I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O WAIKATO-MANIAPOTO
In the Māori Appellate Court of New Zealand
Waikato-Maniapoto District

A20180009413, APPEAL 2018/23
A20190001839, APPEAL 2019/1

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Waiwhakaata 3E 4C Lot 2A Block (Hiiona Marae)
I WAENGA I A *Between*	DAVID TATA Te Kaipīra Tuatahi *First Appellant*
ME *And*	TANIA MARTIN Te Kaipīra Tuarua *Second Appellant*
ME *And*	TAMATI TATA, ANNETTE TATA, ALVY TATA-HOHEPA, NATHAN WHANGA AND NATHAN WHANGA AS FORMER TRUSTEES OF HIIONA MARAE Ngā Kaiurupare *Respondents*

Nohoanga: *Hearing*	14 May 2019, 2019 Māori Appellate Court MB 424-426 (Heard at Hamilton)
Kooti: *Court*	Judge L R Harvey (Presiding) Judge S F Reeves Judge T M Wara
Kanohi kitea: *Appearances*	L Thornton for First Appellant C Bidois for Second Appellant JA Hope for Respondents
Whakataunga: *Judgment date*	20 April 2020

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

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TABLE OF CONTENTS

Introduction

[1] On 19 October 2018, the Māori Land Court found that the former trustees of Waiwhakaata 3E4C Lot 2A (Hiiona Marae) Māori Reservation Trust, including David Tata, had breached their obligations and duties and were jointly and severally liable, together with Tania Martin, to repay trust funds of $37,803.34, that had been paid to Mrs Martin between 2008 and 2010.[1] Mr Tata and Mrs Martin then filed separate appeals against that decision.

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1 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A* (2018) 170 Waikato Maniapoto MB 123 (170 WMN 123)

[2] Mr Tata argues that he did not have an opportunity to present his case against liability before the Māori Land Court and that, given his personal circumstances and his withdrawal from trusteeship, he should be granted relief from liability.

[3] Mrs Martin appeals on two principal grounds. First, that there was no jurisdiction to find her jointly liable for the loss on the basis that she received the trust funds as a constructive trustee. Second, that there is a reasonable apprehension that the decision was made with apparent bias. She now seeks the annulment of all of the orders issued on 19 October 2018.

[4] Judge Armstrong also decided that Mrs Martin and two other nominees for consideration as trustees, Ngaitu Kara and Boyd Katipa, were unsuitable and accordingly declined to issues orders for their appointment. By the time of the hearing before this Court, an appeal against that order was not pursued.

Background

[5] Waiwhakaata 3E4C Lot 2A (Hiiona Marae) is a block of Māori freehold land, 2.024 hectares in area, created by partition order on 14 February 1958.[2] There are currently 57 beneficial owners holding seven shares. The land received the overlay of a Māori reservation on 28 January 1982 as a meeting place, sports and recreation ground for the common use and benefit of Ngāti Porahui and its sub-tribes.[3]

[6] Mrs Martin is a beneficiary of the marae and had been assisting the trustees with their administration. She is closely related to two of those former trustees: Rene Katipa is her mother and Boyd Katipa is her brother. She herself was not a trustee.

[7] Following the death of Te Arikinui Dame Te Atairangi Kahu in 2006, Te Arataura, the principal governance body of the Waikato iwi, paid a one-off grant of $50,000.00 to each Waikato-Tainui marae in honour of her memory. Hiiona Marae received one of those grants. Between 14 August 2008 and 6 August 2010, 53 separate payments were made via telephone banking, which deposited a total of $37,803.34 from the one-off grant into Mrs Martin's bank account. It is said that these funds were paid to Mrs Martin for what might broadly be described as marae development

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2 82 Otorohanga MB 8 (82 OT 8)

3 "Setting Apart Māori Freehold Land as a Māori Reservation" (28 January 1982) 7 *New Zealand Gazette* 247 at 275.

activities and for reimbursements for expenses it was claimed had been properly incurred, approved and accounted for by the former trustees.[4]

Procedural history

[8] The first appeal was originally filed by Mr Tata on 24 December 2018. The application was returned to Mr Tata for correction and was subsequently re-filed and accepted by this Court on 9 January 2019. The second appeal, together with an application for leave to appeal out of time, was filed by Mrs Martin on 4 February 2019.

[9] Then on 26 February 2019, a notice of intention to appear in opposition to the appeal of Mrs Martin was filed by the respondents, as the applicants in earlier proceedings. Mr Hope, for the respondents, then filed a memorandum dated 3 May 2019 confirming that his clients would adopt a neutral stance regarding Mr Tata's appeal.

[10] Following that, on 8 March 2019, Chief Judge Isaac set down both appeals to be heard together and appointed the coram.[5] Directions were then issued to the Registrar to inquire as to the availability of counsel to represent Mrs Martin. Mr Bidois was engaged and sought directions from the Court on 2 April 2019 for the filing of an amended notice of appeal and submissions.

[11] On 3 April 2019, we issued directions for Mr Bidois to file an application to amend the notice of appeal by 18 April 2019, with parties' submissions to be filed and served by 3 May 2019. Mr Hope filed submissions of the respondents on 3 May 2018, while an extension was granted for Mr Bidois to 8 May 2019.

[12] Then on 9 May 2019, Mr Bidois filed a memorandum seeking leave to file the second appellant's submissions out of time and to further amend the appeal grounds. We issued directions that, due to the lateness of the filing, the matters would need to be dealt with as preliminary issues at the hearing.

[13] The hearing was then held on 14 May 2019, following which we reserved our decision.[6] At the outset, we heard submissions concerning the leave sought by Mr Bidois and granted his application to amend the grounds of appeal. Respondent counsel was allowed one month following the release of the hearing transcript to file further submissions on the additional appeal ground.

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4 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A*, above n 1, at [2]
5 2019 Chief Judge's MB 58 (2019 CJ 58)
6 2019 Māori Appellate Court MB 424-462 (2019 APPEAL 424-462)

[14] As Mr Tata was unrepresented, we issued directions for counsel to be appointed to file submissions and any further evidence on those matters raised by Mr Tata. The opportunity to file any response to those submissions was reserved to the other counsel. Further submissions of the respondents were filed on 18 September 2019. Linda Thornton of Lyall and Thornton, Hamilton, was engaged as counsel for Mr Tata.[7] She filed submissions on Mr Tata's behalf on 9 October 2019. No further submissions in reply were filed.

Grounds of appeal

[15] The grounds of appeal for Mr Tata were expanded following the filing of Ms Thornton's submissions. It was contended that Mr Tata did not have an opportunity to state his case before the Māori Land Court against liability for breach of trust. A further ground was that the relevant financial information of the trust was either withheld or "doctored" and there was nothing to suggest to Mr Tata there was financial irregularities, such as to put him on notice. Finally, it was submitted that, as Mr Tata withdrew from his trusteeship due to personal circumstances and was not participating in trust business when the former trustees were appointed, he should be granted relief from liability per s 73 of the Trustee Act 1956.

[16] The grounds of appeal for Mrs Martin were distilled down to two from those originally pleaded. First, that the Court did not have jurisdiction to find Mrs Martin jointly liable for the repayment of monies paid to her on the basis that she received those payments as a constructive trustee. Second, that the decision of the Court below was made with apparent bias, given that the learned Judge decided matters of disputed fact overwhelmingly in favour of the applicants.

Issues

[17] The issues for determination are:

(a) Should leave to appeal out of time be granted?

(b) Should the decision of the Māori Land Court be annulled on the basis of apparent bias?

(c) Is Mrs Martin liable as a constructive trustee?

(d) Is Mrs Martin entitled to any allowance?

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[7] For the avoidance of doubt, Ms Thornton was appointed post hearing even though she is referred to as counsel in the "Appearances" section of the intituling to this judgment.

(e) Should Mr Tata be granted relief from liability?

[18] In the context of the Court's jurisdiction to hold Mrs Martin liable, along with the former trustees, we also consider the issue of recipient liability.

Should leave to appeal out of time be granted?

Mrs Martin's submissions

[19] The appeal of Mrs Martin was filed on 4 February 2919, approximately one month out of time, accounting for the fact the Māori Land Court judgment was distributed on 29 October 2018 and for the Court closures over the Christmas and new year period. Mrs Martin submitted that the reasons for the delay were due to her significant health issues, the recent losses of several close whānau members and the associated emotional toll, together with the fact she was without legal representation at the time of filing her application.

Respondents' submissions

[20] Mr Hope argued that leave should not be granted because Mrs Martin had not satisfied the criteria for leave to appeal out of time and had provided no sworn evidence that she was unwell. He submitted that the new trustees of Hiiona Marae are in limbo waiting for this matter to be determined and both trustees and beneficiaries need certainty and guidance as they progress important marae decisions. In addition, Mr Hope contended that the Court must consider the interests of justice of all parties, noting that the appeal lacks merit and further delays will be prejudicial to the trustees and beneficiaries. Mr Hope also pointed to the conduct of Mrs Martin before the Court below and the significant delays she herself had caused there.

Discussion

[21] The Court has discretion to grant leave to appeal out of time pursuant to s 58(3) of Te Ture Whenua Māori Act 1993 and r 8.14 of the Māori Land Court Rules 2011. In determining whether to grant leave, the overarching consideration is where the interests of justice lie.[8] However, the Court is also likely to consider a range of relevant factors, including:[9]

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[8] *Tahere v Tau – Rangihamama X3A and Omapere Taraire E (Aggregated)* [2017] Māori Appellate Court MB 62 (2017 APPEAL 62) citing *Koroniadis v Bank of New Zealand* [2014] NZCA 197*; Davis v Mihaere - Torere Reserves Trust* [2012] Māori Appellate Court MB 641 (2012 APPEAL 641) at [43]; and *Nicholls v Nicholls - Part Papaaroha 6B Block* [2013] Māori Appellate Court MB 636 (2013 APPEAL 636) at [19]

[9] See *Almond v Read* [2017] NZSC 80and *Rafiq v Attorney-General* [2018] NZCA 292

(a) The length and reasons of and for any delay, and the conduct of the parties;

(b) Any prejudice to the respondent or to others with a legitimate interest in the outcome; and

(c) The significance of the issues raised by the proposed appeal, both to the parties and more generally, and the overall merits of the proposed appeal.

[22] We consider that, in the interests of justice, it is appropriate that leave to file the appeal out of time should be granted, for three principal reasons. First, we accept that Mrs Martin's personal circumstances have been challenging, notwithstanding Mr Hope's opposition on evidential grounds, and that the length of the delay is not significant in the overall background to this appeal. It would not be appropriate that she now be denied the opportunity to challenge the judgment against her by way of a first appeal. Second, the adverse findings made against Mrs Martin are serious and, understandably, she seeks the opportunity to have those findings reconsidered. Third, the quantum of liability for both Mrs Martin and the former trustees is not insignificant. Again, we consider it would be inappropriate to refuse Mrs Martin the opportunity to challenge those findings of liability on a first appeal simply because of a brief delay. For these reasons the application to appeal out of time is granted.

Should the Māori Land Court's decision be annulled on the basis of apparent bias?

Mrs Martin's submissions

[23] Mr Bidois submitted that there are sufficient indicators within the judgment of the Court below which give rise to a reasonable apprehension of bias. Counsel referred to some broad principles set out by the Court of Appeal in *Muir v Commissioner of Inland Revenue* where a reasonable apprehension of bias might arise:[10]

> [64] It is not possible or desirable to create a catalogue of disqualifiers for Judges in which a reasonable apprehension of bias may arise, but some broad principles can be stated. First, a Judge should not decide a case on purely personal considerations. Secondly, there should not reasonably be room for a perception that the Judge will decide the case on anything but the evidence in front of him or her. Thirdly, a Judge must be in a position to consider all potentially relevant arguments. Fourthly, there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged Judge's perception is warped in some way.

[24] Counsel relied on the fourth principle and submitted that the findings on matters of disputed fact were so overwhelmingly in favour of the applicants that it might lead a reasonable lay observer to infer that the Judge's perception of the evidence was skewed in the applicants' favour. Mr Bidois

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10 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334

referred to particular passages from the judgment and submitted that the alleged bias manifested itself in two areas. First, the Court was critical of Mrs Martin's failure to use an hourly rate when calculating her fee and did not properly consider the relevant context, disregarding the possibility that beneficiaries might undertake work on a reimbursement basis. Mr Bidois argued that, having decided that an hourly rate was a precondition, it was never going to be possible for the trustees or Mrs Martin to satisfy the Court, and inevitably this coloured the Judge's perception of the evidence.

[25] Second, the Court noted that Mrs Martin did not recall a briefcase containing trust records being returned to her, then placed weight on the fact she did not positively deny the briefcase had been returned. Mr Bidois argued that, given Mrs Martin's inability to recall the briefcase being returned, her failure to make a positive denial is unsurprising and should not have been relied on by the Court. In addition, counsel contended that the Judge did not consider whether it was plausible that a party who claimed to have been seeking relevant trust records for a significant period would then surrender those records without being required to do so. The Court's perception on this point was therefore also skewed.

[26] Mr Bidois also referred to comments made in the judgment which he argued demonstrated that Judge Armstrong had taken a "very jaded view" of Mrs Martin from early on in the proceedings. Counsel submitted that, irrespective of whether the comments are factually correct, they are at a level which would lead a fair-minded lay observer to reasonably apprehend that, having become frustrated with the lack of co-operation from that party, the Judge might not bring an impartial mind to the resolution of the case.

Respondents' submissions

[27] Mr Hope argued that there is a high threshold for a successful claim of judicial bias and that a Judge asking hard questions or even becoming exasperated at times, is not sufficient to sustain a bias claim. He referred to a decision of Whata J in *Hall v New Zealand Central Authority*, where a claim of judicial bias and predetermination was made.[11] Mr Hope contended that the language used by the Judge in that case was far more robust than anything Judge Armstrong said and was found not to amount to judicial bias. He argued that, by comparison, the comments of Judge Armstrong seemed tame.

[28] Counsel also submitted that there was no excessive questioning by the Judge and nor was there an attempt to limit cross examination. In fact, the hearing, which was initially set down for two

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11 *Hall v New Zealand Central Authority* [2016] NZHC 780

days with six witnesses, was allowed to run for four days to give everyone an opportunity to give their evidence and for counsel to address the relevant issues. The hearing time was not taken up with submissions as these were filed subsequently in writing. In addition, Mr Hope contended that the case was not a complete whitewash, and there was at least one aspect of the application where the (now) respondents were unsuccessful.

[29] Mr Hope submitted that the claim that bias is evident from the overwhelming weight of findings against Mrs Martin and the other trustees is not tenable. If that in itself were grounds for a finding of bias, then the courts would be reluctant to find very strongly in favour of a party when the evidence suggested they should do so. He argued that there is very strong evidence against Mrs Martin and the relevant trustees, and much of the case rested on credibility. Judge Armstrong heard the witnesses give evidence and was able to consider, not only what they said, but their demeanour. There were several matters on which Mrs Martin's credibility in particular was undermined and, according to counsel, she even admitted to a lie. Mr Hope submitted that in such circumstances, the Judge was well justified in preferring the evidence of the applicants and making credibility findings against Mrs Martin.

[30] Mr Hope argued that the decision was reasoned and careful, and the Judge gave full reasons in examination of the evidence as he reached his conclusions. There is therefore no basis for a finding of apparent bias.

The Law

[31] The test for apparent bias was considered by the Supreme Court in *Saxmere v Wool Board Disestablishment Company Limited.*[12] It turns on whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question required to be decided.[13] Two steps are required: first, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits. Second, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[14]

[32] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. The person is neither unduly sensitive or suspicious, nor complacent about what may influence the

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12 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72. See also *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122

13 Ibid at [3]

14 Ibid at [4]

decision-maker's decision.[15] They are to be viewed as reasonably informed about the workings of the judicial system, the nature of the issues in the case, and about the facts, which are said to give rise to an appearance or apprehension of bias.[16]

[33] The observer must also understand three points concerning the conduct of judges:[17]

(a) Judges are independent in decision-making and have taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will";

(b) Judges are required to sit unless grounds for disqualification exist; and

(c) Judges decide between litigants irrespective of the merits of their counsel.

[34] The principles in *Saxmere* have been applied by this Court on several occasions.[18] We adopt them again in this decision.

Discussion

[35] Mr Bidois referred to the broad principles set out by the Court of Appeal in *Muir* and the principle that there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged Judge's perception is warped in some way.[19] However, counsel has not referred to a series of rulings or events but rather, has focussed on three passages from the judgment to support the allegation of bias.[20] The first relates to the calculation of Mrs Martin's fee:

> [43] There was also no proper basis or explanation for Mrs Martin's fee of $21,000.00. Mrs Martin advised this fee was payment for her time and travel expenses. However, in response to my questions, she advised that she did not use an hourly rate when calculating this figure. She was unable to explain how she arrived at this figure and how it was commensurate with the time required to complete the various milestones in the feasibility study.
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> [44] Mr Katipa and Mr Kara were also unable to explain the basis of this fee. There was no proper explanation provided justifying this amount. The first respondents did not seek

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15 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 12, at [5]
16 Ibid at [5], [37]-[38] and [97]
17 Ibid at [8]
18 See *Inia v Julian – Succession to Moehuarahi Inia* [2019] Māori Appellate Court MB 333 (2019 APPEAL 333); *Rudd v Trustees of Horowhenua 11 Part Reservation Trust* [2018] Māori Appellate Court MB 123 (2018 APPEAL 123); *Nicholls v Stevens – Part Papaaroha 6B* [2013] Māori Appellate Court MB 598 (2013 APPEAL 598); and *Rangitukunoa v Koning – Matapihi 1A3D4C1 Block* [2012] Māori Appellate Court MB 690 (2012 APPEAL 690)
19 *Muir v Commissioner of Inland Revenue*, above n 10, at [64]
20 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A*, above n 1

> competing quotes or estimates from other persons who may have been able to undertake the feasibility study. There was no proper basis upon which the first respondents could satisfy themselves that this fee was reasonable. It is hard to escape the conclusion that this amount was selected arbitrarily.

[36] The second passage was in relation to trust records:

> [86] I accept that a briefcase was handed to Mr and Mrs Tata at their house. I also accept Mrs Tata's evidence that this briefcase, along with its contents, was returned to the first respondents. I consider Mrs Tata was an honest and reliable witness and she gave an accurate account of what occurred. While Mrs Martin could not recall the briefcase being returned, she did not deny this happened. No explanation has been provided as to what happened to the Marae computer, which contained the electronic records for the trust.
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> [87] I also consider that the conduct of the parties in this proceeding is relevant. The applicants have been seeking copies of the relevant financial records from the outset of this proceeding. They have sought various discovery orders against the respondents, Westpac and ANZ in an attempt to obtain the relevant financial records.

[37] The final passage referred to by Mr Bidois concerned Mrs Martin's conduct:

> [176] I also consider that Mrs Martin's conduct disentitles her to any relief from this Court. She has shown a strident and defiant attitude throughout this proceeding. She denied all accusations but filed no objective evidence to support her position. She refused to comply with my order for discovery, lied to Court staff about the location of the records, and intentionally manufactured documents to conceal the payments made to her. Her evidence has been evasive and inconsistent with earlier statements. Mrs Martin must be held responsible for her actions and will be held liable to repay those funds along with the first respondents.

[38] Mr Bidois' argument is that these three passages illustrate a skewed perception in favour of the applicants' evidence and that Judge Armstrong had taken a jaded view of Mrs Martin from early on in the proceedings. Regarding Mrs Martin's fee, Mr Bidois' argument was that the Court imposed a view that the calculation of the fee must be on an hourly basis. However, the transcript confirmed that the Judge spent some time with Mrs Martin attempting to clarify how the fee was calculated and working through the discrepancies in her evidence.[21] He also engaged with some considerable time with Mr Katipa and Mr Kara attempting to ascertain the basis of Mrs Martin's fee.[22] The evidence confirms that the witnesses were provided ample opportunity to explain the basis for Mrs Martin's fee, but were consistently inconsistent in their responses. In the absence of a clear explanation as to how the fee was calculated, we consider that Judge Armstrong was entitled to reach the conclusion he did.

[39] As to the trust records, again this issue was well ventilated before the Court below with evidence from both parties. As Mr Hope asserted, the issue was essentially one of credibility, given

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21 150 Waikato Maniapoto MB 1-106 (150 WMN 1-106) at 4-6
22 Ibid at 54-57, 99

the differing positions of the parties. We consider that the findings made by Judge Armstrong were reached after hearing from both parties and were based on his assessment of the evidence and the credibility of the witnesses. There is nothing to suggest his findings were made on any other basis.

[40] As to the argument that the Judge had taken a "very jaded" view of Mrs Martin from the outset, we do not agree. The passage counsel referred to is in the final judgment and towards the end of the decision. That would suggest the Judge reached his conclusions at the end of the proceedings, after considering the case in its entirety, rather than early on. In addition, the findings made regarding Mrs Martin's conduct are qualified by reference to the particular aspects of her conduct that led Judge Armstrong to reach those conclusions.

[41] Overall, we determine that the claim of apparent bias is not made out. We do not consider there to have been a series of events or rulings which warrant an inference that Judge Armstrong's perception was skewed. Nor do we consider there to be a logical connection between the passages identified and a suggestion that the case would be decided on anything other than its merits. Apart from the final judgment, there appeared to be no pattern of rulings which have gone against Mrs Martin such as to suggest bias. The fact that the Judge dealt with delays, allowed an extended hearing, and issued orders for third party discovery when Mrs Martin failed to comply with her discovery order, demonstrates the extent of his even-handed approach and the desire to have all the relevant material before the Court. We find that the parties had ample opportunity to have their cases properly heard and that the Judge made findings based on the evidence and gave full reasons for his conclusions. Accordingly, we conclude that a fair-minded lay observer would reasonably apprehend that Judge Armstrong would bring an impartial mind to the resolution of the proceedings. Therefore, this ground of the appeal must fail.

Is Mrs Martin liable as a constructive trustee?

Submissions of Mrs Martin

[42] Mr Bidois submitted that the Māori Land Court went beyond its jurisdiction when it found Mrs Martin jointly liable for the repayment of monies paid to her on the basis she received them as a constructive trustee. Counsel argued that ss 236 and 237 of the Act do not empower the Court to make orders in respect of constructive trusts. While the Court has extensive supervisory powers in relation to trusts and can grant equitable remedies, s 236 expressly limits the application of ss 237-245 to those trusts specified in s 236. Mr Bidois contented that this does not include constructive trusts and the Court has no inherent jurisdiction to make orders in respect of any form of trust other than those listed in s 236.

[43] Mr Bidois further submitted that ss 18(1)(a) and (d) also do not provide jurisdiction for the Court to hold Mrs Martin liable. He argued that the payments Mrs Martin received were funds from a tribal grant. The grant was not a right, title, estate or interest in Māori freehold land, nor was it the proceeds of alienation of any such right, title, estate or interest. Counsel contended that s 18(1)(a) is activated solely where the Court has been asked to determine disputes in relation to the ownership or possession of Māori freehold land or proceeds of alienation.

[44] Similarly, in terms of s 18(1)(d), Mr Bidois submitted that the debt, demand or damage must relate to Māori freehold land and the Courts have declined to interpret this provision as extending to disputes which do not relate directly to the land itself. He argued that at the centre of the claim was a contract or agreement for services to undertake a feasibility study, rather than any activities touching the land itself, and it is not sufficiently related to the land contained in the Māori reservation. Therefore, the jurisdiction in s 18(1)(d) was not triggered.

Respondents' submissions

[45] Mr Hope submitted that the Māori Land Court has the necessary jurisdiction and was correct to find that Mrs Martin was a constructive trustee and to issue an order for her to repay the money she received. Counsel argued that the Māori Land Court referred to Mrs Martin as having recipient liability, which is a species of constructive trust. Constructive trusts are imposed by the Court over specific property and holding someone as a constructive trustee defines a relationship between that person and the property they hold. Mr Hope contended that constructive trusts can be both institutional and remedial.

[46] Mr Hope argued that, rather than being a trust that is "constituted" under the Act by order of the Court, a constructive trust is imposed by the Court as a way of ensuring accountability or as a remedy. He contended that the funds paid to Mrs Martin were trust funds belonging to Hiiona Marae. The marae is a trust over Māori freehold land and therefore fits squarely within s 236 of the Act, allowing the Court to grant equitable remedies under s 237. The imposition of the constructive trust is therefore not inconsistent with s 236.

[47] Counsel further submitted that the essence of the Māori Land Court's order was the recognition that the trust property that passed to Mrs Martin *remained* trust property and Mrs Martin held it as a constructive trustee and fiduciary. She had obligations to account to the beneficiaries for that property and could not profit from it herself. In other words, the Court's finding that Mrs Martin had actual knowledge the trust funds were paid to her in breach of trust was an extension of the trust, to impose trustee obligations on her. The constructive trust or recipient liability was a device to draw

Mrs Martin into the trust for the purposes of accountability as a fiduciary in respect of the money she received.

Submissions in reply

[48] Mr Bidois disagreed with the respondents that the approach of the Court below was to find Mrs Martin as a constructive trustee and then she impliedly became a fiduciary required to return the money. He argued that the Court approached the matter in two bites. First, that she was a knowing recipient of the funds, and second, whether she should be held liable to repay those funds. Counsel submitted that liability was a separate and discrete issue from the existence of a constructive trust and the Court clearly took the enquiry to a second level.

The Law

[49] Section 237 of the Act provides:

> **237 Jurisdiction of court generally**
> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Maori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.
> (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

[50] The jurisdiction in s 237 is qualified by s 236, which states:

> **236 Application of sections 237 to 245**
> (1) Subject to subsection (2), sections 237 to 245 shall apply to the following trusts:
> (a) every trust constituted under this Part:
> (b) every other trust constituted in respect of any Maori land:
> (c) every other trust constituted in respect of any General land owned by Maori.
> (2) Nothing in sections 237 to 245 applies to any trust created by section 250(4).

[51] It is well-settled that the Māori Land Court has extensive supervisory powers in relation to trusts and, in accordance with s 237 of the Act, it can exercise all the same powers and authorities as the High Court, including its inherent jurisdiction, in respect of trusts generally.[23] In *Mikaere-Toto v Te Reti B and C Residue Trust*, this Court confirmed the Māori Land Court's jurisdiction to grant equitable remedies for breach of trust or fiduciary duties.[24]

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[23] See *The Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999 at [24], [27]; *Clarke v Karaitiana* [2011] NZCA 154 at [36], [38]; and *Mikaere-Toto v Te Reti B and C Residue Trust - Te Reti B and Te Reti C* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249)

[24] *Mikaere-Toto v Te Reti B and C Residue Trust - Te Reti B and Te Reti C* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249) at [26] – [35]

Recipient liability

[52] Recipient liability arises when a third-party stranger knowingly received trust property and dealt with it in a manner inconsistent with the trust.[25] The starting point is a factual analysis of the recipient's state of mind. A leading authority for categorising constructive knowledge is *Baden v Société Générale pour Favoriser le Développement du Commerce et de I'Industrie en France SA* where Gibson J outlined five categories of knowledge:[26]

(a) Actual knowledge;

(b) Wilfully shutting one's eyes to the obvious;

(c) Wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;

(d) Knowledge of circumstances which would indicate the facts to an honest and reasonable person; and

(e) Knowledge of circumstances which would put an honest and reasonable person on inquiry.

[53] In *Equiticorp Industries Group Ltd (in stat man) v The Crown*, Smellie J endorsed the first three categories of imputed knowledge set out in *Baden* and determined that it was unnecessary to decide whether other forms of constructive knowledge were also sufficient.[27] This was also the approach taken by the Māori Land Court when Judge Armstrong decided he did not need to resolve whether the categories of constructive knowledge in *Baden* should be adopted, as this case fell squarely within the first three categories.[28]

[54] English authorities have increasingly focussed on the unconscionability of the retention of property as the essence of a claim of knowing receipt, and this approach was adopted by the Court of Appeal in *McLennan v Livaja*:[29]

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25 Andrew Butler (ed), *Equity and Trusts in New Zealand,* (2nd ed, Brookers, Wellington, 2009) at [13.4.4]

26 *Baden v Société Générale pour Favoriser le Développement du Commerce et de I'Industrie en France SA* [1992] 4 All ER 161. Initially the New Zealand courts seemed to accept that the five categories of knowledge might be sufficient in making out claims for both dishonest assistance and knowing receipt: *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41; *Equiticorp Industries Group Ltd (in stat man) v The Crown* [1998] 2 NZLR 481; and *Lankshear v ANZ Banking Group (NZ) Ltd* [1993] 1 NZLR 481

27 *Equiticorp Industries Group Ltd (in stat man) v The Crown* [1998] 2 NZLR 481

28 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A*, above n 1, at [127]

29 *McLennan (as Liquidators of Neil Timber Ltd) (in liq) v Livaja* [2017] NZCA 446. See also *Re Montagu's Settlement Trusts v National Westminster Bank Ltd* [1987] Ch 264, [1994] All ER 308; *Bank of Credit and Commerce (Overseas) Ltd (in liq) v Akindele* [2001] Ch 437 (CA) at 455; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at [31]

> [38] A claim for knowing receipt, however, depends on the tainted circumstances of receipt of property. Liability will arise where it is unconscionable for the recipient to retain it because of the recipient's state of knowledge in respect of the fact that the transfer involved a breach of fiduciary obligations owed by the transferor.
>
> [39] Different High Court judgments have described the basis for knowing receipt as either unconscionability or unjust enrichment, a divergence possibly arising from the nature of the remedy applied in such cases. This in turn has led to differing conclusions as to the level of knowledge required to establish liability.
>
> [40] We consider that the correct basis for knowing receipt is unconscionability. We prefer to characterise the liability incurred on a finding of knowing receipt as a personal liability to account in equity to the beneficiaries by restoring the property lost by the unconscionable receipt. The core duty of that liability is to restore misapplied assets, or their equivalent, to the beneficiaries.

Discussion

[55] Mr Bidois accepted that the Court has extensive supervisory powers in relation to trusts and that the Judge was entitled to make findings that a person was holding trust property as a constructive trustee.[30] However, he argued that a constructive trust is not a trust which falls within those listed in s 236 and therefore the Court has no power to invoke s 237 and grant equitable remedies as against Mrs Martin.

[56] We consider that Mr Bidois' submissions are misconceived. A constructive trust is not "constituted" by the Court in the way those trusts listed in s 236 are created. It is well-settled that a constructive trust either arises by operation of the principles of equity, upon the happening of events which bring it into being and the Court simply recognises it in a declaratory way, or it is imposed by the Court as a remedy.[31] The two are therefore very different things.

[57] The application before the Māori Land Court sought to enforce the obligations of trust regarding the payments made to Mrs Martin that were made out of trust funds of the Hiiona Marae. It is irrelevant that the funds were received from a tribal grant because they were and remain trust property. The remedy sought was a remedy in respect of the marae, a trust constituted in respect of Māori freehold land and listed in s 236 of the Act. We consider therefore, that the Māori Land Court had the necessary jurisdiction to invoke s 237 of the Act and impose a constructive trust over the marae funds received by Mrs Martin and to hold her jointly liable as a constructive trustee. The constructive trust imposed is not one that stands apart from the marae trust or that could exist independently from it, it essentially operates to extend the obligations of the marae trust to Mrs Martin in the circumstances of this case.

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30 2019 Māori Appellate Court MB 424-462 (2019 APPEAL 424-462) at 438

31 *Fortex Group Limited (in rec and in liq) v MacIntosh* [1998] 3 NZLR 171 at 173

[58] Moreover, to prove a constructive trust on the basis of knowing receipt, it must be established that it is unconscionable for Mrs Martin the retain the funds because of her knowledge that the transfer involved a breach of fiduciary obligations owed by the trustees of Hiiona Marae. The Court below determined that the funds paid to Mrs Martin were paid in breach of trust, therefore the question is whether Mrs Martin was aware that the transfer involved a breach of fiduciary obligations owed by the trustees of Hiiona Marae.[32] In this context, we endorse the findings of the Court below in determining that Mrs Martin was aware that the transfers involved a breach of fiduciary obligations, having both constructive and actual knowledge. In terms of constructive knowledge, Mrs Martin had personal knowledge of the various facts which gave rise to the breach of trust:[33]

(a) The arrangement engaging her to prepare the feasibility study was not in writing;

(b) There was no justification or explanation for the fee charged;

(c) Mr Katipa voted in favour of the payments to his sister;

(d) The study was not produced and there is little if any evidence of benefit received, or justification for paying Mrs Martin to complete the three milestones in the study;

(e) The trustees failed to keep and render accounts concerning these payments; and

(f) The trustees failed to protect the trust assets.

[59] As Judge Armstrong concluded:

> [131] Mrs Martin had personal knowledge of each of these. She knew the arrangement was not recorded in a written agreement. Mrs Martin herself was unable to properly explain or justify the basis of her fee. In her second affidavit, Mrs Martin states she attended the trustee meetings where the payments to her were approved. As such, she would have known that her brother voted in support of those payments.
>
> [132] Mrs Martin did not produce the feasibility study. She says the MFG and MHG applications were completed but did not obtain copies of those from the bodies who received them. She also states Te Kauhanganui relied on her feasibility study concerning its Marae Facilities Upgrades Programme, but once again did not obtain a copy from them.
>
> [133] Mrs Martin knew the trustees did not need to pay someone to complete the MFG application. In her own words staff helped to complete the application and "there is no such thing as an unsuccessful application".
>
> [134] Mrs Martin was paid for consultation with persons as far away as Ruatoki and Whakatane. This was not necessary as the requisite expertise was available at Hiiona Marae. Mrs Martin's own brother did not know about this. It is not clear whether any of the first respondents knew.

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32 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A*, above n 1, at [35] – [106]
33 Ibid at [130] – [131]

> [135] Mrs Martin's own 2015 quarterly report to the trustees indicates the access issue was not resolved.
>
> [136] Mrs Martin was present when the briefcase was handed to Mr and Mrs Tata and when they handed it back. She is also aware of the repeated requests from the applicants (both before and during this proceeding) seeking the accounts and financial records concerning the payments to her.

[60] In terms of actual knowledge, Mrs Martin knew that the funds were paid to her in breach of trust and actively took steps to conceal the payments. The Judge found that:

> [171] …Mrs Martin manufactured the Nixon accounts, and the cover letter, in a deliberate attempt to try and conceal the amount of trust funds that had been paid to her. She did this in response to increasing pressure from beneficiaries, and the incoming trustees, who were seeking financial records accounting for the expenditure of those funds. Mrs Martin then had the trustees pay funds to her to meet Ms Nixon's costs. In reality, Mrs Martin was paying herself for accounts she fabricated in order to conceal the other payments made to her. Mrs Martin knew the funds had been paid to her in breach of trust and she was trying to hide that.

[61] In conclusion, we agree with the Court below that Mrs Martin had actual knowledge that the funds were paid to her in breach of trust.[34] On this basis, recipient liability was established and inevitably, in the circumstances of this case, a constructive trust had to be imposed. Even so, we still have a discretion as to whether Mrs Martin should be held liable to repay those funds along with the Hiiona Marae trustees. However, the onus is on Mrs Martin to establish which payments were legitimate.

[62] Given these findings, we do not need to consider whether the Court would have had alternative jurisdiction under ss 18(1)(a) and (d) of the Act to hold Mrs Martin liable.

Is Mrs Martin entitled to any allowance?

Mrs Martin's submissions

[63] In response to our raising of the issue, Mr Bidois submitted that this Court has jurisdiction to reconsider the extent to which costs were validly incurred by Mrs Martin and what a reasonable fee for the work provided might be. He asserted that Mrs Martin had filed estimates, but further submissions could be filed in respect of the costs that were incurred. Mr Bidois submitted that if the Court was minded to grant Mrs Martin that opportunity, it would not be squandered.

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34 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A*, above n 1 at [172]

[64] In response to Mr Hope's submission that Mrs Martin had been represented by three counsel, Mr Bidois argued that Mrs Martin denied this, as those counsel referred to were engaged by Judy Semenoff and other trustees in relation to the matters before the Court below.

Respondents' submissions

[65] Mr Hope argued that Mrs Martin had ample opportunity before the Court below to present evidence of any legitimate payments but failed to do so. In addition, given her conduct and the credibility findings made against her, the level of Mrs Martin's dishonesty meant that this Court could not rely on any further information she provided. Mr Hope contended that, if an explanation was now given, the Court must question why it was not provided before, particularly when Mrs Martin was represented by three different counsel throughout those proceedings. Mr Hope submitted that on this basis, Mrs Martin should not be allowed to provide any further evidence.

The Law

[66] Section 38 of the Trustees Act 1956 provides:

> **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 the 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.
>
> (2) A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust:
> provided that the court may on the application of the trustee allow such costs as in the circumstances seem just.

[67] Issues of trustee indemnity were considered in *Hall v Opepe Farm Trust – Opepe Farm Trust* where it was held that what constitutes legitimate expenses for reimbursement will invariably turn on the individual facts of each case.[35] Then in *McDonald v Horn* it was determined that trustees will be entitled to costs only where the trustee "has not acted unreasonably or in substance for his own benefit rather than that of the fund."[36]

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35 *Hall v Opepe Farm Trust – Opepe Farm Trust* (2014) 104 Waiariki MB 54 (104 WAR 54) at [49]
36 *McDonald v Horn* [1995] 1 All ER 961 at 970

[68] Then in *Austin, Nichols & Co Inc v Stichting Lodestar*, the Supreme Court set out the principles regarding the approach on a general appeal, noting that the appeal court is required to come to its own view on the merits of the case and, if it considers the decision under appeal is wrong, is entitled to intervene. [37]

Discussion

[69] On the issue of representation for Mrs Martin, a careful examination of the correspondence file in the Court below reveals that there was correspondence from Michael Sharp, barrister, dated 26 February 2015 where he confirmed that he had been instructed to act for several counterclaim respondents, including Mrs Martin. Later in July 2015, Mrs Martin sent an email advising that Mr Sharp was not representing her and that she was seeking counsel. Some months later on 27 June 2016, a memorandum was filed by Cameron Hockly in response to an application for leave to appeal by the applicants. Mr Hockly's memorandum confirmed that he represented Mrs Martin. Further memoranda and submissions were filed by Mr Hockly on 18 July 2016, 31 August 2016, 20 June 2017, 1 October 2017 and 31 January 2018 noting the same. In addition, Mrs Martin's affidavit of 18 April 2017 appears to have been prepared and filed by Mr Hockly.

[70] On the basis of our assessment of this material, our conclusion is that Mrs Martin had in fact been represented by counsel for most of the time the proceedings were before the Court below and would therefore have likely been in receipt of advice on how her case was to proceed.

[71] Before us, the issue of an allowance was discussed with both counsel.[38] It was also considered by Judge Armstrong. He concluded that there was simply insufficient evidence to determine the veracity of any claims for allowances for expenses that may have been incurred by Mrs Martin. Moreover, he also found that some of the claims made by Mrs Martin were improper and that, on at least one occasion, she had both lied and "manufactured" evidence:[39]

> [174] I take into account that some of the funds paid to Mrs Martin may have been legitimate. For example, if a working bee was held, and Mrs Martin did pay for costs associated with the working bee, she was entitled to be reimbursed. As such, it could be argued that holding her liable to repay the full amount is inequitable. The difficulty is there is no way to determine what costs were legitimate and what were not.
>
> [175] It is also clear some of the payments were not legitimate. Mrs Martin was paid $950.00 for manufacturing the Nixon accounts. She was also paid for the Bain invoice even though this account was not cleared until a year later and then by a separate payment. The fact that the 53 payments into her account were often for round figures, occurred frequently, and

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37 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 at [3] to [5]
38 2019 Māori Appellate Court MB 424-462 (2019 APPEAL 424-462) at 445-446; 457; and 460-461
39 *Tata v Katipa – Waiwhakaata 3E4C Lot 2A*, above n 1

> usually when Mrs Martin was low on funds, that her mother was able to transfer funds by telephone on her own, and that her mother did not give evidence, heightens my suspicion that other payments were not legitimate either.
>
> [176] I also consider that Mrs Martin's conduct disentitles her to any relief from this Court. She has shown a strident and defiant attitude throughout this proceeding. She denied all accusations but filed no objective evidence to support her position. She refused to comply with my order for discovery, lied to Court staff about the location of the records, and intentionally manufactured documents to conceal the payments made to her. Her evidence has been evasive and inconsistent with earlier statements. Mrs Martin must be held responsible for her actions and will be held liable to repay those funds along with the first respondents.

[72] Contrast that with the situation in *Pook v Matchitt – Matangareka 3B Block* where this Court permitted the filing of further evidence post hearing to enable the affected trustees and parties the opportunity to provide proof of the reimbursements and allowances claimed and permitted:[40]

> [85] In any event, there are two issues relevant to the claims of conflict against the affected trustees that require further consideration. First, the amount paid to Robyn Power for secretarial duties over a three-year period. In our assessment, on the available evidence, taking into account the nature and size of the trust, its asset base and income, the frequency of meetings, the state of the trust's records, the lack of a formal process of advertising and appointment and related considerations, we consider that an allowance of $3,000 per annum as an honorarium for the period in review would be appropriate in the circumstances.
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> [86] This is on the proviso that there are records that can confirm the duties that were undertaken by Ms Power. These might include invoices, receipts, timesheets and related supporting documents. Without that confirmation, then we cannot see how these payments can be justified. Rather than referring this matter back to the Court below, counsel should submit these documents to the Registrar for assessment within two months from the date of this judgment. If we are satisfied with their veracity, then the allowance we have indicated as appropriate will be confirmed and deducted from the total amount due for repayment by the affected trustees.
>
> [87] Second, the amount claimed for roading preparatory work of $50,000. It is said that this money was advanced to ensure that the roading network for access to the trust's land was going to be suitable for harvesting and extraction purposes. For this amount to be properly claimed, then there needs to be appropriate evidence to support the assertion that the trust itself needed to be responsible for this cost and that the amount paid was reasonable in the circumstances. In the absence of such evidence, then we cannot take the claim for deduction for unjust enrichment further. Counsel has two months to file further evidence that supports the assertion that the amount paid was the responsibility of the trust and that the cost was fair and reasonable. To avoid doubt, if no such evidence is provided to our satisfaction then the orders of Judge Reeves for repayment on this issue will be affirmed.

[73] However, given the findings made in the Court below of improper and, effectively, dishonest conduct on the part of Mrs Martin – findings that were not successfully challenged before this Court – we see no point in permitting the filing of further evidence to justify any allowance. The onus was on both Mrs Martin and the former trustees to provide that evidence either in the Court below, or

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40 *Pook v Matchitt – Mangatareka 3B Block* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167)

before us, by way of application for leave to adduce additional evidence, where argument could have been heard on the admissibility of such evidence in the circumstances of this appeal. As foreshadowed, the final grounds of appeal argued before us were twofold; bias on the part of Judge Armstrong; and a lack of jurisdiction to hold Mrs Martin liable as a constructive trustee. As both grounds of appeal have failed, we see little point in ordering the filing of further evidence, given the findings of Judge Armstrong (and the potential risk of the further "manufacturing" of evidence), which we have upheld.

Should Mr Tata be granted relief from liability?

Submissions of Mr Tata

[74] Mr Tata submitted that he did not appear or participate in the proceedings due to his ill health and stress. He claimed that there was accordingly a paucity of evidence before the Court concerning his involvement in trust business and his personal circumstances. Mr Tata served as a trustee from approximately 2005 to late 2011 or early 2012. However, throughout that time he suffered from diabetes and hepatitis B, a symptom of which is fatigue, and as a result he was in poor physical health.

[75] Mr Tata's evidence was that as a trustee he felt isolated, being the only member of the Tata whānau, and was what he described as "a voice in the wilderness". He claimed that he was excluded from meetings or would arrive only to find no one else was there. Mr Tata further asserted that he opposed the appointment of Mrs Martin as an adviser to the trust, based in part on his feeling that one whānau had control of the marae. According to Mr Tata, three of Mrs Martin's close whānau members were trustees and there were others who were also close to that whānau. While he claimed that he had urged his own whānau to return to the marae to support him, his health deteriorated, and it all became too much for him.

[76] In addition, Mr Tata argued that as he became unwell, he disengaged from his trusteeship, effectively resigning as a trustee. None of the other trustees contacted him further regarding his non-participation in trust business. By the time the former trustees were replaced in 2015, Mr Tata was no longer serving and has not been involved since sometime before then, between 2008 and 2011.

[77] Following Ms Thornton's appointment as counsel, she made submissions on the issue of liability. She contended that the record of trust minutes before the Court was incomplete and accordingly there is no clear record of Mr Tata's attendance at trust meetings. However, Mr Tata accepted that his attendance was poor and this interfered with the performance of his trustee duties. He also acknowledged that he did not formally resign as a trustee. Ms Thornton submitted that the

Court has previously held that a failure to attend trustee meetings without excuse amounts to a failure to perform trustee duties satisfactorily. However, she submitted that the normal sanction for trustee non-attendance is removal.

[78] At the meetings Mr Tata did attend in 2010, the minutes and a trustees' adviser report record Mrs Martin's assurances that an audit was in progress and that a financial review was presented to the trustees. Ms Thornton submitted that there was nothing on the face of the documentation that would have put Mr Tata on notice that there was anything untoward. It was not until the Court's investigation, when bank documents were compared with the financial report, that the discrepancies were apparent. However, it took several directions of the Court for actual evidence to be produced and, in the final analysis, it was an understatement to say there was deceptive conduct. It was submitted that the relevant financial information of the trust was either withheld or "doctored" in a concerted effort to take money from the marae and conceal the transactions from trustees and beneficiaries.

[79] Ms Thornton submitted there was no suggestion anywhere in the Court record that Mr Tata acted dishonestly. His largest transgression was a failure to attend meetings, to resign and to seek advice from the Court. Mr Tata was not involved in the finances of the trust and from the time of his disengagement, was not kept informed. There was nothing to suggest that Mr Tata knew money was being withdrawn and there was nothing that would have put Mr Tata on notice that there were financial irregularities.

[80] Ms Thornton submitted that, while Mr Tata could have been subject to an order for removal, he should not be made liable for financial losses of which he was not aware, in which he was not complicit, and from which he derived no benefit. Counsel therefore argued that Mr Tata should be wholly relieved from liability for any breaches of trust per s 73 of the Trustee Act 1956.

Respondents' submissions

[81] Mr Hope, for the respondents, confirmed that his clients took a neutral position as to the issue of liability for Mr Tata.

Mrs Martin's submissions

[82] Mr Bidois confirmed that his client would abide by the decision of the Court. However, he did point out the extent to which the matters raised by Mr Tata varied from his application for leave to appeal.

Discussion

[83] Section 73 of the Trustee Act 1956 provides:

> **73 Power to relieve trustee from personal liability**
> If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the same.

[84] It is well-settled that for trustees to claim relief, they must establish all the elements of s 73: that they have acted both honestly and reasonably and that they ought fairly to be excused for the breach and for failing to obtain directions from the Court.[41] The onus of proof is on the trustee and, while the Court has a wide discretion as to whether to grant relief and the extent of such relief, that remedy is not given lightly.[42] The essential question is whether objectively it could be said the trustee acted dishonestly. The Court of Appeal in *Wong v Burt* cited with approval Lord Nicholls of Birkenhead from the *Royal Brunei Airlines Sdn Bhd v Tan*:[43]

> [A]cting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard.

[85] Then in *Pook v Matchitt* this Court confirmed that, in determining liability and the granting of relief, the conduct of individual trustees can be considered separately, particularly where certain trustees had not been party to the actual misconduct.[44] While the Court held that relief was not appropriate for the conflicted trustees in that case, it determined that there may be varying degrees of liability as between trustees:

> [84] This can be contrasted with the position of Mrs Pook, who for the reasons articulated above by Mr Webster, cannot be held to account for the same misconduct as the Butlers. She was not present, nor did she support the decisions: to pay an honorarium to John Butler; to remunerate Robyn Power; and to make a payment to ECL. She was sufficiently concerned to raise these issues at the 29 October 2016 AGM and then shortly thereafter refer these matters to the Court and ask for its intervention and direction. Subsequently she sought to resign as a trustee. In summary, she was not a party to the misconduct complained of and actively took steps in an attempt to draw the attention of the Court to these matters.

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41 *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166) at [26]; and *Wong v Burt* [2005] 1 NZLR 91 at [57]

42 *Tauhara Middle 4A2B2C – Opepe Farm Trust* (1996) 68 Taupō MB 27 (68 TPO 27); and *Rātima v Sullivan –Tataraakina C* (2015) 41 Tākitimu MB 102 (41 TKT 102)

43 *Wong v Burt*, above n 37 at [51]–[52] citing *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, and *Walker v Stones* [2001] QB 902 (CA)

44 *Pook v Matchitt – Matangareka 3B Block* above, n 40

[86] The essential question is whether Mr Tata has established that he acted honestly and reasonably and should therefore be excused from liability. He evidence was that he was suffering from diabetes and hepatitis-B at the time the transfer of funds occurred, however there is no independent evidence to support the assertion that, due to his state of health, he was incapable of carrying out his duties as a trustee. Even if such evidence was provided, it could be argued that he should have resigned if his state of health meant he could no longer participate as a trustee. The beneficiaries could have then elected a suitable replacement. Moreover, casting some doubt over this issue is the fact that Mr Tata confirmed in his affidavit of 9 October 2019, that for part of the period in question at least, he continued in his employment as a driver. If he was able to do that then he should have found the time to either make further enquiries of his colleagues and Mrs Martin or seek directions or resign. We are not satisfied therefore, that Mr Tata should now be excused from failing to seek directions.

[87] Mr Tata was re-elected before the transactions under scrutiny commenced, and as a trustee he was in a unique position to raise concerns as to the events that were unfolding or seek directions of the Court. Although he claimed that he did not have copies of bank statements, as a trustee he was in a position to seek access. If he had, he would have seen the unorthodox transactions and would have then been on notice to take steps to protect the trust's assets. As a reasonable trustee acting prudently, he could have sought directions, as Mrs Pook had done in *Matangareka*. A core trustee duty is to preserve trust assets and by failing to attend meetings in 2008 he failed to do so.

[88] Conversely, it is also of relevance that the other trustees and Mrs Martin appeared to go to some lengths to conceal the extent of their misconduct, including her assertion that an audit was in progress. We further note that none of the funds went to Mr Tata and that he did not approve the transfers to Mrs Martin. His misconduct was imprudence and a failure to preserve the trust assets through his disengagement as a trustee. He did not, however, profit personally, directly or indirectly, from his own failings or from the misconduct of his fellow trustees. This is an important distinction in the context of personal liability. Mrs Martin's mother and brother paid her the funds, not Mr Tata.

[89] There was also an onus on the former trustees to make inquiries of Mr Tata as to his ability to continue to participate as a trustee. It might be suggested, however uncharitably, that it suited the former trustees that Mr Tata remained unengaged. The short point is that it was incumbent on all trustees to seek directions if they considered any of their number was failing to act in accordance with their duties. That included Mr Tata's failure to properly engage. As we have underscored, Mr Tata should have sought directions if he genuinely believed there was a risk of misconduct on the part of the former trustees and individuals associated with them. For completeness, we also note that both the respondents and Mrs Martin did not actively oppose Mr Tata's appeal.

[90] As foreshadowed, the test for relief is both honesty and reasonableness. While we accept that, on the basis of the evidence before this and the Court below, Mr Tata acted honestly, our conclusion is that, taking into account all of the circumstances, his conduct was not reasonable. Where trust resources may be at risk or at least have been dealt with in a manner that should have raised concerns, trustees have a positive duty to act to protect the trust fund. Unless there has been a high degree of sophisticated fraud, a trustee must be satisfied that the trust resources are being managed in accordance with the obligations of that office.

[91] More importantly, it is contrary to those responsibilities for a trustee to simply disengage from trust activities in the forlorn expectation that this will somehow inoculate them from the risk of joint liability. The failure of his colleagues and Mrs Martin to produce proper accounts and in a timely manner is one example of where Mr Tata's suspicions should have been raised. As foreshadowed, the appropriate step would have been for Mr Tata to then seek directions from the Court where any concerns might have been properly dealt with much earlier. At the very least, when his health began to wane to such a degree that it affected his ability to fulfil his duties, he should have resigned. He did neither and was accordingly held to account by Judge Armstrong. We see no reason to interfere with that outcome.

[92] This Court has previously confirmed that where a current or prospective trustee owes money to a trust, this will render them incapable of eligibility for appointment, given the conflict between their duties and personal interests.[45] Even if the funds were repaid, their future suitability for appointment should be a matter for further argument if and when it becomes an issue. In any case, now that the appeal by Mrs Martin is dismissed, the current trustees must seek enforcement of the judgment issued by Judge Armstrong for recovery of the funds that are due and owing to the marae trust.

[93] The current trustees are therefore directed to report to the Māori Land Court as to progress, taking into account the present Covid-19 virus situation, within six months from the date of this decision.

Decision

[94] The appeal by David Tata is dismissed per s 56(1)(g) of Te Ture Whenua Māori Act 1993.

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45 *Marino – Repongaere 4G (Part)* (2004) 34 Gisborne Appellate MB 98 (34 APGS 98) at 102-103

[95] The appeal by Tania Martin is dismissed, per s 56(1)(g).

[96] The current trustees of Hiiona Marae are directed to report to the Māori Land Court within six months from the date of this judgment as to progress regarding recovery of the outstanding funds due and owing to the trust from the former trustees and Mrs Martin.

[97] If costs are at issue counsel have three months to exchange and file submissions.

Pronounced at 1.15 pm in Rotorua on Monday this 20th day of April 2020

LR Harvey **JUDGE** (Presiding)	S F Reeves **JUDGE**	T M Wara **JUDGE**