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

A20200005761
APPEAL 2020/4

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Oruanui 9 Block and Part Oruanui 10 Block, Lot 1 and 2 Deposited Plan 471989
I WAENGA I A *Between*	ERIC THOMAS HIRAU WALTERS, APERAHAMA WITHERS, STEVEN KORI TREVELYAN and MICHELLE HURAE VALIANTINA SATCHELL Ngā kaitono pīra *Appellants*
ME *And*	SUNNY WIKIRIWHI and RENEE DES BARRES Ngā kaiurupare pīra *Respondents*

Nohoanga: *Hearing*	4 November 2020, 2020 Māori Appellate Court MB 249-399 (Heard at Rotorua)
Kooti: *Court*	Deputy Chief Judge C L Fox (presiding) Judge P J Savage Judge S F Reeves
Kanohi kitea: *Appearances*	T Conder for the appellants J Koning for the respondents
Whakataunga: *Judgment date*	17 May 2021

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

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Hei tīmatanga kōrerō - Introduction

[1] On 16 June 2020, Eric Thomas Hirau Walters, Aperahama Withers, Steven Kori Trevelyan and Michelle Satchell filed an appeal against the order of His Honour Judge Coxhead removing them as trustees for both the Oruanui 9 Trust and the Oruanui 10 Trust ("the trusts"). Mr Walters also appeals against the order made by Judge Coxhead requiring that Mr Walters personally pay the sum of $128,475 to the Oruanui 10 Trust.[1]

[2] Oruanui 9 block is Māori freehold land and is comprised of 194.937 hectares of land. At the time of the Lower Court hearing there were 652 owners. The appellants are the trustees. Oruanui 9 is administered as an ahu whenua trust, known as the Oruanui Lands Trust. Oruanui 10 block is Māori freehold land and is 14.3483 hectares in size. At the time of the Lower Court hearing there were 643 owners. An area of 10.4058 hectares is administered as an ahu whenua trust, also known as the Oruanui Lands Trust. The trustees are the appellants. The remaining area of 2.4281 hectares is administered as a Māori reservation. The respondent Sunny Wikiriwhi is an owner in both the Oruanui 9 and 10 blocks. There are separate trust orders for the two ahu whenua trusts and the reservation is governed by its charter and the Māori Reservations Regulations 1994.

[3] The Māori Trustee was appointed custodian trustee for the Oruanui 9 block on 22 November 1994 recorded at 66 TPO 211 and the Oruanui 10 block on 1 November 1994 recorded at 66 TPO 209. The two ahu whenua trusts have two separate lists of owners and two separate trust orders.

[4] The respondents oppose the first appeal and also cross appeal seeking alternative relief or an increase in damages. The appeals were set down and heard at Rotorua on 4 November 2020.[2] Mr Conder appeared for the appellants and Mr Koning for the respondents.

Kōrerō Whānui – Background

[5] Prior to 2013, the Oruanui Lands Trust leased land to Gardon Limited who operated a dairy farm on the trust property. Gardon Limited also had a grazing lease over a block

[1] *Wikiriwhi v Walters* (2020) 232 Waiariki MB 212 (232 WAR 212).
[2] 2020 Māori Appellate Court MB 249-399 (2020 APPEAL 249-399).

known as the Corrigall Property, which in 2013 was to be sold by auction. The owner of the that property, Hugh Corrigall, wrote to the Māori Trustee and advised that it was for sale and that the Rateable Value of the property was $1,050,000.00 as at 1 July 2010. He also advised that the sale price was $1,000,000.00. He attached a Bayleys Information Profile to the letter and that also listed the Rateable Value.

[6] A couple of months before the auction of the Corrigall property, Gardon Limited's director (Ged Donald) phoned Mr Walters to tell him that the Corrigall property was for sale and that retaining access to the Corrigall Property was essential to its business. He did not think he could renew the lease with the trust if the Corrigall Property was sold to third parties. Mr Walters spoke to the other trustees and they went to look at the property.

[7] The appellants determined the Corrigall Property was a good investment but that the price might exceed the amount the Oruanui Lands Trust could afford. It was identified that the house on the property would be an unnecessary liability but that it could be subdivided and sold.

[8] Following discussions with Westpac Bank, the trustees found they could only borrow $650,000.00 to contribute to the purchase price. Two of the appellants (Ms Satchell and Mr Trevelyan) approached Mr Walters (who was a trustee) and asked him if he would be prepared to assist by buying the house on the Corrigall Property from the trust should they be the successful purchaser. He discussed the matter with his wife, who agreed to the plan. Mr Walters then approached the remaining trustees to tell them he was prepared to negotiate an agreement.

[9] At this point the evidence of the trustees was that a solicitor for the Oruanui Lands Trust, identified Mr Walters potential conflict. In the cross-examination of Mr Trevelyan in the Lower Court, he indicated that the advice came from Mr Kai Fong via Mr Peter Lewis. However, there is no other evidence that advice was given prior to the hui on 1 November 2013. Mr Walters claims he then engaged his own lawyer and the parameters for the deal were agreed to. The terms were that Mr Walters would pay one-third of the purchase price at auction (with the trustee's maximum bid limited to $900,000.00), and half the cost of subdividing the house property. These terms were not recorded in writing or in any meeting minutes of the Oruanui 9 Trust. The appellants claim that this arrangement was concluded

prior to the auction and that all the trustees agreed to this without Mr Walters being involved in discussions.

[10] The trustees, including Mr Walters, held a meeting on 1 November 2013 and resolved that Ged Donald attend the auction on their behalf as agent. The minutes record that the Westpac Bank had approved a loan of $650,000.00. There was no record of the arrangement with Mr Walters in the minutes. The Oruanui Lands Trust succeeded in purchasing the Corrigall Property at the auction on 1 November 2013 with a bid of $595,000. Ged Donald signed the sale and purchase agreement for the Oruanui Lands Trust.

[11] The trustees were sent a notice dated 12 November 2013 from Mr Walters updating them as to developments. He advised that David Rankilor (licensed surveyor) was working on the subdivision. Within a day, a preliminary subdivision plan was provided to Mr Walters and the trust lawyer on 13 November 2013.

[12] On 15 November 2013, an internal memorandum of the trust's lawyer, records *inter-alia,* that the trust had entered into the agreement to purchase land near Taupo. The Settlement date was 29 November 2013. The land was to be acquired as general land and loan instructions were received from Westpac Bank. The trust planned to subdivide the land. David Ranklior was working on the application for subdivision to be filed with the Taupo District Council. Once he lodged the application, the lawyers were to prepare an Agreement for Sale and Purchase. The memorandum records that it had been agreed by the trustees, Mr Walters and his wife that "the Walters are to purchase the house and an area of land surrounding the house from the trust."

[13] The trustees met again on 22 November 2013 and in an Addendum to the minutes it was noted that the Strategic Plan is to subdivide less than 5 hectares and sell to an interested party at "one third of the purchase cost of the Corrigall farm block. This transaction is to be activated immediately sub division is approved." The trustees approved the payment plan for the purchase of the Corrigall Farm and recorded that the final denominator in influencing the decision to purchase the property was the agreement with Mr Ged Donald, Gardon Limited's director, to restructure their lease. This was moved and seconded by two of the appellants and Mr Walters is recorded as voting in favour. The motion was carried.

[14] On 27 November 2013, the trust's lawyers met with Māori Trustee staff to identify what was required to complete the settlement and mortgage. An email summary of the meeting records that the balance of the purchase price was to be covered by a mortgage and possible additional funds from the trust. Mr Walters advised the Māori Trustee by email that the Trust had resolved to borrow $380,000.00. On the same day Westpac approved this sum for a term of 5 years.

[15] On 4 December 2013, Mr Walters met with David Ranklior to go over the land use and resource consent applications for a shed and the subdivision of the Corrigall block.

[16] On 2 December 2013, the trustees resolved to direct the Māori Trustee to complete the purchase of the Corrigall Property with the land to be retained as an investment. The resolution was signed by four of six trustees, including Mr Walters. Mr Walters advised the trust's lawyers of the resolution by email noting that one trustee (Bully Wikohika) did not sign as he had dementia and the other (Te Kanawa Wikiriwhi) had been absent and uncooperative. The transfer of the property to the Māori Trustee was subsequently registered against the title SA67A/69 on 11 December 2013.

[17] On 13 December 2013, Mr Ranklior sent an email to the Chairman of the Oruanui Lands Trust (for the attention of Mr Walters) requesting a cheque for $1,400.00 for the subdivision application to the Taupō District Council. In the application it was recorded that for the purposes of the mortgage, Lot 1 was to be held in a stand-alone entity with the ownership intended to be transferred to Mr Walters or his nominee, as it was intended to be the residence of Mr Walters, entirely separate from the Oruanui Farm.

[18] On 6 January 2014, the application for subdivision consent from the Taupo District Council was filed. The applicants were the Oruanui Lands Trust (it listed 4 trustees including Mr Walters) and the Māori Trustee and Mr Walters. Only the Māori Trustee and Mr Walters contact details were listed. The application records that "for the purposes of mortgages it is essential that the proposed Lot 1 be held in a standalone entity with the ownership intended to be transferred to Mr Walters or his nominee." The attached plan for Lots 1 and 2 lists as Mr Walters and Oruanui 9 and is dated December 2013 and a similar entry is to be found on the Easement Schedule.

[19] On 10 January 2014, the trustees met with their lawyer – Mr Peter Lewis. Minutes of the meeting record four trustees (the appellants) were in attendance, including Mr Walters. The trustees discussed the subdivision and they resolved to divide driveway costs with Mr Walters. The minutes do not record that Mr Walters left the room during these discussions.

[20] The minutes do record Mr Walters left the room at the point when discussions took place regarding the sale and purchase of Lot 1 to Mr Walters. The remaining trustees explained the arrangement to Mr Peters. They claim that at a hui prior to the purchase, they passed a resolution that he would pay 1/3rd of the purchase price for the Corrigall Farm and that this would represent the house and approximately 4 acres, regardless of what the price was at the time of auction.

[21] A file note prepared by Mr Peter Lewis dated 16 May 2014 later recorded that the arrangement between the trustees had been entered into prior to the auction but he was not advised of that until afterwards. At the trustee meeting in January 2014, he advised the trustees that because the arrangements were not recorded in writing, they were not bound by them. Despite that advice, the file note records the trustees "… regarded themselves as bound by the commitment to Tom Walters who had agreed to step up to the mark to ensure that the Trust was able to procure the land."

[22] At a further meeting of the trust on 17 January 2014, the minutes record that the paperwork for the subdivision had been completed. The decision to share the cost of the driveway was again approved. The trustees also approved payment for David Ranklior, the surveyor. Mr Walters was present, and he is not recorded as having left the meeting.

[23] On 7 February 2014, in an email to one of the trustees, the Māori Trustee raised the issue of a possible conflict of interest in the trust selling the proposed Lot 1 and improvements to Mr Walters. He noted that "typically the Trust would run a contestable process for the sale of land to ensure the competitive market value was attained for the land and improvements." As Custodian Trustee, the office had to be satisfied that the transaction met their obligations. This email was copied to Mr Walters and other trustees. In internal emails dated 7 February 2014, Māori Trustee staff discussed a possible conflict and that the trustee resolutions that had been provided to the office, and upon which the staff acted to purchase the Corrigall property, did not disclose the side-agreement with Mr Walters.

[24] On 8 February 2014, the trustees held another meeting. At that meeting there was a discussion concerning the subdivision drive being completed and the trees that had been cut. Half the costs were to be met by Mr Walters. He had purchased posts and wire to fence the driveway but asked the Trust to hire a tractor power rammer to complete the job. There is no record of Mr Walters leaving the meeting when these decisions were made. The minutes also record the trustees' discussion about how the purchase of the Corrigall Property was going to be presented at the AGM.

[25] On the same day, 8 February 2014, the trustees gave notice by email to the Māori Trustee that the trustees of Oruanui 9 and 10 Farm Trust wished to exit from under the Māori Trustee and stand alone as a trust. This decision is not recorded in the minutes of the trustee meeting held on that day. A response email from the Māori Trustee dated 10 February 2014, indicated there was no issue having the office removed as the Custodian Trustee. It was further noted that the office had an obligation to put forward a position regarding the subdivision. Those concerns were sent in a further e-mail dated 10 February 2014.

[26] On 9 February 2014, Mr Walters emailed the Māori Trustee disputing the position of the Māori Trustee and confirming the trustees would be seeking removal. An email in response, dated 10 February 2014, was sent by staff of the Māori Trustee to Mr Walters advising that in its view, Mr Walters had a perceived conflict of interest requiring further consideration. Staff also expressed concern that the process undertaken did not clearly alleviate concerns around that conflict, for example, there was "no proof that this transaction represented fair value to the trust." In a further email dated 10 February 2014 the Māori Trustee identified three issues concerning: (a) the status of the land, (b) the potential breach of the trustees' fiduciary obligations, and (c) the clear conflict of interest that Mr Walters would have if he took part in decision making relating to the subdivision and the potential breach of breach of cl 5 of the trust order. The office considered there would be a problem if the trustees ask the Māori Trustee as Custodian Trustee to sign off the sale of land to Mr Walters. The office suggested a meeting to discuss a way forward.

[27] On 14 February 2014, a meeting took place between the Māori Trustee and the responsible trustees. Mr Walters was the spokesman, provided background, and explained the nature of the agreement with the trust. It was agreed that Mr Walters would engage Martyn Craven of Telfer Young to provide an independent valuation of the home and sub-

division. Once received the trustees would decide sale price and whether directions should be sought from the Māori Land Court.

[28] Mr Walters met with the valuer on 26 February 2014 and an inspection was undertaken. However, a registered valuation was not completed by the valuer. Rather an Advisory Report from Telfer Young dated 27 February 2014 was completed. The respondents contend that the report was prepared in accordance with the specific instructions from Mr Walters. Mr Walters denied this. On the basis of the $595,000.00 purchase price, the valuer apportioned the purchase price between the two proposed lots. Lot 1 was valued at $267,000.00 and the balance in Lot 2 was valued at $328,000.00. The report points out that the house on the property was moderately dated with some maintenance work required. It was specifically advised by the valuers that the report was not to be relied upon by any other person for any other purpose. It was also noted that the report was not a registered valuation. By 31 March 2014, Mr Walters was claiming that the house was rapidly deteriorating and that he was planning on moving into the house on a part time basis so he could work on weatherproofing and vermin control.

[29] On 17 April 2014, the Māori Trustee filed an application with the Court seeking directions in relation to the status of the purchased land. It was its view the land was Māori freehold land and it sought confirmation from the Court.

[30] On the same day, Mr Walters and David Rankilor had a meeting with the Taupō District Council to progress the subdivision. On 23 April 2014, the trustees had a meeting in Rotorua. Mr Walters reported to the trustees about his meeting with the Taupo District Council. The meeting also resolved to "indemnify" the Māori Trustee and to make application to "re-invest assets to the Responsible Trustees and to follow through with the variation of trust order."

[31] On 15 May 2014, the trustees filed an application with the Māori Land Court to remove the Māori Trustee as custodian trustee for both blocks.

[32] The matter was set down only for Oruanui 9 and was heard on 6 June 2014 along with the application of the Māori Trustee.[3] As a result, cl 4(b)(i) was amended to permit the

[3] 99 Waiariki MB 89-97 (99 WAR 89-97).

trustees "to acquire any land or interest in land whether by way of lease, purchase, exchange or otherwise" and the safeguards of effecting such acquisitions through the agency of the Māori Trustee or the Māori Land Court were deleted. The circumstances and terms of the subdivision and transfer of Lot 1 to one of the trustees were disclosed by the Māori Trustee to the Court in supporting papers to the application but were not referred to during the hearing. The issue was not addressed in oral or written submissions of counsel. Identical orders were subsequently made for Oruanui 10.[4]

[33] It was noted in minutes of the trust, dated 3 July 2014, that David Rankilor was only "authorised to undertake work authorised by" Mr Walters. The subdivision consent was granted on 21 July 2014. It was discussed at a meeting of the trustees held on 4 August 2014 and the trust lawyers were instructed to complete the subdivision. However, issues emerged regarding easements and completing the survey work and these plagued the trust through until approximately August 2015. Mr Walters and the trust lawyers were charged with following up on these issues. The final cost of $15,000 (including GST) was approved for payment to Mr Ranklior on 23 October 2015. Mr Walters was present at this meeting of trustees and there is no record that he left the meeting when this sum was approved.

[34] On 3 September 2015, the transfer of the Corrigall property from the Māori Trustee to the Oruanui Lands Trust was registered by LINZ on the title. New titles were issued as CFR 642145 for Lot 1 and CFR 642146 for Lot 2 on 12 November 2015. The transfer of Lot 1 from the Oruanui Lands Trust to Mr and Mrs Walters was registered on 18 December 2015.

[35] Mr Walters and his wife signed a sale and purchase agreement for the subdivided land and house (Lot 1) for the price of $198,333.33. Mr Walters signed the agreement twice, as both vendor and purchaser. The document is dated 19 December 2013. Mr Conder submitted that the date was wrong, and it should have been dated 19 December 2015 as the agreement until then was merely a verbal agreement. However, that cannot be right because the transfer was registered on the 18 December 2015. A Notice of Sale and Change of Ownership was also sent on 18 December 2015 to the Taupo District Council and Waikato Regional Council recording that the date when the offer was accepted by Mr and Mrs Walters

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[4] 113 Waiariki MB 267-270 (113 WAR 267-270).

was 19 December 2013 and that the date of settlement and possession was 18 December 2015. The vendor (The Oruanui Lands Trust) is listed as responsible for the rates from settlement date until 30 June 2016.

[36] There is limited evidence of when Mr Walters finally paid for the land, but a sales amount of $189,082.00 was recorded in the trust's financial statements for the year ended 31 March 2016.

[37] A general meeting of the Oruanui Lands Trust was held on 28 May 2016. In the minutes of that meeting Ms Satchell described the process of purchasing the land and indicated that the valuation of the land was $1.6m, that Mr Walters provided the balance to purchase the land, and that he had purchased the house on 4 acres. Mr Walters was not recorded as having left the meeting while the purchase of the Corrigall property, the subdivision and the transfer of the house and curtilage to him and his wife was discussed.

Te Whakataunga o Te Kooti Whenua Māori – Judgment of the Māori Land Court

[38] The judgment of the Māori Land Court was issued on 29 April 2020.[5] Judge Coxhead found that Mr Walters breached cl 5 of the Oruanui 9 and 10 trust orders, and s 227A of Te Ture Whenua Māori Act 1993 (the Act) by participating and voting on matters in which he had a clear conflict of interest. In doing so, the learned judge adopted the principles from decisions of the Supreme Court and the Māori Appellate Court on what amounts to a conflict of interest.[6] He found that all the other trustees were also in breach of their duties as they failed to properly identify and manage Mr Walter's conflict of interest.[7]

[39] Judge Coxhead noted that removal of trustees requires a two-stage approach as per s 240.[8] He found that by failing to identify and manage Mr Walter's conflict of interest, all the trustees had failed to carry out their duties as trustees satisfactorily and should be removed.[9] To ensure that the trust would not be left without any trustees, the removal was made conditional on the appointment of new trustees.

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5 *Wikiriwhi v Walters* (2020), above n 1.
6 At [52]-[56], [61] and [100].
7 At [68] and [100].
8 *Rameka v Hall* [2013] NZCA 203.
9 *Wikiriwhi v Walters*, above n 1, at [69]-[71].

[40] Judge Coxhead also ordered Mr Walters pay equitable damages to the trusts of:[10]

(a) $101,000.00 being the difference between the purchase price paid on 18 December 2015 and the registered valuation of Mr McLaughlin, less the costs of improvement estimated at $200,000.00;

(b) $7,475.00 for unpaid rent for the period April 2014 to December 2015; and

(c) $20,000.00 being a half share of the estimated subdivision costs.

[41] Finally, and pursuant to s 24D of the Act, an order was made for interest to be paid at the prescribed rate of 5 per cent on $128,475 from the date of judgment.

Te Take Tuatahi – The First Issue

[42] The first issue on appeal is whether Judge Coxhead erred in finding that Mr Walter's obvious conflict of interest was not properly identified and managed at all relevant times by all trustees leading them to breach their trustee duties.

Summary of Submissions for the Appellants

[43] The Appellants submitted that the learned Judge erred by finding that the appellants breached their duties as trustees due to their mismanagement of Mr Walters' conflict of interest. The submissions distinguished between the actions of the trustees prior to the auction of the Corrigall Property and their subsequent actions while the subdivision of the land and sale of the house were finalised.

[44] Mr Conder acknowledged that both s 227A and cl 5 of the relevant trust orders recognise that a conflict of interest disqualifies a trustee from being involved in decisions that affect his or her interests. Referring to case law, counsel noted that this applies where there is a "real sensible possibility" that a trustee will face "a conflict between duty and interest." However, it was argued that both the Act and the trust orders also "recognise a pathway for trustees to avoid a conflict of interest by recusal." He then submitted that this applies to situations where:

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[10] At [75]-[88], [97]-[99] and [100].

> … trustee's personal interests are different from those of the beneficiaries of the trust, such that his or her duty to prioritise the interests of the beneficiaries may be put at risk (even subconsciously) by the possibility of personal advantage.
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> It follows that a conflict of interest exists where a trustee stands in a different position viz a particular decision or transaction than do the beneficiaries of the trust – that is where the trustee may obtain an advantage that is to the disadvantage of the other beneficiaries, whether directly or indirectly. … However, this situation will only last as long as there is genuine difference between the position of the trustees and beneficiaries. Once the rights between the trustee and the trust have been determined, the fact of a contractual relationship will not be disqualifying, because there will be no conflict between duty and interest. In the language of s 227A, there is no conflict when the decision no longer "affects" the contract in which the trustee is interested, that is where the decisions in question make no changes to the obligations and rights under that agreement. …
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> […]
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> In some cases, a conflict is only identified at a late stage – once discussions have already progressed. This can occur for a range of reasons. Where this is the case, counsel submits that it should not be fatal to the decision under discussion. Rather, those not affected by the conflict should be able to subsequently ratify the decision – confirming that they wish to proceed with the course of action – once the conflicted trustee is recused. In this case, even where the conflict influenced the earlier decisions, the trustees are able to make an independent decision that is not tainted by conflict. … counsel submits, any breach that would have otherwise existed will be cured.

[45] Mr Conder acknowledged that the conflict existed but only up until the point where Mr Walters and the trust settled the terms of their agreement prior to the auction in 2013. That conflict existed until the purchase price had been agreed. He argued that the trustees had appropriately managed the conflict up to that point. In the absence of any record of how the agreement with Mr Walters was negotiated, Judge Coxhead should have accepted the trustees' evidence that they did not include Mr Walters in these discussions.

[46] Mr Conder submitted that from the point terms were agreed, any conflicts were effectively resolved. After the auction, the trustees and Mr Walters were merely engaged in the implementation of the agreement.

[47] Counsel went on to submit that regardless of whether the conflict was appropriately dealt with, the remaining trustees' decision to affirm the contract, after receiving independent legal advice, cured any mismanagement of the conflict that preceded it.

[48] Following that, it was submitted, there was no difference between the position of Mr Walters and the beneficiaries of the trust as their interests were aligned. Any conflict was

managed by the recusal. That was the evidence on behalf of the trustees at hearing, even though the minutes of the trust do not support this.

[49] It was submitted that the Māori Appellate Court should find that Judge Coxhead erred in finding that there was a breach of trust, or if a breach did occur, it was cured by the independent affirmation of agreement by the remaining trustees in February 2014.

Summary of Submissions for the Respondent

[50] Mr Koning referred the Court to cls 5 and 6 of the trust orders, s 227A of Te Ture Whenua Māori Act 1993 and the interpretation of that section in current case law. The authorities demonstrate that Mr Walters had a conflict of interest once the decision was made to enter into an agreement with him. This occurred prior to the auction and by 30 January 2013, Mr Walters had a direct interest in the purchase of the Corrigall Property and the subsequent partition and transfer of Lot 1 to him.

[51] Mr Koning submitted that given Mr Walters involvement and direct interest in the outcome of the subdivision and sale of Lot 1, whether consciously or subconsciously, the existence of that interest influenced the decisions by the trustees concerning the purchase of the Corrigall Property, the subdivision into Lots 1 and 2, the failure to obtain a full valuation in order to apportion purchase price and the decision not to charge rent for his early occupation of the homestead. In his submission divided loyalties influenced the decisions made by the remaining trustees and they were clearly in breach when they allowed those divided loyalties to influence the outcome.

Te Ture – The Law

[52] Clauses 5 and 6 of the Trust Order state:

> **5 Personal Interest of Trustees**
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> Notwithstanding any general rule of law to the contrary no person shall be disqualified from being appointed or from holding office as a Trustee or as a representative of the Trust by reason of his employment as a servant or officer of the Trust or by his being interested or concerned in any contract made by the trustees PROVIDED THAT he shall not vote or take part in the discussion on any matter that directly or indirectly affects his remuneration or the terms of his employment as a servant or officer of the Trust or that directly or indirectly affects any contract in which he may be interested or concerned PROVIDED FURTHER THAT if a Trustee

> is employed by the Trust in any capacity whatsoever he shall not be paid any fees, costs, remuneration or other emolument whatsoever until same has been approved by the Court.
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> **6 Protection of Trustees**
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> In any case where any Trustee is of the opinion that any direction determination or resolution of a meeting of the trustees or general meeting of beneficial owners conflicts or is likely to cause conflict with the terms of this Trust or with any rule of law or otherwise to expose it to any personal liability or is otherwise objectionable then, and in reliance upon section 238 of Te Ture Whenua Māori Act 1993 and of the Trustee Act 1956 he may apply to the Court for directions in the matter PROVIDED HOWEVER that nothing herein shall make it necessary for him to apply to the Court for any such directions.

[53] Clause 5 of the Trust Deed mirrors s 227A of the Act which 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.

[54] The Supreme Court in *Fenwick v Naera* considered s 227A and the principles relating to conflicts of interest:[11]

> [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.
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> [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).
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> [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

[11] *Fenwick v Naera* [2015] NZSC 68 at [61]-[65].

> (consciously or subconsciously) and of influencing fellow decision makers (again consciously or subconsciously).

[55] *Fenwick v Naera* was referred to by the Māori Appellate Court in *Pook v Matchitt Matangareka 3B Block:*[12]

> [60] It is well settled that a trustee may not profit from their office. Such a profit can be made directly or indirectly. Moreover, the owners are entitled to the benefit of 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. While we have carefully considered Mr Bidois' submissions on this point, we find little attraction in them. This is because the conflicts inherent in a sibling relationship fall squarely within the parameters identified by the Court of Appeal and the Supreme Court in the *Naera v Fenwick* line of cases. Added to that, in the case of one trustee John Butler is the compounding factor of spousal conflict. Neither of these conflicts were properly managed consistent with best practice.
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> [61] We agree with Judge Reeves that it was obvious that serious conflicts of interest existed in relation to the Butlers and that they were not properly managed. The evidence confirms that significant sums of trust funds were being managed by the trustees where three of them had a conflict due to them being siblings. Those three trustees should never have been involved in the decision making surrounding the affected transactions as they had a direct personal interest in the outcomes. They should have been excluded from all discussion concerning the affected agreements and should not have been present when the matters were being discussed. It is simply insufficient to 'declare' a conflict and to then remain in the meeting of trustees or to have close family members who were also trustees remain.
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> [62] […] Any affected trustee should have been excluded from all meetings and all discussions on the engagement of relatives or close family members in this manner. These rules are set out in the trust order. It is fundamental that a trustee must understand and adhere to their terms of trust. If the trustees did not understand those provisions, or, if the trust would lose its quorum for decision making where too many trustees are conflicted, then it is incumbent on the trustees to seek directions from the Court. […]

Kōrerorero – Discussion

[56] It is well settled that a trustee may not profit from their office. Owners are entitled to the benefit of decision making by trustees untainted by conflicts of interest.

[57] Mr Conder acknowledges that at the time when two of the trustees approached Mr Walters to consider assisting with the purchase of the Corrigall Property, Mr Walters had a direct interest in the outcome and therefore a conflict of interest. However, he submitted, this conflict only lasted until terms were agreed. Everything that followed to progress the

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[12] *Pook v Matchitt – Matangareka 3B Block* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167) at [60]-[61].

various transactions did not require a conflict to be managed, because the interests of the trust, its beneficiaries and Mr Walters were aligned once terms were agreed prior to the auction.

[58] The problem with this analysis is that Lot 1 did not exist at that time and there was no guarantee that the trustees would be successful at auction or that Mr Walters himself would keep to the oral agreement, if not happy with the outcome of the auction. Furthermore, there was no certainty that subdivision consent would be obtained, and there were other matters such as fencing and grading the accessway that were fundamental to completing the agreement with Mr Walters.

[59] Therefore, there could not have been a legally binding arrangement prior to the auction, nor after the auction, until there was a written agreement. Neither party had sufficient certainty of terms for the arrangement. Given the legal advice received by the trustees following the auction, they should have identified and managed Mr Walters' obvious conflict of interest more appropriately than was done.

[60] Instead, Mr Walters participated in every trustee decision material to progressing his purchase of Lot 1. As Mr Koning pointed out:

(a) On 1 November 2013, Mr Walters participated in discussions of the trustees and he voted with them to purchase the Corrigall Property.

(b) Mr Walters also participated in and voted on the decision made on 22 November 2013, for the trust to subdivide the property and transfer Lot 1 to him.

(c) On 19 December 2013, the Agreement for Sale and Purchase was finalised and Mr Walters signed as vendor and purchaser.

(d) Between 19 December 2013 and December 2015, Mr Walters continued to participate and vote in numerous meetings of the Oruanui 9 Trust on issues relating to the subdivision costs of Lot 1 including the survey, valuation, driveway access, and easements.

(e) Mr Walters and the other trustees were unable to explain why the minutes of these meetings record his involvement but do not record that he ever recused himself from the meetings.

[61] The fact that Mr Walters and the other trustees were able to purchase the Corrigall Property for a better price than expected cannot be relied upon to justify their failure to adhere to their trustee duties to manage Mr Walters' conflict of interest. Those duties did not cease once the property was acquired but continued and were required to be exercised throughout all the various transactions that followed including the subdivision, valuation, sale and purchase of Lot 1, along with the costs of the subdivision, driveway, fencing and survey.

[62] Although the trustees have submitted that Mr Walters' actions benefitted the trust, he was clearly conflicted and the remaining trustees did not manage that conflict in accordance with cl 5 of the trust order, s 227A, case law, and in accordance with best practise. This failure was a fundamental breach of trust.

[63] We decline to uphold the appeal on this ground.

Te Take Tuarua – The Second Issue

[64] The second issue on appeal is whether Judge Coxhead erred in removing the trustees from office pursuant to s 240 without separately considering whether removal was warranted.

Summary of Submissions for the Appellants

[65] If this Court upholds the finding of the Lower Court that there was breach of trustee duties due to the failure to manage Mr Walters conflict of interest, Mr Conder submitted the existence of that conflict was not sufficient on its own to warrant removal. Rather it provided the Court with the jurisdiction to consider the question of removal, having regard to all the circumstances. He contended that the essence of the test for removal pursuant to s 240 requires that the Court determine whether the continuation of the trustee in that role will be detrimental to the beneficiaries. He said:

> It is not a punitive test, but rather a protective one. The Court will need to measure the scale of its breach, and its deliberateness against the general conduct and character of the trustees. It will need to consider the interests and wishes of the beneficiaries and the ability of the trustees to carry out their duties in the future and determine whether the circumstances of the breach require the Court to interfere with the beneficiaries decision to empower the responsible trustees to act for them or whether the trustees tenure should continue.

[66] Mr Conder submitted that Judge Coxhead misdirected himself because he limited his inquiry to whether they had failed to perform their duties satisfactorily. He did not assess whether the appellants would be suitable trustees in the future.

[67] Finally, Mr Conder noted that the appellants were chosen by election. Each has contributed a number of years of effort into their roles as trustees.

Summary of Submissions for the Respondents

[68] Mr Koning referenced the evidence and very succinctly submitted that the removal of the trustees was justified and in accordance with the principles of existing case law. Therefore, there is no basis for the Māori Appellate Court to interfere with the exercise of the discretion by Judge Coxhead to remove all the appellants for breach of trust.

Te Ture – The Law

[69] We note the trust order at cl 8 provides that the Court may, for sufficient cause, at any time remove a trustee from office. In addition to the grounds upon which a trustee might be removed by the Court, the trust order provides that it is sufficient cause for removal if, *inter alia*, a trustee has failed to carry out the duties of his office satisfactorily.

[70] Section 240 as it was at the time of the decision of the Lower Court provides for the removal of trustees:

> **240 Removal of trustee**
>
> (1) The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied that—
>
> (a) 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.

[71] The Appellate Court in *Apatu v Puna – Owhaoko C Trust* has described the general duties of trustees as:[13]

> (a) A duty to acquaint themselves with the terms of trust;
>
> (b) A duty to adhere rigidly to the terms of trust;
>
> (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, 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: *Garrow and Kelly Law of Trusts and Trustees* (sixth edition, pp 523-582 inclusive).

[72] In *Rameka v Hall*, the Court of Appeal identified a two-stage approach for determining whether trustees should be removed under s 240, firstly, have the trustees failed to carry out their duties satisfactorily and secondly, should the Court exercise its discretion to remove the trustees.[14]

[73] The Māori Appellate Court in *Taurua v Harawira - Te Tii Waitangi A* said:[15]

> The jurisdiction to remove a trustee requires unsatisfactory performance in an objective sense as a jurisdictional precursor, and then the exercise of a discretion by the Court to decide whether or not to actually remove. The discretion is to be exercised in accordance with the well-known provisions in Te Ture Whenua Māori Act 1993 (including the Preamble).

[74] The Court in *Re Perenara* said for an appeal against an exercise of judicial discretion to succeed, an appellant must show that the judge acted on a wrong principle or failed to take into account some relevant consideration or took into account some irrelevant matter or was

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[13] *Apatu v Puna – Owhaoko C Trust* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34) at [16].
[14] *Rameka v Hall* [2013] NZCA 203.
[15] *Taurua v Harawira - Te Tii Waitangi A* [2017] Māori Appellate Court MB 328 (2017 APPEAL 328) at [13].

plainly wrong. It is well settled the Appellate Court will not substitute its view of the case where the Lower Court has complied with the law.[16]

Kōrerorero – Discussion

[75] Determining whether the trustees have performed their duties satisfactorily is the first step in any decision of whether to remove. The word "satisfactorily" requires *inter-alia* adequately fulfilling the requirements of the office of a trustee. Those requirements include adhering to trustee duties. These duties have been listed in a number of decisions including in *Apatu v Puna – Owhaoko C Trust.*[17] Judge Coxhead found that by failing to manage the conflict of interest of Mr Walters, all the trustees had failed to carry out their duties as trustees satisfactorily. We agree and consider that his findings are consistent with the case law on this issue.

[76] We also find that Judge Coxhead did turn his mind to the issue of whether the trustees' failure to perform their duties satisfactorily warranted their removal as his decision expressly applies the test set out in *Rameka v Hall* by the Court of Appeal.[18]

[77] On any objective assessment of the evidence, removal was an appropriate remedy in respect of the failure by the trustees to perform their duties satisfactorily. Judge Coxhead exercised his discretion to remove the trustees and this Court will not interfere with that discretion unless we are satisfied that he failed to take into account relevant considerations, or that he took into account irrelevant considerations.

[78] We do not agree that this Court should overturn the removal of the trustees on the basis that, the deal was a good one, that it was entered into for what the trustees say were the right reasons, that the trustees have generally performed well in their role, that the owners support the trustees and the trustees do not present a real risk of ongoing negligence in that role. All of these matters were put in evidence and submissions before the learned judge, yet he was not persuaded that the trustees' failure to perform their duties satisfactorily should be addressed in some other way. The removal of the trustees was consistent with his jurisdiction to do so.

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[16] *Re Perenara* [2004] 10 Waiariki Appellate MB 233 (10 AP 233) at 240.
[17] *Apatu v Puna – Owhaoko C Trust* [2010], above n 13.
[18] *Rameka v Hall* [2003], above n 14.

[79] Furthermore, there is nothing that qualifies s 240 in the manner submitted by Mr Conder. Adopting his approach would require an inquiry into the entire administration of the trust by the trustees, their general performance, and the degree of support they have from the owners. If such an inquiry were required, it would have been expressly provided for in the legislation.

[80] We decline to uphold the appeal on this ground.

Te Take Tuatoru – The Third Issue

[81] The final substantive issue before this Court is whether Judge Coxhead erred in his assessment that equitable damages should be awarded in this case. If so, was the amount of damages awarded sufficient to compensate the trust, or alternatively, should an account for profit be ordered?

Summary of Submissions for the Appellants

[82] Mr Conder notes that the trustees abide the decision of this Court on the issue of damages and that Mr Walters is the only appellant challenging the judgment in this respect. Mr Walters argues that the subdivision and sale of Lot 1 to him was for fair value and no compensation should be payable.

[83] Judge Coxhead considered that Mr Walters should pay the difference between what he and his wife paid for Lot 1 on the date of transfer and the value of the property. To assess the value, he referred to the evidence of a registered valuer (Mr McLaughlin) by Mr Koning's clients during the hearing. He was engaged by the respondent on 16 April 2019 to provide a retrospective report on Lots 1 and 2 and that report was completed on 31 May 2019.

The market value of Lot 1

[84] The valuer, Mr McLaughlin determined that the market value of Lot 1 as at 18 December 2015 was $535,000.00. Judge Coxhead deducted what he thought was the likely sale price of $198,333.33 and the costs of Mr Walter's improvements, assessed at $200,000.00. He rounded the sum to $101,000.00 to pay.

[85] Mr Conder's submission is that Judge Coxhead erred at law, and that the point at which terms were agreed prior to auction should have been the date for assessing the value. This is the relevant point in time to determine if the price was fair. Mr Conder did not call any expert valuation evidence but pointed to his cross-examination of Mr McLaughlin who appeared to accept that the value of Lot 1 may have been approximately $353,500. By then deducting the purchase price that Mr Walters and his wife paid and the costs of improvements, Mr Conder submitted that the price paid for Lot 1 was fair.

[86] With respect to the rental payment, given the condition of the dwelling and the fact that the trustees did not want to be involved in renting, it was also submitted that no rental should have been ordered.

[87] Mr Conder concluded that payment to the trust was fair and no compensation is warranted, other than the payment of subdivision costs.

[88] On the issue of granting an account for profit, Mr Conder submitted that account for profit remedy is discretionary. The Court must be satisfied that it is an appropriate award and not unduly punitive. It must properly assess causation, both in terms of the profit that flows from the breach and those that do not. There must be proportionality between the remedy and the wrongdoing. The length of time that has elapsed is also relevant as are any additional contributions that the errant fiduciary has made. Taking these matters into account it would be a clear injustice and punitive to order an account for profit in this case. A better remedy would be to require Mr Walters to pay what would have been a fair price at the time the agreement was reached adjusted by interest.

Summary of Submissions for the Respondents & Cross-Appellants

[89] Mr Koning submitted that the Court erred in holding that Mr Walters was entitled to a $200,000.00 deduction as no supporting evidence was ever produced by him to verify his expenditure.

[90] In the alternative, Mr Koning's clients elected for an account for profit, despite not making such an election before the Lower Court. He submitted the starting point for calculating the profit was the difference between the purchase price paid and the registered valuation on 18 December 2015. On that basis the profit to Mr Walters was $301,000.00

and that sum should be disgorged by him. Mr Walters, he submitted, provided insufficient evidence for the Court to make a rational approximation of any allowance as an errant fiduciary.

Te Ture – The Law

[91] There are three primary remedies available where a breach of fiduciary duty has occurred: proprietary remedies, equitable compensation and an account of profits.[19]

[92] An account of profits is an equitable restitutionary remedy. Its source is the equitable principle that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit.[20]

[93] Once it has been determined an account for profits is required, the Court must:[21]

(a) Determine how much of the defendant's gain is truly profit (that is, after allowing for costs and expenses); and

(b) Make an apportionment so as to arrive at the profits attributable to the wrongful conduct.

[94] The Court can also make an allowance for the defendant's time, trouble and expertise if the profit is attributable to the fiduciary's effort.[22] As noted by Tipping J in *Chirnside v Fay*:[23]

> The principle which has developed from *Boardman v Phipps* and subsequent cases is that there is a presumptive requirement that the errant fiduciary disgorge all profits made by dint of the breach. There is room, however, for the Court to exercise its discretion to allow the errant fiduciary some measure of allowance or recompense for effort, skill and enterprise in making these profits, if it would be unjust not to do so. All the relevant circumstances must be taken into account. The more reprehensible the fiduciary's conduct the less inclined the Court may be to make any allowance or be liberal in the amount awarded. The essence of the exercise is to define fairly the profit for which the fiduciary is required to account.

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[19] *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5 at [63].
[20] *Urwin v Te Kura - Te Reti B and Te Reti C Block* (2014) 74 Waikato Maniapoto MB 277 (74 WMN 277) at [53].
[21] Andrew Palmer (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [31.4.1].
[22] At [31.4.1].
[23] *Chirnside v Fay* [2007] 1 NZLR 433 (SC) at [122].

[95] The Privy Council in *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* confirmed compensatory and disgorgement damages are generally almost always inconsistent. An election is required between them:[24]

> Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant.

Kōrerorero – Discussion

[96] We consider that the appeals concerning the amount of equitable compensatory damages to be well founded. First, there was not any sufficiently reliable valuation evidence of the state of the Lot 1 house and curtilage prior to its sale so that a proper assessment of any improvements completed by Mr Walters could be made. We note that the valuer for the respondents was not able to enter the house to assess improvements. Secondly, there was insufficient evidence of any significant expenditure by Mr Walters on improvements before the Lower Court that would warrant the $200,000.00 deduction.

[97] Therefore, both the appeal and cross appeal on this issue are partially upheld and those matters will be remitted back to the Lower Court for full consideration of the legal and factual issues.

Outstanding Matters

[98] Finally, Mr Koning noted that the appellants were removed as trustees pending the Registrar convening a general meeting of Oruanui 9 Trust to elect new trustees. There has been delay and Mr Koning submitted that an independent trustee should be appointed as an interim measure and that this would be in the best interests of the beneficiaries.

[99] We acknowledge there is merit in this submission but note that the Lower Court is in the best position to consider and appoint an independent responsible trustee.

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[24] *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514 (PC); *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) at 521.

Whakataunga – Decision

[100] The appeal is dismissed in terms of issues 1 and 2 in accordance with s 56(1)(g).

[101] The appeals are partially upheld with respect to the order for equitable compensatory damages. The Lower Court order is revoked pursuant to s 56(1)(b). The issue is remitted back to the Lower Court for a full rehearing of the evidence and submissions of the parties pursuant to s 56(1)(e).

[102] The Lower Court is directed to appoint an independent responsible trustee for the management of the block until an election of new trustees is conducted at a duly called meeting of owners. That meeting of owners is to be facilitated by the Māori Land Court with the independent trustee appointed.

[103] The Case Manager is directed to send a copy of this judgment to all parties.

I whakapuaki i te 1.00 pm i Turanganui-a-Kiwa, tekau mā whitu o ngā rā o Haratua i te tau 2021.

C L Fox	P J Savage	S F Reeves
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**