I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O AOTEA
In the Māori Land Court of New Zealand
Aotea District

A20180004434
A20180004854
A20180006936

WĀHANGA *Under*	Sections 43. 19(1)(a). (b). (c), 238, 239 and 240, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Horowhenua 11 (Lake) Block
I WAENGA I A *Between*	PHILLIP TAUEKI AND CHARLES RUDD Ngā Kaitono *Applicants*
ME *And*	JONATHAN PROCTER, MATHEW SWORD, MARAKOPA MATAKATEA, ROBERT WARRINGTON, KELLY TAHIWI, KERI TE PA, WAYNE HURUNUI, NEDDY NAHONA, TIMOTHY TUKAPUA, CAROLINE O'DONNELL AND KEREHI WARENA AS FORMER TRUSTEES OF THE HOROWHENUA 11 PART RESERVATION TRUST Ngā Kaiurupare *Respondents*

Nohoanga: *Hearing*	19 July 2018, 388 Aotea MB 128-135, 136-144 4-6 March 2019, 398 Aotea MB 1-243 6 March 2019, 398 Aotea MB 244-250 9 May 2019, 401 Aotea MB 9-34 (Heard at Levin and Rotorua)
Kanohi kitea: *Appearances*	L Watson for P Taueki L Thornton for C Rudd M McKechnie and L Underhill Sem for Former Trustees G Baumann for Heritage New Zealand Pouhere Taonga
Whakataunga: *Judgment*	11 May 2020

TE WHAKATAUNGA Ā KAIWHAKAWĀ L R HARVEY
Judgment of Judge L R Harvey

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Introduction

[1] Following a decision of the Māori Appellate Court dated 12 September 2018, an application to appoint trustees to Horowhenua 11 Part Reservation Trust was referred back to this Court for hearing before another Judge.[1] An issue in the appeal was whether Judge Doogan should have recused himself. While that appeal was pending, Phillip Taueki filed an application for injunction to stop the then trustees from undertaking earthworks around Lake Horowhenua, followed by further proceedings for the removal of the trustees.[2] Mr Taueki asserted that the former trustees were not acting in the best interests of the trust's beneficiaries

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1 *Taueki – Horowhenua 11 Part Reservation Trust* [2018] Māori Appellate Court MB 512 (2018 APPEAL 512)

2 Application A20180004434

but, on the contrary, had adopted an approach of acquiescence when, in his view, the former trustees ought to have been opposing the activities of the Horowhenua District Council and Horizons Regional Council. Mr Taueki also claimed that the former trustees failed or refused to take steps against the local authorities and instead are working with them to, in effect, continue to permit the ongoing pollution of Lake Horowhenua. He further argued that, by declining to support his proceedings in this Court against the HDC for continuing discharge of storm water into the Lake, the former trustees were acting against the interests of the trust beneficiaries, for their own purposes. Both applications are now considered in this judgment.

[2] Several years earlier on 12 November 2013, Charles Rudd filed an application for enforcement of obligations of trust.[3] Mr Rudd asserted that the former trustees acted in breach of the trust order and their duties generally, sufficient to warrant removal, by allowing their duties to the trust to conflict with their personal interests, including with the Lake Horowhenua Domain Board. Mr Rudd also alleged that the former trustees purported to delegate their decision making responsibilities to a subcommittee of the trust which included local authority representatives in breach of their duties; that they permitted contracts with and payments to individual trustees in excess of $350,000 from trust funds in breach of their duties of non-conflict and non-profit; that they failed to properly disclose the scale of these individual payments in the annual accounts or at trust meetings or to the Court in breach of the trust order and then failed to follow the proper process for authorising such payments; and that they then failed to convene annual general meetings, thereby avoiding the proper disclosure of their payments to the trust beneficiaries for discussion and scrutiny. Those proceedings also remain extant and were finally heard before me at Levin on 4-6 March and 9 May 2019. Mr Rudd's application is also disposed of in this decision.

[3] The former trustees deny the allegations and acknowledge that, while they may not have adhered to the letter of the trust order in every instance, they have acted on advice and appropriately in the best interests of the trust. Regarding the application for injunction and removal of trustees, the former trustees deny those allegations. They claim that they have acted at all times in accordance with the trust order and the law and in accordance with the aspirations of the trust's beneficiaries.

[4] Moreover, the former trustees say that regardless of aspects of their conduct that might be subject to criticism, they have retained the support of the trust beneficiaries and point to the 2016 and 2019 election results as confirmation of that endorsement. They contend that

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[3] Application A20130010178 now being reheard under application A20180004854

the applicants and their supporters are a small group of disaffected beneficiaries who are philosophically opposed to the more cooperative approach to water quality improvement and related issues that the former trustees had adopted toward the local authorities.

[5] During the hearings, the former trustees applied for an order under s 98C of Te Ture Whenua Māori Act 1993 to restrict the ability of the present applicants, Messrs Taueki and Rudd, from bringing proceedings concerning the conduct of the trustees. Both applicants deny the claims made against them and oppose the orders sought. That application is also dealt with in this judgment.

Procedural history

[6] Phillip Taueki sought an injunction on 12 June 2018, followed by the inclusion of an application for removal of the then trustees. After seeking a response from the affected parties, I issued an interim decision on 22 June 2018.[4] In that judgment, I directed both the trustees and Mr Taueki to file further information, following which a telephone conference would be arranged. I declined to grant an injunction, conditional on the trustees providing an undertaking that no further works would be carried out on the land.

[7] A joint memorandum was filed by counsel for Messrs Taueki and Rudd on 5 July 2018, proposing that Mr Taueki's application be heard together with the application for enforcement of the obligations of trust filed by Mr Rudd in 2013, which, as foreshadowed, had recently been referred back to this Court by the Māori Appellate Court for rehearing.[5] Counsel asserted there were common facts and history raised by both applications and the Court would benefit from a coordinated approach from counsel. The trustees opposed the joining of the proceedings but acknowledged that the Court should arrange for the multiple applications concerning the trust to be heard on the same day, where practicable.

[8] Both applications of Messrs Taueki and Rudd were subsequently heard on 19 July 2018.[6] I then directed the trustees to file the outstanding undertaking as a matter of urgency, to avoid an interim injunction issuing. I also directed the parties to file a memorandum concerning the future conduct of the proceedings including the exchange of evidence, and noted that a written direction would then issue. Following the hearing, I conducted a site visit.

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4 *Taueki – Horowhenua 11 (Lake)* (2018) 386 Aotea MB 142 (386 AOT 142)
5 Application A20130010178, now being reheard under application A20180004854
6 388 Aotea MB 128-135 (388 AOT 128-135); and 388 Aotea MB 136-144 (388 AOT 136-144)

[9] Mr Watson and Ms Thornton then filed a memorandum on behalf of the applicants on 26 July 2018, which set out a proposed procedural timetable and sought the grant of an injunction, given the trustees' continued failure to provide an undertaking. A further joint memorandum was then filed by counsel on 15 August 2018 with a list of interrogatories and documents for production by the trustees.

[10] On 6 September 2018, I issued a decision addressing several preliminary matters, including timetabling, discovery and the grant of the injunction.[7] I confirmed the proposed timetable and directed the trustees to advise the Court regarding the instruction of counsel and to answer the interrogatories posed, noting that once there had been compliance a substantive hearing could be fixtured. In terms of the injunction, I accepted the trust's assurances that all works had ceased and adjourned that matter to the substantive hearing.

[11] However, on 12 September 2018, the Māori Appellate Court issued its judgment in relation to the 2016 decision appointing trustees.[8] That Court quashed those orders of appointment and directed a rehearing, effectively leaving the trust without trustees.[9] Joint memoranda of counsel for the applicants were then filed on 14 and 17 September 2018, followed by a memorandum of counsel for the now former trustees on 18 September 2018. A judicial conference was held with the parties on 26 September 2018, at the end of which I directed the parties to file further memoranda regarding how to progress the overlapping matters currently before the Court.[10]

[12] Several memoranda were subsequently filed by counsel regarding various preliminary matters. A further judgment was issued on 25 October 2018 addressing several issues, including how the trust was to be managed in the interim.[11] Directions were issued that the applicants file further evidence concerning the injunction, removal and enforcement of obligations of trust proceedings. The former trustees were also directed to respond to the questions and file documents sought by the applicants. I then appointed Clinton Hemana as an independent interim responsible trustee, with the former trustees to be appointed as

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7 *Rudd – Horowhenua 11 (Lake)* (2018) 390 Aotea MB 31 (390 AOT 31)

8 *Taueki – Horowhenua 11 Part Reservation Trust* [2018] Māori Appellate Court MB 512 (2018 APPEAL 512)

9 Application A20160001071 now being reheard under application A20180006936. This was also contrary to earlier Appellate Court authority that held this Court should never leave a trust without trustees: *Te Whata v Paku - Akura Lands Trust* [2011] Māori Appellate Court MB 55 (2011 APPEAL 55)

10 391 Aotea MB 247-258 (391 AOT 247-258)

11 *Rudd v The Former Horowhenua 11 Part Reservation Trustees* (2018) 392 Aotea MB 179 (392 AOT 179)

advisory trustees, subject to their consent. The Registrar was directed to call for trustee nominations, which was to be followed by a postal ballot and hui for the election of trustees.

[13] Judicial conferences were held on 19 and 21 November 2018, to discuss progress to a substantive hearing.[12] Directions were issued on 21 December 2018 regarding the filing and service of further evidence and evidence in reply.[13] Additional documents were also sought from the responsible and advisory trustees.

[14] On 2 February 2019, the hui for the election of trustees was held, facilitated by the Registrar. A teleconference was then convened with counsel on 26 February 2019 to discuss various matters prior to the applications being heard.[14]

[15] The substantive hearing was held between 4-6 March 2019.[15] The hearing in relation to the application to appoint trustees was also held on 6 March 2019, where issues were raised regarding the suitability of the proposed trustees for appointment.[16] Following that, I indicated that directions would issue regarding the filing of closing submissions. Directions were then issued for the filing of closing submissions for all applications to be heard on 9 May 2019. At the end of the hearing I confirmed that a written decision would issue in due course.[17]

[16] For ease of reference, I will refer to the bound volume of documents, filed by Mr Rudd's counsel, Ms Thornton, as the "Rudd Bundle" using the paginating set out at the foot of each page.

Issues

[17] The issues for determination are:

(a) Should an injunction be granted?

(b) What is Te Mana o Te Wai project and how was it managed?

(c) Did the former trustees improperly delegate their duties?

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12 392 Aotea MB 289-297 (392 AOT 289-297); 393 Aotea MB 118-129 (393 AOT 118-129)
13 394 Aotea MB 151-153 (394 AOT 151-153)
14 397 Aotea MB 4-11 (397 AOT 4-11)
15 398 Aotea MB 1-243 (398 AOT 1-243)
16 Ibid, at 244-250
17 401 Aotea MB 9-34 (401 AOT 9-34)

(d) Did the former trustees fail to manage conflicts of interest appropriately?

(e) Did the former trustees fail to protect wāhi tapu?

(f) Did the former trustees fail to convene annual general meetings?

(g) Had the former trustees breached their duties enough to warrant their removal?

[18] As mentioned previously, the issue of whether the applicants should be prevented from bringing further proceedings is also considered at the end of this decision.

Background

[19] Horowhenua 11 (Lake) block is Māori freehold land 400.9234 ha in area. It was created by partition order dated 19 October 1898 and vested in trustees as a reserve for a fishing easement following a series of hearings and an appeal.[18] The original trustees were Makere Te Rou, Hema Henare, Haare Taueki, Himiona Kowhai, Taare Porotene, Ariki Raorao, Kereihi Tomo, Waata Muruahi, Rihipeti Tamaki, Rewi Wirihana, Wirihana Hunia, Rangimairehau, Hoani Puihi and Raniera Te Whata.

[20] At the commencement of the proceedings filed by Mr Rudd, the trustees were Brenton Tukapua, Charles Rudd, Eugene Henare, Jonathan Procter, Marokopa Matakatea, Robert Warrington, Vivienne Taueki, Keri Hori Te Pa, Wayne Hurunui, Mathew Sword and Kelly Tahiwi.[19] Then following elections, the trustees remained largely unchanged, apart from the replacement of Ms Taueki and Messrs, Rudd, Henare and Brenton Tukapua with Timothy Tukapua, Caroline O'Donnell, Ned Nahona and Mungu Wi Warena on 19 May 2016.[20]

[21] Then on 25 October 2018, Clinton Hemana was appointed sole responsible trustee, and with their consent, the former trustees were appointed advisory trustees. This remained the position until the date of this judgment.[21]

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18 37 Ōtaki MB 10 (37 OTI 10)
19 293 Aotea MB 165 (293 AOT 165)
20 354 Aotea MB 54-88 (354 AOT 54-88)
21 392 Aotea MB 179-185 (392 AOT 179-185)

Objects of the Lake Horowhenua Trust

[22] Before considering the issues for determination in detail, it is convenient to reproduce from the trust order the objects of the trust, which are set out in cl 2. They will have a bearing on measuring the conduct of the trustees against the allegations that have been made against them. Clause 2 states:[22]

> **2 OBJECTS**
>
> **2.1** The Trust shall hold the Land together with such other Trust Property as it may from time to time acquire or receive upon the trusts set out in this trust order.
>
> **2.2** Subject to any express restrictions set out in this trust order, the objects of the Trust shall be:
>
> (a) to promote and facilitate the use and administration of the Land and any other assets acquired by the Trust on behalf of the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe:
>
> (i) in a manner consistent with the well-being of the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe; and
>
> (ii) in the interests of the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe;
>
> (b) to represent the interests of the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe in relation to all matters relating to the Land and to the use and enjoyment of the facilities therewith.

Should an injunction be granted?

Mr Taueki's submissions

[23] Mr Taueki sought to prevent the former trustees from carrying out works, causing trespass and injury to the land and resulting in the removal of flax and other flora. He submitted that contractors were undertaking significant earthworks including the excavation of ponds and the laying of tracks or walkways, without consultation with the owners and without resource consent or authority from Heritage New Zealand Pouhere Taonga. Mr Taueki argued that the works were being carried out on land that is culturally, archaeologically and environmentally significant to the iwi, causing damage and distress.

[24] Mr Taueki believed the purpose of the works was to pre-empt an application by the Horowhenua District Council ("HDC") for resource consent to continue discharging Levin's stormwater into Lake Horowhenua, and to create a public cycleway or walking track around

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[22] 293 Aotea MB 165-174 (293 AOT 165-174); Rudd Bundle, at 362

the Lake. His concerns were that the activity would cut across an application he filed in 2014 to halt the discharge of stormwater into the Lake by the HDC, and that the trustees were, effectively, purporting to alienate part of the land without owner consent, such that members of the public would be able to access Māori freehold land as a "gift" to the community.

[25] Counsel submitted that, while the injunction had been granted on an interim basis, given the advice that no further works are occurring, Mr Sword had confirmed that further T-drain works are contemplated in the 2018-2019 year under the Freshwater Fund. Counsel also noted that the Horizons Regional Council ("HRC") had issued an infringement notice to the trust regarding the T-drain works.

Heritage New Zealand Pouhere Taonga submissions

[26] Jamie Jacobs filed a statement on behalf of Heritage New Zealand Pouhere Taonga ("HNZPT") regarding the earthworks undertaken around Lake Horowhenua. Mr Jacobs noted that a letter was first sent on 22 May 2018 to the HDC and copied to Mr Sword as chairperson of the trust regarding the earthworks. HNZPT advised there was a high probability of unrecorded archaeological sites in the area and noted they had no record of any assessment or authority being sought to modify or destroy that area. Further information about the works and an assessment of potential effects on the area was also sought from the then trustees.

[27] Mr Sword responded to HNZPT regarding various matters, including the appropriateness of the requirements to obtain an archaeological authority and the site visit. The correspondence did not include the requested details regarding the earthworks and their potential effects. Mr Jacobs then advised Mr Sword of a pending site visit.

[28] That site visit by HNZPT occurred on 25 June 2018 along the eastern edge of Lake Horowhenua where it was reported the earthworks had occurred. Archaeologist Kathryn Hurren compiled a report confirming that the area around the Lake had been recently modified and that archaeological material had been present. Given the works had already been completed, the origin of the archaeological materials could not be conclusively ascertained. A meeting was then arranged between the parties to discuss the report and, more generally, the archaeological provisions of the HNZPT Act 2014. Following the meeting, Mr Jacobs sent a final letter to the parties accepting the word of those involved that no in situ archaeology was damaged by the works. As there was no new information to allow HNZPT to examine matters further, they had no additional involvement.

The former trustees' submissions

[29] In their first response, the former trustees submitted that the contractors were engaged to provide critical services, and the works had been undertaken by the trust under the mana given to them by the owners for their benefit. They considered Mr Taueki's approach in filing proceedings for an injunction was no more than a "cynical attempt to undermine the Lake Trust's ability to have essential works undertaken" on the land in the future. The trust argued there was no injunction to be heard as all activity had ceased and all equipment had been removed due to the work being completed. Later, Mr Sword, as chairperson of the trust, submitted that the works undertaken consisted of three minor events along the eastern side of the dewatered area of the Lake. These included:

(a) A walkway from the Lake Domain to the Arawhata Stream;

(b) Clearing for a pā harakeke area for Muaūpoko expert weavers to more readily access and harvest harakeke for weaving; and

(c) Creating a T-drain at the end of the Queen Street storm water drain where it enters the Lake.

[30] Mr Sword argued that none of these works required resource consent, which was confirmed by the HDC and HRC.

[31] The former trustees disputed HNZPT's generalised classification of the Lake as an archaeological site, stating that wide generalisation without first consulting with them as mana whenua is a gross failure of due process and Muaūpoko tikanga.[23] In addition, the fact that HNZPT wrote to the trust does not, of itself, point to evidence of an archaeological site along the area of the works. Mr Sword confirmed that there had been extensive investigations undertaken and that there are currently no registered archaeological areas on the eastern dewatered area of the Lake. Any discussion of suspected unmarked sites is a matter of ongoing dialogue with HNZPT. In any case, Mr Sword contended that the trust does recognise there are sites of cultural significance in the general location, which is why three mana whenua representatives with experience in a cultural context were present during the works to ensure that proper protocols would be followed in the event of an accidental find.

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[23] Affidavit of Associate Professor Jonathan Noel Procter sworn 4 March 2019, at [31]

[32] Regarding consultation, Mr Sword argued that, although they do not require permission, they have consulted with the trust beneficiaries. The T-drain works have been well documented through the Lake Accord processes at general meetings since 2011. The walkway had been discussed on the marae with beneficiaries and wider Muaūpoko, most recently in November 2017, in conjunction with a bus tour to visit various Lake rehabilitation projects. Mr Sword confirmed that more consultation was planned for the walkway to continue around the western side of the Lake. The pā harakeke area is an idea that had also been discussed widely amongst Muaūpoko. Mr Sword confirmed that the trust's plans were also discussed at other events such as Waitangi Day celebrations.

Discussion

[33] The Court's jurisdiction to grant injunctions is per to s 19 of the Act:

> **19 Jurisdiction in respect of injunctions**
>
> (1) The court, on application made by any person interested or by the Registrar of the court, or of its own motion, may at any time issue an order by way of injunction—
>
> (a) against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land, Maori reservation, or wahi tapu; or
>
> (b) prohibiting any person, where proceedings are pending before the court or the Chief Judge, from dealing with or doing any injury to any property that is the subject matter of the proceedings or that may be affected by any order that may be made in the proceedings; or
>
> (c) prohibiting any owner or any other person or persons without lawful authority from cutting or removing, or authorising the cutting or removal, or otherwise making any disposition, of any timber trees, timber, or other wood, or any flax, tree ferns, sand, topsoil, metal, minerals, or other substances whether usually quarried or mined or not, on or from any Maori freehold land; or
>
> (d) prohibiting the distribution, by any trustee or agent, of rent, purchase money, royalties, or other proceeds of the alienation of land, or of any compensation payable in respect of other revenue derived from the land, affected by any order to which an application under section 45 or an appeal under Part 2 relates.
>
> (2) Notwithstanding anything in the Crown Proceedings Act 1950, any injunction made by the court under this section may be expressed to be binding on the Māori Trustee.
>
> (3) Any injunction made by the court under this section may be expressed to be of interim effect only.
>
> (4) Every injunction made by the court under this section that is not expressed to be of interim effect only shall be of final effect.

[34] The principles in relation to the grant of an interim injunction, that are adopted here, are well settled. The applicant must show there is a serious question to be tried, that the

balance of convenience is in their favour and that it is in the interests of justice than an injunction should be granted.[24] As noted in *Roseneath Holdings Ltd v Grieve*, the object of an interim injunction is to protect the applicant from harm occasioned by any breach of rights that are the subject of current proceedings, for which damages may not be adequate compensation.[25]

[35] In my assessment, which included a site inspection, any injunction would have already served its intended purpose in providing for a preservation of the status quo until the present applications have been finally determined. The former trustees have also confirmed that the works have been completed. That being the case, I see no reason to grant an interim injunction.

[36] In terms of a permanent injunction, although Mr Sword had indicated that further works were to occur in the 2018-2019 period regarding the T-drain, I note that Mr Hemana is currently the sole interim responsible trustee. He was appointed to maintain the operations of the trust but was not to have a power to make more than administrative decisions without the approval of the Court. The issue of further works, should they arise, can be dealt with by either Mr Hemana or by any incoming trustees. This may include weed and pest control and the ongoing work initiated by the former trustees.

[37] To avoid doubt, the application for injunction is accordingly dismissed.

What is the Te Mana o Te Wai project and how is it managed?

[38] Turning then to the central issue of these proceedings, the allegations of conflicts of interest. These centre on the payments that have been made to trustees following receipt of substantial external funding from central and local government intended to facilitate the reduction of the effects of decades of pollution of Lake Horowhenua. What follows in the Schedule attached to this judgment, is a summary of a number of salient decisions and discussion points concerning this project, extracted from the minutes of trustee meetings during the period 2015-2018 and related documentation. To avoid doubt, the narrative set out below is not a summary of every issue raised or discussed at trustee meetings and every position taken by trustees. It is confined principally to relevant references to Te Mana o Te

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[24] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129; *Henry Roach (Petroleum) Pty Ltd v Credit House (VIC) Pty Ltd* [1976] VR 309; and *Lomax v Apatu – Awarua o Hinemanu Trust* (2013) 22 Tākitimu MB 282 (22 TKT 282)

[25] *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168 (CA)

Wai, which is also referred to subsequently as "Te Kakapa Manawa o Muaūpoko", in the context of the allegations of conflicts of interest, delegation of duties and the duty not to profit.

[39] In 2013, following a period of discussion, the Lake Horowhenua Accord was entered into between the trust and local authorities as the principal parties, along with the Lake Horowhenua Domain Board ("the Domain Board") and the Department of Conservation ("DOC").[26] The overarching aim, it appeared, was to facilitate restoration of the Lake. In a document entitled "The Lake Horowhenua Accord Action Plan 2014-2016" the following objectives are identified:[27]

(a) Return Lake Horowhenua as a source of pride for all people of Horowhenua;

(b) Enhance the social, recreational, cultural and environmental aspects of Lake Horowhenua in a fiscally responsible manner that will be acceptable to the community of Horowhenua;

(c) Rehabilitate and protect the health of Lake Horowhenua for future generations; and,

(d) Consider how to respond to the key issues, management goals and the 15 guiding action points the Accord partners have agreed upon.

[40] The Action Plan identified eight key issues and seven management goals, which outline the relevant issues and concerns that the plan is intended to address, wholly or in part:[28]

> Key Issues
>
> (a) Poor water quality
>
> (b) Sources of nutrients and contamination and other causes of adverse effects to the health of the Lake;
>
> (c) Cyanobacteria blooms;
>
> (d) Excessive lake weed;
>
> (e) High turbidity and sediment inputs;
>
> (f) Declining fishery;
>
> (g) Pest fish; and
>
> (h) Confusing and overlapping responsibilities.

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26 See Ministry for the Environment, Manatū Mō Te Taiao, website <https://www.mfe.govt.nz/fresh-water/clean-projects/lake-horowhenua>

27 Horizons Regional Council "The Lake Horowhenua Accord Action Plan 2014-2016" <www.horizons.govt.nz/publications-feedback/publications/lake-horowhenua>

28 Ibid

Management Goals

(a) To maintain or enhance the fishery in the Lake and its subsidiaries;

(b) To reduce or eliminate the occurrence of nuisance cyanobacteria;

(c) To limit and manage nutrient input into the Lake from all sources;

(d) To improve the water quality of the Lake, for example from hypertrophic to supertrophic or eutrophic;

(e) To reduce the abundance of aquatic macrophytes in the Lake;

(f) To consider more efficient and effective management/decision making processes around the Lake and to empower beneficial owners and Muaūpoko to more effectively participate in the management of the Lake; and

(g) To regularly communicate to beneficial owners the state of the Lake.

Project summary

[41] A useful and very current summary of the various Lake projects can be found in a report to the Policy and Strategy Committee of HRC dated 10 March 2020, which was retrieved following a search for costs awarded against the applicants and Ms Taueki. This summary provides a useful history and outline of several of the principal aims of the Lake projects:[29]

2. EXECUTIVE SUMMARY

2.1. Lake Horowhenua is the largest lake within the Horizons Region and the largest dune lake within New Zealand. Monitoring data shows that the lake experiences poor water quality and many of the parameters monitored are below the One Plan targets and the national bottom line for a number of the attributes that are contained in the National Policy Statement for Freshwater Management (2014). The Lake has had a long complicated history of management and this continues to be a matter that is considered as part of the ongoing Treaty Settlement processes.

2.2. The Lake Horowhenua Accord is a collaboration led by the Lake Trust (that are elected to represent the Beneficial Owners of the lake). Other partners include the Horowhenua Lake Domain Board (Domain Board), Horizons Regional Council, Horowhenua District Council, and the Department of Conservation. Horowhenua District Council led the formation of the Lake Horowhenua Accord with the Accord celebrating its sixth anniversary on the 4th of August 2019. The Lake Horowhenua Accord aligns a range of organisations who have various, and in some cases overlapping, responsibilities for Lake Horowhenua.

2.3. The regulatory and non-regulatory activity for Horizons was identified in the One Plan including Lake Horowhenua being a catchment included in the nutrient management rules and two non-regulatory methods (see Annex A), Method 5-6 Lake Horowhenua and other coastal lakes and Method 5-7 lake quality research, monitoring and reporting. The Lake Horowhenua Accord was formed following the completion of lake restoration option reports

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[29] Horizons Regional Council <http://www.horizons.govt.nz/HRC/media/Media/Agenda-Reports/Strategy-Policy-Committee-2020-10-03/2030%20Lake%20Horowhenua%20Update.pdf>

commissioned by Horizons and completed by National Institute of Water and Atmospheric Research (NIWA).

2.4. This collaborative approach through the Lake Accord has delivered an Action Plan and significant works to implement the actions within it. The collaboration has been extended to involve Central Government, horticulture growers and the dairy industry across three large work programmes comprising of the Lake Horowhenua Freshwater Clean-up Fund, Te Mana o Te Wai Fund and Freshwater Improvement Fund (FIF) projects. Horizons, the Accord Partners, Universities, NIWA and others have collaborated to undertake science and monitoring to inform restoration options and to measure progress.

2.5. Through the Lake Accord, progress has been made in the restoration of Lake Horowhenua. There has however been opposition to some of the monitoring and restoration activity that has slowed progress. The opposition to monitoring and restoration work around Lake Horowhenua predates the Lake Horowhenua Accord and has continued following its formation with court action opposing a range of activities including:

- the establishment of a fish pass to restore fish to access the lake from the sea that was blocked by installation of a weir on the lake outlet; a sediment trap to reduce the amount of sediment and nutrient reaching the lake; and
- the lake weed harvesting project that aims to address in-lake process caused by introduced lake weeds that lead to toxic conditions in the lake for aquatic life and close the lake for recreational use.

2.6. Legal processes in various courts have included cases around the regulatory consents for undertaking restoration programmes, the legality of Horizons being able to access the lake, and related to these matters, governance arrangements of the Lake Horowhenua Trust, including trustee elections. Many of the decisions relating to the obtaining of resource consents and implementation have been appealed to higher courts. These legal challenges have significantly increased costs (including diverting funds from restoration projects) and delayed actions to restore the lake, either on the ground or in the lake.

2.7. This item provides an update on the progress and activities involved to enable the establishment and operation of the weed harvester on Lake Horowhenua. Weed harvesting was identified as one of the key in-lake interventions to improve water quality and aquatic health. In addition, it seeks a Council decision for the next steps for the weed harvesting project.

[42] Near the end of this report, a series of points are highlighted underlining the approach and strategy of HRC and the Lake Accord partners, and while lengthy, are also useful in understanding the intent of the parties to these projects:[30]

8. DISCUSSION

Interventions:

8.1. Changes in land management practices were also identified as part of the Lake Horowhenua Accord and the Acord has taken an integrated approach to management of the lake. A large component of the Freshwater Clean-Up

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[30] Horizons Regional Council <http://www.horizons.govt.nz/HRC/media/Media/Agenda-Reports/Strategy-Policy-Committee-2020-10-03/2030%20Lake%20Horowhenua%20Update.pdf>

Fund project was working with the horticulture growers and the associated changes to farming practices through this engagement. The aim of this being to reduce the sediment that left properties combined with the establishment of the sediment trap at the base of the Arawhata Catchment. In addition, an understanding of the drainage network throughout the Arawhata Catchment was developed to identify bottlenecks to water flow and identify areas were the network has never been fully developed. This work, being undertaken by Tonkin and Taylor for Horizons, is ongoing with a current project underway working to identify options to improve the drainage network and options to further reduce sediment and nutrient inputs to the lake. A Sustainable Farming Fund project and Massey PhD project (both supported in-part by Horizons) are also underway in the catchment looking at options to reduce nutrient inputs from Horticultural operations into the lake.

8.2. The Freshwater Clean-up Fund project also worked with all dairy farms within the catchment and these have now obtained nutrient management consents through the One Plan framework. These catchment wide interventions continue to progress and can be considered more medium to long-term interventions. Regulatory processes are also ongoing in relation to reducing inputs to the lake such as nutrient management consents Strategy and Policy Committee 10 March 2020 Lake Horowhenua Update Page 8 for dairy and horticulture farms and stormwater consenting for Horowhenua District Council. Further research work on the groundwater inputs to the lake are also underway as a part of the work planned via the Freshwater Improvement Fund project.

In-lake processes:

8.3. The lake weed harvesting project is viewed as a key in-lake intervention for the health of the lake and for improving the suitability of the lake for recreation. This in-lake activity seeks to address the in-lake processes that lead to toxic conditions in the lake including elevated pH, ammonia toxicity and the cyanobacteria blooms that occur in the lake.

8.4. These processes are driven by the presence of the introduced macrophytes (lake weeds) including *Potamogeton crispus*. During spring the macrophytes start to grow and undergo a rapid growth phase resulting in the pH of the water column being raised above 9.2. The pH levels reached in-lake are high enough for Dissolved Reactive Phosphorus (DRP) to be released from sediment. Further, the pH change results in ammonium becoming ammonia and this can result in toxic ammonia concentrations in the water column. The macrophytes continue their fast growth cycle, depleting the water column of all soluble inorganic nitrogen and depending on the climatic conditions, the macrophytes reach their peak in late October through to December. During this growth phase they are reproducing turions (seed equivalents) which are dropped to the lakebed. Once they reach their peak the macrophytes start to collapse as a part of their life cycle. The depositing of the plant material on the lakebed creates low dissolved oxygen (anoxic) conditions on the lakebed. These conditions are suitable for the release of DRP from the lakebed sediments into the water column. The high DRP concentrations in the water column and the low nitrogen levels (due to the uptake by the macrophytes) provides cyanobacteria blooms a competitive advantage over other algal species and cyanobacteria blooms begin to become dominant in the lake causing impacts on aquatic life and closing the lake for contact recreation.

8.5. Regardless of catchment wide interventions, without some form of in-lake interventions the lake would continue to experience these conditions due to the presence of the introduced macrophyte. Internationally and nationally alum (or alum based agents) have been used to bind DRP on lake beds and make it unavailable for uptake by cyanobacteria. This is effective for the removal of DRP and essentially locks it up. This was considered as a tool for Lake Horowhenua however, was discounted due to cultural concerns around the discharge of alum to the lake. In Lake Horowhenua, although alum

> dosing could effectively deal with the DRP concentrations in the lake and the associated cyanobacteria blooms, it would not prevent the pH changes and the associated ammonia toxicity that the lake can experience. Further information on lake weed harvesting is provided in Annex C.
>
> 8.6. The sediment trap, fish pass, and weed harvesting were all identified as interventions which could be completed in a short time frame and make a meaningful difference to the health of Lake Horowhenua. These interventions have always been considered as a part of a wider long-term restoration programme. The weed harvesting activity is targeting the aspects of lake health that cause toxic effects (ammonia toxicity and cyanobacteria), it is not an intervention that will address the presence of other algae in the lake i.e. the lake will likely continue to have a strong presence of green algae in the lake if weed harvesting is undertaken. The weed harvesting activity aims to eliminate or significantly reduce the toxic form of the algae that impacts on aquatic life and recreational use of the lake.

[43] To avoid doubt, I readily accept the criticism that this report was not before the parties or their counsel at the close of these proceedings for obvious reasons; that the authors were not available to be questioned and that there may be an argument that the report is wholly from an HRC perspective and consistent with that of those promoting these projects; and there has been no opportunity for the applicants and their counsel to challenge the assertions and opinions stated. If any counsel considered that further submissions are necessary, (and at least on one issue over trustee relief, there will be an invitation for further argument), then I will accept further submissions in due course on this point if counsel are so minded. Even so, this is a helpful thumbnail sketch of the background to and the rationale behind the approach taken by the Lake Accord partners.

Did the former trustees improperly delegate their duties?

Mr Rudd's submissions

[44] Counsel submitted that the trust received money from the MFE's Te Mana o Te Wai fund. However, management of those funds was purportedly and improperly delegated to a subcommittee, known as the Governance Group, comprising three trustees, a project manager (also a trustee) and a staff member or representative from each of the HDC and the HRC. Terms of reference were drafted by the Governance Group and Mr Sword, the chairperson of the trust, who was then "appointed" interim project manager by the Governance Group. A bank account for the trust was set up by the HDC who advanced funds on behalf of the trust to be reimbursed from the MFE when milestone funding was received under Te Mana o Te Wai. The evidence makes is clear that the use of these funds was controlled by the Governance Group in connection with the HDC and HRC.

[45] According to Ms Thornton, the evidence confirmed that the Governance Group also purported to contract with the former trustees and pay them significant sums from funds that belonged to the trust. However, there are no resolutions of the trust authorising the contracts, which are only signed by one trust signatory, and Court approval was not sought, contrary to the trust order. The fact that the former trustees were receiving large payments was also not disclosed in trust minutes.

[46] Ms Thornton argued that the former trustees allowed trust funds to be spent without proper approval in accordance with the trust order and, as the former trustees have failed to produce financial information for the relevant account, and in contempt of disclosure directions, there are no details as to how the remainder of the funds have been spent. There has been no clear disclosure of the Governance Group's activities to the former trustees, let alone the trust beneficiaries. Therefore, the former trustees delegated their functions to the Governance Group in breach of the trust order and their duties.

Mr Taueki's submissions

[47] Mr Watson argued that the former trustees improperly delegated authority to a Governance Group, which included non-trustee members, allowing that group to hold funds received under the Te Mana o Te Wai agreement that were intended to benefit Lake Horowhenua and the trust. They also improperly delegated authority to one trustee as a project manager to enter into contracts on behalf of the trust without securing the correct approvals in accordance with the trust order.

The former trustees' submissions

[48] Mr McKechnie drew attention to the fact the trust order does not provide a mechanism where the trust is able to efficiently work with third parties to collaborate towards a goal of sustainable management and enhancement of the environment.

[49] In terms of financial accountability, Mr McKechnie submitted that the trust has provided all annual accounts since 2014 and all documents related to income and expenses, including contractual agreements to progress current and future projects funded by local and regional authorities and central Government. The former trustees maintain that the trust order did not restrict them from entering into the funding agreement with the MFE, which comprised a comprehensive set of projects to improve the Lake waters, environs and fisheries. The

resulting Deed of Funding required the establishment of a governance group and terms of reference.

[50] Counsel contended that Mr Sword was appointed project manager via a public process in which other parties to the joint venture all participated. The former trustees maintain that their conduct has been consistent with the TOR and there has been no wilful attempt to avoid disclosure of the operation of the Governance Group, which has provided comprehensive reporting on progress. The MFE was in any case satisfied with the performance of the contract and expenditure related to the funds provided to the trust. The former trustees submitted that the funding arrangement has been significant to progress the interests of the beneficial owners in restoring the health of the Lake. Its success is reflected in the ongoing financial support from the MFE and HRC.

The Law

[51] Section 31(1) of the Trustee Act 1956 states:

> **31 Power to delegate trusts**
>
> (1) A trustee who—
>
> (a) is for the time being out of New Zealand or is about to depart therefrom; or
>
> (b) expects that he may be absent from New Zealand from time to time during the administration of the trust; or
>
> (c) is or may be about to become temporarily incapable, by reason of physical infirmity, of performing all his duties as a trustee; or
>
> (d) expects that he may be from time to time temporarily incapable, by reason of physical infirmity, of performing all his duties as a trustee,—
>
> may, notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person the execution or exercise, during any period for which the trustee may be absent from New Zealand or incapable of performing all his duties as a trustee, of all or any trusts, powers, authorities, and discretions vested in him as such trustee, whether alone or jointly with any other person or persons:
>
> provided that a person being the only other co-trustee and not being a trustee corporation shall not be appointed to be an attorney under this subsection.

[52] As this provision applies to situations where a trustee is either going to be absent from New Zealand or cannot perform the duties of trustee due to physical infirmity, it is not relevant to the present case because neither condition was applicable. In addition, the learned authors of *Jacobs Law of Trusts in Australia* confirm the core principles concerning the rule against delegation of duties by trustees:[31]

(a) Any delegation must be specifically permitted by the trust instrument;

(b) Any delegation must be specifically permitted by statute; or

(c) In any other case, is a ministerial act not involving the exercise of a discretion or where the trustees are, by necessity, bound to employ an agent.

[53] In this case, as mentioned, the Trustee Act 1956 does not apply since none of the trustees were out of the country at the relevant time or were otherwise prevented by illness from exercising their duties. There is also no power of delegation in the trust order.

The trust order

[54] The powers of the trustees are contained in cl 4 of the trust order, which, despite their length, are set out below in full for convenience:[32]

> **4 POWERS**
>
> **4.1 General**
>
> Subject always to the objects of the Trust and in accordance with the powers conferred by this trust order, the Trustees are empowered to do all or any of the things that the Trustees would be entitled to do if they were the absolute owners of and beneficially entitled to the Trust Property, **PROVIDED HOWEVER** that the Trustees shall not alienate by way of sale or gift the whole or any part of the Land.
>
> **4.2 Specific**
>
> Without limiting the general powers in the preceding provision, the Trustees are expressly authorised:
>
> (a) To set aside cash reserves. To accumulate income and to set aside such cash reserves as the Trustees in their absolute discretion think fit for contingencies or for capital expenditure or for expansion in accordance with the objects of the Trust or in connection with any business carried on by the Trustees.
>
> (b) To apply or distribute income. To apply or distribute all or any income of the Trust towards all or any of the objects of the Trust as the Trustees in their absolute discretion think fit, including Māori community purposes under section 218 of the Act or such other purposes as may be ordered by the Court.
>
> (c) To lend or invest. In furtherance of any object of the Trust, to lend or invest all or any income of the Trust whether in New Zealand or elsewhere upon any securities in which trust funds may be invested by trustees in accordance with the Trustee Act 1956 or in accordance with any other statutory authority.

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31 J D Heydon and M J Leeming *Jacobs' Law of Trusts in Australia* (8th ed, Lexis Nexis Butterworths, Australia, 2016) at [17–23]

32 293 Aotea MB 165-174 (293 AOT 165-174); Rudd Bundle, at 364-366

(d) To borrow. To borrow money for the purpose of the furtherance of any of the trusts or powers contained in this trust order whether or not with security over all or any Trust Property.

(e) To buy. To acquire any land or interest in land whether by way of lease, purchase, exchange or otherwise and to acquire and sell, hire or otherwise deal in any other assets including shares, vehicles, plant, chattels or equipment.

(f) To lease. To lease the whole or any part or parts of the Trust Property from year to year and for any term of years at such rent and upon such covenants and conditions as the Trustees consider reasonable and to any person or body corporate and/or Her Majesty the Queen and to accept a surrender of any such lease.

(g) To improve. To maintain, develop and improve the Trust Property and to erect on any land forming part of the Trust Property buildings, fences, yards and other constructions or erections of such nature as the Trustees consider necessary or desirable.

(h) To protect Wāhi Tapu. To safeguard to the best of the Trustees' ability all Māori urupā, wāhi tapu and all other places in or upon the Trust Property that are sacred or of historic, spiritual or cultural significance to the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe.

(i) To employ. To employ, engage, or dismiss professional advisers, agents, employees or independent contractors required to carry out the objects of the Trust or to otherwise carry out the work of the Trustees and to fix their reasonable remuneration and to provide such indemnities to them as the Trustees think fit.

(j) To pay own costs. From the revenue derived from the operation of the Trust to pay all costs, expenses and disbursements incurred by the Trustees including the costs of any person or body employed by them in the administration of the Trust or in the furtherance of any of the objects of the Trust and to reimburse the Trustees for all their out of pocket expenses incurred in their attendance to the affairs of the Trust, and if approved by the Court any fees to be paid to the trustees.

(k) To join with others. To enter into arrangements, agreements, contracts whether in the names of the Trustees or jointly or in partnership with any other person, organisation, body corporate or local authority.

(l) To insure. To effect and maintain all such insurances in respect of any undertaking, activity or assets of the Trust, including the Trust Property, as the Trustees consider necessary or desirable.

Discussion

[55] The Governance Group terms of reference cited above at paragraph [54]-[55] make it plain that its objectives, roles and responsibilities were to oversee the various Lake "restoration" and improvement projects that included management and oversight of financial decisions. This is confirmed by the Governance Group minutes of 7 September 2016 where a resolution approving the purchase of $21,000 worth of plants is recorded.[33] The Project

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[33] Affidavit of Matthew James Sword sworn 1 March 2019

Manager would provide reports and the Governance Group also "received" and noted in its minutes, financial reports on progress with the projects. For example, 15 May, 9 July and 13 August 2018, the Governance Group minutes record that the income and expenditure statements are "received".

[56] The terms of reference are equally clear that the Governance Group's functions included "making effective decisions" and "ensuring appropriate management practices" are adopted, as well as ensuring that the projects are "successfully delivered" in accordance with objects, timeframes, levels of quality and cost. The terms of reference also record that the Governance Group retained responsibility for "managing significant financial and community risks" along with "determining whether to approve" future programmes and budgets and "resolving strategic or directional issues".

[57] Curiously, the report to the Policy and Strategy Committee of HRC states that, as far as HRC were concerned, the projects were led by the trust:[34]

> The Lake Horowhenua Accord, the associated Action Plan and the collaborative approach that the Accord has taken has resulted in three successful bids to Central Government Funds to enable works to be completed. The Lake Horowhenua Clean-Up Fund project was led by Horizons, Te Kakapa Manawa o Muaūpoko (Te Mana o te Wai) was led by the Lake Horowhenua Trust, and the Lake Horowhenua Freshwater Improvement Fund project also led by the Lake Horowhenua Trust. All of these projects have or will deliver on the ground works to improve the health of the lake (including cultural health and connections). These projects and progress on them are overviewed in Annex C

[58] Tellingly, the Governance Group's responsibilities also included "considering" the advice of the trust and "reviewing" any reports from the trust or project manager. So contrary to Mr Sword's assertion of 29 November 2015, that the Governance Group was under the "full control" of the trust, the former was neither formally required to report to the trust or seek to have its recommendations or decisions ratified by the trustees, regardless of its actual practices. Dr Procter had also stated in his evidence that the Governance Group "is accountable to the Trust and it must keep the Trust updated on the projects and administration of the fund".[35] Mr Sword during cross examination also sought to explain that the delegation to the Governance Group was a condition of the Deed of Funding with the MFE:[36]

> When we delegated the responsibility of having oversight over the projects to a governance group, (1) it was a requirement under the funding agreement but (2), there

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34 Horizons Regional Council <http://www.horizons.govt.nz/HRC/media/Media/Agenda-Reports/Strategy-Policy-Committee-2020-10-03/2030%20Lake%20Horowhenua%20Update.pdf> at [7.4]

35 Affidavit of Associate Professor Jonathan Noel Procter sworn 4 March 2019, at [13]

36 398 Aotea MB 208-209 (398 AOT 208-209)

> are multiple layers of transparency through this. I think I mentioned yesterday or earlier today, I can't quite remember, Ministry for the Environment does a deep dive audit into every milestone report that we provide requesting copies of invoices, contracts, our photo evidence and progress of work, then we have the governance group itself who has responsibilities to have oversight of the project manager and the implementation of the project, then ultimately, the trustees. So, I agree, the importance of transparency through any delegation, is important.

[59] So, for all intents and purposes, the Governance Group was the overseer of the projects and of the project manager because it had the decision-making powers as set out in the terms of reference. The clearest example of that was when Mr Sword announced on 1 May 2016 that the Governance Group had "appointed" him to the role of interim project manager rather than recommended that the trust appoint him to that role. Both Mr Sword and Dr Procter confirmed in their evidence that the Governance Group had been "delegated" authority from the trust to undertake effective oversight of the various projects including the appointment of Mr Sword and the subsequent appointment by him on behalf of the Governance Group of his colleagues to contractor roles.[37]

[60] In any event, the law is well settled that the former trustees could not delegate their decision-making function to the Governance Group, even if they wished to do so. This is a fundamental trust duty.[38] As foreshadowed, their own minutes record confirmation of this fact, with the statement that the Governance Group would remain under the control of the trust. This includes the ability of the trust to engage contractors like Messrs Sword and Warrington, and companies associated with them. Yet the practice appeared much more varied, and as the evidence confirms, was ultimately contrary to the non-delegation duty.

[61] For example, it would not be unreasonable to expect that every report of the Governance Group, especially those containing recommendations or purported decisions including for payments, would require the endorsement of the trustees as a whole for approval in a formal resolution at a duly convened meeting of the trust. This is what cl 6.1 of the trust order requires, which is discussed further in this decision. The Governance Group could never have delegated to it the decision-making power that properly remained within the mandate of the trust. The trust order requires the trustees to approve payment of its funds, not a subcommittee of three trustees and others, just as it only empowers the trustees to engage, employ or contract persons to carry out the work of the trust.

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37 See Mr Sword's responses to Ms Thornton at 398 Aotea MB 154 (398 AOT 154); and Affidavit of Associate Professor Jonathan Noel Procter sworn 4 March 2019, at [6] – [16]

38 *Chambers v Minchin* (1802) 7 Ves 186; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 cited with approval in *Pitt v Holt* [2013] UKSC 26

[62] Neither was this arrangement with the Governance Group comparable to the trust engaging a contractor with set terms of appointment and costs, the application of which would be at the contractor's discretion. For example, if the trust engaged a fencing contractor for a set price based on a quote with the expectation that a minimum number of the contractor's employees would be engaged to complete the task within the agree timeframe, whether the contractor then engaged a lesser number of its staff but decided to work twelve hours a day instead of the expected eight would be a matter entirely within the mandate of the contractor. In this case, decision making on critical matters including the management of financial risk and the approval of work programmes and budgets appeared to lie with the Governance Group, not the trust. While the trust may have retained broad knowledge of the budget and project objectives, based on reports provided by Mr Sword, decision making on the approval of critical matters, like payments to trustees and their companies, apart from two identifiable occasions, rested with the Governance Group.

[63] The only meeting that came close to approving Mr Sword's engagement was that held on 1 May 2016 when he announced his appointment "by the Governance Group." That was then the time when the trustees should have formally approved Mr Sword's appointment as interim project manager. Curiously, in his evidence Dr Procter stated that Mr Sword *was* appointed to the interim project manager role on 1 May 2016. I assume he meant that it was the trust that had done so because he also said that the Governance Group meetings commenced in June 2016:[39]

> In accordance with the Deed of Funding, steps were taken to appoint the Project Manager. Initially, Mathew Sword was appointed on an interim basis, made by way of resolution on 1 May 2016, while we sought expressions of interest and publicly advertised the position. I understand a copy of this advertisement for Project Executive / Project Governance Group has been attached to the affidavit of Mr Sword on 1 March 2019.

[64] The record confirms, however, that no such resolution was passed by the trustees on 1 May 2016, and in any event, if the proper rules of conflict had been applied, Mr Sword would have needed to remove himself from the meeting and not be counted towards the quorum in accordance with cls 11-13 of the trust order, which would have resulted in the meeting becoming inquorate. The trust order requires that any person with a conflict, as this clearly was, could not be counted towards the quorum. With a then compliment of eleven trustees, the quorum would have been six and the minutes record that six trustees were present. Remove Mr Sword and, as foreshadowed, the meeting becomes inquorate.

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[39] Affidavit of Associate Professor Jonathan Noel Procter sworn 4 March 2019, at [17]. Dr Procter confirmed that the Governance Group meetings commenced on 27 June 2016, at [15].

[65] It will be remembered that cl 4.2(i) of the trust order empowers the *trustees* to employ, engage or dismiss agents, employees or independent contractors, to carry out either the objects or the work of the trustees and to "fix their reasonable remuneration". Once again, there is no provision for the trustees to delegate that role to the Governance Group. In addition, the only formal written agreements between the trust and its contractors, who were also trustees, or entities connected with them, are those signed by Mr Sword as project manager, or in his own case, by Dr Procter. Mr Sword did not possess the authority to engage his fellow trustees without the approval of a majority of unconflicted trustees properly documented by resolution. If the trustees had correctly appointed him to a management role and within the terms of his contract he could employ or engage individuals that would be entirely appropriate, provided that if the contractors were also trustees, the proper rules of conflict had been strictly observed. The former trustees were therefore in breach of this provision requiring them to engage contractors and to agree their remuneration.

[66] As Mr Sword confirmed under cross examination when asked if he engaged his fellow trustees as contractors, he replied that he did so under "delegated authority" of the Governance Group, and accordingly there was no formal approval needed by the trust:[40]

> **M Sword:** Yes, I'm signing in the capacity of project manager I believe.
>
> **L Thornton:** Right.
>
> **M Sword:** On behalf of the governance group acting under delegation of the trust.
>
> **L Thornton:** Okay, and did any of these contracts go to the trust for approval?
>
> **M Sword:** No. Under the terms of reference for the governance group, it is the governance group and the project executive or the chair of the governance group that has that delegated authority.
>
> **L Thornton:** So, there's no resolution of the trust authorising these agreements?
>
> **M Sword:** No.

[67] Mr Sword also confirmed that the contracts were not signed according to the terms of cl 9.2 of the trust order in that two trustees were required to do so and that, in any case, the trustees were seeking to "be not inconsistent" with the trust order as the following exchange with Ms Thornton reveals:[41]

> **L Thornton:** Okay. So, you didn't comply with that, did you?
>
> **M Sword:** Well, we're complying with the delegated authority.
>
> **L Thornton:** Now, is it your view then that by the trustees unilaterally can override a term of reference that obviates or changes the trust order unilaterally?

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40 398 Aotea MB 154 (398 AOT 154)
41 Ibid, at 154-156

M Sword: Well, I believe the governance group still represented by three trustees, so are able to still comply with this. But we followed the terms of the funding agreement to set up those terms of reference for governance group. And so, I guess what I'm saying is not attempting to change the trust deed, but attempt to work in a manner that is consistent, at least consistent with it.

L Thornton: So, what you're saying is the Ministry was happy with it, is that right?

M Sword: The Ministry was happy with it.

L Thornton: Right. So, what about the trust order?

M Sword: Well, the trustees are also happy with it in making that delegation.

L Thornton: Did you go to the Court to ask that to be changed?

M Sword: No. Well, we didn't change the trust deed.

L Thornton: Well how is it that you can do this without complying with the trust order unless you've more or less changed it effectively?

M Sword: Well that's what I'm saying, I think we took the view that we acted in a manner that was, at least in our view, consistent, not contrary to existing terms or the deed.

[68] Regarding the payment of funds, cls 6 and 7 of the trust order provide:[42]

6.1 CONTROL OF FUNDS

6.2 All monies received by or on behalf of the Trust shall forthwith be paid to the credit of the Trust's bank account.

6.3 All payments from the Trust's bank account shall **first be approved** at a meeting of Trustees and all cheques and withdrawal slips drawn on the account shall be signed by the Treasurer and by either the Chairperson or Secretary or any other elected person.

7 MINUTES, REPORTS AND ACCOUNTS

7.1 The Trustees shall keep a proper written record of all resolutions passed and business transacted at every meeting of the Trustees in a minute book. The minutes of every meeting shall be signed by the chairperson of that meeting and shall be reviewed and, after any necessary amendment, confirmed at the next succeeding meeting of Trustees.

7.2 The Trustees shall keep proper books of account in which shall be kept full, true and complete accounts of the affairs and transactions of the Trust.

7.3 Within three months following the annual general meeting, the Chairperson shall file in the Aotea Registry of the Court the following:

(a) a copy of the reports and accounts submitted to the annual general meeting and the minutes of that meeting; and

(b) the current notified office and contact details of the Trust.

(Emphasis added)

[69] The Deed of Funding between the trust and MFE confirms that the project purpose is to "provide funding to the Horowhenua 11 Part Reservation Trust" which is also recorded as the recipient of the funds. That it was subsequently agreed that the HDC would, in effect,

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[42] 293 Aotea MB 165-174 (293 AOT 165-174); Rudd Bundle, at 366

underwrite the costs of the projects on the understanding that it would be reimbursed directly, does not alter the reality that the funds were for and therefore belonged to the trust once approved by the funders. At the 3 July 2016 meeting Mr Warrington had queried how the project funding "was going to be incorporated into the financials." Mr Sword confirmed that he was in discussions with the trust's accountants, Fluker Denton & Co over the inclusion of the project funding in the annual accounts.[43] They then included a note in the accounts to provide such confirmation.[44] As at 31 March 2018, the trust recorded in the annual accounts that it had received the benefit of $562,573 for the projects. My conclusion is that the funds that were used to pay the former trustees therefore belonged to the trust.

[70] Accordingly, by entering into the arrangements that it did, on the face of the evidence before the Court, the trust was no longer approving expenditure of its own funds. Clause 6.2 requires any funds "received by or on behalf of the Trust" must be immediately paid into the trust's own bank account, not an agent or third party. Equally importantly, cl 6.3 requires the *prior* approval of payments before they are made. So, any retrospective approvals, to the extent that they were ever made, and there is some doubt about the consistency of the trustees' conduct in this regard, were also in breach of the trust order. The former trustees failed to adhere to their terms of trust regarding the payment of accounts with funds that were its property, regardless of where they were held. This was a breach of their duties for which they must be held accountable.

[71] A compliant alternative would not be difficult to imagine. The project costs, to the extent that they could be properly estimated, could be approved prior to them being incurred on a month, two month or quarterly basis, so that the project could proceed in a timely manner. The trustees could approve, based on an annual or project budget, certain costs to be incurred up to say three months in advance and where they were likely to exceed the approved amount, a further meeting or written resolution authorising same could be arranged. Those costs would be checked against receipts, invoices and the budget to ensure compliance. The approvals could then be recorded by a formal trustees' resolution. If the trustees were in doubt as to whether such a process was compliant, then they could have sought directions.

[72] In addition, Mr Sword accepted under cross examination that, regardless of the TOR for the Governance Group, there still had to be compliance with the trust order:[45]

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43 Rudd Bundle, at 56-57
44 Ibid, at 202-211. Lake Horowhenua Trust 2017 Annual Accounts, at 9.
45 398 Aotea MB 145-146 (398 AOT 145-146)

> **L Thornton:** And were your terms of reference for your governance group meant to be a substitute for the trust order as far as the governance group went?
>
> **M Sword:** Was the terms of reference supposed to be a substitute for the trust order?
>
> **L Thornton:** Trust order.
>
> **M Sword:** No.
>
> **L Thornton:** What's the relationship to the trust order then?
>
> **M Sword:** So, essentially the terms of reference are terms of reference for what you could regard as a sub-committee of the lake trust, being the governance group.
>
> **L Thornton:** And is it your view then that the governance group would still have to comply with all of the provisions of the trust order?
>
> **M Sword:** Yes. And that would be something that the trustees retained control of is the terms of the – terms of reference, the representatives on that governance group so if the governance group were to be acting in a way that was contrary they retain that right to make changes.

[73] Curiously, he then goes on to confirm that the trustees did not approve these payments because that function had been "delegated" to the Governance Group.[46] Mr Sword also accepted that there was no way of determining from the annual accounts what payments from trust funds individual trustees were receiving. The issue of transparency and disclosure by fiduciaries will be discussed later in this judgment.

[74] In summary, the Governance Group had no authority to bind or commit the trust to any agreement until the trustees, at properly constituted meeting, had given approval as recorded in the relevant minutes. Any such decision the Governance Group purported to make, including the appointment of Mr Sword and other trustees by him "for Horowhenua 11 (Lake) Part Reservation Trust" to use the wording of the contracts, could not have been valid as an agreement that would have bound the trust or authorised any payment of funds held by or for the trust. Put simply, the Governance Group, like Mr Sword as project manager, could only ever make recommendations, which the trust would then need to either endorse or decline. In addition, the Governance Group could not make decisions on the expenditure of funds that belonged to the trust. By their conduct, when they endorsed the terms of reference and by their subsequent behaviour, the former trustees permitted the Governance Group and Mr Sword to purport to make decisions on behalf of the trust in circumstances where they simply could not do so. The former trustees improperly delegated their responsibilities to the Governance Group for the engagement of contractors and the payment of trust funds and in doing so they acted in breach of their duties, for which they must be held to account.

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[46] 398 Aotea MB 145-146 (398 AOT 145-146), at 151-152

Did the former trustees fail to manage conflicts of interest appropriately?

Mr Rudd's submissions

[75] Ms Thornton submitted that the former trustees who held dual roles on both the trust and the Lake Domain Board had conflicting duties regarding negotiations between both entities around disposal of the Rowing and Sailing Club buildings. Those conflicts were not properly disclosed, and the affected trustees did not stand down from the meeting when a memorandum of partnership was entered into between the trustees and the Domain Board. Accordingly, their duty of loyalty as trustees was compromised by their obligations as Domain Board members. This problem occurred again at a meeting in 2018 where the conflict was acknowledged but the trustees did not disqualify themselves and passed a vote of no confidence in the then chairperson of the Board, which highlighted their conflicting roles.

[76] Ms Thornton also argued that the financial arrangements which have allowed the trustees to pay themselves substantial amounts of money from funding received to address the health of the Lake is a significant conflict of interest and the record does not support the claim of Mr Sword that the payments were reimbursements for fair and reasonable expenses. The conflicts were self-evident, and the former trustees simply failed to manage those conflicts properly. This situation was then exacerbated, she argued, by the improper delegation of financial decisions to the Governance Group which did not constitute a majority of unconflicted trustees.

[77] Overall, because the dual appointees had conflicting roles between the trust and the Domain Board's respective interests, when decisions had to be made by the trust, those individuals could not be counted toward the quorum or cast a vote one way or the other. They refused or failed to stand down which meant that their votes should not have been counted. The correct result therefore would have been that the resolutions that had been either promoted or supported by the dual appointees should have failed or now be deemed invalid.

Mr Taueki's submissions

[78] Mr Watson submitted that the former trustees have consistently breached their terms of trust in material ways, adopting the submissions of Ms Thornton on this issue.

[79] Counsel argued that the former trustees failed to comply with the financial accountability provisions in the trust order, including: the signing of contracts; approval for payment of trustee fees; prohibitions on trustees profiting; and in declaring conflicts.

The former trustees' submissions

[80] Mr McKechnie submitted that, in relation to trustees holding dual roles on the trust and Domain Board, the former trustees have provided evidence that all alleged conflicts of interest were declared and managed appropriately at various hui. Counsel contended that Domain Board members are recommended by Muaūpoko iwi and there is no restriction on a person serving on both the Domain Board and the trust, either in the trust order or in any legislation or regulations.

[81] Counsel also argued that the interests of the Domain Board and the trust are close, and this is reflected in the working relationship and common objectives set out in the Memorandum of Partnership. The evidence presented does not identify a dispute between the two entities which has in any way prejudiced the interests of the beneficial owners.

[82] Mr McKechnie submitted that all perceived conflicts concerning contracts with trustees and entities associated with them engaged by the trust to undertake projects about the Lake, were managed appropriately. This was supported by Dr Procter on the appointment of Mr Sword as project manager and the Governance Group's procurement guidelines to award contracts for services. Counsel further submitted that the Court has previously supported the employment of one of the former trustees as part of the Te Mana o Te Wai projects.[47]

The trust order

[83] Clauses 11-14 of trust order provide:[48]

> **11. DISCLOSURE OF INTERESTS**
>
> **11.1 Definition of interested Trustee**
>
> A Trustee will be interested in a matter if the Trustee:
>
> (a) is a party to, or will derive a material financial benefit from that matter;
> (b) has a material financial interest in another party to the matter;

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47 375 Aotea MB 20 (375 AOT 20)
48 293 Aotea MB 165-174 (293 AOT 165-293)

(c) is a director, officer or trustee of another party to, or person who will or may derive a material financial benefit from, the matter, not being a party that is wholly owned, or in the case of a trust controlled, by the Trust or any subsidiary of the Trust;
(d) is the parent, child or spouse of another party to, or person who will or may derive a material financial benefit from, the matter; or
(e) is otherwise directly or indirectly materially interested in the matter.

11.2 Disclosure of interest to other Trustees

A Trustee must, after becoming aware of the fact that he or she is interested in a transaction or proposed transaction with the Trust, disclose to his or her co-Trustees at a meeting of the Trust:

(a) if the monetary value of the Trustee's interest is able to be quantified, the nature and monetary value of that interest; or
(b) if the monetary value of that Trustee's interest cannot be quantified, the nature and extent of that interest.

11.3 Recording of Interest

A disclosure of interest by a Trustee shall be recorded in the minute book of the Trust.

12 DEALINGS WITH "INTERESTED" TRUSTEES

12.1 An interested Trustee shall not take part in any deliberation or vote in respect of any matter in which that Trustee is interested, nor shall the Trustee be counted for the purposes of forming a quorum in any meeting to consider such a matter.

13 PROHIBITION OF BENEFIT OR ADVANTAGE

13.1 In the carrying on of any business by the Trust, and in the exercise of any power authorising the remuneration of the Trustees, no benefit, advantage or income shall be afforded to, or received, gained, achieved or derived by any Associated Person where that Associated Person, in his or her capacity as an Associated Person, is able by virtue of that capacity in any way (whether directly or indirectly) to determine, or to materially influence the determination of the nature or amount of that benefit, advantage or income, or the circumstances in which that benefit, advantage or income is, or is to be, so afforded, received, gained, achieved or derived.

14 REMUNERATION AND EXPENSES

14.1 No private pecuniary profit

No private pecuniary profit may be made by any person from the Trust. However, each Trustee shall be entitled to be reimbursed for fair and reasonable expenditure incurred by him or her on behalf of the Trust subject in every case to approval by the Trust.

The Law

[84] The fundamental principle concerning conflicts of interest, or the rule against self-dealing was set out by Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Brothers*:[49]

> A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary character towards his

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[49] *Aberdeen Railway Co v Blaikie Brothers* [1843-60] All ER Rep 249 at 252

> principal, and it is a rule of universal application, that **no one having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect**. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for *cestui qua* trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interest of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.
>
> The English authorities on this head are numerous and uniform. …
>
> (Emphasis added)

[85] The essential point is that the interest and duty of a trustee must not be put into conflict.[50] As a fiduciary, a trustee cannot permit any conflict between personal interests and the trustee's duties to the beneficiaries: *Boardman v Phipps.*[51] This is because trust beneficiaries are entitled to trustee decision making untainted by any conflict between the trustees' duty to them on the one hand and any personal considerations and interests on the other.[52]

[86] In addition, allied with the trustees' non conflict or self-dealing rule is the duty not to profit from their office: *Robinson v Pett.*[53] Trustees must also act gratuitously and are not entitled to reimbursement for their time.[54] It is a breach of fiduciary duty regardless of whether the profit is made directly or indirectly: *Rochefoucauld v Boustead.*[55] It will also be a breach where the profit is made by a third party, including children of the trustee: *Willis v Barron.*[56] A profit made honestly or dishonestly will still amount to a breach of fiduciary duty. Where trustees profit from their role they must then account to the trust for the unauthorised retention of trust capital: in *re Macadam*.[57] That said, there are limited exceptions including where payment to trustees is provided for in the terms of trust, where there is an agreement with all the trust beneficiaries or where the Court approves payment.[58] Any exceptions that may be

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50 *New v Jones* (1833) 1 Mac & G 668n; *Bray v Ford* [1896] AC 44 at 51
51 *Boardman v Phipps* [1967] 2 AC 134, [1966] 3 All ER 721
52 *Re Thompson's Settlement* [1986] Ch 99 at 115
53 *Robinson v Pett* (1734) 3P Wms 249
54 *Barrett v Hartley* (1866) LR 2 Eq 789
55 *Rochefoucauld v Boustead* [1898] 1 Ch 550 (CA)
56 *Willis v Barron* [1902] AC 271 (HL)
57 *Re Macadam* [1945] 2 All ER 664
58 J D Heydon and M J Leeming *Jacobs' Law of Trusts in Australia* (8th ed, Lexis Nexis Butterworths, Australia, 2016) at [17-39]

provided for in the terms of trust, as they are a derogation of the rule against self-dealing, must be narrowly construed.[59]

[87] As the Court of Appeal affirmed in *Naera v Fenwick*, the intent of the conflict rule is prophylactic, to remove the fruits of temptation:[60]

> [90] Where the trustee is conflicted in this manner, he or she cannot deal with the trust without the informed consent of all beneficiaries or of the Court. If neither of these steps is taken, and the conflicted trustee participates in decision making, any resulting transaction will be voidable regardless of the fairness or otherwise of that transaction. Indeed, "no inquiry on that subject is permitted". Likewise, the honesty or otherwise of the fiduciary is also irrelevant.
>
> [91] Furthermore, the transaction will be voidable regardless of whether or not other trustees were similarly conflicted. In *Re Thompson's Settlement* Vinelott J held:
>
> > The principle is applied stringently in cases where a trustee concurs in a transaction which cannot be carried into effect without his concurrence and who also has an interest in or holds a fiduciary duty to another in relation to the same transaction. The transaction cannot stand if challenged by a beneficiary because in the absence of an express provision in the trust instrument the beneficiaries are entitled to require that the trustees act unanimously and that each brings to bear a mind unclouded by any contrary interest or duty in deciding whether it is in the interest of the beneficiaries that the trustees concur in it.

[88] Section 227A of the Act is also relevant to conflicts of interest. It provides:

> **227A Interested trustees**
>
> (1) A person is not disqualified from being elected or from holding office as a trustee because of that person's employment as a servant or officer of the trust, or interest or concern in any contract made by the trust.
>
> (2) A trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects that person's remuneration or the terms of that person's employment as a servant or officer of the trust, or that directly or indirectly affects any contract in which that person may be interested or concerned other than as a trustee of another trust.

[89] In *Fenwick v Naera*, the Supreme Court commented on the scope of s 227A:[61]

> [52] Section 227A(2) provides that a "trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects … any contract in which that person may be interested or concerned other than as a trustee of another trust".
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> [53] **We do not accept the Trustees' submission that s 227A must be construed narrowly. The wording is expansive. It applies to any contract. It applies to both**

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59 *Breakspear v Ackland* [2009] Ch 32

60 *Naera v Fenwick* [2013] NZCA 353 (footnotes omitted). Although the subsequent appeal to the Supreme Court was allowed in part, the Supreme Court agreed with the Court of Appeal that the rules against conflicts were designed with prophylactic effect. See *Fenwick v Naera* [2016] 1 NZLR 354 (SC) at [61] – [65]

61 *Fenwick v Naera* [2016] 1 NZLR 354 (SC). This decision was recently followed by *Pook v Matchitt – Matangareka 3B* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167)

> **an interest and a concern in a contract**. It applies not only to a direct, but also to an indirect, interest or concern in any contract. The fact that specific types of contract are dealt with (as an employee or as an officer) in the subsection cannot colour the generality of the words that follow. These words are intended as a catch all.
>
> (Emphasis added)

[90] The Supreme Court then went on to state:[62]

> [61] … **We agree with the Court of Appeal that all trustees participating in decision making must "bring to bear a mind unclouded by any contrary interest". Nor is it an answer that their fellow trustees all supported the transaction**. Section 227A provides that a conflicted trustee must not "participate in the discussion" on a matter affecting his or her interests. The reason a conflicted trustee must not participate in discussions is to remove the risk that the other decision makers may be influenced (either consciously or subconsciously) by a person with divided loyalties.
>
> [62] **Equally, it is irrelevant that Mrs Fenwick (and Mr Eru) were not driven by personal financial considerations. That may have been so, at least at a conscious level. But it may not have been so subconsciously**. Further, the beneficiaries were entitled to be assured that every trustee considering and voting in favour of the transaction did so without a conflict of interest and the risk of being influenced by that conflict (whether or not the person was in fact influenced).
>
> [63] **We agree with the Court of Appeal that the rules against conflicts and s 227A are designed with prophylactic effect – to avoid the appearance, and risk, of conflict**. This applies both in terms of a conflicted trustee being influenced by the conflict (consciously or subconsciously) and of influencing fellow decision makers (again consciously or subconsciously).
>
> …
>
> [65] As the Court of Appeal said, there were in this case means of avoiding the conflict issue. The conflicted trustees could have withdrawn from the discussions in accordance with s 227A(2). They could have applied to the Court to approve the transaction.
>
> (Emphasis added)

[91] I adopt the reasoning set out in these decisions.

Discussion

Were there any conflicts for trustees who were Domain Board members?

[92] Dealing with the issue of the relationship between the roles of Lake trustees and the Lake Domain Board, at first blush, I agree with Ms Thornton that the connection is, in effect, inherently problematic and conflict driven in this particular case, given the background history and the nature of the relationships. Even so, it is well settled that, within a governance context, conflicts can also be managed appropriately. The possibility of a conflict could arise in two

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62 *Fenwick v Naera* [2016] 1 NZLR 354 (SC) (footnotes omitted)

obvious scenarios. First, where the Domain Board and Lake trust positions on any issue were diametrically opposed. In such a situation, it would be expected that a trustee would support without equivocation the position of the trust and the interests of the trust beneficiaries. The second obvious instance of potential conflict is where a trustee was receiving payment or some other form of benefit from the Domain Board by virtue of his or her position as a Lake trustee in a manner that was not managed in accordance with the trust order and trust law principles.

[93] In the present situation, it was contended that the position between the Domain Board and the Lake trustees over the buildings on trust land was such that the dual Board and trustee members should have declared a conflict and stood aside from any decision. That would be correct where the Domain Board members, who were also trustees, were acting in conflict with the position of the trust as a whole. While I understand the argument that, the dual appointees cannot serve two masters and must, to use the phrase from *Fenwick v Naera*, attend their trustee duties with their minds "unclouded by any contrary interest", the question becomes whether, on a case by case basis, there is in fact a contrary interest.[63] It does not necessarily follow that the interests of the trust and the Domain Board will always be contrary. Each set of circumstances needs to be examined individually to assess whether the risk of any such conflict arises.

[94] From the evidence, my understanding is that the trustees who were also Domain Board members, by and large, endorsed an approach that was supported by the majority of Lake trustees. It would not matter if the trust majority *included* dual appointees because, if they are the majority of the trustees, then their decision will be determinative. It would not be in the contemplation of the trust order that, as submitted, the dual appointees could not vote at a trust meeting in support of a decision concerning the Domain Board. What Mr Rudd's counsel argued was that the dual trustees should have stood aside from controversial decisions of the trust concerning the Domain Board because of an actual or perceived conflict. The result then may have been the failure of any such resolutions to pass.

[95] In the present case, the motion of no confidence against the previous chairperson of the Domain Board was apparently supported by a majority of the Lake trustees, as set out in the minutes of 12 June 2018. What Ms Thornton and her clients appeared to be suggesting was that, by opposing the then chairperson of the Domain Board, the trustees who voted that way were themselves acting contrary to the interests of the beneficiaries. That is likely to be speculation, in the absence of evidence to the contrary. I also do not accept that trustees with

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63 *Fenwick v Naera* [2016] 1 NZLR 354 (SC), at [61]

dual responsibilities are automatically precluded from participating in any decisions that affect the Lake trust merely because they are also members of the Domain Board. It will depend on the precise nature of the alleged conflict and whether, first, it exists at all, and second, whether it has been managed appropriately.

[96] In summary, the evidence does not support a sustainable claim of conflict between the Domain Board members who were also trustees. A difference in opinion, no matter how strong, as between trustees, will not amount to a conflict unless a trustee effectively "goes rogue" and pursues a policy that is contrary to the *majority*. Whether the policy of the majority is consistent with the aspirations of engaged beneficiaries is a separate question. Moreover, by the time this decision on the Domain Board chairperson was taken, the minutes confirm that there were no longer any dissenting trustees from the decisions of the trust as a whole.

Was the process of appointing trustees as contractors consistent with the trust order?

[97] Clause 12.1 of the trust order provides that trustees cannot participate in any discussions or deliberations concerning a contract that they may be interested in, directly or indirectly, in some material way. This is also consistent with s 227A of the Act as discussed in both *Naera v Fenwick* in the Court of Appeal and in *Fenwick v Naera* in the Supreme Court. As foreshadowed, it is also well settled that trustees are not permitted to delegate their decision-making duties to anyone else. This is perhaps even more relevant where those being engaged and paid from trust funds are trustees themselves.

[98] There is no evidence that the former trustees formally resolved to approve Mr Sword's appointment at its meeting on 1 May 2016. In any event, Mr Sword made it clear that it was the Governance Group that had appointed him and Dr Procter confirmed this was the case.[64] As foreshadowed, it had been made equally clear at the 29 November 2015 meeting that the Governance Group would be under the "full control" of the trust. That statement was made in the context of earlier concerns about delegation and Mr Sword's advice that "whilst Trustees could not delegated [sic] their elected roles, they could delegate the functions of the Trust to a person or committee."

[99] The only viable alternative would have been for the trustees to formally accept the recommendation of the Governance Group. That acceptance would have to take the form of

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64 Affidavit of Matthew James Sword, sworn 1 March 2019, at [15]; Affidavit of Associate Professor Jonathan Noel Procter sworn 9 March 2019, at [17]-[20]

a written resolution properly recorded in the minutes. Best practice would also include a written agreement between the trust and Mr Sword or any other contractor that had been prepared with the benefit of legal advice, given the risks that can flow to a trust where that advice has not been properly secured.[65] Otherwise, the trustees would have delegated their decision-making role to the Governance Group – conduct that was impermissible.

[100] Moreover, given all of the background history to governance misconduct with this trust – dating back to 2003-2005 and the removal of trustees for making unauthorised payments to themselves and failing to convene general meetings or seek the Court's approval – for such a critical and sensitive appointment, both in terms of the position and the appointee, it was surprising that the former trustees did not adopt a more robust and transparent approach relevant to this case and conduct themselves in accordance with their trust order and general trust law principles.[66] It would not have been unreasonable for them to have anticipated that the appointment of the then trust chairperson to a high-profile role within the Levin community concerning the Lake, that might result in payments to him of several hundred thousand dollars over the contract term, would probably attract the attention – if not the ire – of some of the trust beneficiaries. In terms of risk management, it would not be unreasonable to have expected the former trustees to have been more forthcoming with their proposals to appoint Mr Sword and to permit, by act or omission, the payment of significant sums to him for that role and to then properly disclose the extent of those payments to the trust beneficiaries in the annual accounts and at general meetings.

[101] The amendment to the trust order on conflicts made by Judge Doogan in 2017 does not assist in providing an explanation for the former trustees' conduct for two reasons. First, it did not absolve trustees from their duty to avoid or manage conflicts appropriately, including the requirement that interested trustees do not influence outcomes by being present at trustee meetings where decisions were to be taken on issues where they had a direct or indirect interest. Second, the change was made to the trust order *after* Mr Sword had been purportedly contracted by the Governance Group in April 2016, so it did not cover that contract, which is at the centre of the allegations of conflicts of interest. In any event, the addition of the word "materially" does not provide any solace to Messrs Sword and Warrington and any of the other former trustees who received payments, because they were all materially affected by the contracts that they entered into to receive payments from trust funds.

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65 *Ratima v Sullivan – Tataraakina C* (2019) 79 Tākitimu MB 103 (79 TKT 103) at [46], [49]. See also *Marks v Orbell – Rowallan Block XIII Secs 1 and 5 Ahu Whenua Trust* (2015) Te Waipounamu MB 37 (28 TWP 37) at [130], [192].

66 See *Taueki - Horowhenua 11 (Lake) Māori Reservation* (2005) 163 Aotea MB 99 (163 AOT 99)

[102] Then there is the issue of trustees being appointed to contractor roles by Mr Sword himself, as set out in his evidence of 1 March 2019. Mr Sword states that the appointment of trustees as contractors was not undertaken by the trust but by the Governance Group and himself as Project Manager, following a process of advertising.[67] At the risk of belabouring the point, it was not within the mandate of Mr Sword or the Governance Group to appoint his colleagues to paid contractor roles since that would have been contrary to the express terms of the trust order. Only a duly convened meeting of trustees acting in accordance with the trust order could make such appointments. This would simply require the interested trustees to be absent from the meeting and for the remaining trustees to satisfy themselves that, acting prudently, the process in appointing fellow trustees to paid roles using funds that belonged to the trust was appropriate in the all the circumstances. Moreover, advertising the roles did not cure this critical defect in the appointment process. As Mr McKechnie pointed out, previously, the Court has expressed support for the engagement of suitable individuals, who may be trustees, but on condition that the correct processes have been followed without deviation.[68]

[103] Once again, following *Fenwick v Naera*, the process would have been for a quorate meeting of trustees, devoid of conflicts, to have made the decisions and then had those outcomes accepted by the Governance Group without change. Alternatively, the Governance Group could make recommendations for the trustees as a whole, taking into account proper processes for the disclosure and management of conflicts. Those recommendations would, invariably, include the appointment of contractors to undertake roles as part of the various projects and any contracts of engagement and approval of any fees and expenses. The unconflicted trustees, at a duly convened meeting, or by written resolution, following a process of examination and scrutiny consistent with their duties of prudence, could then decide on whether to approve, amend, defer or reject the recommendations. If this procedure had been followed, the affected trustees could have then removed any suspicion or perception of conflict by simply referring to that process whereby they played no part in the decision making, were not present when the decisions were taken and were therefore contracted on an arms-length basis following an appropriate tender or advertising process.

[104] One interpretation, advanced by the applicants, is that, effectively, the former trustees acted to ensure that the financial decisions in which they, or those trustees of their "faction" who had a direct interest, were removed from the scrutiny of their fellow trustees.[69] Especially

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67 Affidavit of Matthew James Sword sworn 1 March 2020, at [23]-[26]

68 Closing Submissions for the former trustees, M McKechnie dated 1 May 2019, at [38] citing 375 Aotea MB 20 (375 AOT 20)

from Messrs Rudd and Henare, who from the outset expressed their opposition to the projects and the payment of monies to trustees, and Ms Taueki, who was and remains diametrically opposed to the resource consent applications that were made in support of the objectives of Te Mana o Te Wai. Mr Sword and those who supported him would be aware, based on previous disputes, that Mr Rudd and Ms Taueki would be hostile to their proposals, both philosophically and personally, and might even alert the Court to their concerns, with the result that any intervention may have delayed or stymied their plans. To avoid that possibility, the subcommittee procedure was adopted. While this is purely speculation, an uncharitable eye from among the trust beneficiaries might reasonably have formed such a view.

[105] A contrary view is that the creation of the Governance Group was a genuine attempt to remain transparent by including those parties who supported the Lake Accord and whose participation and input would be essential to the restoration efforts' success or otherwise. While it had been acknowledged by the former trustees that there had been lapses with adhering strictly to the terms of trust, this was inadvertent and below the threshold necessary for any intervention by the Court or any sanctions against the affected trustees, let alone their removal. In addition, the former trustees argued that, despite their breaches of the trust order and general trust law principles, the trust beneficiaries suffered no loss. The trust's interests, it was contended, were not detrimentally affected by the former trustees' behaviour. On the contrary, in effect, the trust had benefited significantly from the former trustees' approach and accordingly, this should be taken into account when considering the allegations. Yet, as both the Court of Appeal and Supreme Court confirmed in the *Fenwick* cases, no inquiry is permitted into whether the conflicts resulted in a fair value exchange, in this case, for services.

[106] The former trustees have acknowledged that their conduct has amounted to a breach of trust, in that they did not adhere to their terms of trust at all times. Both the chairperson Mr Sword and Dr Procter admitted that they had not followed the terms of trust, particularly in the context of contracts with trustees and the conflict and reporting provisions of the trust order.[70] Moreover, as foreshadowed, both Dr Procter and Mr Warrington had been before the Court before for precisely this issue; the proper management of conflicts of interest. It is therefore inexplicable that they have evidently failed to adhere to both the trust order and my express direction set out in the November 2012 judgment. It is arguable that this level of misconduct was almost wilful – at the very least it was imprudent and a breach of a core trustee

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69 Closing Submissions for Phillip Taueki dated 14 April 2019 at [23]-[24]; Charles Rudd's Closing Submissions dated 14 April 2019, at [17]-[20]; [42]-[47]; [51]-[55]; and [57]-[58].

70 398 Aotea MB 1-243 (398 AOT 1-243) at 223-225; 238

duty.[71] All the former trustees had a duty to do so; to be familiar with those terms and to abide by them. They have not done so and must be held to account for that misconduct.

[107] One final point. Ms Thornton contended that the former trustees also paid themselves from trust funds without the Court's approval, contrary to the trust order. In response to my question that the trust order requires the Court's approval before trustees can be paid fees, Mr Sword replied: "I believe that is correct".[72] Clause 4.2(j) states that any fees paid to the trustees must be approved by the Court. This means meeting or attendance fees paid to trustees for attending properly convened trust meetings. I do not understand it to refer to monies paid to trustees as contractors. The distinction being that, where a trustee is paid as a contractor or agent, compliance with the trust order will mean that it will be the unconflicted trustees acting prudently (and without the presence and therefore influence of any interested trustee) who will fix the remuneration, not the Court. The non-conflict and non-profit duties must be strictly observed, however. This is somewhat academic now because I have determined that the process of delegation and appointment of the former trustees as contractors was so contrary to the trust order and trust law principles as to render the agreements practically invalid.

[108] A parallel point is that, if the contracts are held to have been invalid, then the payments to the former trustees are arguably at least (and in the absence of a successful application for relief under the Trustee Act 1956), unauthorised. In fairness to the parties, this point was not fully ventilated at the last hearing and so it would be appropriate to call for further evidence and submissions on the issue.[73] Equally important, I noted from the file and from reports from the responsible trustee, Mr Hemana, that MFE have apparently expressed satisfaction with the fulfilment of the work completed by the former trustees. I also note an earlier counterpoint to this argument which is, while the trustees are not permitted to profit from their office, nor should the trust become unjustly enriched by the services provided by the former trustees that have enhanced the trust in some way.

[109] If there is any remaining suggestion that the issue of monies paid to the former trustees needs to be considered further in light of my earlier determinations, counsel may file further

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71 See *Wong v Burt* [2005] 1 NZLR 91

72 398 Aotea MB 1-243 (398 AOT 1-243) at 223

73 Consistent with the approach taken in *Pook v Butler - Matangareka 3B Block* [2020] Māori Appellate Court MB 126 (2020 APPEAL 126); *Pook v Matchitt - Matangareka 3B* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167); *Rātima v Sullivan - The Tataraakina C Trust* (2015) 41 Tākitimu MB 102 (41 TKT 102); *Rātima v Sullivan - Tataraakina C Trust* (2017) 64 Tākitimu MB 121 (64 TKT 121); *Rātima v Sullivan - Tataraakina C* (2019) 79 Tākitimu MB 103; and *Tupe Snr v Everton - Manunui No 1 4th Residue Ahu Whenua Trust* (2015) 334 Aotea MB 227 (334 AOT 227)

submissions within two months. Without the benefit of counsel's submissions on the point, my preliminary view is that, should a direction and application for relief be sought for Dr Procter, Mr Matakatea, Mrs Hori Te Pa and Ms Tahiwi, then, in the absence of compelling counterarguments, there is a case for relief.

Was the process of paying trustees as contractors consistent with the trust order?

[110] In terms of agreeing a process on how payments were to be made, that included payments to trustees, at the meeting held on 3 May 2015, Mr Sword gave a view concerning the authorisation of payments:[74]

> Matt stressed the importance of ensuring correct processes were followed when it came to paying accounts. Marokopa had the oversight of the Observer Function portfolio. **Any work that occurred for which payment was received needed to come back to the Trust for approval. To date the approval had occurred retrospectively. That processes needed to be tightened up**.
>
> (Emphasis added)

[111] This would not be the first time Mr Sword gives his view as to the proper procedure for the management of conflicts of interest and the interpretation of the trust order, particularly in the context of payments including those made to trustees. Given his background, experience and qualifications, this is unsurprising. The extent to which his colleagues then relied on his advice and guidance will be an issue for consideration in the context of whether their actions were reasonable. Equally importantly, Mr Sword underscores the correct procedure as set out in the trust order, that payments of any kind, needed to be approved by the trustees. Yet, as events would reveal, this process would in fact become bypassed in favour of the Governance Group seemingly approving payments not only to suppliers, but to trustees contracted separately and paid from trust funds.

[112] The trust meeting held on 29 November 2015 was particularly significant because it was at this hui that Dr Procter confirmed that the trust had been successful in securing funding from the MFE with support also being provided by the local authorities for the amount of some $1.2 million. This was the most significant funding that the trust had ever received and, understandably, the trustees needed to ensure that proper processes for accountability were in place before the various projects commenced. Once again, Mr Sword gives his opinion as to how trustees could delegate their "functions". Despite that, however, he made it plain that the trust would exercise authority over any subcommittees that might be formed:[75]

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74 Rudd Bundle, at 14
75 Ibid, at 25-26

> Because concerns had been raised in the past about delegating authority to other than the Trustees, **Matt said he had checked the Trust's rules and whilst Trustees could not delegated [sic] their elected roles, they could delegate the functions of the Trust to a person or committee. The Governance Group would be under the full control of the Trust.** In terms of handling the funding, a requirement would be to set up a separate bank account for accountability and reporting purposes.
>
> (Emphasis added)

[113] Given the terms of the current trust order, it is accepted that trustees can contract, directly or indirectly, with the trust as the terms of trust permit such conduct. This is a common clause in many trust orders approved for trusts over Māori land created under Part 12 of the Act. For the affected former trustees to fall within the protective ambit of the rule, they must have had their contracts scrutinized and reviewed by their colleagues who were not in any conflict and who subsequently agreed to the proposed terms, while acting prudently.

[114] In addition, the interested trustees could not be present and certainly could not vote or participate in the discussion to award them any contract, directly or indirectly, because of their relationship with the Lake Horowhenua Trust or as a result of their role as a trustee. The interested trustees could not be included in any quorum either, as the trust order sets out in unequivocal terms at cl 12.1. As evidence to corroborate this application of the rule against conflicts of interest, at the very least, the trust meeting minutes should record the proper application of the conflict clauses of the trust order and s 227A of the Act. However, none of this occurred since, as stated above, there was no resolution of the trust appointing Mr Sword as project manager and there were also no properly passed resolutions of the former trustees appointing several of their number to the various contractor roles that they subsequently occupied. Those former trustees included Mr Warrington, Dr Procter, Mr Matakatea, Mrs Hori Te Pa and Ms Tahiwi.

[115] As to whether the trust minutes record the correct observance of the conflict rules, both in terms of paying trustees and where trustees are otherwise interested in a contract, directly or indirectly, it is evident that at critical points they did not. Indeed, the minutes reveal that the trustees' approach was at times inconsistent and was certainly in breach of the trust order. For example, at the 25 January 2015 meeting, Mr Rudd correctly expressed concerns when the previous hui minutes from 16 November 2014 were being discussed where reference to a payment to Mr Matakatea was properly identified as a conflict of interest. Yet nothing further was done it appears and the meeting continued without further response or action.[76]

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[76] Rudd Bundle, at 3

[116] Then at the 3 May 2015 meeting, payments of $450.00 and $1,035.00 and $1,311.00 to Messrs Matakatea and Warrington respectively were approved and the minutes record that these two former trustees "abstained". There is no record that they left the meeting when this discussion occurred or when the vote on payment was made.[77] On page one of these minutes under the heading "Conflicts of Interest" is the statement "None recorded" before setting out an exchange between Messrs Sword and Henare that apparently degenerated into the latter "shouting further abuse at [Mr Sword]" and to "holding a patu to bash over his head." Unsurprisingly, the minutes then state that a five-minute break was held.[78]

[117] Another example is found in the 13 December 2016 minutes where a payment of $3,100.25 from Mr Warrington was discussed and approved. There is no mention of Mr Warrington absenting himself from the hui when that approval was given.[79] Then at the trust meeting held on 26 October 2017, Mr Sword "vacated the Chair" which was assumed by Mr Warrington while the former's invoice for $2,843.51 was approved for payment. There is no record of Mr Sword removing himself from the meeting and the moment the payment was approved, the minutes record that Mr Sword resumed his role chairing of the meeting again.[80] It is also not clear as to whether these payments to Messrs Sword and Warrington were for services rendered in connection with their consultancy companies or whether these payments were for something else.

[118] The minutes of 21 March 2018 disclose the existence of another form of conflict – Mr Nahona's brother had applied for the position of nursery manager which had been advertised. He himself disclosed the conflict to his colleagues, which was the correct step for him to take. Yet despite that, and despite the trust order and the minutes stating that there were "no conflicts of interest", the minutes then record the trustees' approach: "Trust noted and happy for Ned to continue in his role on the selection committee".

[119] By direction dated 21 December 2018, the former trustees were required to submit copies of all agreements with contractors, as set out in paragraphs [3](f) and (g) of that direction.[81] A job description has been located on the file along with a contract between the trust and Mr Sword, dated 30 June 2016, signed by Dr Procter with the reference to the parties being "Te Mana o Te Wai Governance Group for Horowhenua 11 (Lake) Part Reservation

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77 Rudd Bundle, at 14

78 See earlier judgment in *Taueki v Procter – Horowhenua (11) Lake* (2013) 296 Aotea MB 91 (296 AOT 91) referring to unruly behaviour necessitating the very prescriptive trust order.

79 Rudd Bundle, at 79

80 Ibid, at 116

81 394 Aotea MB 151 (394 AOT 151)

Trust" and "Matt Sword Consultancy Limited". Yet, the schedule of payments filed confirms that Mr Sword had commenced providing services in April 2016, the date recorded on his first invoice for $10,228.82 plus GST with an hourly rate of $150 excluding GST. This would suggest that for almost three months, April, May and almost all of June, Mr Sword's company had been paid in excess of $30,000 plus GST without a contract, to the extent that such would have been valid in any event, due to the delegation of duties hurdle. No payments should have been made to any contractor without a signed contract in place beforehand – more so when the contractor is a trustee and the trust chairperson, no less. This was not appropriate, let alone best practice, and is certainly short of what might reasonably be expected, given all of the unique circumstances at play.

[120] All of the above examples confirm the incorrect management of conflicts of interests and the payment of trust funds by the former trustees that were contrary to the trust order and to general trust law principles. The affected trustees needed to declare their conflicts and then leave the hui while their contracts and payments were under discussion. As the Supreme Court confirmed in *Fenwick v Naera*, citing the Court of Appeal, where a trustee is conflicted, the informed consent of all trust beneficiaries or the Court is required and without that approval the transaction will be voidable, regardless of its fairness or the honesty of the fiduciary.[82] The short point is that the former trustees failed to adhere to their own trust order as to the proper procedure for both the management of conflicts concerning payments to trustees or entities associated with them and over the actual procedure for authorising such payments.

Was there transparency through disclosure by the former trustees over monies received?

[121] An important element of the proper management of conflicts of interests and observance of the rule against self-dealing is the issue of disclosure through transparency. How will beneficiaries know if their trustees are acting with probity if there are limits on the extent of any transparency when it involves payments from trust funds to trustees? Put another way, inquiry and questions will only be possible where there has been transparency through disclosure. The simplest example of this will be in the notes to the accounts - a common almost rudimentary practice with trusts over Māori land - where any payments to trustees or entities associated with them are properly disclosed in this way.[83] Transparency and

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82 *Fenwick v Naera* [2016] 1 NZLR 354 (SC) at [34]

83 The Pukeroa Oruawhata Trust at Rotorua provides details of what trustees receive as trustees and directors: https://pukeroa.co.nz/wp-content/uploads/2019/10/RS02988-Pukeroa-Annual-Report-2019-SCREEN.pdf>.

accountability also overlap into the annual general meeting process, which is discussed later in this judgment.

[122] However, a review of the 2017 and 2018 annual accounts to not provide any details of payments to trustees. Instead, the amounts for $74,400 and $88,822 respectively are recorded in each financial year under the heading "Project". Similarly, next to the reference "Glass Eels" are the amounts of $48,059 and $52,740 for 2017 and 2018. Likewise, for "Cultural Monitoring" are recorded the figures $88,213 and $29,000 respectively. "Governance" has consumed a further $14,019 and $20,830 for each year. As the discovery process eventually revealed, during the 2016-2018 period, significant sums were paid to several trustees or entities associated with them and these are outlined below.

[123] The minutes of trustee meetings confirm that certain trustees received payment for tasks or services over and above their attendance fee for trust hui, namely, Messrs Sword and Warrington, Dr Procter, Mr Wiremu-Matakatea, Mrs Te Pa and Ms Tahiwi. This was also corroborated by the schedule of payments made to trustees. In total, the amounts paid to individual trustees, directly or indirectly, for the period 25 May 2016 to 16 December 2018 are set out below:[84]

Trustee	Date	Amount	TOTAL
Matthew Sword	24.5.16 - 29.10.18	216,509.90	
Robert Warrington		55,570.52	
Jonathon Procter		3,000.00	
Kelly Tahiwi		5,250.00	
Keri Hori Te Pa		2,800.00	
Marokopa Matakatea		250.00	
Axemen Ltd		30,000.00	
Trustee fees		900.00	
Payroll		2,400.00	
			$316,680.42

[124] Axemen Ltd also received payments totally $30,000 in connection with the various projects undertaken during the period in review. Axemen Ltd is a private company with Mr Warrington and a Raymond Warrington listed as directors. The registered address of the company is 178 Avenue Road, Foxton. That this company, like that of Mr Sword's, may have had overheads, contractors and staff to pay is probable. In the absence of evidence this is merely speculation. Even so, this does not diminish the requirement for transparency where the payments to individuals and entities connected to the trustees in some way.

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84 Rudd Bundle, at 301-306

[125] In the context of this central allegation of conflict of interest, and by implication, the duty not to profit from office, the simple question, as raised by Ms Thornton and Mr Watson, is where could a trust beneficiary go to find out how much money, as a contractor or otherwise, a current trustee was receiving from monies advanced via HDC that belonged to the trust? It would be an unsustainable assertion to contend that beneficiaries would not be entitled to his information and indeed, that does not appear to be the position taken by the former trustees. Beneficiaries are entitled to information from their trustees to enable the former to assess their trustees' performance and to determine whether they have been acting consistent with their terms of trust and their duties.[85]

[126] In response to questions from Mr Watson, Mr Sword acknowledged two important points regarding the most recent annual accounts. First, that the annual accounts had not been presented to a properly convened annual general meeting. Second, that the details of what he and his colleagues were being paid was not disclosed to the trust beneficiaries and had not been included in the annual accounts:[86]

> **L Watson:** Would you agree with me that this is the situation. Audited financials of the Lake Trust have not been presented at a validly constituted AGM?
>
> **M Sword:** Yes.
>
> **L Watson:** And?
>
> **M Sword:** For reasons I gave earlier, but we published information in newspapers to where people could obtain copies of the financials.
>
> **L Watson:** Yes, and if they weren't, and obtained those financials, they wouldn't see any disclosure, would they, of interparty transactions.
>
> **M Sword:** No, correct.
>
> **L Watson:** Nor would they disclose any payments to the trustees from the Lake, Te Mana o Te Wai fund?
>
> **M Sword:** Correct.

[127] Mr Sword then continues with the statement that, while the details may not be contained in the annual accounts, there are relevant references set out in the Governance Group reports to the trust and the trustees' minutes are available online to beneficiaries:[87]

> **M Sword:** But in regard to who was being appointed to certain roles, the existence of a governance group, all of those things were known. These are included in our minutes, which are available to beneficial owners.
>
> **L Watson:** I see, so the governance group minutes which were provided on Friday under a request for confidentiality, have been made available to owners, have they?

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85 See *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709; *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 and *Addleman v Lambie Trustee Limited* [2019] NZCA 480

86 398 Aotea MB 213 (398 AOT 213)

87 Ibid

> **M Sword:** Well, we provide a governance group report to the trustees, which are received and form part of the minutes which we attempt to have made available on line. All our minutes of our meetings are online.

[128] However, a review of the trust minutes, as set out in the Schedule, confirm that there are scant references to trustee payments and even fewer details of what trustees as contractors are getting paid. Trust beneficiaries should not be required to commence litigation to have trustees disclose what they have decided to pay themselves in the absence of formal endorsement from the trust's annual general meetings or approval from the Court. The reasons for this are obvious – fiduciaries who conduct themselves without regard to the non-conflict and non-profit rules will invariably be held to account where they have breached the trust reposed in them by their beneficiaries and may even be required to restore the trust fund and disgorge any profits.[88]

[129] The former trustees had a duty to have included in the notes to the accounts details of all payments made to trustees or entities associated with them, especially funds received for the projects concerning Lake Horowhenua. It was inappropriate for such details to be omitted from the notes to disclose for transparency and probity purposes the full extent of trust funds that were being paid to the former trustees. They had a duty to do so to avoid exciting suspicion of claims of profiting from their office and to also act to prevent their personal interests from conflicting with their duties. To use the vernacular, it was simply a "bad look" not to have disclosed these details from the outset so as to minimise or eliminate any allegations of the breach of their non-profit and non-conflict duties.

[130] In *Erceg v Erceg*, the Supreme Court underscored the importance of trustee accountability, the nature of a beneficiary's interest in a trust and its relevance to trust information and their entitlement to access key trust documents in order to assess trustee performance:[89]

> [50] While the supervisory jurisdiction of the Court has been described in the New Zealand cases following *Schmidt* as a discretion, we think it is better seen as a jurisdiction that must be exercised in accordance with principle, after careful assessment of the factors relevant to the disclosure sought by the particular beneficiary.
>
> [51] We see the starting point as being the obligation of a trustee to administer the trust in accordance with the trust deed and the duty to account to beneficiaries. A beneficiary who seeks such an account may seek access to documentation necessary to assess whether the trustee has acted in accordance with the trust deed. That can be

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88 See for example, *Adlam v Savage* [2016] NZCA 454, [2016] NZAR 1393; *Rātima v Sullivan - Tataraakina C* (2019) 79 Tākitimu MB 103 (79 TKT 103); and *Tupe Snr v Everton - Manunui No 1 4th Residue Ahu Whenua Trus*t (2015) 334 Aotea MB 227 (334 AOT 227)

89 *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 (footnotes omitted)

> expected to be the basis on which the beneficiary will seek disclosure of trust documentation.

[131] Then again:[90]

> [59] The nature of the beneficiary's interest will also be significant. A named beneficiary or a member of a class such as the immediate family of the settlor, who can be expected to either receive dispositions from the trust or, at least, to be a strong candidate to do so, will have a far more compelling case for disclosure than, say, a charitable institution that is within the category of institutions to which a disposition could be made but has no other association with the trust.
>
> [60] As noted earlier, the starting point is the obligation of trustees to administer the trust in accordance with the trust deed and their duty to account to beneficiaries. So the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees' actions in order to hold them to account.

[132] There is no question that any beneficiary of the trust in this case is entitled to receive the annual accounts and minutes of general meetings – the trust order and variations being publicly available at the registry and accessible during normal business hours. Contracts between the trust and its trustees should also, in the normal course of events, be accessible by beneficiaries. As cl 2.2 of the First Schedule of the trust order prohibits trustees from being employees of the trust the usual privacy considerations for employees would not apply.

[133] The evidence confirms that there has been no disclosure of the amounts of trust funds paid to the former trustees in the annual accounts or in any other readily available source that might reasonably have been accessible to the beneficiaries. The Governance Group minutes that have been filed, like those of the trust, were also both lacking in the necessary detail for proper disclosure of trust funds being paid to trustees, regardless of which role they were in, trustees or contractors. The evidence is also clear that there was never any detailed disclosure of these payments at annual general meetings, actual or attempted. It is therefore difficult to reconcile this evidence with the contention of the former trustees that they have acted in accordance with the duties of non-conflict and non-profit. The short point is that it has only been through these proceedings that the full extent of payments to trustees have been disclosed – hardly a satisfactory situation under any circumstances.

[134] I do not accept the argument, however, that the former trustees deliberately sought to obstruct and thereby prevent trust beneficiaries from accessing this information, notwithstanding Ms Thornton's submissions on the alleged evasiveness of the responses Mr

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90 *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 (footnotes omitted)

Sword provided to the 9 April 2016 general meeting.[91] Rather it appeared that they erroneously considered disclosure to the Governance Group and inclusion in the annual accounts without attribution was sufficient.[92] It was not, and the former trustees should have known better and acted with proper transparency to remove any suspicion of improper conduct in this context. This was a breach of their duties that, in the absence of compelling arguments in mitigation, are sufficient to warrant their removal. That said, I also consider that there are degrees of responsibility as between the former trustees, which is discussed later in this decision.

Did the former trustees fail to hold annual general meetings?

Mr Rudd's submissions

[135] Ms Thornton contended that most annual general meetings held since 2013 have been inquorate and the former trustees have not complied with the trust order regarding the reconvening of such meetings within a set time frame. The trustees also failed to hold an AGM in 2018 after it was "adjourned" for unruly conduct before it was called off and a rescheduled hui was never held, contrary to the trust order. Accordingly, there have been no valid AGMs since 2016. This is a breach of the trust order by the former trustees, she argued.

[136] In addition, counsel submitted that, when general meetings were held, the former trustees were not transparent in their disclosure to the trust beneficiaries regarding the details of financial arrangements for Lake projects that concerned several of those trustees personally. This was a further breach of the trust order that was serious enough to warrant intervention by the Court and the removal of the former trustees.

Mr Taueki's submissions

[137] Mr Watson submitted that the trustees failed to adhere to the quorum requirements for AGMs and did not call for trustee nominations within the required timeframe on at least two occasions, despite clear direction from the Court when the issue had arisen previously. This, he argued, amounted to systemic failures, and accordingly, the former trustees must be held

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91 Rudd Bundle, at 153

92 See Mr Sword's response to Ms Thornton on the issue: 398 Aotea MB 156-157 (398 AOT 156-157)

to account for this misconduct. The only option available was for the former trustees to have been removed.

The former trustees' submissions

[138] Mr McKechnie, citing *Bramley* submitted that the breaches of the trust order have been technical and not substantial in nature. He argued that, although there has been a failure to follow the precise process laid down by the very restrictive trust order, unless such failures have damaged the interests of the trust or are egregious in character, they are not in any way of a disqualifying kind. Counsel submitted that, while there had been some misunderstanding of AGM process from time to time, the beneficiaries were not deprived of an appropriate forum for their views to be expressed. In any case, counsel submitted that the conduct of the trustees at meetings has been transparent, which is well documented in the evidence.

The trust order

[139] Clause 10 sets out the requirements for annual general meetings:[93]

> **10. GENERAL MEETINGS**
>
> **10.1 Trust to hold annual general meeting**
>
> The Trust shall, no later than six (6) calendar months after the end of each Income Year, and in any event no more than fifteen (15) months after the date of the last annual general meeting of the Trust, hold a general meeting for the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe, to be called its annual general meeting, and shall at that meeting:
>
> (a) report on the operations of the Trust during the preceding Income Year;
> (b) present the accounts;
> (c) announce the names of any newly appointed Trustees;
> (d) undertake all other notified business; and
> (e) at the discretion of the Chairperson, undertake any other general business raised at that meeting.
>
> **10.2 Notice of general meeting.**
>
> Subject to the specific notice requirements described in the Schedules to this trust order, the Trust shall give not less than twenty-eight (28) days notice of the holding of the annual general meeting, such notice to be posted (or sent by electronic means, if requested). Notice of the meeting shall also be inserted prominently in appropriate major metropolitan newspapers circulating in New Zealand and in any provincial newspapers circulating in regions where the Trust considers that a significant number of the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe reside. All such notices shall contain:
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> (a) the date, time and place of the meeting;

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[93] 293 Aotea MB 165-174 (293 AOT 165-174); Rudd Bundle, at 367-370

(b) an agenda of matters to be discussed at the meeting;
(c) details of where copies of any information to be laid before the meeting may be inspected; and
(d) any other information specified by or under the Act.

[140] Clause 10.8 states that the quorum for general meetings is 30 beneficiaries of the trust who are also members of the Muaūpoko tribe and this number must include a minimum of six trustees. Clause 10.11 then provides for the procedure for dealing with a general meeting that cannot proceed due to the lack of a quorum. It provides a "second chance meeting' mechanism whereby all that was required was for the trustees to simply reconvene the meeting, regardless of whether the quorum would be met:

> **10.11 Adjourned meetings**
>
> If within one hour of the time appointed for an annual or special general meeting a quorum is not present, the meeting will stand adjourned to be re-convened twenty-one days after the date of the meeting. On that later day, the meeting will be held again at the same time and in the same place as the adjourned meeting. If a quorum is not present within one hour from the time appointed for that adjourned meeting, the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe present will constitute a quorum.

[141] In addition, cl 8 requires that the trustees have available for inspection at any such general meeting the previous three years' worth of annual reports and minutes of all annual and special general meetings.

Discussion

[142] Ms Thornton sets out in her submissions a table of general meetings that were attempted to be convened over the period 7 December 2013 to 11 December 2016.[94] She submitted that none of the meetings achieved compliance with the quorum requirements of the trust order. Counsel contended that only the 9 April 2016 hui came close to complying with potentially over thirty beneficiaries present but even then, there were only five trustees present when the trust order requires six.

[143] The evidence confirms that the former trustees attempted to convene AGMs from time to time but were unable to continue due to the lack of a quorum. In addition, the minutes of the 21 March 2018 trust meeting refer to the AGM and concerns over personal safety, given the history of what has been claimed to be violent behaviour. Regarding the reconvening of AGMs, the following is recorded:[95]

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94 Charles Rudd's Closing Submissions dated 14 April 2019, at [48]
95 Rudd Bundle, at 133

> It is actually better not to reconvene this meeting as per the rules and focus on the next AGM to be held around August this year at a venue we are better able to ensure safety of participants.

[144] However, as Ms Thornton argued, what the former trustees then failed to do was to reconvene the AGMs in accordance with cl 10.11 of the trust order. The result is that there have been few, if any, validly constituted AGMs on more than one occasion. There has been no sustainable argument from the former trustees against this allegation, other than to submit that, regardless of any technical breaches of the trust order, the former trustees have not created outcomes detrimental to the interests of the trust's beneficiaries.

[145] A difficulty with this position is that the AGM is the key opportunity for the trust's beneficiaries to review the annual report, examine the accounts and scrutinize the conduct of the trustees. Where the annual report and accounts have not been presented to the AGM, there is no other opportunity for the trust beneficiaries to question the trustees about their content. By failing to properly convene general meetings according to the trust order the former trustees can be said to have denied the beneficiaries the opportunity to ask questions and hold them to account. As foreshadowed, Mr Sword accepted that the annual accounts had not been presented to a properly constituted AGM which even if they had, would not have disclosed the detail of payments that the former trustees had made to themselves, under the aegis of the Governance Group.[96] Ms Thornton contended that, even at the 9 April 2016 meeting, basic financial information was not provided to the hui and that in response to Mr Rudd's question on how much would be spent on each project, Mr Sword replied that while the total funding would be $1.2 million, there was no funding contract in place at that time and in any event the project would be "managed by the trustees."[97]

[146] The procedure to follow where a general meeting was inquorate was set out in the trust order. It is not an optional provision or one that can be ignored. Inexplicably, it was simply a formality to reconvene a general meeting where those beneficiaries who were in attendance would *then* constitute the quorum. Put another way, much like the original second chance provisions of the now withdrawn Te Ture Whenua Māori Bill 2016, the trust order provides that, in the absence of a quorum, the trustees are to reconvene a general meeting with notice within 21 days and, whoever from the beneficiaries decided to attend the second meeting would constitute the quorum. It is therefore a provision for precisely the situation

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96 398 Aotea MB 213 (398 AOT 213)
97 Rudd Bundle, at 153

that the trustees found themselves in. Yet for reasons unclear they did not reconvene on all relevant occasions when the trust order required them to do so.

[147] In this context I acknowledge Mr McKechnie's point that the current trust order is restrictive in that it provides very detailed terms of trust. This was made plain to the trustees and beneficiaries in 2012 when the trust order was first confirmed:[98]

> [8] While it is correct that the trust order that has now been issued is very detailed there are two important points that need to be remembered. First, the reason for such a detailed trust order is simply because the trustees have proven themselves incapable of acting appropriately in the most simple and mundane of matters including notice for calling meetings, setting the agenda and conducting themselves without threats, allegations of intimidation and the similar conduct. In short, a detailed trust order on the procedure for calling, conducting and recording meetings is necessary because of the constant bickering amongst the trustees as the voluminous Court files will confirm.
>
> [9] Secondly, when the trust order was issued I emphasised that it was still a work in progress and, in concert with the beneficiaries, the trustees may need to refine it further so that it will properly reflect their aspirations and desires. It is surprising that after the passage of over three years the trustees and the beneficiaries do not appear to have made much progress with such discussions, to say nothing of the interminable delays that were experienced under a previous regime of trustees concerning a draft trust order.

[148] As Clifford J observed in *Paki v Māori Land Court*, this was unsurprising, given the relevant background circumstances and history of dispute between current and former trustees and trust beneficiaries from time to time – all of which necessitated a more detailed trust order, even if only on an interim basis.[99] In any event, as my earlier decisions record, in 2012 when the first terms of trust were confirmed, they were only ever intended to be a work in progress, of an *interim* nature and would inevitably require further refinement and change to suit the trust and its beneficiaries. Put another way, it was and has always been open to the trustees to seek a variation per s 244 of the Act if they wished to have any of the trust provisions altered.

[149] There has been one such variation as ordered by Judge Doogan in 2017.[100] This concerned the addition of the word "material" to cl 11.1(e) of the trust order. So, it has always been within the trustees' ability and competence to pursue trust order variations if and when they considered it appropriate to do so. Remembering that by 2017, the projects under Te Mana o Te Wai were well underway and that, if as claimed, the trust order was so restrictive and almost unworkable, the former trustees took few if any concrete steps to promote, pursue and prosecute before the Court the sorts of variations they considered necessary to facilitate improved governance outcomes.

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98 *Taueki v Procter – Horowhenua (11) Lake* (2013) 296 Aotea MB 91 (296 AOT 91)
99 *Paki v Māori Land Court* [2015] NZHC 2535 at [88]
100 375 Aotea MB 19-20 (375 AOT 19-20)

[150] The former trustees, by their responses, have acknowledged that they were aware of the requirements of cl 10.11 but, evidently, they decided not to follow strictly its terms. This does appear inexplicable, given the background history to the trust and the litigation before the courts for a long period of time. It would not be unreasonable to expect the trustees, especially those like Mr Sword with legal training, to either follow the trust order exactly or to seek directions. So, it is evident that there has been a breach of the trust order in the failure to properly reconvene any adjourned meeting strictly in accordance with the trust order. Indeed, the trustees themselves acknowledged as much, as the minutes of their meeting held on 21 March 2018 confirmed:[101]

[151] I find that the former trustees failed to convene general meetings in strict accordance with the trust order and this was a breach of trust. It limited the means by which beneficiaries were able to formally demonstrate their support for or opposition to the conduct of the former trustees. That conduct included the payment of significant sums to two trustees in particular because of their association with the trust. As foreshadowed, this is even more relevant in terms of the money that would eventually be paid to several former trustees via various contracting arrangements entered into with external parties on account of their involvement, association and experience as trustees. It is evident that Messrs Sword and Warrington, for example, were selected for their contracting roles due to their experience including that gained as trustees of this trust. So, the proper forum for any assessment of the trustees' conduct following a careful scrutiny of the annual accounts and related arrangements was a duly constituted and convened AGM. Mr Sword accepted in response to questions from Mr Watson that no validly constituted annual general meeting had received the trust's annual accounts and nor did they contain details of payments made to trustees from trust funds.[102]

[152] Counsel's second submission was that even when meetings were held or attempted, the former trustees had failed to properly disclose their individual personal financial arrangements, both with third parties and with the trust, directly or indirectly. Put another way, even if the former trustees had either convened general meetings in accordance with the trust order, or had applied the second chance quorum provisions, it was argued that neither would have assisted the beneficiaries' understanding of the activities of the trust because the former trustees had failed or refused to properly disclose the detail of their personal arrangements in the annual report and accounts. That issue has been considered earlier in this judgment in some detail and need not be repeated here.

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101 Rudd Bundle, at 133
102 398 Aotea MB 213 (398 AOT 213)

[153] In summary, the convening of annual general meetings is central to the accountability of trustees for the reasons expressed above. If the quorum was not reached then the simple expedient of reconvening the AGM within 21 days was the remedy. At that second meeting, the former trustees could have promoted a variation to the trust order to reduce the quorum. If the accounts preparation was leading to delays, then that was the responsibility of the former trustees. With the trust financial year ending 31 March 2017, draft accounts should have been prepared within three to six months – by June or September. That by December 2017, they remained incomplete nine months later reveals a lack of proper governance oversight. If the former trustees were concerned about security, they could have sought directions. When Mr Sword was presented with the option of the registrar's support to facilitate the 2015 AGM for example, he declined to take up that offer because he thought "things were not that bad that they needed Court intervention."[103] In failing to convene general meetings the former trustees denied the trust beneficiaries the formal opportunity to properly assess their performance and scrutinize their conduct, had they disclosed their individual payments in the accounts. This was a breach of the trust order for which they must now be held to account.

Did the former trustees fail to protect wāhi tapu?

Mr Rudd's submissions

[154] Ms Thornton submitted that, although expressly authorised to protect wāhi tapu and other places of historic, cultural or spiritual significance, the former trustees dismissed the concerns of owners and authorised the bulldozing of areas of significance to provide for a walkway and T-drain. Counsel contended that the issue of the walkway was discussed by the trustees on several occasions over the years, which related to seeking financing for feasibility studies and design, but the walkway was not approved.

[155] In 2017, the trustees were to take the proposal to the trust beneficiaries, however, that never eventuated, and a portion of the walkway was installed before being ratified in 2018. Ms Thornton argued that the applicant views this as an alienation and not consistent with protection of the Muaūpoko fishery, which is one of the core duties of the trust. The reasons put forward by the former trustees instead referred to benefits for the community, including beautification, and possible economic advantages.

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[103] Trustees minutes dated 25 January 2015, Rudd Bundle, at 4

Mr Taueki's submissions

[156] Mr Watson argued that the former trustees failed to preserve the assets of the trust by undertaking earthworks without obtaining appropriate archaeological assessments and authorities that would have ensured the identification, protection or mitigation of archaeological sites. He submitted the earthworks were significant in terms of the impact on the whenua, and the cultural, historic and archaeological significance of the area. The works also involved significant expenditure of trust funds and resulted in the former trustees deriving a personal profit from the project. Mr Watson contended that the former trustees had a duty under the trust order to protect wāhi tapu and they should have ensured the beneficial owners were informed of the proposal in advance.

[157] Counsel then submitted that the former trustees entered into the Lake Accord and two funding agreements, Te Mana o Te Wai and the Freshwater Fund, which, while having laudable objectives to improve the health of Lake Horowhenua, only promote initiatives which merely "tinker" with the issue of water quality rather than taking bold and drastic steps to address critical aspects of the Lake's health. The agreements also prioritise initiatives that are favourable to the HDC, HRC and the Crown, but fundamentally, compromise the rights of the trust beneficiaries.

[158] Counsel contended that the former trustees have not sought to challenge the actions of the HDC regarding both the lack of consent to discharge contaminants into the Lake via the drain known as the "Queen Street Drain" and the significant expansion of the Horowhenua catchment, which drains into the Lake. The HDC's application to extend resource consent for the wastewater treatment plant located adjacent to the Lake, which previously malfunctioned and discharged effluent into the Lake, was also a serious omission by the former trustees.

[159] In addition, counsel submitted that the former trustees have not sought to addresses the deficiencies of the Reserves and Other Lands Disposal Act 1956 and its limitations on the exercise of tino rangatiratanga by the trust beneficiaries, by advocating for a new decision-making mechanism for the Lake. Mr Watson argued, therefore, that the former trustees failed to act in the best interests of the beneficiaries on all these important issues.

The former trustees' submissions

[160] Mr McKechnie submitted that all parties to these proceedings share the same objective for Lake Horowhenua, which is to restore the health of the Lake and protect the interests of

the trust beneficiaries. He contended that there has been unprecedented activity in relation to restoration of the Lake since the appointment of the former trustees in 2016, reflecting substantial operations, initiatives and achievements in this area. The former trustees did not accept that their initiatives to improve Lake Horowhenua were in the nature of "tinkering". Counsel also highlighted there has been no alternative plan put forward by the applicants as to how to achieve the objectives of improving water quality and managing storm water.

[161] In addition, Mr McKechnie argued that the former trustees have taken a collaborative approach, rather than adopt one which seeks to work in opposition to local and regional authorities and central Government. This approach has resulted in successful working relationships, such as the Partnership Agreement, the Lake Horowhenua Accord, the Te Mana o Te Wai project, and the Punahau Freshwater Fund initiative. The allegations made by the applicants of such collaboration amounting to fraud, conspiracy and misconduct have no factual foundation.

[162] Counsel reiterated that there has also been no alternative plan put forward by the applicants as to how to effect any meaningful relationship with other parties. Instead, the approach of the applicants is entirely confrontational and would have them in relentless conflict with the local and regional authorities, and with little to show for those efforts.

[163] Finally, regarding the construction of the walkway, bund and sediment pond, the former trustees maintain that no walkway had been built around the Lake. Instead, they contended the existing pathways and walkways have been cleared of overgrowth along the eastern side of the Lake and as part of the regular maintenance to clear the margins around the Lake. The former trustees also disagreed that an archaeological assessment by HNZPT was required for the construction of the sediment pond and bund. The evidence showed that the archaeological database of HNZPT did not record any sites on the eastern margin of the Lake.

[164] Mr McKechnie submitted that detailed engineering plans for construction were presented and kaumātua were on site as part of the construction in the event anything of significance was uncovered this is also set out in the evidence.[104] Counsel argued that construction of the sediment pond and bund reflects positive action by the former trustees to address the amount of stormwater contamination running into the Lake. While the former trustees do not support stormwater discharge into the Lake, their position is that they must work in a collaborative manner to effect change, which will take time. Extensive work and

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[104] Affidavit of Associate Professor Jonathan Noel Procter sworn 4 March 2019, at [31]

consultation has been undertaken with the HRC and landowners at the source of the contamination.

The trust order

[165] Clause 4.2 (h) of the trust order states:

> **4.2 Specific**
>
> Without limiting the general powers in the preceding provision, the Trustees are expressly authorised:
>
> **…**
>
> (h) To protect Wahi Tapu. To safeguard to the best of the Trustees' ability all Māori urupa, wahi tapu and all other places in or upon the Trust Property that are sacred or of historic, spiritual or cultural significance to the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe.

Discussion

[166] The parties to these proceedings remain strenuously opposed to each other on most matters concerning Lake Horowhenua and none more so than the issue of wāhi tapu. Ms Taueki and Mr Taueki assert that the former trustees conduct in constructing the bund, sediment pond and walkway amount to, in effect, a form of cultural violence against their whānau and hapū interests, while at the same time Dr Procter accuses Heritage New Zealand Pouhere Taonga of desecrating sites and misinterpreting evidence, inadvertently or otherwise, in part due to the inference, he suggests of other persons.[105] In summary, the applicants and the former trustees remain implacably opposed to each other on the issue of Lake protection, restoration and enhancement.

[167] The opposition to the majority approach of the former trustees over the Lake Accord, Te Mana o Te Wai and Te Kakapa Manawa o Muaūpoko is best described by Ms Taueki:[106]

> Because the Accord really is a mitigation strategy for the effects of intensive land use, farming, et cetera, which are responsibilities of the, of Horizon's Regional Council anyway, you know, the regional council for example, now it's hard, this has got to – in 2017 a decision from the Environment Court showed that the regional council's been processing and issuing restricted discretionary consents illegally unlawfully and in contravention of the act, because they had prepared – they had done a resolution in 2013 to say that there are certain parts of the proposed one plan, rules within the one plan, that they did not have to consider when processing consents, and this was all to do with intensive farming, and this – so the regional council passed a resolution which the decision clearly showed was not lawful but, so we found out that since 2013 until

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105 Affidavit of Associate Professor Jonathan Noel Procter sworn 4 March 2019, at [27] – [33]
106 398 Aotea MB 105 (398 AOT 105)

> now, we're not too sure whether it's stopped, they have been relying on an unlawful illegal resolution that council made to give consent.
>
> …
>
> However, you know, the regional council were trying to make us think that that's better than what it was, when in fact there should've been no discharge whatsoever of any contaminants to the bed of the lake or the streams. And they knew this, so how, you know, this was for the purpose of enabling intensive farmers to then apply for a restricted discretionary consent for their discharges and if that is the regional council working in good faith, that they were actually breaking the law to allow contaminants into our lake that by law, under their one plan, we're not supposed to be there how can we believe or have any faith in them, that they're doing what's right for us. All of these projects I see are to, as I say, mitigate the effects of intensive land use.
>
> …
>
> So, you have very little faith in them complying with their own rules, full stop, and this has been, you know, I know way back in 20 years ago, the Domain Board and my brother was on it, was insisting that the district council gets consents for their drains et cetera and then we've carried on with the same argument, like a cracked record for years, and it was only really following Philip's application to don't forget the storm water, that suddenly now the Accord starts, you know, and I find it quite funny that 2013, when the resolution was made in June 2013, to not take into account these certain matters. That was the same year the Accord was signed. That was the same year the application for the silt trap was applied for, you know, I don't have faith in the regional council in this partnership.

[168] Ms Taueki went on to underscore under cross examination that in her view the continuation of farming and the inaction of the local authorities was damaging not only to the physical environs of the Lake area but was also having deeper cultural impacts:[107]

> This council has been – the 1998 overflow of sewerage into the lake, despite the regional council turning down their consent, there was never any enforcement order, there was never any abatement notice issued, there was never any punishment, I suppose, those discharges still remain unauthorised, hundreds and hundreds of thousands of cubic litres of sewerage into our lake. And as I say, that was what was the catalyst for removing the sewerage treatment plant from the edge of the lake, however, so many years later certain lake trustees approved for it to stay there for another 20 something years, and do you know if you read the cultural impact report there, about the spiritual effects that we suffer as a result, and how until the threat is removed, which is removing that infrastructure from the side of our lake, we continue to suffer, that is why the decision to remove it was made and yet our own people say, "No stay there. Keep the threat there, keep the threat of another overflow going. Don't heal. Don't heal."

[169] Mr Sword, and the majority of former trustees, see the situation very differently. In response to Mr Watson, Mr Sword set out in some detail the overall rationale of the approach that he and his colleagues had adopted, including their views on how the Queen Street Drain issue is viewed:[108]

> **M Sword:** There's two things there. The first thing is that we're not trying to find a solution, we're trying to effect change. It took over a century for the lake to find itself

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107 398 Aotea MB 136 (398 AOT 136)
108 Ibid, 185-186

> in the polluted state it is in today. We're not going to fix it tomorrow. So, we're trying to test and prod and use scientific best practice to find solutions, but we're not, by no way, shape or form, suggesting that we've got these solutions.
>
> The second thing I'd like to say about storm water, Queen Street storm water drain, yes, it is a major infrastructure issue similar to the wastewater treatment plant, but the key difference is that the Queen Street drain, prior to it being a Queen Street drain, was a natural waterway that fed the lake [for] millennia. Now we've got to deal with storm water all around the lake.
>
> There's at least five I can rattle off the top of my head. You know, we're talking about the Makomako, Patiki, Mangaroa, the Queen Street drain, the Arawhata. Is the solution just to pipe all that away? Well, these are waterways that have fed our lake for millennia, as I say, and so we've got to find ways that we can deal with the reality of having a township on our doorstep without – yes.
>
> Some of us feel like we have the freedom to just say, "It's not my problem, it's council's problem, they need to come up with the solutions. I just want it stopped," and then there's others of us who say, "Well, it's probably important to think about how we're going to achieve the same outcome we want, but we have to be realistic in terms of the resources we have, the influence that we can bring to others who actually have those statutory mandates and powers, not us." I agree it's a private land it should not – there's no – should not be any discharge of storm water into our lake, and that's the outcome we're working towards.

[170] Mr Sword denied any suggestion that he and the majority of former trustees in some way supported the activities of HDC. He emphasised the challenges that would arise in any attempts to stem the flow of natural waterways, regardless of where they emanated from:[109]

> Sorry if I'm continuing on, but I've also heard in that exchange that the trustees are supporting council to obtain a resource consent to discharge. I've heard nothing on that. We've never agreed to anything in – I'm talking about in terms of my tenure as a trustee. We never would unless we were fairly certain and fairly confident that we can front our owners and say, "We've made the right decision here. We've got other plans to deal with that issue." Right now, I'm not confident that council are even halfway there. In respect of the wastewater treatment plant, our confidence is much higher because there have been major structure upgrades that have occurred over the last decade or more.
>
> So, in respect of Queen Street drain, I think our approach that we've taken is how do we deal with the obvious issue of storm water contaminants coming into the lake, which I agree with you is a contributing factor, with the reality also that, you know, we can't just wave a wand and the township's going to disappear and we're no longer going to have storm water, and piping away storm water, I don't know what the financial ramifications of that, whether it's feasible or not, I'm not really that interested in that, that is council's problem, but I am concerned through – and I don't profess to know everything environmental or historical about our rohe, but I do listen to others who do seem to have that knowledge and they say that we are playing with fire if we think that we can just stop natural waterways coming into the lake, and the lake has already been lowered artificially and anything we do to exacerbate that situation can't be good for the lake and for the fishery.

[171] As to Mr Watson's submissions that the projects undertaken by the majority of the former trustees are "tinkering", that the agreements like the Lake Accord have compromised the rights of the trust beneficiaries in favour of the local authorities and farming interests, and

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[109] 398 Aotea MB 185-186 (398 AOT 185-186)

that the former trustees have been reluctant to pursue issues like the expansion of the Horowhenua catchment or oppose the HDC applications to extend its existing consents for the wastewater treatment plant, there is some force in these arguments. It would not be unreasonable to expect the former trustees to obtain legal advice as to their potential rights and remedies as against the local authorities and neighbouring businesses over discharges and related activities.

[172] At the very least, then the trust would know whether it would be prudent to either commence litigation, or support Mr Taueki's proceedings or to take a recommendation to the beneficiaries at a duly convened general meeting that such action was not supported and to explain their reasons for that stance. Then there was Mr McKechnie's related point that, there had been an assumption that a consent regarding for example the Queen Street drain was required when he suggested that there may not be clarity yet as to the precise legal position. In response to Mr Watson's questions over discharges and the drain, Mr Sword even appeared to agree with Mr Taueki.[110] Moreover, it is not as if the discharge issue is new and it was likely to have been a relevant issue during the tenure of previous trustees, including Messrs Rudd, Henare and Ms Taueki. In any case, there appears to be something of a legal information vacuum that needs to be considered, including the possibility of a specialist barrister's opinion, which is provided for expressly in the trust order at cl 23.2. This would also apply to the wastewater treatment plant and the expansion of the catchment issue.

[173] There is also the related point raised by counsel concerning the future governance of the Lake in light of the Waitangi Tribunal recommendations where it was alleged that the former trustees had not "promoted or advocated" for a new decision-making mechanism to, I infer, replace the Reserves and Other Lands Disposal Act 1956. While I accept the validity of the argument that the former trustees should be at least exploring the pathway toward a reform of the legislation that affects their governance, including the ROLD Act, it would not be unreasonable to expect that any government initiative to progress such issues will be tied, directly or indirectly, to the global settlement of all historical Muaūpoko Treaty claims against the Crown. There is currently little evidence on how the iwi intends to approach those negotiations and the relationship with the trust in such discussions, so it is unclear as to what remedy might be available to the applicants on this issue via the Court, apart from the pleaded change in trustees following an election.

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110 398 Aotea MB 187-189 (398 AOT 187-198)

[174] On the issue of damage to historical sites by the former trustees and their contractors, this issue was also contested between the parties. There was the evidence from Heritage New Zealand Pouhere Taonga concerning their traversing of the area where the works were being undertaken. Kathryn Hurren in response to Mr McKechnie's questions expressed the belief that a consent was not required and that many years of archaeological research had not disclosed the location of wāhi tapu sites on the Lake's western edge:[111]

> **M McKechnie:** Did you speak with the Horowhenua District Council?
>
> **K Hurren:** They were present at the meeting.
>
> **M McKechnie:** The meeting that took place in August?
> **K Hurren:** Yes.
>
> **M McKechnie:** And did they confirm to you that the trustees of the Lake Horowhenua Trust were not required to obtain planning consent for this work and that they were entitled, so far as the Horowhenua Council was concerned, to commission this work?
>
> **K Hurren:** I can't remember, but I believe so.

[175] Ms Hurren then stated:

> **M McKechnie:** And nowhere in all that time has there been an archaeological site located on the shore of Lake Horowhenua on the western shore that we look at? That's the position, is it not?
>
> **K Hurren:** That is true, but there could be a number of reasons for that.
>
> **M McKechnie:** There may be a number of reasons, but the plain fact is that if somebody was looking at where the archaeological sites were on Lake Horowhenua, they would see that none were on the eastern edge of the lake, would they not?
>
> **K Hurren:** They would. But we use this as an indicator that there may be other sites present.
>
> **M McKechnie:** I accept that there may be other sites of significance located at some time in the future, but this is the result of decades of research, is it not?
>
> **K Hurren:** That is true.

[176] Dr James Jacobs also gave evidence on the processes used by Heritage New Zealand Pouhere Taonga. He confirmed that the work of the New Zealand Archaeological Association was accepted by his organisation as authoritative:[112]

> **M McKechnie:** Is that information that comes from the archaeological association over decades, is that the best information collected that is available to identify sites on Lake Horowhenua?

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111 398 Aotea MB 35 (398 AOT 35)
112 Ibid, at 38

> **Dr J Jacobs:** I'm not an archaeological expert, but so far as I know, yes, and that's based on my interaction with the archaeologists on my team.
>
> **M McKechnie:** Right. So, you're essentially adopting the advice that they've given you in relation to that?
>
> **Dr J Jacobs:** Their expert advice, yes.

[177] Mr McKechnie then questioned Dr Jacobs as to whether, despite complaints that had been made against the former trustees and their contractors, there would be a prosecution, to which he confirmed there would not:[113]

> **M McKechnie:** And then in the next paragraph, I want to read into the record what is said there, we accept the word of those involved with the earthworks that there was no in situ archaeology damaged in the formation of the pond and the bund. We also accept the assertion that this part of the lake was once under water. Any recipient of this correspondence is wholly welcome to share these views with any other party.
>
> Now, Dr Jacobs, as far as Heritage New Zealand was concerned, was that the end of the matter?
>
> **Dr J Jacobs:** No, it was the end of the matter with regard to the archaeology of the site and the possible prosecution, which could be an end product of that process, so yes.
>
> **M McKechnie:** But there was and will be no prosecution, is that correct?
>
> **Dr J Jacobs:** That is correct.

[178] That said, Dr Jacobs continued later in his evidence that, because of evidential challenges, it was not possible to bring a prosecution and that the best procedure would have been for his agency to have been notified in advance of any planned excavations. Put another way, his evidence and that of Ms Hurren in particular, appeared to suggest that, because the soil from the works had not been set aside and had been effectively mixed in with other material, it was no longer possible to determine whether an archaeological site had been damaged. For completeness, I also note Dr Procter's refutation of the applicants' evidence on the issue of the activities of Heritage New Zealand Pouhere Taonga.

[179] On this issue, there appears to have been limited consultation with trust beneficiaries who had expressed concerns over the T-drain and related works and construction. As to the response that there had merely been a clearing of existing overgrown access tracks, when, after a hearing the Court staff and I undertook a site inspection, it was evident that there had been significant changes to the landscape including the removal of flax and the use of heavy equipment to create tracks over the areas we traversed. I consider that whenever such works are contemplated or proposed then there should be proper consultation with trust beneficiaries and genuine attempts to obtain feedback and achieve protections of areas and sites where they

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[113] 398 Aotea MB 39 (398 AOT 39)

have been identified by the affected hapū. In this area at least I find that the former trustees have failed to properly consult with beneficiaries affected directly by the significant works that occurred and that it would be inconsistent with their duties to adopt the same approach to engagement in the future. It would be equally improper to rely on the views of hapū not directly affected in terms of traditional rohe as a means of justifying such conduct.

[180] In summary, the applicants argued that the former trustees' approach to the protection of the Lake and wāhi tapu overall was mere "tinkering" and compromised the interests of the trust beneficiaries while putting the trust assets at risk. The failure or refusal to take HDC and HRC to task over resource consents was an example of the former trustees' incompetence. It also included the wilful or careless destruction of historical sites and wāhi tapu important to the applicants and their hapū in the face of legitimate concerns, without genuine consultation and engagement. The former trustees' pathway it was said favoured the local authorities and local framing activities at the expense of Muaūpoko rights and aspirations.

[181] In rejoinder, the former trustees contended that the litigation approach favoured by the applicants has unquestionably proved fruitless, divisive and ultimately counterproductive. They argued that ceaseless confrontations with local authorities and businesses has not improved the Lake water quality and had become an unnecessary diversion whereas the Lake Accord and Te Mana o Te Wai initiatives had seen appreciable changes to the Lake and its environs. The former trustees submitted that the Lake was degraded over a long period and so its restoration cannot occur overnight which is why they supported a collaborative and restorative approach.

[182] Whether the overall approach of the former trustees constituted breaches of trust sufficient to warrant the removal of the former trustees had they been validly reappointed in 2016 trustees is a more complex question to determine, especially in circumstances where the approach of the former trustees appears to have some level of support from the trust beneficiaries. It is also at least arguable that the approach adopted by the majority of former trustees, from a pragmatic perspective, is in the interests of the trust beneficiaries at this point in time. I express no view on whether it is or not, but simply point out that it is at least arguable. Moreover, it is not the role of the Court to determine whether a policy decision taken by responsible trustees is sensible or otherwise, unless it directly affects the discharge of their legal duties as trustees to the point where they are in breach of said responsibilities to warrant the intervention of the Court. Even so, if trustees decide to take a policy decision that potentially affects the legal rights of their beneficiaries adversely, it would not be unreasonable to expect to see evidence of rational decision making supported by independent expert advice.

Had the former trustees breached their duties sufficient to warrant their removal?

Submissions of Mr Rudd

[183] Ms Thornton submitted that there have been multiple serious, and in some instances continuing, breaches of trust by the former trustees, which reveal a course of conduct that disregarded the requirements and purpose of the trust order. Counsel contended that the former trustees had failed to convene AGMS, had not properly manage conflicts of interest and had personally received significant payments under contracts exceeding $300,000 without approval or disclosure contrary to the trust order, had not obtained proper approval for spending, had improperly delegated their authority and had failed to protect wāhi tapu and other places of significance.

[184] They had also sought to exclude trustees, had removed the then chairperson without recourse to the dispute resolution provisions of the trust order, had failed to protect the assets of the trust and had constructed a walkway without beneficiary consultation or approval. For all of these reasons, the trustees should be prohibited from reappointment.[114]

Submissions of Mr Taueki

[185] In summary, Mr Watson submitted that there are three broad categories of alleged breach of trustee duties by the former trustees. Firstly, they failed to act in the best interests of the beneficial owners. Secondly, they consistently breached their terms of trust to a material degree. Thirdly, they failed to preserve the assets of the trust. In essence, it was untenable for the former trustees to remain in office or to be reappointed following the recent election.[115]

The former trustees' submissions

[186] In short, Mr McKechnie submitted that, overall, the applicants have failed to establish both material grounds for breach of the trust order or a conflict of interest which has prejudiced the interests of the beneficial owners or damaged the assets of the trust. There was, accordingly, no basis to remove the trustees. On the contrary, in accordance with the elections results of February 2009, they should be immediately reinstated to their roles and resume their stewardship of Lake Horowhenua.[116]

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114 Charles Rudd's Closing Submissions dated 14 April 2019, at [7]
115 Closing Submissions for Phillip Taueki dated 14 April 2019 at [6]-[7]
116 Closing Submissions for Trustees Elect dated 1 May 2019 at [2]-[6]

The Law

[187] Section 238 of the Act provides:

> **238 Enforcement of obligations of trust**
>
> (1) The court may at any time require any trustee of a trust to file in the court a written report, and to appear before the court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.
>
> (2) The court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

[188] In *Clarke v Karaitiana*, the Court of Appeal confirmed that this Court has wide supervisory and enforcement powers under s 238.[117]

> [36] ... Apart from the inherent jurisdiction enjoyed by the High Court and conferred on the Māori Land Court by s 237, the Māori Land Court has wide supervisory and enforcement powers under s 238. These include the power to require any trustee to provide a written report to the Court and to appear before the Court in any matter relating to the administration of the trust or the performance of his or her duties as a trustee. In addition, the Court may, at any time, in respect of any trustee, enforce the obligations of the trust whether by injunction or otherwise. As well, the Court has the power, at any time, to add, reduce, replace or remove trustees under ss 239 and 240.

[189] The general functions and duties of responsible trustees are set out in s 223 of the Act, which includes: carrying out the terms of trust; the proper administration and management of the business of the trust; the preservation of the assets of the trust; and the collection and distribution of the income of the trust.

[190] In *Rameka v Hall*, the Court of Appeal confirmed that these statutory duties are not exhaustive and general trustee law principles are also relevant.[118] In addition, the applicable trust order may add other responsibilities. The Court listed the following as the relevant trustee obligations:[119]

(a) A duty to acquaint themselves with the terms of trust;

(b) A duty to adhere rigidly to the terms of trust;

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117 *Clarke v Karaitiana* [2011] NZCA 154

118 *Rameka v Hall* [2013] NZCA 203 at [29]

119 Ibid, citing *Apatu v Puna – Owhaoko C1 and C2* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34)

(c) A duty to transfer property only to beneficiaries or to the objects of a power of appointment or to persons authorised under a trust instrument or the general law to receive property such as a custodian trustee;

(d) A duty to act fairly by all beneficiaries;

(e) A duty of trustees to invest the trust funds in accordance with the trust instrument or as the law provides;

(f) A duty to keep and render accounts and provide information;

(g) A duty of diligence and prudence as an ordinary prudent person of business would exercise and conduct in that business if it were his or her own;

(h) A duty not to delegate his or her powers not even to co-trustees;

(i) A duty not to make a profit for themselves out of the trust property or out of the office of trust

[191] I adopt the reasoning set out in these judgments.

Discussion

[192] As mentioned above, by its 12 September 2018 decision, the Māori Appellate Court quashed orders appointing the former trustees and directed a rehearing before this Court. The effect of that decision on the status of the former trustees following the 2016 elections was to render them once again trustees elect. That status was then affirmed following the 2019 elections, notwithstanding the applicants' objections as to the suitability of the former trustees while a final decision on these proceedings was pending. Effectively, therefore, the former trustees' terms had expired, they had been reappointed by Judge Doogan and his orders were then annulled. At that stage, no adverse findings had been made and therefore, as foreshadowed, their status remained unchanged as trustees elect up to the closing of the case before me.

[193] This is relevant both in the context of the application for the rehearing of the appointment of trustees and in terms of compliance with cl 2.1 (d) of the First Schedule of the trust order, which states:

2. ELIGIBILITY FOR APPOINTMENT

2.1 Restrictions on Trustees

A person shall not be permitted to be a Trustee if he or she:

(a) is an undischarged bankrupt; or

(b) has ever been convicted of an offence involving dishonesty as defined in section 2(1) of the Crimes Act 1961, or an offence under section 373(4) of the Companies Act 1993 (unless that person is an eligible individual for the purposes of the Criminal Records (Clean Slate) Act 2004); or

(c) has ever been disqualified from being a director of a company registered under the Companies Act 1955 or the Companies Act 1993; or

(d) has ever been removed as a trustee of a trust by order of a Court on the grounds of breach of trust, lack of competence or failure to carry out the duties of a trustee satisfactorily; or

(e) is subject to a property order made under section 30 or section 31 of the Protection of Personal and Property Rights Act 1988.

[194] In short, the adverse findings that have been made against the former trustees in this decision have been issued while they were trustees elect with the result that they cannot be removed because they were, at the commencement of these proceedings for rehearing, and thus remain, trustees elect. This is how Mr McKechnie has referred to his clients throughout this case. The starting point, therefore, is that I consider this then means the former trustees remain eligible for reappointment because they have never been "removed as a trustee of a trust by order of a Court" on the grounds of breach of trust, incompetence of failure to carry out their duties satisfactorily.

[195] Using the list of allegations set out in paragraph [7] of Ms Thornton's closing submissions as a guide, on the issue of the elections, the explanations provided by the trustees are unsatisfactory. They knew, or they ought to have known, when their terms were to expire. It had been discussed in open Court more than once.[120] The previous election should have been their guide, given the furore that arose on this very issue following the failure to initiate the last election in a timely manner and in accordance with the trust order. It is no answer for the former trustees to suggest that there had been confusion, since any doubt could have been removed by the seeking of directions before the trustees' terms expired. While it has not been suggested that the trustees were tardy in calling the elections simply to keep extending their term of office beyond what the trust order permitted, it would not be unsurprising for a concerned trust beneficiary to form such a view, regardless of whether such a perception could be sustained. The short point is that, as foreshadowed, the trustees failed to follow their terms

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[120] See 398 Aotea MB 1-243 (398 AOT 1-243) at 215-217

of trust regarding the convening of the last election, against the background of this very issue being relevant to these same trustees in earlier proceedings.

[196] Then there are the suggestions that the general meetings were delayed because of trustee concerns over safety, given the past performances of some attendees.[121] While it is also not surprising that such views were held by the former trustees, attendance at the meetings by the proper authorities or at venues were there was more likelihood of order being maintained were always possibilities. If the former trustees harboured such fears over safety at general meetings, they could have sought directions. Indeed, during my carriage of cases concerning Lake Horowhenua trust elections and AGMs dating back to 2003, on more than one occasion the hui have been convened by the Registrar for that very reason. Ironically, in the minutes, Mr Sword himself acknowledges that a further offer made directly by me to him for Court staff or independent persons to convene and facilitate the meetings was turned down.[122] My conclusion is that, as mentioned, the former trustees failed to convene AGMs strictly in accordance with the trust order and this was a breach of trust.

[197] That said, in fairness to the former trustees, it would be wrong to suggest that there has never been any forum for trust beneficiaries to engage with the former trustees over the latter's administration and management of the trust. A review of the minutes and notes of the various meetings, formal and informal, reveals a high degree of trust beneficiary and former trustee interaction and dialogue. For example, the 7 December 2013 meeting notes record extensive discussions between the parties on a wide range of subjects – the 22 February 2014 meeting less so because of a lack of quorum it was adjourned before any real discussion occurred. Contrast that with the 17 May 2015 meeting, also inquorate, where the notes record a high level of engagement with many relevant issues including the problems achieving a quorum at general meetings. This is also evident at the April 2016 meeting. So, I accept Mr McKechnie's submission that the trust beneficiaries were not denied the opportunity to engage with the former trustees and express their views at informal meetings, sometimes stridently.

[198] However, it was Mr Sword's subsequent conduct, like at the 22 February 2014 meeting in declaring it adjourned without reconvening within 21 day a stipulated in the trust order or alternatively seeking directions if there was any difficulty with compliance. He repeated this declaration the 17 May 2015 at the 11 December 2016 hui, erroneously asserting that this was in accordance with the trust order when it clearly was not. Clause 10.11 requires

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121 Rudd Bundle, at 133
122 Ibid, at 4

that the hui be adjourned after one hour if it was still inquorate at that time and that it be reconvened within 21 days at the same time and venue. Given Mr Sword's training and experience, it seems surprising that he interpreted the trust order this way, and doubtless, his fellow trustees would have in all reasonable probability, have relied on his advice and direction on such a technical point.

[199] Ms Thornton argued that it was a breach of trust for trustees to be excluded from trust meetings. Messrs Rudd and Henare said the same thing during the trust meetings, on more than one occasion and in forceful terms. Their allegation was that the funding and related resource consent applications had been pursued by the majority "behind closed doors" to use Mr Rudd's phrase including by email on what was argued as an exclusionary basis. There was no real denying this claim when the responses of the former trustees are examined as set out in the minutes of those meetings.

[200] Turning to the conflicts issue, and affected trustees' own views on the matter of breaches concerning the approval processes for the use of funds and the management of conflicts and their disclosure, illustrative examples include the following: [123]

> **The Court:** Do you accept that from time to time, the trustees have not adhered to all of the terms of trust consistently?
>
> **M Sword:** Yes, I would accept that. I think in attempting to deploy the projects, we've tried to act in a manner that's consistent. There have been times in the past, and I think I've raised this with yourself in the Court, that some of those provisions are unworkable and have resulted in adjustments being made, **but in answer to your question, yes there have been occasion**.
>
> **The Court:** Now, one of the terms of the trust is that there shall be no payments to trustees without the Court's approval, that is correct?
>
> **M Sword: I believe that's correct**.
>
> …
>
> What I am focussing on here is, was the process followed strictly according to the trust order. So, that is one silo, and the other silo is disclosure. Now we can use all sorts of labels like related party transactions etcetera and it always pays as you know when you a fiduciary to err on the side of caution.
>
> Do you think on reflection it might have been preferable that the various financial arrangements between the Lake Horowhenua Trust, external funding sources, and trustees and contractors, that if that had of been those relationships including the amounts of money involved had been included in the trust annual accounts, even as a footnote, but that might have alleviated some of the concerns that have been expressed?
>
> **M Sword:** It might have alleviated some of the concerns, I agree.
>
> (Emphasis added)

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[123] 398 Aotea MB 1-243 (398 AOT 1-243) at 223-224

[201] Then further:[124]

> **The Court:** Yes, but coming back to the main point that I am trying to engage you with is the trustees really have not followed the trust order strictly and they have not dealt with the financial elements of the relationships in a best practice manner, you accept that?
>
> **M Sword: I accept that from the stand point of the trust order**. I think in the context of there being significant layers of transparency wrapped around this, best practise has been observed, **but I accept your point in regard to strict adherence to the trust order**.
>
> **The Court:** Okay.
>
> **M Sword:** With no intent to do anything other than try and progress, but thank you. I note your comments.
>
> (Emphasis added)

[202] An additional example can be found in exchanges with Dr Procter. He accepted that a majority of trustees had not approved the contract to Mr Sword:[125]

> **The Court:** … Dr Procter, you heard me talking to Mr Sword about the trust or the processes. Do you agree with what he says?
>
> **Dr J Procter:** Yes.
>
> **The Court:** Now, the part I struggle with is that three trustees with these two other helpers can make decisions concerning funding and contracts that affect trustees directly, do you accept that on reflection, it would have been better to get the governance group decisions affirmed by a majority of trustees?
>
> **Dr J Procter:** Retrospectively, yes, but I think we have a very transparent process in place anyway. In terms of the contracts and the works to be undertaken were quite detailed and specified from Ministry for the Environment and our funding deed and contracts from them, so there wasn't too much interpretation of what could be done or what couldn't be done and –
>
> **The Court:** Yes, that is not the issue though, is it?
>
> **Dr J Procter:** No.
>
> **The Court:** The issue is that majority of the trustees did not approve those contracts or payments?
>
> **Dr J Procter:** No, but in terms of the funding agreement that we had with MFE and the requirements to deliver on that contract, I feel that we've met those requirements.

[203] As to the knowledge of the former trustees of the correct processes that needed to be followed to properly manage conflicts of interest, in a decision dated 26 November 2012 *Procter – Horowhenua 11*, on the issue of conflicts concerning Dr Procter and Mr Warrington, I made the following points:[126]

> [21] Regarding the allegations of actual or perceived conflicts both Dr Proctor and Mr Warrington must ensure that they adhere to robust and transparent processes where such circumstances might arise. **This means that if they are connected with or**

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124 398 Aotea MB 1-243 (398 AOT 1-243) at 225
125 Ibid, at 238
126 *Procter – Horowhenua 11* (2012) 293 Aotea MB 165 (293 AOT 165)

> **interested in any contract, agreement or arrangement of any kind with a third party which may give rise to their duty to the beneficiaries conflicting with their personal interests, they must give notice of the possibility of any potential or actual conflict to the trustees and then they must withdraw from any discussion or deliberation. This also means that they must leave any properly convened meeting of trustees where such matters are being discussed to ensure that they do not influence in any way the outcome of the trustees' discussions.**
>
> [22] **If at any time either they or any other trustee who may fall into this position or the trustees as a group are unsure then they must apply immediately for directions from the Court**. The purpose of rules against conflicts of interest is to ensure that the interests of the beneficiaries remain paramount and that the activities of the trustees both as individuals and as a group are beyond reproach. Put another way, rules for managing conflicts of interest are applied to ensure all of the interests of affected parties and in particular the beneficiaries are protected at all times. It is a well settled principle of trust law that a trustee cannot be the author of his or her terms of engagement.
>
> [23] In my assessment of the available evidence before the Court, I discern nothing therein to excite the Court's suspicion that actual conflicts of interest exist that would compromise the ability of either Dr Proctor or Mr Warrington to act as trustees. **That said, it is essential, as I have mentioned, for both nominees and indeed any other trustees, to ensure that they declare any possible conflicts and that they do not participate in any deliberation of the trustees concerning such matters. At the risk of belabouring the point, where trustees are unsure or have concerns then they must apply to the Court for directions.**
>
> (Emphasis added)

[204] That decision was then endorsed by a subsequent judgment of this Court, *Rudd - Horowhenua 11 Part Reservation Trust*.[127] In this latter case, once again, the issue of conflicts of interest, their management and the precise terms of the trust order were properly before the Court for discussion and where all of the principal participants in the present proceedings were also involved. So, it is not as if this issue is new or a surprise to anyone. The management of conflicts of interest is a matter that has been squarely before the former trustees and the trust beneficiaries in one form or another since at least 2003 and, with the former trustees represented by Mr McKechnie, since at least 2012 if not earlier.

[205] On the matter of the replacement of Mr Henare as trust chairperson without invoking cl 22 of the trust order concerning the resolution of disputes, this issue was hardly argued during the hearings. There is some tension between this clause and cl 4.3 of the Second Schedule which concerns the proceedings of trustees. It provides that a chairperson holds office until that trustees ceases to hold office or is removed by a resolution of trustees. While an argument can be made that cl 22 is intended to cover inter-trustee disputes, it is equally valid to contemplate that 4.3 on a plain and ordinary meaning confirms the ability of trustees to replace their chairperson at will. There is also no cross reference to cl 22. For the future, it

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127 *Rudd - Horowhenua 11 Part Reservation Trust* (2017) 368 Aotea MB 201 (368 AOT 201)

is probably necessary that some clarity be added to remove any doubt as to the applicability of cl 22 to inter-trustee disputes, if that is the will of the trust beneficiaries, per s 244 of the Act on a proposed variation of trust.

[206] Regarding cl 6 of the trust order and the correct procedures for the approval and payment of expenses from the trust bank account, I have already determined that the former trustees acted in breach of this provision.

[207] Turning to the Governance Group issue, as I have determined previously, there is no provision in the trust order for the trustees to delegate their accountabilities for funding and contracting decisions to any external authority, regardless of how it had been obtained. Where trustees are making decisions concerning funding and related resources that have been procured in the name of the trust, wholly or jointly, or for the benefit of the trust, then it is the trustees who must make the decisions. That is their function and responsibility which cannot be delegated in circumstances like those that presented themselves to the former trustees in this case.

[208] From November 2015 until May 2016, a period of some six months, there were curiously, no formal trustees' meetings, yet, the Governance Group, in April 2016, had decided to "appoint" Mr Sword to the Interim Project Manager role. Following that, at the 1 May 2016 meeting, the rest of the trustees were advised of this appointment. Crucially, they did not formally approve of Mr Sword's appointment at that 1 May 2016 meeting, which would have been the last reasonable time that such approval might have legitimately been given.

[209] At the risk of once more belabouring the point, it will be remembered that the trust had previously confirmed that the Governance Group would be "under the full control of the Trust" yet regarding Mr Sword's contract, that does not appear to have occurred. It would be quite a different situation if the funding provider made the decisions on contract allocation independently, ideally following a transparent process, and simply contracted the trust to implement those decisions. In this case, however, three trustees were directly involved in decision making concerning the expenditure of funds that had been obtained for the trusts' benefit and where individual trustees derived a personal benefit from those outcomes.

[210] On balance, my conclusion is that Messrs Sword and Warrington in particular have acted in breach of their duties sufficient to warrant their removal by failing to adhere to the trust order regarding the proper management of conflicts of interest in circumstances where

they should have either taken advice or sought directions from the Court. Dr Procter, while receiving nothing like the amounts paid to Messrs Sword and Warrington, should have been aware that the conflicts needed to be managed robustly by strict adherence to the trust order, since, as foreshadowed, both he and Mr Warrington had been the subject of managing these very concerns dating back to 2012.

[211] Given the torrid history of the administration and management of the trust over many years before this and other courts and the earlier removal orders issued by this Court in 2005, it is inexplicable that the former trustees have failed to diligently follow their terms of trust, particularly in the context of appropriate procedures regarding funding accountability, the management of conflicts of interest, actual and perceived, and the election processes set out in the trust order concerning their tenure. Nothing in their evidence and submissions effectively dispose of this point. If they knew or ought to have known how conflicts should have been managed, their inability or refusal to do so must inevitably be the result of neglectful oversight or wilful misconduct.

[212] Moreover, neither Mr Sword or Dr Procter can be regarded as lay trustees in the sense that they are professionals possessing appropriate knowledge, qualifications and experience of land and governance that, with respect, exceeds that of their colleagues in a strictly orthodox professional trustee context. They should have sought directions in circumstance where there was a risk of breaching, or appearing to breach, the conflict rules and to create a perception of conflict. That is not to say that the contractors like Messrs Sword and Warrington – including entities that they were associated with – have not met their contract terms or have provided an unsatisfactory service. But it was an error of judgment for the former trustees to have persisted with their flawed governance oversight process, given the conflicts that existed, in the absence of directions or the appropriate management of conflicts in accordance with the trust order, the Act and trust law principles generally.

[213] Arguably, a more appropriate process might have been for Mr Sword to have been appointed project manager by the unconflicted trustees and for him to have resigned either the chairmanship or his trustee position altogether, thereby reducing if not eliminating altogether any suggestion of conflict. When the project was completed, Mr Sword could have stood for office once more. Alternatively, as foreshadowed, where a quorate meeting of trustees had approved Mr Sword's appointment as project coordinator or manager and had endorsed the terms of his appointment and approved his contract payments, then that too would have been satisfactory given that there would have been proper compliance with the trust order.

[214] On the claims of a failure to protect wāhi tapu, and by extension, the constructing of the walkway, the issues are less clear cut since the absence of agreement within the trust beneficiary community, a situation that has endured for many years.

[215] Turning to the issue of removal, s 240 of the Act provides:

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

[216] It is trite that the removal of trustees from a Māori land trust is not undertaken lightly.[128] Where there is real evidence of malfeasance, incompetence or neglect, the Court may undertake the serious step of removal but only in the absence of any viable defences and the failure of any application for relief.[129] In summary, there is no doubt that many of the allegations of breaches of the trust order, over several years, despite the regular exhortations from Mr Rudd to desist, have been made out against the former trustees. In the context of failing to follow the express terms of the trust order, they even accepted this reality themselves, which was an appropriate and sensible concession to make. The next question, equally important, is whether that conduct amounts to misconduct so serious in nature that it requires the removal of the trustees or a determination that, but for their resignations, they would have been removed for cause. An alternative argument is that, because of adverse findings made here, the former trustees, or some of them, are no longer suitable for appointment.

[217] Taken separately, each of the breaches of trust outlined above, may at best be seen to be, in part at least, technical or not of a magnitude to warrant serious intervention by the Court. However, when all of the breaches are considered in their totality, taking into account the various roles played by individual trustees, the impression created is of a series of behaviours and practices that fall well short of the standard trust beneficiaries might properly expect from their fiduciaries. In my assessment, the most serious of all were the breaches of the non-delegation, non-conflict and non-profit duties.

[218] It was never going to be appropriate for a group of three trustees from a full complement of eleven to purport to make the decision to appoint the trust chairperson to a role

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128 *Rameka v Hall* [2013] NZCA 203 at [90]

129 *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233) at 241

that would see him paid in excess of $240,000 from trust funds over a two year period. Or to appoint their colleagues to paying contractor roles without compliance with the trust order and to seek to avoid those protections by the device of the purported delegation to the Governance Group. As mentioned above, only a majority of unconflicted trustees could do so under the trust order, provided also that they were acting prudently. The lack of transparency over the annual accounts in terms of disclosing details of payments made to individual trustees from trust funds was also an egregious omission on the part of the former trustees. The details needed to be disclosed – otherwise, how might a trust beneficiary properly assess whether the trustees are acting prudently and in accordance with their duties of non-delegation, non-conflict and non-profit?

[219] In my assessment, in the absence of any defence or grant of relief, the only appropriate outcome had they remained in office would have been for the removal of Messrs Sword and Warrington as trustees, and for the censure of Dr Procter for his role in enabling the payments to be made to his colleagues, contrary to both the terms of the trust order and trust law principles generally, in circumstances where he should have known better. Both Mr Warrington and Dr Procter had been directed, in my decision of 26 November 2012, in the strongest terms, how to properly manage conflicts of interest. In other words, Dr Procter should have ensured that there was proper compliance with the trust order at all times, given his experience. While I do not consider his conduct so egregious to require the serious step of removal, his role in assisting with the facilitation of the more serious breaches of the trust order warrants adverse comment, nonetheless. I consider this matter further in relation to the issue of whether any of the proposed trustees should be reappointed.

[220] The trustees who also received payments, Mr Matakatea, Mrs Hori Te Pa and Ms Tahiwi are in a slightly different position for two principal reasons. First, it would not be an unreasonable assumption that the majority of the former trustees would have relied on Mr Sword's advice on how conflicts of interest and payments should be managed. They would have not unreasonably have assumed that Mr Sword's advice was correct – he was their chairman and is a lawyer. It may have also been persuasive to them that Dr Procter would invariably concur with Mr Sword's comments. His experience as a highly qualified scientist and university associate professor might have also had an impact on the deliberations of the former trustees with his tacit approval of the interpretations of the trust order proffered by Mr Sword, notwithstanding the speculative nature of these observations.

[221] Secondly, although their contracts were also invalid because they were not properly approved by unconflicted trustees, the amounts of their payments were very modest. It is not

unusual for trustees to be contracted by their colleagues to undertake tasks where such engagement complies with the conflict rules where the unconflicted trustees are acting according to their duties.[130] This is because often the contracting trustees will possess particular skills and knowledge relevant to the trust with the result that such an engagement is ultimately for cost effective for those reasons. The question then arises, should the rest of the former trustees who received payments, despite the invalidity of their contracts, be subject to a finding that but for their resignations, then they too would be removed, and should they have to refund monies they were paid? For the reasons expressed, I consider that it is appropriate that a distinction be made between the amounts received and the fact that two former trustees had been expressly directed in 2012 on how they needed to manage their conflicts.

Should any of the former trustees be reappointed?

Applicants' submissions

[222] Both applicants submitted that the trustees elected at the hui held on 2 February 2019 cannot be reappointed because, by their misconduct, they have now rendered themselves ineligible to serve in their former roles. They argued that the former trustees who now seek reappointment are unsuitable to hold office due to their serious breaches of trust which disqualify them. In addition, the election was held in advance of these proceedings and, in the broader context of non-disclosure, the nominees cannot be said to be broadly acceptable to the beneficial owners.

[223] In addition, the applicants submitted that it is appropriate for a full hui of owners to be convened with all of the facts, and an election be thereafter held to ensure that the nominees have the broad support of fully informed beneficial owners. Counsel argued there is no prejudice to the owners nor to the projects currently underway, as Mr Hemana is appointed as an independent responsible trustee. There is no evidence that Mr Hemana's continued appointment would impact adversely on the Lake revitalisation measures, given his oversight of the trust in recent years.

[224] Further, the applicants proposed that Mr Hemana remain in office until the determination of the substantive applications and once there has been full consideration of this decision by the trust beneficiaries at a duly convened meeting. An election could be then held,

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130 For imprudent conduct leading to removal, see *Rātima v Sullivan - The Tataraakina C Trust* (2015) 41 Tākitimu MB 102 (41 TKT 102) at [127] – [136]

independently facilitated, with a direction that the former trustees be ineligible to stand because of their previous misconduct rendering them ineligible.

Respondents' submissions

[225] Mr McKechnie submitted that the 11 successful candidates elected at the meeting held on 2 February 2019, should now be reappointed as responsible trustees. He argued that the trust cannot continue to operate in a caretaker position. In addition, counsel submitted that the trustees elected were the 11 highest polling candidates and they have not demonstrated any disqualifying conduct to suggest they lack the ability, experience or knowledge for the role. He argued that the election results of both 2016 and 2019 are consistent and demonstrate that the beneficiaries have confidence in and support the successful candidates. He noted that in 2016, 376 beneficiaries cast votes, while at the most recent election, 619 owners voted.

[226] Mr McKechnie contended that this demonstrates the trust beneficiaries are genuinely interested in the governance of Lake Horowhenua and, given the very little support that Messrs Taueki and Rudd have attracted in the two recent elections, suggested that the beneficial owners are informed and do not support the points of view of the applicants. Of those former trustees in office in 2016 who sought re-election, only one was not re-elected. Essentially therefore, the same group of trustees have been re-elected in 2019, despite the challenges and conflicts that have arisen with the applicants.

[227] Further, Mr McKechnie noted the fact that many of these former trustees have served as advisory trustees, working closely with Mr Hemana since his appointment. So there has been, in effect, a seamless continuity in the work of the trust and the input and participation of the former trustees.

The Law

[228] Section 222 of the Act provides:

> **222 Appointment of trustees**
>
> (1) Subject to subsections (2) and (3), the court may appoint as trustee of any trust constituted under this Part—
>
> (a) an individual; or
>
> (b) a Maori Trust Board constituted under the Maori Trust Boards Act 1955 or any other enactment, or any body corporate constituted by or under any enactment; or
>
> (c) a Maori incorporation; or

(d) the Māori Trustee; or

(e) Public Trust; or

(f) a trustee company within the meaning of the Trustee Companies Act 1967.

(2) The court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part,—

(a) shall have regard to the ability, experience, and knowledge of the individual or body; and

(b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

(3) The court shall not appoint any individual or body to be a trustee of any trust constituted under this Part unless it is satisfied that the proposed appointee consents to the appointment.

(4) Subject to subsection (5), the court may appoint any such individual or body as a responsible trustee, or an advisory trustee, or a custodian trustee.

(5) For every trust constituted under this Part the court shall appoint 1 or more responsible trustees, and may appoint 1 or more advisory trustees and 1 or more custodian trustees.

[229] The leading authority on the appointment of trustees is the Court of Appeal judgment in *Clarke v Karaitiana*.[131] In that decision, which considered the factors that needed to be taken in account during the appointment process, the Court confirmed that, while the views of the owners will ordinarily hold substantial weight, the Court will also have regard to other factors which may render the candidates unsuitable to be appointed. Those factors might include, for example, conflicts of interest:

> [51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by s 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.
>
> [52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint the leading candidates as elected by the owners, it must still be satisfied the requirements of s 222(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

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131 *Clarke v Karaitiana* [2011] NZCA 154

Discussion

[230] As foreshadowed, the former trustees who received significant payments not properly authorised by their fellow trustees at duly convened trustees' hui where conflicts were not properly managed in accordance with the trust order and general trust law principles, have acted in breach of their duties sufficient to warrant their removal if they had been validly reappointed in 2016. Their improper and continuing delegation of their decision-making functions concerning funds intended to benefit the trust to the Governance Group compounded their earlier misconduct in failing to manage their conflicts. That they persisted in this behaviour despite the exhortations of Mr Rudd and others and given their knowledge of the trust's history in the context of accountability, seems inexplicable. Moreover, as foreshadowed, the former trustees by their own evidence, admitted that they had continued to act in breach of their duties on the basis of their own interpretation of the trust order to justify that conduct.

[231] Regarding the remaining former trustees, my conclusion is that, while they have not followed the trust order as was expected of them, and while they also failed to challenge the decisions of their colleagues or seek directions from the Court, their misconduct is, on balance not as egregious as those trustees who will not be reappointed. In this context, I also reject the submissions of the applicants that it is necessary to hold an election for *all* trustee positions on the basis that, if the beneficiaries had been aware of the behaviour of the former trustees at the time of the last election, it is doubtful that the eventually successful nominees would have been elected. That is speculation and given the findings that have now been made and the decisions set out in this judgment, that possibility as articulated by the applicants' counsel may diminish further, I would suggest.

[232] As I have determined, on the available evidence, the majority of the former trustees appeared to take the not unreasonable step of following the advice of their then chairperson over the key trust breach issues – the duties not to delegate, not to self-deal and not to profit from the assets of the trust. It was, arguably at least, a reasonable position for them to take in this case, given their own individual backgrounds and experience. In the end it was wrong to do so, but it was not an unreasonable position for them to take in the circumstances. In any event, the short point is that there have been no submissions on relief under the Trustee Act 1956 and until that occurs, in terms of trustee reappointments for the remaining affected former trustees, then the status quo will need to prevail. Once an application for relief has been filed and heard then a final decision will be made on the extant remaining appointment applications.

[233] In the meantime, I see no reason why the appointments of the new trustees, Dean James Wilson, Pamela Anahera Winiata and Deanna Mere Hanita-Paki, should be delayed any further. There is also no reason why they should be disadvantaged as to when their terms of appointment commence. Until there is a full compliment of eleven trustees again, Mr Hemana should remain as independent trustee and now as interim chairperson until further order of the Court.

[234] A related issue will be whether any former trustees who will not be reappointed should serve terms of ineligibility for reappointment. Clause 2.1 (d) of the Second Schedule to the trust order states that any trustee who has been removed for cause from any trust by the Court "shall not be permitted to be a trustee." In other words, if a trustee is formally removed per s 240 of the Act, it will be impossible for them to be reappointed at some time in the future, unless the trust order is varied per s 244. Given the circumstances of this case, it may be appropriate that orders should be issued prohibiting certain former trustees from being appointed, not indefinitely necessarily, but for a period of one or more three year terms. Counsel are invited to file submissions on this issue.

Should the applicants be prevented from filing further proceedings?

Respondents' submissions

[235] The former trustees seek an order that the applicants, Messrs Taueki and Rudd, be subject to an order under s 98C of the Act limiting either party from commencing proceedings to challenge the conduct of the trustees in office.

[236] In respect of Mr Rudd, counsel submitted that his historical involvement is relevant. He was obliged to resign as a trustee at an earlier time as it was made clear that if he did not resign the Court would remove him. He nonetheless, then and presently, disputes that he had done anything requiring his resignation. Moreover, he went to the media to question the judgment of the Court even though he did not dispute the ruling by any legitimate judicial process of appeal or review.

[237] Counsel submitted that Mr Taueki's application has been without substantial merit. The evidence at this hearing established a long history of disputes with the persons entrusted with the governance of Lake Horowhenua, which has involved proceedings in the District and High Court, disruption of meetings and the involvement of the Police.

[238] Mr McKechnie argued that the litigation initiated by Messrs Taueki and Rudd has involved very significant cost to the taxpayer, and a great deal of judicial time and resources. Further, successful candidates at the 2019 election who seek confirmation in office, wish to get on with the business of the trust without constant harassment and legal processes initiated by a small, disaffected and misguided minority group.

Applicants' submissions

[239] Mr Watson submitted that, when Mr Taueki's proceedings are analysed, there is no jurisdictional basis for an order under s 98C of the Act. He contended that the test must be whether the proceedings are "totally without merit" and Mr Taueki's involvement in Court proceedings do not fall into that category. He says it is important to note that s 98D relates to proceedings commenced or continued by Mr Taueki, not those where he is a defendant. On an analysis of proceedings initiated or continued since 2015, Mr Watson submitted that Mr Taueki has only been unsuccessful on one appeal. In all other instances, he has been successful. Therefore, the proceedings he initiated cannot be seen to be totally without merit.

[240] Mr Watson further argued that, given the lack of judicial guidance on these provisions, the Court should interpret them restrictively, balancing the need to ensure vexatious litigation is tempered against the basic principle of access to justice.

[241] Ms Thornton similarly argued that Mr Rudd has not brought enough cases before the Court to be considered vexatious under the statutory formula. She contended that, to sustain either a limited or extended order against Mr Rudd, the Court must consider that two or more cases previously brought were "totally without merit". However, Ms Thornton pointed out that only three previous cases have been brought to the Court by Mr Rudd including the current proceedings. The other two proceedings were terminated in Mr Rudd's favour and any argument that they were without merit cannot be sustained. Even if the current proceedings are decided against Mr Rudd, that is only one proceeding.

[242] Ms Thornton also submitted that counsel raised the issue of Mr Rudd's previous resignation from the trust as being relevant to the grant of a s 98C order. However, there is nothing before the Court to indicate that Mr Rudd was anything more than a party to an action brought by someone else, and there was no finding of wrongdoing involving him. Accordingly, Mr Rudd seeks an order dismissing the application per s 98C.

The Law

[243] Sections 98C and 98D were inserted into the Act in 2016 and are changes that give this Court broader powers regarding proceedings that are without merit. It confers powers on a Judge to make a limited or an extended order restricting a person from commencing or continuing proceedings in the Court. Section 98C of the Act provides:

> **98C Judge may make order restricting commencement or continuation of proceeding**
>
> (1) A Judge may make an order restricting a person from commencing or continuing proceedings in the court.
>
> (2) The order may have—
>
> (a) a limited effect (a limited order); or
>
> (b) an extended effect (an extended order).
>
> (3) A limited order restrains a party from commencing or continuing proceedings on a particular matter in the court.
>
> (4) An extended order restrains a party from commencing or continuing proceedings on a particular or related matter in the court.
>
> (5) Nothing in this section limits the court's inherent power to control its own proceedings.

[244] The grounds for making such an order are set out in s 98D of the Act:

> **98D Grounds for making section 98C order**
>
> (1) A Judge may make a limited order under section 98C if, in proceedings about the same matter in the court, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.
>
> (2) A Judge may make an extended order under section 98C if, in at least 2 proceedings about any matter considered by the court, the Judge considers that the proceedings are or were totally without merit.
>
> (3) In determining whether the proceedings are or were totally without merit, the Judge may take into account the nature of any other interlocutory application or appeal involving the party to be restrained, but is not limited to those considerations.
>
> (4) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.
>
> (5) For the purpose of this section and sections 98E and 98F, an appeal in a proceeding must be treated as part of that proceeding and not as a distinct proceeding.

[245] In *Rudd – Horowhenua 11 Part Reservation Trust*, these new provisions were noted as being part of a policy of increasing the jurisdiction of the courts to regulate their own proceedings and to effectively deal with applications that are totally without merit.[132] In

addition, this policy position is reflected in the strengthening of the existing contempt provisions under the new Contempt of Court Act 2019. This relates to the publication of incorrect or inflammatory material on the internet as it concerns the judiciary and the discharge of their functions. In short, the ability of the Court to manage its proceedings has been enhanced by these changes and are strengthened further under that new Act.

[246] Recently in *Karena v Steedman – Te Koau A*, I considered whether the applicant should be prevented from filing further proceedings and an order granted per ss 98C and 98D of the Act.[133] In that decision, similar provisions were reviewed which had been inserted in other legislation, such as the Senior Courts Act 2016 and the Resource Management Act 1991. Authorities which considered the issue of litigants in repeated applications before this Court were also reviewed and they confirm that repeated applications are permissible where there is no express statutory prohibition. However, when the filing of repeated applications becomes an abuse of process that is another issue. Applicants should be aware that they risk having the same outcome as previously decided and a substantial award of costs.

Discussion

[247] Since 2003, there have been over thirty reserved decisions issued about Lake Horowhenua from this Court and the Māori Appellate Court, including interlocutory and costs applications. Messrs Rudd and Taueki are listed as litigants in over half that number, including three earlier judgments relevant to the present proceedings. There are also several decisions concerning the Lake in some way that have been issued by the general courts.[134] Moreover, that is only one aspect of the issues that have continued to vex the custodians and beneficiaries of the Lake over generations, as noted in *Taueki v McMillan - Horowhenua 11 (Lake):*[135]

> [7] It is an understatement to record that Lake Horowhenua and the surrounding Māori lands have had a controversial history. They have been the subject of several inquiries, reviews and proceedings for well over a century, involving almost every level of court within the legal system, as well as numerous reviews and inquiries over the same period of time that have involved Parliament. The present case and a series of interrelated yet separate applications have been before this Court for over a decade in one form or another. The participants in some of those applications have also become embroiled in proceedings before the general courts including the Supreme Court, albeit in the context of trespass and claims of disorderly conduct and assault.

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132 *Rudd v Horowhenua 11 Part Reservation Trust* (2018) 390 Aotea MB 31 (390 AOT 31)
133 *Karena v Steedman – Te Koau A* (2019) 76 Tākitimu MB 183 (76 TKT 183)
134 For example, see *Taueki v R* [2013] NZSC 146; and *Taueki v R* [2014] 1 NZLR 235
135 *Taueki v McMillan - Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144)

[248] The brief history of litigation concerning Lake Horowhenua, including in the years prior to 2014, was set out in my 2014 decision cited in the preceding paragraph. As an example, it refers to the applications filed over a 10-year period, 2003 – 2013:

(a) 2003 – Vivienne Taueki - Interim injunction to prevent dredging of Lake Horowhenua;

(b) 2003 – Vivienne Taueki - Wāhi tapu determination;

(c) 2004 – Vivienne Taueki and William Taueki- Replacement, removal and appointment of trustees;

(d) 2005 – Vivienne Taueki - Interim injunction regarding mandate of the Lake Domain Board;

(e) 2005 – William Taueki - Review of trust;

(f) 2006 – Deputy Registrar - Enforcement of obligations of trust;

(g) 2009 – Philip Taueki - Determination of ownership of buildings at Lake Horowhenua;

(h) 2009 – Philip Taueki - Interim injunction over storm water;

(i) 2009 – Philip Taueki - Determination of ownership;

(j) 2010 – Vivienne Taueki - Interim injunction over willow tree removal;

(k) 2010 – Philip Taueki - Application for inquiry;

(l) 2011 – Vivienne Taueki - Removal of a trustee;

(m) 2012 – Vivienne Taueki - Appeals against dismissal of removal application;

(n) 2013 – Philip Taueki - Removal and interim injunction regarding nursery;

(o) 2013 – Eugene Henare - Interim injunction to prevent trustees from replacing chairman of the trust;

(p) 2013 – Philip Taueki - Interim injunction concerning washing of boats at Lake Horowhenua;

(q) 2013 – Charles Rudd - Enforcement of obligations of trust

[249] Since 2013, there have also been several additional applications filed, followed by further hearings and appeals. Added to that has been the Waitangi Tribunal process and the issue of its early report into the claims concerning Lake Horowhenua.[136] In addition, when

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136 Waitangi Tribunal *Horowhenua – The Muaūpoko Priority Report* (Wai 2200, 2017)

the historical record is reviewed, it would appear that legal disputes concerning the Lake have been in existence in one form or another since the time of colonisation or soon thereafter.[137]

[250] In my assessment, over the last almost 18 years of hearing cases in Levin, the principal parties to this litigation, and for some, their predecessors, remain philosophically and implacably opposed to each other. Regrettably, it would appear that the passage of time has done little to remedy the rancour and hostility that continues to manifest itself both before this Court and in other related fora on an almost continuous basis. In the context of the application to prevent the filing of further proceedings, a review of the decisions cited in paragraph [248] discloses that Messrs Rudd and Taueki, while being regular users of Court processes, were neither entirely successful nor complete failures in the litigation that they have initiated. Mr Watson's submission, that the applicants have prevailed from time to time in their efforts before this Court, is not inaccurate. Similarly, the applicants and those opposing the trustees have also been unsuccessful.

[251] On balance, my conclusion is that their conduct falls short of that contemplated by ss 98C and 98D of the Act. That said, it is always open to respondents in future proceedings to seek security for costs, to seek costs following a dismissal or adopt the approach of the HDC in seeking to have proceedings they consider vexatious or an abuse of process struck out.

Conclusion

[252] In or about May 2015, the former trustees decided to adopt a collaborative approach to relations with central and local government with the aim of seeking to improve water quality and the environs generally of Lake Horowhenua. By a majority, they determined that the previous approach of some trustees and trust beneficiaries was wrong because they considered continuous confrontation with the authorities had produced few tangible results for the beneficiaries. This group decided to seek government funding to initiate projects they believed are intended to benefit the Lake and to also build capacity amongst the beneficiaries of the trust and with the Muaūpoko iwi generally, in the context of what they considered to be the proper stewardship of the taonga that is Lake Horowhenua.

[253] The applicants, Messrs Rudd and Taueki, supported by Mr Henare and Ms Taueki, have remained consistent in their opposition to both the overall approach of the majority as

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[137] For examples, see *Paki v Māori Land Court* [2015] NZHC 2535; and Waitangi Tribunal *Horowhenua – The Muaūpoko Priority Report* (Wai 2200, 2017)

well as the means by which the funding was secured and eventually expended. At considerable personal cost, including engagement with the mainstream courts and enforcement authorities, serving terms of imprisonment for Mr Taueki, and with the awarding of substantial costs against Ms Taueki by the Māori Appellate Court, the Environment Court and this Court over the years, those opposed to the majority former trustees have maintained a deep philosophical as well as a practical (and even at a tribal level a political) antipathy to almost everything that the projects represent.

[254] In addition, Mr Rudd and to an extent Mr Henare, both expressed serious concerns over what they considered was the exclusionary approach of the majority in pursuing the funding applications and the parallel resource consent process. They argued that the majority had been pursuing this pathway of cooperation without the knowledge of their colleagues and contrary to the trust order at critical points. That Mr Rudd has been largely vindicated in several of his key allegations will come as little surprise to him. That said, there are also wider issues that transcend the current set of ongoing conflicts that continue to vex this community of beneficial owners that no Court can ever remedy. There are examples elsewhere within tribal communities where a minority seeks to maintain its own individual identity and exercise autonomy accordingly. The challenge is where individual and at times competing hapū interests overlap, one with others, and seeks to pursue diametrically opposed pathways.

[255] The short point is that, had the former trustee followed the trust order regarding self-dealing, non-delegation and non-profit without deviation, then the projects that they have promoted and pursued would have continued largely without criticism from the Court, except, as foreshadowed, where the issue of wāhi tapu protection is concerned. Those who both support and oppose the projects are entitled to maintain their respective positions and for the trust beneficiaries, in properly convened general meetings, to continue to voice their support or opposition. Ultimately, where the majority of beneficiaries cast their votes at properly convened general meetings and through verifiable voting processes outside of hui is often where the outcomes will rest. That is also a reflection of the reality of s 17 of the Act, which includes in its list of objectives, the ascertaining and giving effect to the wishes of the owners.

[256] Even so, it is also appropriate that individual hapū interests are properly taken into account by the trustees when it comes to the identification, protection and enhancement of wāhi tapu. This is consistent with s2 of the Act and the Preamble. Indeed, it would be an anathema, to use an analogy, where within a tribal confederation, the majority of hapū decide that the wāhi tapu of another hapū are either non-existent or not worthy of protection to the extent that the affected hapū considers necessary. Section 17 requires that the Court to protect

minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority. The Court is also required to ensure fairness in dealings with the owners of any land in multiple ownership and finally to promote practical solutions to problems arising in the use or management of any land. Solutions, even those only temporary in nature, invariably involve degrees of compromise and cooperation. Where parties remain obdurately turned away from each other, then any meaningful solutions will continue to remain elusive.

[257] One final point. In preparing this long and complex decision, I was assisted by the succinct and well-argued submissions of all counsel. Even so, I regret the lengthy delay in finally issuing this judgment.

Decision

[258] Matthew Sword and Robert Warrington would have been removed for cause for breach of their duties had they been validly reappointed responsible trustees in 2016. As they had never been removed from office per s 240 of Te Ture Whenua Māori Act 1993, cl 2.1(d) of the First Schedule of the trust order does not apply.

[259] As a result of the adverse findings that have been made in this decision, I decline to reappoint Matthew Sword and Robert Warrington, following the election held in February 2019, per s 222 of Te Ture Whenua Māori Act 1993.

[260] Submissions are invited from counsel within two months from the date of this decision as to the term of their ineligibility for reappointment. To avoid doubt, the applications to reappoint Messrs Sword and Warrington as responsible trustees are dismissed. In the circumstances, I consider it appropriate that they also resign as advisory trustees within one month from the date of this judgment, or face removal.

[261] Submissions and evidence on relief, per s 73 of the Trustee Act 1956, in respect of any of the former trustees are invited from counsel within two months.

[262] The application to reappoint Marokopa Matakatea, Keri Hori Te Pa, Neddy (Ned) Nahona, Jonathan Procter, Kelly Tina Tahiwi, Mungu Kerehi Wi Warena as a result of the February 2019 election is adjourned until the disposal of any application for relief.

[263] The application to appoint Dean James Wilson, Pamela Anahera Winiata and Deanna Mere Hanita-Paki as responsible trustees is granted. To avoid doubt, their three year term as trustees is to commence from the date of this judgment.

[264] The Registrar, in concert with Mr Hemana, is directed to hold an election to fill any remaining vacancies, once any application for relief is finally determined. Any such election is to be held within three months of that decision. To avoid doubt, Mr Hemana is to remain as independent trustee until further order of the Court or until all aspects of the extant proceedings are concluded.

[265] Counsel may file submissions within two months on whether there should be any further inquiry into the trust funds that have been paid to any of the former trustees.

[266] The application for orders per ss 98C and 98D of the Act is dismissed.

[267] For the avoidance of doubt, applications A20180004434, A20180004854 and A20180006936 are now concluded and dismissed, save insofar as a file number is required for receiving submissions on any of the outstanding issues raised above.

[268] There will be no order as to costs.

These orders are to issue immediately, per r 7.5, Māori Land Court Rules 2011.

Pronounced at 5.15pm in Rotorua on Monday this 11th day of May 2020.

L R Harvey
JUDGE

SCHEDULE

Trustees meeting: 25 January 2015

1. Ten trustees were present: Mr Sword as chairperson, Messrs Warrington, Rudd, Matakatea, Hurunui, Henare and Dr Procter and Ms Taueki, Mrs Te Pa and Ms Tahiwi.[138] Reference was made to the "Lake Horowhenua Freshwater Clean Up Fund and Resource Consent Applications" where it was intended that application be made to the Ministry for the Environment ("MFE") for funding to support Lake restoration and improvement projects. Mr Sword confirmed that the initiative had come from HRC and outlined the overall intent to pursue projects in accordance with the Lake Accord that had been developed between the trust and the local authorities. The aim, it appeared, was to facilitate restoration of the Lake. The minutes record that a majority of the trustees were supportive of this overall approach. Running parallel with the funding applications were related resource consent applications.

2. The minutes record that Messrs Rudd and Henare, along with Ms Taueki and Wayne Hurunui, opposed the approach of the majority regarding, in particular, the approval of the HRC proposals in their letters dated 23 December 2014 and 23 January 2015:

    (a) Ms Taueki stated that she opposed the applications and maintained a right to do so including for the reason that there had been, she claimed, inadequate disclosure to and therefore limited input from the rest of the trustees who had been excluded from the initial discussions.

    (b) Mr Rudd asserted that the proposals for weed harvesting for example were to benefit local boat owners and rowers, not the trust beneficiaries and that there had been inadequate consultation.

    (c) Mr Henare expressed concerns over the quality of reports that the trust had received and raised doubts over the limited consultation that had preceded the applications.

3. All four trustees asked that their dissent be recorded. Messrs Rudd and Henare, and Ms Taueki, formally opposed the majority decision of the trust to enter into a "Memorandum of Partnership" with the Domain Board for, it would appear, similar reasons.

Trustees meeting: 3 May 2015

4. Nine trustees were present: Messrs Sword, Warrington, Rudd, Hurunui, Henare and Matakatea, Mrs Te Pa, Ms Tahiwi and Dr Procter.[139] The minutes record that "[c]opies of the application and letters of support from HRC and HDC were handed out". The minutes record that the trustees had approved the application by email and that the meeting resolved to endorse that earlier decision. The minutes confirm that Messrs Sword, Warrington and Matakatea and Dr Procter approved, along with Mrs Te Pa and Ms Tahiwi - a majority.

5. Messrs Rudd and Henare, along with Ms Taueki, maintained their opposition. Mr Rudd accused his colleagues of "collusion" echoing earlier sentiments that some trustees felt that they had not been privy to the discussions and the preparation of the application before it had been submitted. Mr Rudd reiterated that he opposed conduct that was

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138 Rudd Bundle, at 1-8
139 Ibid, at 9-16

undertaken "behind closed doors." Mr Henare supported these comments also expressing concern over the lack of inclusion of all trustees and considered that there should have been "more collaboration before being bound to things." He emphasised that his concerns centred on "due process".

6. Mr Sword, in reply, confirmed that the prime movers of the application had been himself, Dr Procter and Messrs Warrington and Matakatea. In addition:

   (a) Dr Procter congratulated Mr Sword for taking the initiative, noting that any projects to improve the Lake required funding.

   (b) Mr Warrington spoke in support of the application.

   (c) Mrs Te Pa considered the potential for funding a "wonderful opportunity" for the trust.

   (d) Ms Tahiwi also confirmed that she had spoken with Mr Sword and Dr Procter about the application and supported it without hesitation.

   (e) Mr Hurunui said that he had opposed the application but, having had the opportunity to reconsider, changed his views and was supportive of the initiative to seek funding.

7. When a vote was taken, Messrs Rudd and Henare recorded their dissent before leaving the meeting. It was also at this May 2015 hui that mention was made in the minutes of the "difficulties in achieving a quorum" for the "initial" AGM for the trust.

Trustees meeting: 16 August 2015

8. Six trustees were present: Messrs Sword, Hurunui and Warrington, Dr Procter, Mrs Te Pa and Ms Tahiwi.[140] The significant decisions made at this meeting were that the trust:

   (a) noted Mr Rudd's concerns over, in effect, trust policy and practice, while acknowledging some of the issues his correspondence raised had been dealt with before and any unresolved would be addressed through Court;

   (b) supported resource consent applications for the creation of a fish pass, for the harvesting of weeds on the Lake and the construction of boat ramps, parking and vehicular access for that purpose; and

   (c) agreed to becoming a party to the relevant archaeological protocols attaching to the consent process and associated works including enabling the local authority staff to have access to the Lake for those purposes.

Trustees meeting: 29 November 2015

9. Six trustees were present: Messrs Sword, Hurunui and Warrington, Dr Procter, Mrs Te Pa and Ms Tahiwi.[141] In the context of Te Mana o Te Wai, this hui was of significance due to confirmation that the trust had been successful in its funding applications. Dr Procter confirmed that, in total, the trust would be receiving approximately $1.2 million in funding for the various Lake restoration and improvement projects it had sought to implement as part of the Lake Accord agreement. This included a contribution of

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140 Rudd Bundle, at 17-21
141 Ibid, at 23-27

$175,000 from HRC and $15,000 from the trust in kind/time. The trustees then resolved to accept the funding proposal with the MFE and appoint Mr Matakatea and Mrs Te Pa trust signatories for any contracts.

10. The minutes then record:[142]

> Because concerns had been raised in the past about delegating authority to other than the Trustees, Matt said he had checked the Trust's rules and whilst Trustees could not delegated [sic] their elected roles, they could delegate the functions of the Trust to a person or committee. **The Governance Group would be under the full control of the Trust.** In terms of handling the funding, a requirement would be to set up a separate bank account for accountability and reporting purposes.
>
> (Emphasis added)

11. The formal resolution of the trustees then confirmed that the trust would establish a subcommittee with the responsibility to "oversee the implementation of the Te Mana o Te Wai project" and appointed Mr Hurunui, Ms Tahiwi and Dr Procter as members of the subcommittee, with Dr Procter appointed "Project Executive". The trustees also resolved to permit a representative each from HDC and HRC to participate as members of the subcommittee.

12. The minutes record that the triennial elections for the trust would be held on 12 March [2016] and that there would be an election subcommittee comprising Mrs Te Pa and Messrs Sword and Matakatea to oversee the process.

Combined meeting: 18 April 2016

13. From what are described as "Meeting Notes" of what appears to be a joint hui between certain Lake trustees, Messrs Sword and Matakatea and Dr Procter, and representatives from HDC and HRC, including the then Mayor, Brendan Duffy, the discussions included:[143]

    (a) The Te Mana O Te Wai Terms of Reference ("TOR") had been finalised and were awaiting adoption by the trustees;

    (b) Once approved, the TOR would go to Horizons Strategy and Policy Committee on 14 June 2016 where the Governance Group was welcome to answer any queries;

    (c) Mr Sword, as Interim Project Manager**,** had started preparation of the Community Engagement Plan which would assist with any presentation to HRC and also to HDC;

    (d) The final version of the full Project Plan was tabled as this had been approved by MFE with no significant changes. All major projects were accounted for financially;

    (e) The Project Plan was reasonably high level and more detail was needed. The Interim Project Manager would produce a plan with milestones for the next 12 months;

    (f) The project was now live, with Milestone one being Project Establishment, which was due for completion by 31 May;

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142 Rudd Bundle, at 25-26

143 Meeting Notes, 18 April 2016, Levin

(g) Regarding HDC support with finances, as David Clapperton had been unavailable, discussions had been held with Monique Davidson to see if HDC would provide the same assistance it gave the Lake Domain Board. Further discussions were needed and if that proceeded a Memorandum of Understanding could be prepared accordingly for consideration by the Governance Group before any decision was made;

(h) MFE funded on a milestone completion basis and the effect that would have on cash flow was discussed. Mr Sword was talking with MFE in terms of having cash available at commencement. There had been no decision on that as yet from MFE, but Mr Sword would let David Clapperton and Mr Duffy know the result of those discussions. If HDC did look after the finances, there would be a separate account.

14. The Governance Group terms of reference stated that its role was to "oversee the governance of the fund" by fulfilling the following objectives:

(a) Ensuring appropriate management practices are in place to deliver the agreed outcomes and milestone of the programme;
(b) Making effective decisions that will maximise expected benefit realisation;
(c) Ensuring the programme remains viable throughout its life cycle; and
(d) Ensuring the programme is successfully delivered according to objectives, scope, time, quality and cost with expected benefits on track for realisation.

15. The Governance Group also had 16 "roles and responsibilities" that included:

(a) Considering the advice of the trust;
(b) Reviewing any reports provided by the trust or Project Manager;
(c) Approving progress of the programme against objectives;
(d) Managing significant financial, community and other significant risks or variations to the budget or milestones and/or outcomes;
(e) Determining whether to approve subsequent work programmes and budgets; and
(f) Resolving strategic or directional issues.

16. The meeting also discussed the issue of cash flow and the extent to which the MFE and the HDC could resolve a sensible arrangement between themselves. According to Dr Procter's evidence, two days before this hui, the trust entered into a Deed of Funding with MFE on 16 April 2016, and that since then variations to the deed were made on 11 April 2017 and 19 February 2018.

Trustees meeting: 1 May 2016

17. The same six trustees from the last hui were present: Messrs Sword, Matakatea and Warrington, Dr Procter, Mrs Te Pa and Ms Tahiwi, with an apology recorded from Mr Henare.[144] Under the heading "Conflicts of Interest", Mr Sword advises his fellow trustees that the Governance Group, comprising three trustees out of 11, have "appointed" him "Interim Project Manager" as he had submitted an application for the position, which had been previously advertised. The minutes do not disclose any formal resolution of the trustees confirming the "decision" of the Governance Group to appoint Mr Sword to the position.[145] Dr Procter was also confirmed as "Project Executive".

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144 Rudd Bundle, at 49-52

145 With the quorum set at 6 for 11 trustees, Mr Sword would not have been able to participate and so the meeting for the purpose of approving his appointment would have been inquorate in any event.

18. Concerning Te Mana o Te Wai, the following is a summary of the relevant discussions and decisions made during the hui:

    (a) The TOR for the Governance Group were presented and approved where it was confirmed that they could only be changed by the trustees;

    (b) The Governance Group would report to the trust and would be a standing agenda item;

    (c) Mr Matakatea was appointed an advisor to the Governance Group;

    (d) Dr Procter, reporting for the Governance Group, confirmed that Mr Sword was the sole applicant for the position of Project Manager with four other expressions of interest being made; and

    (e) Funding would be managed through a separate account that would be "overseen" by the Governance Group with Dr Procter and the HDC Finance Manager as signatories.

Trustees meeting: 3 July 2016

19. Following an election, new trustees were added, and former trustees replaced. Along with the six regular attendees during this period, the trustees now included Ned Nahona, Caroline O'Donnell, Tim Tukapua and Kerehi Wi Warena.[146] The minutes record that no apologies had been received for Messrs Hurunui and Wi Warena, but all other trustees were present. The meeting resolved to appoint Mr Sword again as chairperson, Dr Procter as deputy, Ms Tahiwi as secretary and Mr Warrington as treasurer.

20. In the context of the project, the following statements and decisions were made:

    (a) The project was being led and run by the trustees;
    (b) The TOR for the Governance Group were amended to include oversight of financial reporting and health and safety issues;
    (c) The Governance Group had met five times and had appointed Mr Sword as Project Manager as he fulfilled the position criteria; and
    (d) Mr Sword would report monthly to the Governance Group and quarterly to the MFE. Governance Group reports would be brought to the trust meetings by Dr Procter.

21. Mr Sword also confirmed that he had had discussions with the trust's accountants, Fluker Denton and Company as to how the project finances would be incorporated into the trust's annual accounts.

Trustees meeting: 24 July 2016

22. Eight trustees attended: Messrs Sword, Wi Warena, Hurunui, Matakatea, Warrington and Nahona, Mrs O'Donnell and Dr Procter, with apologies tabled from Mrs Te Pa, Ms Tahiwi and Mr Tukapua.[147] The hui dealt with several matters including a presentation from Phillip Taueki on his ideas for the improvement of the Lake's water quality and environs, including, presumably, through litigation against HDC regarding the storm water. The trustees subsequently resolved to neither support nor oppose Mr Taueki's

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146 Rudd Bundle, at 53-60
147 Ibid, at 65-68

proceedings. The minutes recorded that the trust's position was to support the initiatives embodied in the Lake Accord.

23. In terms of conflicts of interest, the minutes record the roles of Dr Procter and Messrs Sword, Matakatea and Warrington as Domain Board members. Mr Sword also provided an update on the Lake restoration project, noting that several positions for the project's Cultural Monitoring Programme had been advertised.

Trustees meeting: 28 August 2016

24. Seven trustees were present: Messrs Sword, Hurunui, Matakatea and Warrington, Mrs Te Pa, Ms Tahiwi and Mrs O'Donnell, with apologies from Dr Procter and Messrs Nahona, Tukapua and Wi Warena. Lake restoration projects, which were now referred to under the heading Te Kakapa Manawa o Muaūpoko, were mentioned to by Mr Sword where he confirmed that progress was being made. That included reference to the trust's nursery and the idea of a wānanga for trust beneficiaries. Mr Sword mentioned the resource consent appeal process before the Environment Court. The meeting resolved to receive Mr Sword's milestone report for July 2016.

25. Earlier on, reference was made to the payment of trustees as part of the trust's Tangata Tiaki processes, where it was noted that a transparent process was needed.

Trustees meeting: 25 September 2016

26. Nine trustees were present: Messrs Sword, Hurunui, Nahona, Warrington, Tukapua and Matakatea, Mrs Te Pa, Ms Tahiwi and Mrs O'Donnell with apologies from Dr Procter and Mr Wi Warena.[148] Under the heading Te Kakapa o Muaūpoko Mr Sword gave an update on the projects that were in train, including the proposed nursery and a supporting business case, a reference to the glass eel project, along with confirmation that Milestone three of the project had been completed.

27. Mr Sword confirmed that "some funding had been moved between the milestones" with an accompanying variation to the funding agreement. The minutes also recorded under the heading "Lake Accord" that the resource consent appeals had been dismissed. There was reference to a formal resolution receiving the trust's financial report and approving a payment of $1,600.

Trustees meeting: 20 November 2016

28. Seven trustees were present: Messrs Sword, Nahona, Matakatea, Warrington and Tukapua; Dr Procter and Ms Tahiwi.[149] Under the heading Te Kakapa Manawa o Muaūpoko is the note that the Project Manager's report would be emailed to trustees. Reference was also made to core sampling, nursery and cultural monitoring along with a note that any funding underspend would be allocated to the next financial year. The minutes record that the financial report for the seven-month period ending 31 October [2016] was received. The trustees resolved to approve the creation of a fish pass on "the Hokio Weir" and the undertaking of weed harvesting and infrastructure that might be required in connection with harvesting.

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148 Rudd Bundle, at 69-72
149 Ibid, at 73-76

Trustees meeting: 13 December 2016

29. Ten trustees were present: Messrs Sword, Warrington, Matakatea, Wi Warena, Nahona and Tukapua, Dr Procter, Mrs Te Pa, Ms Tahiwi and Mrs O'Donnell.[150] The meeting was called to deal with litigation concerning Phillip Taueki and the trust nursery and the removal of Mr Taueki and others from the area due to historic and ongoing disputes. The trustees resolved to take legal steps to have Mr Taueki and Peter Heremaia trespassed from the Lake area, including any third parties associated with either of them, and that counsel would be instructed for this purpose. The minutes also record that there were no conflicts of interest while approving an invoice from Mr Warrington, the trust treasurer, for $3,100.25. Mr Warrington did not appear to vacate the meeting while this was done.

Trustees meeting: 19 February 2017

30. Seven trustees attended: Messrs Sword, Hurunui, Matakatea, Warrington and Wi Warena and Mrs Te Pa, with apologies tabled for Messrs Tukapua and Nahona and for Dr Procter.[151] Much of the meeting concerned the Domain Board relationship with the trust. Under 'Te Kakapa Manawa o Muaūpoko' the minutes confirm that Mr Sword reported on the project including reference to a clearing undertaken by Tatana Contractors, the nursery and glass eel initiatives and cultural monitoring. The minutes refer to the Lake Accord and proposals for a public walkway around the boundary and for fencing to impede stock.

Trustees meeting: 22 March 2017

31. Seven trustees attended this meeting: Messrs Sword, Warrington, Nahona and Matakatea, Dr Procter, Mrs O'Donnell and Ms Tahiwi with an apology provided for Mrs Te Pa.[152] Under the heading "Lake Accord" the trustees resolved to apply for further MFE funding in concert with HRC and HDC. Mr Sword gave a report on Te Kakapa Manawa o Muaūpoko, noting again that Tatana Contractors were "doing a really great job in assisting at the Nursery". The minutes also record a resolution of the trustees to demolish the nursery buildings at the Lake, given the long history of conflict and dispute with Mr Taueki.

Trustees meeting: 26 April 2017

32. Six trustees were present: Messrs Sword, Warrington, Wi Warena and Matakatea, Mrs O'Donnell an Ms Tahiwi.[153] Concerning Te Kakapa Manawa o Muaūpoko, the minutes record that the trust had sought $1.6 million in funding from the MFE with the intention that HRC would contribute $100,000 and the HDC a further $600,000 as their input into the projects. Once again, Mr Sword complimented Tatana Contractors for the work that they were doing in improving the general lake area, noting that the nursery building was nearly complete.

Trustees meeting: 24 May 2017

33. Messrs Sword, Warrington, Nahona and Matakatea were present at the meeting along with Mrs O'Donnell, Ms Tahiwi and Mrs Te Pa.[154] The minutes also record that the

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150 Rudd Bundle, at 77-79
151 Ibid, at 80-84
152 Ibid, at 85-88
153 Ibid, at 89-91
154 Ibid, at 92-94

project had been in operation for 12 months and that Mr Sword would be negotiation with the MFE for changes to some of the project timelines.

Trustees meeting: 19 July 2017

34. Seven trustees were present: Messrs Sword, Matakatea and Wi Warena, Dr Procter, Mrs O'Donnell, Ms Tahiwi and Mrs Te Pa.[155] The hui agreed that the annual accounts to 31 March 2017 needed to be updated "as the Te Mana O Te Wai ledgers needed to be included".

35. The meeting then discussed proposals for further applications for project funding:

    (a) Mr Sword reported that the trust had been invited to proceed to Stage 2 of the funding process known as the Freshwater Improvement Fund;

    (b) The trustees agreed that the current governance arrangements for future project oversight should be maintained;

    (c) The trustees invited Mr Sword to continue work on the funding application, given his success in getting the trust to stage 2, and he accepted this, noting his interest to continue as interim project manager until the trust decided otherwise; and

    (d) The trustees commended Mr Sword for the quality of his work with the project and in progressing the various funding applications and projects for the trust.

36. The trustees then resolved to appoint Dr Procter and Mr Warrington as signatories for any future funding agreements. The minutes record that Mr Sword "stood down from chair while vote was being cast" and that Dr Procter chaired the meeting for that purpose. It is assumed that Mr Sword remained present because there is no reference to him leaving the meeting at this point.

Trustees meeting: 27 July 2017

37. The seven trustees present were Messrs Sword, Warrington, Nahona and Matakatea, Dr Procter, Mrs Te Pa and Ms Tahiwi.[156] The meeting was called to consider the recently released report of the Waitangi Tribunal. The minutes also record the response of the trust to Mr Rudd's current application before this Court.

Trustees meeting; 30 August 2017

38. Seven trustees attended this hui: Messrs Sword, Warrington, Hurunui, Nahona and Matakatea, Mrs O'Donnell and Ms Tahiwi, with apologies tabled for Dr Procter, Mr Tukapua and Mrs Te Pa.[157] The minutes record in Mr Sword's report on the project, that milestone four had been completed, that Mr Sword was working on the budget for year two and that all projects "were tracking as planned". There is no formal resolution receiving or approving the report. There is however a resolution for the trust to register an interest is supplying manuka plants to the HDC where Mr Warrington "[Abstained]" from voting, presumably because he had an interest of some kind. There is also no reference to him leaving the meeting when the discussion was held, or the decisions taken.

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155 Rudd Bundle, at 96-100
156 Ibid, at 102-104
157 Ibid, at 105-107

Trustees meeting: 5 October 2017

39. Eight trustees were present for all or part of this meeting: Messrs Sword, Nahona, Hurunui, Wi Warena and Matakatea, Dr Procter, Mrs O'Donnell and Ms Tahiwi, with apologies recorded for Messrs Warrington and Tukapua and Mrs Te Pa.[158] The minutes also confirm that Mr Sword gave a report on Te Kakapa Manawa o Muaūpoko where he noted that a contract variation for year two was being negotiated, the eels were growing, Lake weed had been surveyed and that plants from the nursery were available for sale adding further income.

Trustees meeting: 26 October 2017

40. Eight trustees attended this hui: Messrs Sword, Warrington, Nahona, Tukapua and Matakatea, Mrs O'Donnell, Dr Procter and Mrs Te Pa.[159] The minutes record that there were no conflicts of interest. There is also a reference to a variation to the trust order on conflicts:

> With regard to the change to the Trust Deed, it had been explained to the Judge that all the Trustees would have interconnecting interests and therefore potential conflicts. The Trust Deed (11.1 (c)) wording had been changed to say "is otherwise directly or indirectly interested in the matter" which basically covered a financial interest. Did someone benefit financially. With regard to other matters, it was left up to the Trustees to decide if someone was deemed to have a conflict of interest. Completed.

41. A lengthy discussion then ensued under the headings "Lake Accord" and "Te Kakapa Manawa o Muaūpoko". Concerns were expressed about how the HDC were being represented on the Lake Accord, about how the HDC was meant to have undertaken certain tasks that had not been completed and that the Mayor "had been interfering in things" contrary to the Accord's objectives. The trust was still awaiting sign off from the MFE over proposed changes to project funding and milestones, while noting that, with the general election approaching, there may be some delay. Cultural monitoring and the glass eel projects were continuing in any case.

42. Regarding the AGM, the minutes record that, as the financial statements were still awaited from the trust's accountants, it was likely that there would be a delay in convening the hui-a-tau. The minutes also record that Mr Sword vacated the chair for the duration of a resolution being put by Mr Warrington to pay the former's invoice of $2,843.51. There is no record of Mr Sword leaving the meeting for this purpose.

Trustees meeting: 15 November 2017

43. Six trustees were present: Messrs Sword, Warrington and Nahona, Dr Procter, Mrs Te Pa and Ms Tahiwi, with apologies from Mr Tukapua and Mrs O'Donnell.[160] The meeting considered issues concerning the Fish and Game Council, the HDC and a new funding proposal that would also involve the Muaūpoko Tribal Authority and proposed enhancements to the planned walkway around the Lake. There was no other significant reference to the projects initiated under Te Kakapa Manawa o Muaūpoko, apart from mention of Mr Rudd's proposed appeal to the Māori Appellate Court.

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158 Rudd Bundle, at 109-112
159 Ibid, at 113-117
160 Ibid, at 119-122

Trustees meeting: 20 December 2017

44. Eight trustees were present: Messrs Sword, Nahona, Wi Warena, Matakatea, Hurunui and Tukapua, Mrs O'Donnell and Ms Tahiwi with apologies from Dr Procter and Mr Warrington.[161] Mr Sword, in presenting a progress report on the project, noted that due to no December meeting being held "the November/December 2017 Progress Report that he had circulated to Trustees had not been signed off". The financial report for that period would be circulated once it was available. Mr Sword also reported on progress with varying the funding agreement with the MFE. He further reported that certain activities had been deferred pending confirmation of the funding, that the trust-owned nursery had made a profit of $15,000 and that a full-time appointee as manager for the nursery would be advertised in due course.

45. The minutes record the trustees' decision to oppose Mr Rudd's appeal of this Court's judgment dated 19 July 2017 and the overdue nature of the AGM, compounded by the delay in having the annual accounts finalised. The hui-a-tau was set for 25 February 2018.

Trustees meeting:21 February 2018

46. Eight trustees were present: Messrs Sword, Nahona, Hurunui and Wi Warena, Dr Procter, Mrs Te Pa, Ms Tahiwi and Mrs O'Donnell, with apologies from Messrs Warrington, Matakatea and Tukapua.[162] In his report on Te Kakapa Manawa o Muaūpoko, Mr Sword confirmed that the variation of funding agreement for year two had been approved by the MFE. Mr Sword also reported on the glass eel project, Fresh Water Improvement Fund projects starting in March and the launch of a public exhibition.

Trustees meeting 21 March 2018

47. Eight trustees were present: Messrs Sword, Nahona, Warrington and Wi Warena, Dr Procter, Mrs Te Pa, Ms Tahiwi and Mrs O'Donnell, with apologies from Messrs Hurunui and Tukapua.[163] Under the heading Te Kakapa Manawa o Muaūpoko, Mr Sword reported that two applicants for the position of nursery manager had been received, including a brother of a trustee, Mr Nahona. Despite this conflict, which Mr Nahona himself had declared, the minutes record "Trust noted and happy for Ned to continue in his role on the selection committee". Earlier on page one, the minutes recorded that there were "no conflicts of interest." The minutes also confirm that Mr Sword's project report was formally received.

Trustees meeting: 12 June 2018

48. Seven trustees were present: Messrs Sword, Warrington and Matakatea, Dr Procter, Mrs O'Donnell, Ms Tahiwi and Mrs Te Pa.[164] The minutes state that the hui was called to discuss the Domain Board and the chairperson in particular. The trustees resolved to trespass the chairperson and the HDC Mayor, and to "put on hold" the memorandum of partnership between the trust and the Domain Board. The minutes also record that the trust endorsed the work completed on the walkway, harakeke site and T-drain at Lake Horowhenua. The trustees then resolved that they would not attend hearings of this Court due to security concerns.

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161 Rudd Bundle, at 123-127
162 Ibid, at 128-131
163 Ibid, at 132-134
164 Ibid, at 135-136