harvey’s costs decision of 7 July 2014*

[36] In his decision of 7 July 2014 Judge Harvey ordered that Arthur pay \$12,000.00 costs to Sam.<sup>35</sup> In approaching the costs issue Judge Harvey addressed three questions.

[37] First, should costs be awarded? Judge Harvey concluded that Sam had been largely successful in the proceeding and that an award of costs was appropriate.<sup>36</sup>

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<sup>33</sup> 29 Takitimu MB 27-78 (29 TKT 27).

<sup>34</sup> *Gemmell v Gemmell – Mohaka A4 Trust* (2014) 32 Takitimu MB 63 (32 TKT 63).

<sup>35</sup> *Gemmell v Gemmell – Mohaka A4 Trust* (2014) 32 Takitimu MB 174 (32 TKT 174).

<sup>36</sup> At [15]. We note that the paragraph numbering in the decision contains sequencing errors. We adopt the paragraph numbering in the minute book notwithstanding those errors.

[15] As outlined earlier these proceedings are part of wider litigation involving this whānau. The review of trust highlighted systematic failures in the past administration of the Trust, culminating in the appointment of an independent trustee. If the former responsible trustees had not resigned I was satisfied that there was sufficient evidence before the Court to have all of the former trustees removed for cause per s 240 of the Act. Wisely, they decided to resign and allow themselves to be replaced with an independent trustee. The short point then is that the applicant has been largely successful in this proceeding and therefore costs should follow the event. For completeness I note that, despite the absence of any counsel for the respondent at certain points, the proceedings were conducted in a manner akin to orthodox civil litigation.

[38] Second, what is an appropriate costs award? Judge Harvey noted that Ms Smart's total costs were \$7,726.94 and legal costs totalled \$13,844.27. Judge Harvey was satisfied with the manner in which Sam and his counsel prosecuted the application. At paragraph [18] he noted that while evidence of Ms Smart had been obtained for separate proceedings in the District Court, it was nonetheless highly relevant to the lower Court proceedings. He took into account Sam's role as a former trustee and that the decisions of the Tauwhareroa Trust were relevant to the Mohaka A4 Trust. Taking into account all relevant considerations and having reviewed the evidence, Judge Harvey settled on a figure of \$12,000.00.

[39] Third, should costs be awarded against Arthur Gemmell or against all trustees? This is the key part of the decision under challenge and it is appropriate that we set out Judge Harvey's reasons at paragraphs [21] to [26] in full:<sup>37</sup>

[21] The applicant submits that costs should be awarded against Arthur Gemmell solely. The applicant further submits that the established position is that a trustee is liable for the loss suffered by the trust property by the wrongful act of a fellow trustee and as between themselves there is a right to contribution and recoupment from trustees. Mr Wenley<sup>38</sup> submits that whilst the Court may choose to make an order against all the trustees who held office at the time and then order a contribution to be paid to each of them from Arthur Gemmell the more straightforward approach is to award costs against Arthur Gemmell solely.

[22] The learned authors of *Equity and Trusts in New Zealand* note that:

In general, a trustee is fully liable for the loss suffered by the trust property by the wrongful act of a fellow trustee: liability of trustees is joint and several, even if there are varying degrees of blameworthiness or (none at all)

[23] As between co-trustees there is a right to contribution and recoupment. In relation to this point the learned authors of *Equity and Trusts in New Zealand* note:

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<sup>37</sup> At [21] to [26].

<sup>38</sup> During the course of the appellate hearing we clarified that this reference should have been to Sam's counsel, Mr Fletcher.

As a general rule, a trustee can require a contribution from his or her co-trustee where he or she has paid off the trustees' liability for a breach of trust.

...

Trustees are entitled to take action against a co-trustee independently of the beneficiaries, to compel him or her to make good a breach of trust he or she has committed.

[24] Section 38 of the Trustee Act 1956 provides an exception to this general principle:

**38 Implied indemnity of trustees**

(1) **A trustee** shall be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for sake of conformity, and **shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee**, nor for any bank broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

...(Emphasis added)

[25] In any event, it is accepted by Arthur Gemmell that he was responsible for the actions taken by the Trust at the time and that he was acting as the only surviving trustee. In such circumstances it seems clear that Mr Gemmell should be liable for any costs award. That he might seek indemnity from the Trust for part of those costs remains a question at large. While Mr Wenley refers to pre 2004 issues and how they were apparently disposed of in a 2005 decision, on any review of trust the Court is entitled to consider the activities of a trust as a whole and is not necessarily confined to particular period of time.

[26] Moreover the two decisions I have been able to locate issued in 2005 do not appear to relate to review matters but rather are focused on an injunction proceeding involving the then trustees and a former lessee. It may be that there is a further decision that does deal with issues of review but even then I cannot see how that would preclude a fresh review application considering a trust's past performance over a long period of time. The only issue would be one of notice. In this case it is apparent that all former trustees had ample notice of proceedings and the nature of them. They also had opportunity to seek advice and consider their positions as well as asking for adjournments, which did occur from time to time.

## Arguments on appeal

### *The appellant's arguments*

[40] Mr Wenley appeared in the lower Court on behalf of Arthur in relation to the costs aspect of Sam's 2009 review application. On appeal, Mr Wenley says that Judge Harvey's reasons for awarding costs against Arthur solely was Arthur's role as a pre-2005 trustee in the Tauwhareroa Trust administering the Mohaka A4 Trust's land and income – what we refer to as the Tauwhareroa Trust accounting issue. He argues that Judge Harvey was wrong to rely on that issue to single-out Arthur for costs.

[41] Mr Wenley says the primary reason for Sam's 2009 review application and Judge Harvey intervening in the Mohaka A4 Trust's affairs (by appointing Mr Gray as sole trustee) was the dysfunction amongst the trustees appointed in 2005. Arthur was not one of those trustees. Further, Mr Wenley argues that Judge Isaac had already taken into account the Tauwhareroa Trust accounting issue when removing Arthur and his fellow trustees on 3 May 2005. This was therefore not a new issue for the Court in 2011. Judge Harvey's 9 September 2011 decision did not make any findings in relation to the accounting issue and left it to Mr Gray to resolve. Indeed, Judge Harvey's later interim decision of 27 May 2014 confirmed that the accounting issue remained unresolved and possibly subject to further action.

[42] Mr Wenley argues that Judge Harvey's costs award was wrong in several respects. The decision is said to have departed from the principle that costs follow the event, as the Tauwhareroa Trust accounting issue was merely a matter "lurking in the background" of the 9 September 2011 decision and did not go to its substance. In relying on Arthur's conduct as a pre-2005 trustee, Judge Harvey had taken into account an irrelevant consideration. Conversely, in failing to take into account the responsibility of the 2005 trustees for the Mohaka A4 Trust's difficulties between 2005 and 2011, Judge Harvey had failed to take into account a relevant consideration. Overall, Mr Wenley argues that singling-out Arthur for the full costs award was plainly wrong.

[43] In addition, Mr Wenley says that Judge Harvey was wrong in concluding that Arthur was the only surviving pre-2005 trustee as he was the only surviving *active* pre-2005 trustee. Further, in terms of Ms Smart's two tax invoices in respect of which Sam sought costs, the first tax invoice dated 24 November 2008 in the sum of \$2,812.50 related to the District Court proceedings and should not have been the subject of the lower Court's costs award.

*The respondent's arguments*

[44] Mr Fletcher, who acted for Sam in the appeal but not in the lower Court, argues that Judge Harvey's costs decision should be upheld.

[45] Mr Fletcher says that Sam was the successful party in the lower Court. On 16 September 2010 Judge Isaac appointed an accountant to investigate the affairs of the

Mohaka A4 Trust and on 9 September 2011 Judge Harvey appointed Mr Gray as sole trustee. These orders reflect what Sam had sought from the Court. Therefore Sam was entitled to an award of costs.

[46] Judge Harvey applied the correct legal principles to the costs exercise and was entitled to conclude that costs should be awarded against Arthur solely. The actions of Arthur as a pre-2005 trustee were relevant to the review application and costs issue. Nevertheless, Mr Fletcher conceded that had the 2005 trustees attended to their duties, Sam's 2009 review application would not have been necessary. Further, Mr Fletcher accepted that Judge Harvey had not made any express findings of liability on the part of Arthur or his fellow pre-2005 trustees.

[47] As for Arthur being singled-out amongst the pre-2005 trustees, Mr Fletcher pointed to Arthur's statement during the 7 March 2013 hearing that "the responsibility should fall on that previous trusts" (sic) – set out at paragraph [32] above. Mr Fletcher described the proceedings as "a moving feast" and while Judge Harvey may not have made findings of culpability in his decision of 9 September 2011, in his costs decision and interim decision of 27 May 2014 he clarified that he held the pre-2005 trustees responsible for the situation of the Mohaka A4 Trust.

### **Discussion**

[48] As noted at the outset at paragraph [2], this Court has a limited scope within which to review an exercise of discretion such as an award of costs. Importantly, even if an appellate court considers that it might have exercised its discretion differently from the lower Court, that alone cannot justify overturning the lower Court's decision. There must be a clear error of the type outlined above before an appellate court can intervene.

[49] We have devoted a considerable portion of this decision to setting out the series of inter-related applications that came before the lower Court and other courts. That gives a sense of the dysfunction within the Mohaka A4 Trust and its beneficial owners. But the purpose in setting out that background is to outline the issues that Sam's 2009 review application placed before the Court, who was the focus of that application, and how the Court addressed the application.



[50] We are mindful that this appeal is not against Judge Harvey’s substantive decision of 9 September 2011. Nevertheless, it is relevant to observe that a review application is broad in scope, that the Court is primarily concerned with matters of policy and its implementation, but that the Court will necessarily be drawn into operational matters. In the context of a review the Court can invoke its “armoury of powers” under Part 12 of the Act, including under s 238 to enforce the obligations of trust.<sup>39</sup> The Court has wide supervisory and enforcement powers under s 238, and the Court can further invoke its other powers under Part 12 of the Act including ss 239 and 240 to remove and replace trustees.<sup>40</sup>

[51] Judge Harvey was therefore correct in his costs decision in observing that on a review application the Court is entitled to consider the activities of a trust as a whole and is not necessarily confined to a particular timeframe.<sup>41</sup> That reflects the broad scope of a trust review.

[52] Nevertheless, where the Court is asked to award costs following the conclusion of a trust review, the Court must ensure that its costs award reflects the true scope of the application and its outcome. In other words, in deciding what costs should “follow the event”, it is important to be clear on what was the “event”.

[53] As far as the scope of Sam’s review application is concerned, we agree with Mr Wenley that it was primarily concerned with the dysfunction and inaction of the 2005 trustees who were appointed by Judge Isaac on 7 July 2005. The unresolved Tauwhareroa Trust accounting issue was certainly a key feature of that dysfunction. That was also a feature of the removal of trustees in 2005 and, according to Judge Harvey’s interim decision of 27 May 2014, may still be the subject of further action. But in 2009 the Tauwhareroa Trust accounting issue was symptomatic of wider dysfunction amongst the 2005 trustees who had not progressed that nor any other key governance issues in the previous four years. By the time of Judge Harvey’s decision in 2011 that period of dysfunction had extended to six years.

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<sup>39</sup> *Proprietors of Mangakino Township v Māori Land Court*, CA65/99, 16 June 1999, at [19]-[24].

<sup>40</sup> *Clarke v Karaitiana* [2011] NZAR 370 (CA) at [36].

<sup>41</sup> *Gemmell v Gemmell – Mohaka A4* (2014) 32 Takitimu MB 174 (32 TKT 174) at [25].

[54] We also agree with Mr Fletcher that Sam's review application was something of a "moving feast". But it was never expressly concerned with obtaining relief or judgment against Arthur. That is certainly not how it was framed. Most tellingly, Mr Fletcher conceded that had the 2005 trustees performed their duties between 2005 and 2009, Sam would not have had to bring his review application in 2009.

[55] The outcome of Sam's review application also points to it being primarily concerned with the failures of the 2005 trustees to address the trust's outstanding and ongoing issues.

[56] On 16 September 2010 Chief Judge Isaac appointed an independent accountant to prepare a financial report on the Mohaka A4 Trust for the years 1999 to 2010. Clearly one issue was the treatment of the payments received by the Tauwhareroa Trust. But that only related to the period up to 2004. Chief Judge Isaac was also interested in ongoing financial accountability after 2005.

[57] Similarly, Judge Harvey's orders of 9 September 2011, considered at paragraphs [23] to [26] above, were also mostly concerned with the inability of the 2005 trustees to perform their functions. Certainly, the first of Mr Gray's tasks as sole responsible trustee (resolving annual accounts and taxation issues dating back to 2004) included the Tauwhareroa Trust accounting issue. But that was only one aspect of the relief granted. The relief was primarily concerned with putting in place a trustee to deal with the issues the 2005 trustees were incapable of addressing.

[58] Importantly, neither Chief Judge Isaac in his decision of 16 September 2010 nor Judge Harvey in his decision of 9 September 2011 made any express findings of liability or culpability against any individual trustees for the state of the Mohaka A4 Trust. Judge Harvey's decision deserves close analysis in this regard.

[59] As far as the Tauwhareroa Trust accounting issue was concerned, Judge Harvey outlined the relevant evidence but did not make any findings.<sup>42</sup> He identified the resolution of the accounts and taxation issues as one of a number of issues that needed to

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<sup>42</sup> *Gemmell – Mohaka A4* (2011) 11 Takitimu MB 86 (11 TKT 86) at [9] to [13].

be resolved.<sup>43</sup> However, the lack of independence of the owners<sup>44</sup> meant that it was necessary to appoint Mr Gray as sole trustee.<sup>45</sup> Mr Gray was then tasked with completing the annual accounts for the trust back to 2004 and any taxation liabilities, along with several other issues that related to events post-2005.<sup>46</sup> Judge Harvey commented on the “conduct of the trustees to date” but did not single-out any trustee. Importantly, his view that the evidence justified the removal of the trustees under s 240 of the Act could only relate to the 2005 trustees.<sup>47</sup>

[60] Accordingly, not only did Judge Harvey not make any express findings in relation to Arthur’s actions, the observations he did make in relation to trustee conduct related to events after Arthur’s time.

[61] Nevertheless, Mr Fletcher argues that in Judge Harvey’s costs decision of 7 July 2014 and his interim judgment of 27 May 2014 he does criticise Arthur’s role. We consider there are inherent flaws in Mr Fletcher’s proposition that the reasons set out in those two decisions can justify the costs award.

[62] In the first place, the costs decision can only relate to the outcome of the review application as represented by Judge Harvey’s substantive decision of 9 September 2011. A costs decision is not an opportunity to make further substantive findings. This is particularly so in a review application, where ordinarily the Court is focussed on the functioning of a trust as a whole. If in a review application the Court considers that particular trustees are responsible for the situation a trust finds itself in, then that must be spelt out in the substantive decision, and on occasion the Court may need to invoke s 238 of the Act. In the second place, Judge Harvey’s interim judgment of 27 May 2014 related to separate applications and not Sam’s review application. It is irrelevant.

[63] We also note that in his costs decision Judge Harvey refers to authorities on the joint and several liability of trustees.<sup>48</sup> It is not clear to what extent these authorities influenced the outcome of his decision. Nevertheless, we cannot see how the principle of

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<sup>43</sup> At [21]

<sup>44</sup> At [22]

<sup>45</sup> At [25] and [26]

<sup>46</sup> At [26] to [29]

<sup>47</sup> At [32]

<sup>48</sup> *Gemmell v Gemmell – Mohaka A4* (2014) 32 Takitimu MB 174 (32 TKT 174) at [22] to [24].

joint and several liability can be a proper basis to award costs against one trustee in the context of a trust review when the Court has not made substantive findings of culpability on the part of that trustee.

[64] We therefore agree with Mr Wenley that in awarding costs against Arthur solely Judge Harvey erred in his approach. In singling-out Arthur as one of the pre-2005 trustees Judge Harvey has taken into account an irrelevant consideration as the review was primarily concerned with the dysfunction and inaction of the 2005 trustees. Conversely, in failing to take into account the dysfunction and inaction of the 2005 trustees, which was the primary reason Sam brought his application, Judge Harvey failed to take into account a relevant consideration. In other words, the decision failed to give proper weight to the respective responsibilities of the pre-2005 trustees and 2005 trustees for the review application. Judge Harvey's approach otherwise amounted to an error of law or principle in attributing liability for costs to Arthur solely when in his substantive decision of 9 September 2011 he had not made any express findings of liability or culpability against Arthur.

[65] There are also errors in two aspects of Judge Harvey's approach to the material before him.

[66] First, Judge Harvey erred in describing Arthur as the "only surviving trustee". He is the only surviving *active* trustee but there are other pre-2005 trustees still alive.

[67] Second, Judge Harvey took into account Ms Smart's first tax invoice in awarding costs even though that related to the District Court proceedings. In our view, any costs related to the District Court proceedings could not be the subject of a costs award in the lower Court. Quite simply, they did not relate to the lower Court proceedings. Furthermore, Sam was unsuccessful in the District Court proceedings and the judgment against him included costs of \$5,074.00. To award Sam some of his costs in relation to those proceedings would amount to an unintended collateral attack on the District Court judgment.

**Outcome**

[68] We therefore conclude that Judge Harvey's costs award of \$12,000.00 against Arthur must be set aside. We do not believe it would be in the interests of justice or the parties to refer the costs application back to Judge Harvey to address once again. We will address it ourselves.

[69] There was no dispute that Sam was entitled to an award of costs given that he had been successful in his review application. The questions are: what should be the amount of costs and who should pay?

[70] Dealing with the first issue of quantum, we note that Sam sought the full costs of Ms Smart together with a modest contribution to his legal costs. Ms Smart's second invoice amounted to \$4,914.44. Sam's legal costs in the lower Court were \$13,844.27. Judge Harvey was prepared to award total costs of \$12,000.00. Given that he erroneously included Ms Smart's first tax invoice in that sum, the amount of \$2,811.50 needs to be deducted. That reduces the total costs to \$9,188.50. As Sam was seeking the full costs of Ms Smart's involvement in the lower Court, the amount of \$9,188.50 would represent payment of Ms Smart's entire second tax invoice of \$4,914.44 together with a contribution of \$4,274.06 to the total legal costs of \$13,844.27. In our view, \$9,188.50 represents a reasonable costs award in the circumstances.

[71] Turning to the second issue, Judge Harvey's essential error was in failing to give proper weight to the respective responsibilities of the pre-2005 trustees and 2005 trustees for the review application. As we have outlined, Sam's review application was primarily concerned with the dysfunction amongst the 2005 trustees. They should bear the greater proportion of any costs award. However, the pre-2005 trustees bear some responsibility for the review application given that the Tauwhareroa Trust accounting issue was a cause of the Mohaka A4 Trust's dysfunction.

[72] It is not possible to take a scientific approach to the apportionment of costs. In our view, the 2005 trustees should bear responsibility for 75 percent of Sam's costs (\$6,891.38) and the pre-2005 trustees (excluding Sam) should bear responsibility for 25 percent of Sam's costs (\$2,297.12). The extent to which any of those trustees can look to the Mohaka

A4 Trust or to each other to recover those costs is not a matter before this Court and we offer no comment.

**Orders**

[73] The appeal is allowed. Pursuant to s 56(1)(b) of the Act the Court revokes the lower Court's costs order of 7 July 2014 and substitutes it with a costs order pursuant to s 79 of the Act as follows:

- (a) Arthur Thorpe Gemmell, Bessie Phillips, Nicky Gemmell, Paul Mutu Gemmell, Rihi Moore and Thomas Gemmell are jointly and severally liable to pay costs to Samuel Carter Gemmell in the sum of \$2,297.12; and
- (b) Richard Henare Gemmell, Steven James Gemmell, Rihi Patere Moore, Bessie Phillips, Querida Rewi, Claude D Gemmell and Neti Whatuira are jointly and severally liable to pay costs to Samuel Carter Gemmell in the sum of \$6,891.38.

[74] The orders are to issue immediately.

[75] Arthur has been largely successful on appeal. We leave counsel to resolve between themselves the costs on the appeal. If they are unable to do so then they are to file costs submissions within four weeks.

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

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C L Fox  
**DEPUTY CHIEF JUDGE**  
(Presiding)

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S Te A Milroy  
**JUDGE**

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D J Ambler  
**JUDGE**