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

A20210014842
APPEAL 2021/8

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Otakanini Church Site Block
I WAENGA I A *Between*	TRACEY HILL Te Kaitono Pīra *Appellant*
ME *And*	JANE SHERARD Te Kaiurupare Pīra *Respondent*

Nohoanga: *Hearing*	30 May 2022, 2022 Māori Appellate Court MB 185-198 (Heard at Whangārei (via Zoom)
Kooti: *Court*	Chief Judge W W Isaac (Presiding) Judge C T Coxhead Judge R P Mullins
Kanohi kitea: *Appearances*	T Hill (in person) C Panoho-Navaja for the Respondent
Whakataunga: *Judgment date*	31 October 2022

TE WHAKATAUNGA Ā TE KOOTI PĪRA MĀORI
Reserved Judgment of the Māori Appellate Court

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Hei tīmatanga kōrero
Introduction

[1] On 8 October 2021, Judge Armstrong issued a decision finding the former trustees of the Otakanini Māori Reservation Trust (the Trust) jointly and severally liable to repay $67,838.86 for "serious and significant breaches of trust concerning the payment of funds".[1]

[2] Tracey Hill, the appellant, is one of the trustees who was found liable. The appellant appeals the findings of the Court and the order of costs. This is on the basis that the Court did not take into account the facts that the day before the substantive hearing, an agreement was reached between the parties that the trustees all resign. All trustees except Mr Ratu Waata resigned. As a result of that resignation the trustee's lawyer, Mr Robertson advised the resigning trustees to not to respond to the Court proceedings. If the implications of the Court's decision had been known to the appellant, she would have responded. Further, if the Court had all the available evidence, it would not have made the findings and costs orders that it made.

[3] The appellant also submits that the Lower Court decision has not only cost implications but also impacts on mana and relationships with the whānau, which are important considerations that the Court should consider.

Kōrero whānui
Background

[4] Haranui Marae is located in Otakanini at the southern head of the Kaipara Harbour. On 7 March 2016, the marae trustees received $267,848.17 from the post-settlement governance entity for Ngāti Whatua ki Kaipara, Ngā Maunga Whakahii o Kaipara Development Trust. Part of those funds were spent on renovations for the marae.

[5] In 2016 the respondent in this appeal, Ms Sherard, filed applications for a review of the trust, removal of the trustees and an enforcement of the trustees' obligations alleging that over $70,000 of those funds received by the Trust were spent by the trustees in breach of trust.

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1 *Sherard v Devereux – Otakanini Church Site Block* (2021) 238 Taitokerau MB 185 (238 TTK 185) at [53].

[6] In October of 2016, Judge Armstrong granted an interim injunction restricting the use of trust funds. Hearings for the remaining applications were set for February 2018. The day before the hearings an agreement was reached by the parties that the trustees resign. All but one of the trustees resigned.

[7] At this point in the proceedings, the appellant claims that they were advised by their lawyer Mr Robertson, that due to their resignation, their involvement in the Court proceedings was at an end. They were encouraged not to engage with any of the parties in relation to matters of the marae. As a result, the appellant and the other trustees did not actively engage in the Court processes that followed.

[8] The Court was unaware that the trustees had received this advice and notice of subsequent hearings was sent to them as per standard procedure. Mr Robertson sent a final invoice for costs to be paid out of the Special Aid Fund in March 2018. In this same correspondence, he also informed the Court that his role as counsel for the Trust had come to an end, there being no trust until such time as one was re-established.

[9] Following their resignation from the Trust, the trustees (including the appellant) no longer participated in any of the Court hearings. Judge Armstrong detailed this in his judgment:[2]

> During the early stage of these proceedings the respondents instructed counsel and actively engaged. This changed following 27 February 2018 where, by consent, I removed 10 of the 11 respondents as trustees given that they had resigned. Since then the respondents have had limited engagement in this proceeding. They provided financial records to Mr Bennett and responded to his queries concerning his reports. However, for the most part, they have not engaged with the proceeding nor have they attended subsequent hearings

[10] However, Judge Armstrong determined that the trustees had been given sufficient notice of the application and the orders sought against them, as well as sufficient opportunity to respond.[3]

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2 Above n 1 at [19].
3 At [21].

[11] Judge Armstrong found that the respondents had an obligation to act in the best interest of the beneficiaries. As trustees, they have a duty to protect and preserve trust funds and ensure that funds are only applied for a proper purpose. He found that:[4]

(a) Trustees cannot engage in "self-dealing" by placing themselves in a position where their duty and interest conflict.

(b) A forensic accountant determined that $70,465.36 was not properly accounted for.

(c) Funds were paid in breach of trust.

[12] When considering if the trustees should repay these funds, Judge Armstrong considered the seriousness of the breaches of trust, which he found were in this case very serious, "go[ing] to the heart of the trustees' duty to protect, preserve and account for trust funds".[5] He also noted the trustees' failure to appear to explain and justify the expenditure.

[13] The Judge found that $67,838.86 should be repaid to the marae. Payments made to one of the trustees for project management work, and payments with receipts for a hire company, were the only expenditures justified and not requiring repayment. [6]

[14] On the question of who should repay the $67,838.86, the Court relied on s 131 of the Trusts Act 2019, which provides that the Court may relieve a trustee from personal liability where the trustee has acted honestly and reasonably and ought to be fairly excused for the breach. Judge Armstrong noted that the trustees did not appear to justify the use of the funds and explain their eligibility for relief:[7]

> I have considered whether the trustees who received funds personally should be held severally liable for those funds, with the remaining trustees being held jointly and severally liable for the balance. Had Joseph Timoti, Denise Stewart, John Hohepa and Ratu Waata appeared before me and presented such an argument I would have been sympathetic to it. They did not. The onus is on them to prove that they should be granted relief in whole or in part. They chose not to do so despite the repeated opportunities afforded to them and despite my warning that such an order may be

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4 Above n 1 at [32].
5 At [33].
6 At [41].
7 At [49].

> granted. In these circumstances, all of those respondents should be jointly and severally liable for the full amount.

[15] Consequentially, Judge Armstrong issued orders under ss 37(3), 236, 237 and 238 of Te Ture Whenua Māori Act 1993 (the Act) against the trustees, finding them to be liable for the repayment of $67,838.86 to the Otakanini Māori Reservation Trust.

Ngā take
The issues

[16] The appellant, who was not legally represented for the appeal, submitted that by following the advice of their lawyer to not appear and give evidence in the lower Court, the former trustees have been denied an opportunity to present their side of the story and give evidence and submissions concerning their liability to repay $67,838.86 to the Trust.

[17] Counsel for the respondent interpreted the appellant's submission as an application to adduce further evidence before this Court. This is largely how the case was framed and argued before us. Our approach at hearing was to consider the case within this framework. At the conclusion of the hearing, we reserved our decision on whether leave to adduce further evidence would be granted. Arguments on the appellant's substantive case – that the money expended by the former trustees was reasonable and that they should not be liable to repay it to the Trust – could follow depending on our decision whether to allow further evidence to be adduced. Counsel for the respondents indicated that, were the appellant to be given leave to adduce further evidence before this Court, they would wish to respond to and cross-examine that evidence as part of a substantive hearing. They also indicated they would wish to recall the forensic accountant.

[18] Natural justice was raised at the hearing as one of the factors that may or may not justify leave being granted to adduce further evidence before the Appellate Court. However, our view is that the issue of natural justice is a preliminary question that should be considered at the outset. If the appellant has demonstrated that there has been a breach of natural justice, we must then consider whether this is best remedied by allowing further evidence to be adduced before this Court, or by referring the substantive issues back to the Māori Land Court to be reheard.

[19] Therefore, in our view the issues this Court must determine, are:

(a) Has a breach of natural justice occurred in this instance?

(b) If there was a breach, does natural justice require that the new evidence be sought to be produced by the appellant be heard?

(c) If so, should such evidence be considered by way of adducing new evidence before the Māori Appellate Court, or by referring the matter back to the Māori Land Court to reconsider the question of trustee liability?

Ngā kōrero a te kaitono pīra
Submissions of the appellant

[20] The appellant seeks to appeal the Court's order holding several of the former trustees, including herself, liable for the repayment of $67,838.86, on the basis that the Court did not have all relevant information before it. To rectify this, she wishes to be able to put further evidence before the Court to explain the expenditure and conduct of the trustees.

[21] The appellant claims that she, along with the other trustees, was advised by their lawyer not to continue attending Court proceedings after they had resigned as trustees. This advice was communicated over the phone by the lawyer, who has since passed away. The appellant summarises the events as follows:

> (a) We were advised that if trustees volunteered to stand down, the court proceedings would end there and not affect us;
>
> (b) We were encouraged not to engage with the involved parties any further with respect to matters of the marae; and
>
> (c) As a result, I did not actively engage in the processes set out by the Court, including not attending the three Māori Land Court hearings, and not actively participating in the forensic accounting exercise.

[22] The appellant continued to receive Court notices, but due to the advice of the lawyer, did not read the notices or attend the hearings. She submits that this led to a lack of fairness at the hearing, as the trustees, by following the advice of their lawyer, were unable to present their side of the case.

[23] The appellant is concerned that an affidavit she submitted in 2017 was not considered by the Māori Land Court because of her absence from proceedings. This affidavit detailed

matters of the Trust's finances, challenges the trustees were contending with, as well as including an offer for the respondent to voluntarily resign. Furthermore, the appellant submits that she has additional information which justifies many of the expenses which had previously been unaccounted for.

[24] The appellant submits that:

(a) Their lawyer's advice, stating that the trustees did not need to attend any further hearings after resigning, resulted in the Court not having a full and clear set of information when it determined that certain marae expenses were unaccounted for and unjustified.

(b) Most of the funds can be accounted for and were spent on the renovation and running of the marae. A review of the Court's decision would allow for evidence regarding the use of funds to be properly considered.

(c) The forensic accountant did not have all the relevant information when compiling his report. The lack of primary records has been acknowledged by the accountant. Additionally, the process and findings of the forensic accountant are not in accordance with tikanga, particularly the criticism of the use of koha (by way of cash cheques) paid to the trustees.

(d) The decision of the Court has had implications on mana and relationships within the whānau. It has affected the applicant's standing at the marae, as well as that of her children and mokopuna.

Ngā kōrero a te kaiurupare pīra
Submissions of the respondent

[25] Counsel for the respondent did not agree that the appellant should be given another opportunity to present new evidence to the Court. Counsel argued:

(a) It was unreasonable for the appellant and the other trustees to be able to rely on any purported advice not to participate in the hearings in the lower Court. A reasonable person would have at least enquired as to why they would have

continued to receive communications from the Court when they no longer had any requirements or liability. The proceedings took place over two years, which gave the appellant ample time to make such enquiries.

(b) The evidence that the trustees' lawyer advised them not to engage in further hearings is questionable, as there is nothing which states this in writing.

(c) The appellant had received all the Court notices that were sent to her so she could not claim lack of notice.

[26] In terms of a breach of natural justice, the respondent states that this is not a case where the appellant was not afforded an opportunity to participate in the lower Court. The appellant has not pleaded lack of notice and acknowledges that the Court provided notices of further hearings, copies of transcripts, and copies of Court directions directing the trustees to file submissions in response to the respondents. In relation to fairness, the respondent stated that there was not enough evidence of the lawyer's advice to make a ruling on the unfairness of the trustees not being given an opportunity to be at court to present their side of the argument.

[27] The respondent asserts that there was sufficient notice for a reasonable person to have at least made an enquiry as to what steps they should have taken. It was unreasonable for the appellant and the other trustees to be able to rely on any purported advice not to participate. Given the length of time that the proceedings occurred over, and the number of substantive hearings, there was ample opportunity for them to query the advice.

[28] As noted above, Counsel interpreted the appellant's submission as an application to adduce further evidence before this Court. Counsel submitted that the appellant has failed to meet the necessary test for adducing further evidence and therefore any application to do so should be declined. Counsel referred to s 55 of the Act, which provides that the Court may only allow further evidence to be adduced if the Court determines that it is necessary to reach a just decision in the case.

[29] Counsel also referred to the *Dragicevich v Martinovich* test,[8] and submitted that the documents and information filed by the appellant do not meet the tests for adducing further evidence set out in that decision, which they summarise as:

(a) That the evidence must be such that it could not have been obtained with reasonable diligence for use at trial.

(b) That if given, it would probably have an important influence on the result, although it need not be decisive.

(c) That it is presumably to be believed, although it need not be incontrovertible

[30] On the first arm of the *Dragicevich* test, the respondent submits that the evidence was either already contained in the record of proceedings or was clearly available at the time of the hearing before Judge Armstrong. At the time the appellant was still participating in the proceedings, all the documents in question would have been available to be produced. The respondent further claims that the documents which the appellant seeks to add do not take the substantive matter any further and that they are "mere opinion".

Te Ture
The Law

Natural justice

[31] Natural justice is the central consideration in this matter. Natural justice requires that all interested parties are given a reasonable opportunity to appear in court and be heard. This applies to the Māori Land Court as much as any other court.[9]

[32] The leading text *Constitutional and Administrative Law in New Zealand* explains natural justice as being the duty to act fairly, that is context specific requiring flexibility and adaptability. It is critical that decisions of the Court are not only reached justly and fairly but are also seen and be seen to be so.[10]

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8 *Dragicevich v Martinovich* [1969] NZLR 306 (CA).
9 *White v Potroz* – Mohakatino Parihihihi No 1c West 3A2 (2016) Maori Appellate Court MB 143 (2016 APPEAL 143) at [52].
10 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at p 1046.

[33] It is a fundamental tenet of natural justice that an affected party should be given notice of proceedings that might affect his or her rights or interests.[11] There is no prescribed formula for providing notice, but it must be reasonable.[12]

[34] New Zealand courts, including the Māori Land Court and Māori Appellate Court, have focused on the principle of "fairness" as synonymous with natural justice. *Ngāti Apa Ki Te Waipounamu Trust v Attorney General* considered the requirements of natural justice in the context of the Māori Appellate Court:[13]

> We begin with the proposition that the parties, those appearing before the [Māori Appellate Court], and those affected by the proceeding were entitled to a fair hearing. That entitlement includes the right to have adequate notice of the proceeding and a reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them.

[35] The case of *Mounga v Associate Minister of Immigration* also dealt with a claim of breach of natural justice.[14] In that case, the applicant fall out of contact with her legal counsel because of being denied legal aid and feeling ashamed about being unable to pay her legal costs. As a result, she did not receive the notice of her hearing, and was not in attendance when the court found against her application to stay in the country. In that case, the High Court found that there had been a breach of natural justice and declared the original decision invalid to allow for the applicant's case to be reconsidered.

[36] The High Court emphasised that there does not have to have been an error in the delivery of notice by the court for a breach of natural justice to occur.[15] Likewise, natural justice can still be breached if the applicant or their advisors have been at fault.[16] Finally, the High Court stated that there is "no less a breach because the adjudicator when making his decision did not know of the facts which constituted the breach."[17]

[37] All affected parties before the Māori Land Court and Māori Appellate Court are entitled to the right to be heard and to procedural fairness, a touchstone of which is proper

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11 *Tioro v McCallum* – Estate of Ngapiki Waaka Hakaraia (2015) 2015 Māori Appellate Court MB 483 (2015 APPEAL 483) at [20].
12 Above n 10 at 1023.
13 *Ngati Apa Ki Te Waipounamu v Attorney-General* [2004] 1 NZLR 462, at [18].
14 *Mounga v Associate Minister of Immigration* [1993] 1 NZLR 500.
15 Above n 14 at 505.
16 Above n 14 at 507.
17 Above n 14 at 507, citing Stephenson LJ in [1985] 1 All ER 1073, 1082.

notice.[18] Judges have a significant amount of discretion when considering whether there has been a breach of natural justice and must consider each situation on a case-by-case basis. Ultimately, when determining whether there has been a breach of natural justice "[t]he purpose is to cull manifest unfairness, not apportion blame."[19]

[38] Further where there is the possibility that the Court may find someone(s) personally liable for trust funds the Māori Appellate Court in *Pook v Matchitt*[20] was clear that specific notice of potential liability is mandatory in cases of this nature.[21]

Kōrerorero
Discussion

Has a breach of natural justice occurred in this instance?

[39] Natural justice in simple terms is fairness. What is fair will depend on the particular circumstances of the case.

[40] Here we have a situation where, as a result of the agreement to resign, the trustees' lawyer advised them that they did not need to continue to participate in the Court proceedings. The appellant also says that the trustees were advised not to engage with any party involved in the proceedings on matters relating to the marae. In an exchange with Chief Judge Isaac the appellant was clear that the trustees were following the advice of their lawyer:[22]

> Chief Judge Isaac: Did he [Mr Robertson] talk about any agreement with you if you did resign, that there was a way forward?
>
> T Hill: Yes, he did. He said to us that if we resigned and we chose to voluntarily stand down there would be no substantive hearing. We wouldn't have any financial implications to any one of us. A forensic report was going to be done. Other than that he also advised us that we were not to communicate with anyone else. Were were not to get into any dialogue with the Māori Land Court or any of our whānau, period. That is why Your Honour I really never responded at all, only once for this entire time until the appeal.

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18 *Tioro* above n 11 at [27].
19 Above n 10 at 1115.
20 *Pook v Matchitt* – Matangareka 3B [2019] Māori Appellate Court 167 (2019 APPEAL 167)
21 Above n 20 citing *Tito – Mangakaahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86), *Tioro v McCallum — Estate of Ngapiki Waaka Hakaraia* 2015 Māori Appellate Court MB 483 (2015 APPEAL 483), *Maxwell v Parata — Maruata 2B2* (1994) 4 Taitokerau Appellate MB 18 (4 APWH 18), *Ngāti Apa Ki Te Waipounamu Trust v Attorney General* [2004] 1 NZLR 462.
22 2022 Māori Appellate Court MB 185-198 (2022 MAC 185-198) at 197.

[41] The appellant's position is supported by correspondence from other former trustees to the Court and other parties.[23]

[42] Further, former trustee Mr John Hohepa attended the hearing on 27 September 2018 and said:[24]

> ...as they withdrew last year after we were forcefully resigned by the lawyer advised us to resign, "resign," so we done so. I've got the letter that has been sent to you from the lawyer saying, "Enjoy your free time because you's are now free of obligations to the marae, I have done my job. Yet now we are here in Court for this 238 and no representation.

[43] The former trustees believed, based on advice from their lawyer, that as far as the trustees were concerned the matter was at an end.

[44] Unfortunately, we are unable to get this evidence directly from the trustees' former lawyer Mr Robertson as the appellant advises he has since passed away. However, as Mr Robertson was appointed via the Māori Land Court Special Aid fund, we have seen a copy of his final invoice to the court as well as the corresponding minute:[25]

> ...Secondly that will be our final invoice. My role as counsel for the trust board is now at an end there being no trust board until such time is [sic] one is re-established.

[45] The Court minute from 4 April 2018 records:[26]

> Mr Robertson advises this is his final invoice. His role as counsel for the application and other parties is now at an end and he is retiring from law. He thanks the Māori Land Court for the opportunity to work with the Haranui Marae.

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23 For example, refer email from John Hohepa to Toni Wirihana (case manager) and Carole Povey regarding withdrawal of legal representation (25 September 2018). (ROA p 1424); mail from Carles Devereux (Carole Povey) to Toni Wirihana and John Hohepa (26 September 2018). (ROA p 1424); email from Carles Devereux (Carole Povey) to Toni Wirihana regarding lack of legal counsel and need for deferral (26 September 2018). (ROA page 1420); Letter from John Hohepa to Chief Justice Helen Winkleman regarding the hearing of the Haranui Marae (18 March 2019). (ROA p 1323).

24 181 Taitokerau MB 120-136 (181 TTK 120-136) at 126.

25 Email from John G Robertson to Nanette Rahui and Reona Parkin regarding invoice and retirement (13 March 2018).

26 170 Taitokerau MB 85 (170 TTK 85).

[46] It is clear from Mr Robertson's email that his position was that he no longer acted for the trustees, there being no trust as they had all, except Mr Waata, resigned. This supports the appellant's kōrero that once they had resigned the matter would be at an end.

[47] We note that the appellant and the other trustees were sent correspondence from the Court enclosing copies of minutes, directions, hearing times and dates for the filing of evidence and submissions. From their resignations to the end of 2021, they were sent 11 separate pieces of correspondence. The appellant's evidence is that she did not even read any of the correspondence.[27] Not reading such a significant number of communications sent to you by the Court over an almost four-year period is arguably an extreme example of non-engagement. We need to balance this against the advice the appellant and former trustees had received from their lawyer that once they had resigned, they no longer needed to participate, the matter would be at an end, and they should no longer engage with the Court or any of the parties.

[48] Mr Hohepa and Ms Povey communicated with the Court prior to and during the 27 September 2018 hearing advising that they no longer had legal representation and had been told by their lawyer that they could "return to their lives". Ms Povey sought to withdraw her application to enforce the obligations of trust, and this was dismissed by consent.[28]

[49] Another relevant factor is that Mr Robertson was being paid via the special aid fund, so costs were not a barrier to ongoing involvement. If the former trustees understood they were required to participate in the proceedings, then they would have instructed their lawyer to do so. They had actively participated until that point.

[50] At no stage did the Court make it clear to the former trustees that despite their resignations, the fact that they were no longer represented, and the dismissal of Ms Povey's application, that they could still be found personally liable.

[51] In *Pook v Matchitt*[29] Ms Pook sought leave to withdraw at the initial hearing on the understanding that her involvement was going to be limited. This was granted. However, the Court subsequently made findings against her. The appellant argued that there was no clear

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27 2022 Māori Appellate Court MB 185-198 at 189.
28 181 Taitokerau MB 120-136 (181 TTK 120-136) at 128, withdrawing application A20140008387.
29 Above n 20.

warning that the Court was considering her liability and the Court ought to have given notice of the case against Ms Pook so she could have an opportunity to take advice and present a case in defence. The Māori Appellate Court agreed that it was not unreasonable for Ms Pook to assume any legal issues that might have been relevant were limited to the question raised at the initial hearing and that the lower Court should have formally notified her if they wanted to involve her in questions of potential personal liability for trust funds paid. Specific notice of potential liability is mandatory in cases such as this. The Māori Appellate Court also accepted that, had she been properly notified, Ms Pook would have taken steps to continue to instruct counsel to appear and file relevant evidence and submissions. They pointed to that fact that Ms Pook had appeared with counsel at the earlier hearings, so there was no reason to assume she would not have continued to do so if she had been given adequate notice. Consequentially, the Court allowed the appeal in part, annulling the payment orders against Ms Pook.

[52] Against this background we are of the view that the former trustees were simply following the advice of their lawyer with an understanding, albeit misguided, that they were no longer involved and, importantly, that there was no risk of personal liability. If the trustees knew that the proceedings still required the presentation of evidence and submissions in their defence as ultimately the Court was determining their liability, we accept the submissions of the appellant that they would have continued to participate.

[53] As this was not the case, the appellant did not present relevant evidence to the Court. To enable a just and fair outcome of the issues before the Court, the appellant and her co-trustees should have this opportunity.

If there was a breach, does natural justice require that the new evidence be sought to be produced by the appellant be heard?

[54] The applicant and the former trustees must be given the opportunity to present evidence and submissions challenging the case against them.

[55] The respondent should also be given the opportunity to test that evidence and produce evidence in response.

If so, should such evidence be considered by way of adducing new evidence before the Māori Appellate Court, or by referring the matter back to the Māori Land Court to reconsider the question of trustee liability?

[56] In our view, the Māori Land Court is best placed to hear the new evidence and reconsider the question of trustee liability.

[57] Accordingly, we refer the matter back to the Māori Land Court for consideration.

Kupu whakatau
Decision

[58] For the reasons set out above we find that there has been a breach of natural justice and the matter should be referred back to the Māori Land Court to hear the new evidence wished to be adduced by the applicant.

I pānuitia tēnei whakataunga i te Kooti i Kirikiriroa i te 10.30am karaka o te rā 31 Hiringā-a nuku i te tau 2022.
Pronounced in Hamilton at 10.30am on this 31st day of October 2022.

W W Issac **CHIEF JUDGE**	C T Coxhead **JUDGE**	R P Mullins **JUDGE**