IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT

A20180005980
APPEAL 2018/13

A20180006063
APPEAL 2018/15

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Matangareka 3B Block
BETWEEN	TUIHANA POOK First Appellant
AND	RICHARD BUTLER, THOMAS BUTLER AND STEWART BUTLER Second Appellants
AND	EDWARD MATCHITT Respondent

Hearing:	6 November 2018, 2018 Māori Appellate Court MB 558-603 (Heard at Rotorua)
Court:	Deputy Chief Judge C L Fox (Presiding) Judge L R Harvey Judge S R Clark
Appearances:	S Webster for First Appellant C Bidois for Second Appellants T Wara for Respondent
Judgment:	12 April 2019

JUDGMENT OF THE COURT

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Introduction

[1] Edward Matchitt sought a review of the Matangareka 3B Trust, the enforcement of trust obligations and the removal of two trustees. Mr Matchitt claimed that the trustees had failed to manage their conflicts of interest with the result that they had profited from their office and had not acted in accordance with their duties. He also sought an injunction to prevent the trustees making payments to close family members, to entities where they held a financial interest and from performing forestry related contracts.

[2] After several hearings, the Māori Land Court issued a final judgment on 12 June 2018 finding that the trustees had failed to properly manage conflicts of interest and had breached their duties sufficient to warrant removal. Orders were also made rescinding the forestry contracts and compelling the former trustees to repay significant funds to the trust.

[3] A former trustee, Tuihana Pook, now brings the first of two appeals against that decision. Mrs Pook claims that the principles of natural justice were breached because she was not properly notified that findings could be made against her and was not provided with a proper opportunity to address the allegations. Mrs Pook argues that the Court below erred in finding she was in breach of her duties and in not granting her relief from liability.

[4] Richard Butler, Thomas Butler and Stewart Butler also filed an appeal and did so out of time. They make three principal points. First, the finding there was a conflict of interest was wrong. Second, the finding that the trustees failed to properly manage that conflict, due to their relationship as siblings, was also in error. Third, they contend that the Court below rescinded the forestry contracts without justification and failed to consider relevant matters, including trustee indemnity and relief, before ordering repayments to the trust.

[5] We are advised that, earlier this year, one trustee, Mrs Robson passed away. Ngā mihi aroha ki a ia, me tōna whānau hoki.

Background

[6] Matangareka 3B is Māori freehold land 1,967.4095 hectares in area. It was created by partition order on 6 May 1929.[1] There are currently 1,623 owners holding 4,654.00 shares.

[7] The land is administered by the Matangareka 3B Ahu Whenua Trust, which was constituted on 21 January 1982. The original trustees were Renata Te Moana, Hone Waititi, Tawhai Waenga, Tuhi Callaghan, Harold Helmbright, Edward Callaghan, Perenu Callaghan, John Waenga and Hoani Callaghan.[2] At the time of the original proceedings, the trustees were Maura Robson, Richard Butler, Thomas Butler, Moana Waititi, Stewart Butler and Tuihana Pook.[3] The current interim trustees are Goldsmith Trustees Matangareka Ltd and Christopher Marjoribanks.[4]

[8] On 22 July 1985, a forestry lease was granted by the then trustees to Matangareka Forest Ltd for a term of 75 years.[5] On 14 June 2016, five months prior to the proceedings being issued, the lease was surrendered by the trustees for a payment of $1,000,000 plus GST.[6]

[9] Eastbay Woodlots Ltd ("EWL") and Eastern Contracting Ltd ("ECL") were two companies relevant to the proceedings. Richard Butler (known as John) was the sole director and shareholder of ECL and Thomas Butler (known as Tom) was the sole director and

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1 27 Ōpōtiki MB 61 (27 OPO 61)
2 58 Ōpōtiki MB 360 (58 OPO 360)
3 104 Waiariki MB 1-7 (104 WAR 1-7). Sadly, Mrs Robson passed away on 8 March 2019
4 165 Waiariki MB 135-137 (165 WAR 135-137)
5 Title Notice TN 16169. Matangareka Forest Ltd was later amalgamated to become Matangareka Forest (No2) Ltd. See Title Notice TN 23119
6 Title Notice TN 24376

shareholder of EWL. As foreshadowed, both men were trustees along with their brother Stewart.

Māori Land Court proceedings

[10] The application was filed on 16 November 2016. It was initially heard on 18 November 2016 before Judge Savage, who issued an interim injunction freezing the trust bank accounts and preventing the contracting and logging companies from entering the trust property.[7] The application was then heard before Judge Reeves on 24 November 2016 and she continued the injunction and adjourned the case pending receipt of further information.[8] The learned judge issued a preliminary judgement on 21 December 2016 finding that the trustees acted in breach of trust through their failure to properly manage the conflicts of interest in the award of forestry contracts to EWL and ECL. Given an admission by the trustees, the Court also found that they acted in breach of trust in receiving fees and payments without authorisation. The injunction was also continued.[9]

[11] A final hearing was held on 8 February 2017.[10] Following discussions regarding practical ways to safeguard the business of the trust in the meantime, it was agreed that the existing trustees would step aside to enable an independent responsible trustee to be appointed, together with an advisory trustee or trustees. The trust's counsel also indicated that an appeal against the preliminary judgment would be sought. By this time Mrs Pook had resigned.

[12] Directions were issued on 24 February 2017, suspending the existing trustees pending resolution of the substantive issues, and appointing interim trustees.[11] On or about 16 May 2017, a further decision was issued addressing the issue of leave to appeal the preliminary decision.[12] The Court concluded that it was in the interests of justice and the parties for a final decision on all remaining substantive issues to be delivered before any appeal was heard. Leave to appeal was therefore declined.

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7 153 Waiariki MB 59-72 (153 WAR 59-72). A variation to the injunction was allowed for ten loads of logs already overdue. 153 Waiariki MB 59-72 (153 WAR 59-72) at 70-72

8 153 Waiariki MB 127-202 (153 WAR 127-202)

9 *Matchitt v Butler – Matangareka 3B* (2016) 154 Waiariki MB 261 (154 WAR 261)

10 159 Waiariki MB 17-93 (159 WAR 17-93)

11 The orders appointing the interim trustees were subsequently finalised on 11 July 2017. See 165 Waiariki MB 135-137 (165 WAR 135-137)

12 *Butler v Machitt – Matangareka 3B* (2017) 163 Waiariki MB 10 (163 WAR 10)

[13] A second judgment was issued on 14 December 2017 dealing with whether the trust's forestry contracts with EWL and ECL should be rescinded.[13] The Court concluded that entering into the contracts was a breach of the statutory scheme regarding conflicts under s 227A of the Te Ture Whenua Māori Act ("the Act") and that there were several factors which weighed in favour of rescission. They included that most trustees did not approve awarding the contracts, that the trustees proceeded with awarding the contracts in the face of legal advice to the contrary and because of concerns expressed by the beneficiaries about trustees' conflicts of interest, and the failure to seek directions from the Court. Judge Reeves found it was in the best interests of the trust for the contracts to be rescinded.

[14] As foreshadowed, a final judgment was then issued on 12 June 2018.[14] The decision considered further allegations of breaches of trust in relation to decisions of the trustees in the period from June to November 2016, following receipt by the trust of a $1 million pay-out for settlement of a forestry lease. The Court considered whether the trustees breached their obligations in relation to the purchase of shares and assets in Kotahitanga Log Haulage Ltd ("KLHL"), the advancement of funds to KLHL and ECL, the payment of trustee fees and honorariums, and other payments made to partners of trustees. The Court also considered whether the trustees were entitled to relief, whether the trustee obligations should be enforced and whether the trustees breached their duties sufficient to warrant their removal. Judge Reeves concluded there were several breaches of trustee obligations and that all trustees had failed to perform their duties satisfactorily, sufficient to warrant their removal. She granted relief per ss 72 and 73 of the Trustee Act 1956 in respect of trustee fees, but otherwise found that the trustee obligations should be enforced where there was demonstrated loss to the trust.

[15] Orders per ss 236, 237 and 238 of the Act were then made for repayment to the trust as follows:[15]

(a) John Butler to pay $20,000 (twenty thousand dollars);

(b) Richard John Butler, Thomas Henry Butler, Stewart James Butler, Tuihana Pook, Maura Hiona Robson, and Moana Parehuia Waititi to pay $40,000 (forty thousand dollars);

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13 *Matchitt v Butler – Matangareka 3B* (2017) 177 Waiariki MB 170 (177 WAR 170)
14 *Matchitt v Butler – Matangareka 3B* (2018) 189 Waiariki MB 74 (189 WAR 74)
15 *Matchitt v Butler – Matangareka 3B* (2018) 189 Waiariki MB 74 (189 WAR 74) at 106

(c) Richard John Butler, Thomas Henry Butler, Stewart James Butler, Tuihana Pook, Maura Hiona Robson, and Moana Parehuia Waititi to pay $50,000 (fifty thousand dollars).

Procedural history of the appeals

[16] The appeal by Mrs Pook was filed on 13 August 2018. On 17 August 2018, the second appellants, Richard Butler, Thomas Butler and Stewart Butler, filed their appeal. Included with the second appeal was an application for leave to appeal out of time. The Court has discretion to grant leave to appeal out of time pursuant to s 58(3) of the Act. In determining whether to grant leave, the overarching consideration is where the interests of justice lie.[16] However, the Court is also likely to consider a range of relevant factors.[17] Having reviewed the submissions of counsel and the authorities on the point, we accept that it is in the interests of justice that the application for leave to appeal out of time is granted.

[17] On 14 September 2018, counsel for Mr Matchitt filed a notice of intention to appear in relation to both appeals. Mr Matchitt indicated his support for the appeal of Mrs Pook but his opposition to that filed by the Butlers. The appeals were set down and a coram appointed by the Chief Judge on 5 September 2018,[18] followed by the issue of initial directions on 20 September 2018.[19] The parties were also asked to file submissions on whether Judge Harvey should recuse himself from this appeal, given his membership of the council of a local tertiary education institute where he has served for several years with Mrs Pook. No party took issue with that relationship as a need for the Judge to recuse himself from the coram.

[18] Further directions were then issued on 26 September 2018, which required counsel to file their submissions in advance, allowing for reply submissions to be presented at the hearing.[20] Submissions were filed for Mrs Pook dated 24 October 2018, by the Butlers on 26 October 2018 and for Mr Matchitt on 2 November 2018.

[19] The hearing was held on 6 November 2018 and we reserved our decision.[21]

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16 *Matchitt v Matchitt – Te Kaha 65 Block* [2015] Māori Appellate Court MB 662 (2015 APPEAL 662)

17 *Taueki – Horowhenua 11 (Lake)* [2018] Māori Appellate Court MB 512 (2018 APPEAL 512). See also *Almond v Read* [2017] NZSC 80; *Skelton v Howcroft* [2018] NZCA 140 and *Rafiq v Attorney General* [2018] NZCA 292

18 2018 Chief Judge's MB 559 (2018 CJ 559)

19 2018 Māori Appellate Court MB 523-524 (2018 APPEAL 523-524)

20 2018 Māori Appellate Court MB 533-534 (2018 APPEAL 533-534)

21 2018 Maori Appellate Court MB 558-603 (2018 APPEAL 558-603)

Grounds of appeal

[20] This decision responds to separate appeals filed by Mrs Pook and the Butler brothers respectively. Mrs Pook appeals only against the final judgement of the Māori Land Court. The specific grounds of appeal are set out below, that the Court erred in:

(a) finding that Ms Pook was in breach of trust or, in the alternative, in failing to grant relief pursuant to s 73 of the Trustee Act 1956;

(b) failing to properly deal with Ms Pook's application for directions dated 4 November 2016;

(c) finding that Ms Pook was jointly and severally liable to repay $90,000 to the trust, because:

(i) The Court did not have sufficient regard for Ms Pook's application for directions dated 4 November 2016 or for cl 5 of the trust order;

(ii) The Court failed to provide Ms Pook with a proper opportunity to be heard on the issues before the Court;

(iii) The Court made findings of fact on Ms Pook's conduct without hearing any evidence or submissions from her or full evidence regarding the trustee meetings;

(iv) The Court failed to assess the conduct of Ms Pook in relation to all the decisions found by the Court to be in breach of trust; and

(v) The Court failed to recognise the minority position held by Ms Pook on the trust.

(d) holding that a trustee can only avoid liability if objections are recorded in the minutes of trustee meetings.

[21] Mrs Pook seeks orders that she is not jointly and severally liable to repay the trust $90,000 and granting her relief under s 73 of the Trustee Act 1956 in relation to any breaches of trust. She also seeks any other orders the Court considers appropriate.

[22] The Butlers appeal against three of the decisions of the Court below: the preliminary judgment, the second judgment and the final judgment, citing the following grounds of appeal:

(a) On the preliminary judgment:

(i) The findings that there was a conflict of interest and that the trustees failed to properly manage that conflict were based on an error of law;

(ii) The Court failed to take into account relevant considerations before making a finding on the conflict issue;

(iii) The Court misdirected itself when it found that whānau loyalty or interests would be, or would be seen to be, an influence on the trust's decision making; and

(iv) On the above basis, the decision to continue the injunction was made in error.

(b) On the second judgment:

(i) In granting the order to rescind the contracts between the trust and EWL and ECL, the Court proceeded upon an error of law in relation to its interpretation of the decision in *Fenwick v Naera* and of s 227A of the Act*;* and

(ii) The Court proceeded on a wrong principle by relying on the supposition that the decision to award the contracts was not a majority decision.

(c) On the final judgment:

(i) The Court failed to take relevant considerations into account when making orders for the trustees to repay the sums of $40,000 and $50,000. Those considerations included the trustees' right to indemnity, the benefit received and the extent of unjust enrichment.

[23] The Butlers seek:

(a) An order revoking the findings that there was a conflict of interest and a failure on the part of the appellants to properly manage that conflict;

(b) An order annulling the decision in para [48] of the preliminary judgment to continue the injunction;

(c) An order revoking the orders for rescission of contracts between the trust and EWL and ECL; and

(d) An order revoking the payment orders made at [153] (b) and [153] (c) of the final judgment and substituting those with an order for a further hearing to determine an appropriate quantum to avoid unjust enrichment.

Issues

[24] Having set out the background, procedural history and grounds of appeal we consider that the issues which arise on appeal are:

(a) Did the Māori Land Court comply with the principles of natural justice?

(b) Were any conflicts of interest properly managed?

(c) Were the trustees entitled to any indemnity and relief from liability?

[25] We also consider the issue of whether orders for removal, per s 240 of the Act were properly made and complied with the requirements of that provision. We say this in the context of the grounds of appeal referred to in para [23] above, which we have interpreted as an appeal against the removal of the second appellants as trustees.

Did the Māori Land Court comply with the principles of natural justice?

Submissions for Mrs Pook

[26] Counsel for Mrs Pook, Mr Webster, submitted that the process adopted by the Court in dealing with the application was deficient, as it failed to satisfy the principles of natural justice. He argued that Mrs Pook did not have proper notice the Court was considering making findings against her and she did not have a proper opportunity to address those issues.

[27] Counsel contended that the original application sought orders in relation to the dealings between the trust and ECL and EWL, an account of profits from John and Thomas

Butler and their removal as trustees. The application did not seek such orders against Mrs Pook and there is no indication the application was amended in that regard. Leading up to the first hearing therefore, Mrs Pook would only have been aware that her fellow trustees were facing liability. At the initial hearing before Judge Reeves, Mrs Pook appeared with her then counsel, who sought leave to withdraw, seemingly on the understanding that Mrs Pook's involvement need only be limited. The only issue the Court signalled in relation to Mrs Pook was regarding the payment she received for trustee meeting fees.

[28] However, the Court subsequently made findings against her in the absence of evidence or submissions from her. Mr Webster argued there was no clear warning the Court was considering the liability of all trustees or the liability of Ms Pook in relation to all matters considered in the final judgment. The Court should also have been aware that the departure of Mrs Pook's lawyer was going to be prejudicial. Mr Webster submitted that Ms Pook ought to have had notice of the case against her and had an opportunity to take advice and present a case on those issues.

[29] We record that Mr Matchitt does not oppose the appeal by Mrs Pook and will abide the decision of the Court.

Discussion

[30] In *Ngāti Apa Ki Te Waipounamu Trust v Attorney General*, the Court of Appeal considered the requirements of natural justice in the context of the Māori Appellate Court:[22]

> [18] We begin with the proposition that the parties, those appearing before the MAC, and those affected by the proceeding were entitled to a fair hearing. That entitlement includes the right to have adequate notice of the proceeding and a reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them. …

[31] The principles of natural justice apply to the Māori Land Court as much as to any other court.[23] In our recent judgment *Reihana v Benedito - Punakitere 4J2B2B,* we set out the broad principles in relation to issues of natural justice, referring to our earlier decision in *Tioro v McCallum – Estate of Ngapiki Waaka Hakaraia*:[24]

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22 *Ngāti Apa Ki Te Waipounamu Trust v Attorney General* [2004] 1 NZLR 462

23 *White v Potroz – Mohakatino Parininihi No 1C West 3A2* [2016] Māori Appellate Court MB 143 (2016 APPEAL 143) AT [52]

24 *Reihana v Benedito – Punakitere 4J2B2B* [2018] Māori Appellate Court MB 32 (2018 APPEAL 32)

> [4] It is well established that the principles of natural justice require that notice must be given to anyone who may be affected. This is so that such persons can appear and be heard. In *Tioro v McCallum – Ngapiki Waaka Hakaraia* this Court underscored the need for notice:
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> > [20] It is a fundamental tenet of natural justice that an affected party should be given notice of proceedings that might affect his or her rights or interests. This stems from the maxim *audi alteram partem*, which simply means "hear the other side". As the leading text Cons*titutional and Administrative Law in New Zealand* explains:
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> > Where a hearing is proposed, it is elementary that persons who may be affected by the decision must be given notice of the date, time and place of the hearing. The range of interested parties must be determined according to common law requirements as to standing. The courts presume that Parliament does not intend its statutory procedures to prescribe exhaustively those who might have standing to be heard. Reasonable steps must be taken to serve all interested parties, unless the rights or interests affected are speculative or insignificant. An interested party includes those whose public responsibilities are implicated, such as a public official or body administering a statutory scheme. In *Waitemata Health v Attorney- General*, a review tribunal erred by failing to notify the Director of Mental Health of the right of appearance in a hearing to release a mental health patient. The law prescribes no particular procedure for the serving of notice, provided the notice is *reasonable*. Notice may be sent to a party's postal or business address, or it may be more widely disseminated through public notice in the local newspaper. The latter method may be necessary if the number of interested parties is indeterminate or large.
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> > [21] Nevertheless, the requirements of natural justice depend on the circumstances of the case:
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> > "Natural justice is but fairness writ large and juridically." The duty to act fairly (or simply "fairness") may substitute as a reference for natural justice. They are alternative descriptions for a single but flexible concept whose content may vary according to the nature of the public power in question and the circumstances of its use, including the effect of the decision on personal rights or interests. The requirements of natural justice are "flexible", "adaptable", and "context specific", and cannot be neatly tabulated: "This is an area of broad principle, not precise rules". Prescribing prescriptive rules of universal application would introduce "a new formalism" – a "recipe for judicialisation on an unprecedented scale". The courts will look at the matter "in the round" to determine whether the process was fair. Higher standards of fair treatment are required where a decision has profound or significant consequences, or bears the earmarks of adjudication affecting "rights". Rigorous standards of procedural fairness are expected of courts but only rudimentary standards may apply to employers, trade unions or political parties: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." The courts are concerned with not only the "actuality" but also the "perception": decisions must be reached "justly and fairly" and be seen to be so.
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> > [22] These principles of natural justice apply to the Māori Appellate Court, the Māori Land Court and applications to the Chief Judge.

[32] We agree with Mr Webster that, on a reading of the transcript when Mrs Pook appeared with counsel, it was not unreasonable for her to assume any legal issues that might have been relevant were limited to the question of trustee fees. If the Court had intended that Mrs Pook was to be drawn into consideration about payments beyond trustee fees, then she should have

been formally notified by direction that potential personal liability for the funds paid by the trust to third parties was now in play.[25]

[33] This is even more relevant when we consider that Mrs Pook sent a letter to the Court dated 4 November 2016. Her letter preceded the application filed by Mr Matchitt. In it, Mrs Pook outlined her concerns regarding various trustee decisions, the management of conflicts and she sought a judicial conference seeking directions. Her request was never formally dealt with and Mrs Pook certainly did not understand that it had been. Our conclusion is that Mrs Pook was not properly notified that - despite her request for directions, her resignation and her appearance with counsel - she was facing personal liability issues for tens of thousands of dollars and the prospect of being removed as a trustee.

[34] We accept the argument that Mrs Pook had not been properly notified as to the extent of the potential claims against her and that it could reasonably have been assumed that the issues for which she was possibly accountable for, related to trustees' fees only. We also accept as reasonable the argument that, had she been properly notified, Mrs Pook would have taken steps to continue to instruct counsel to appear and to file submissions and evidence relevant to the extent of her liability, if any. This is because she appeared with counsel at the earlier hearing rather than simply entering no appearance and not responding at all. The authorities are clear that specific notice of potential liability is mandatory in cases like this.[26]

[35] Our conclusion is that the notice requirement was not met on this occasion and that consequently Mrs Pook was not able to provide evidence and submissions challenging the case against her, as she was entitled to do. For this reason, we would allow this aspect of the appeal against her. We make no comment now as to whether her submissions would have been successful but consider that issue later in this decision.

Were any conflicts of interest properly managed?

Submissions for Mrs Pook

[36] Mr Webster argued that the Court below failed to consider the position of the individual trustees in relation to each of the transactions. Instead, he contends that it held that

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25 153 Waiariki MB 127-202 (153 WAR 127-202) at 131

26 See *Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86); *Maxwell v Parata – Maruata 2B2* (1994) 4 Taitokerau Appellate MB 18 (4 APWH 18)

a breach by some was a breach by all trustees. Mr Webster pointed to the fact that Mrs Pook did not participate in any of the resolutions or sign agreements regarding both the payment to Robyn Power and the payment to ECL, for which she is being held liable. In addition, she could not have been in breach of s 227A as she was not related to the parties as the other trustees were. He says the final judgment was flawed in that it did not consider the position of Mrs Pook when there was clearly a different case to consider.

[37] Mr Webster also submitted that the Court failed to have sufficient regard for Mrs Pook's letter of 4 November 2016 seeking court directions and a judicial conference. While the Court below considered Mrs Pook's actions were "too little, too late" and disregarded her letter, Mr Webster argued that she did exactly what courts have routinely directed trustees to do in these cases, which is apply to the Court for directions.

[38] In addition, Mrs Pook resigned in writing shortly after on 23 November 2016. Mr Webster argued that the Court below was wrong to discount that and to find that the only way for a trustee to avoid liability where they do not agree with the majority was to attend a meeting and record their dissent.

Submissions for the Butlers

[39] Counsel for the Butlers, Mr Bidois, submitted that the findings regarding the conflicts of interest were based on an error of law. He argued that the Court relied on the common law principle identified in *Naera v Fenwick* that trustees act in breach of trust where they place themselves in a situation where there is a prima facie conflict between their interests as trustees and their interest, or the interests of their family members, on the other side of the transaction.[27] He contended, however, that the Supreme Court did not uphold the approach of the Court of Appeal and instead found that general trust law applies to trusts under the Act but only to the extent that this is consistent with the scheme of the Act.

[40] Mr Bidois argued that the decisions appealed against relied entirely on the approach of the Court of Appeal and did not consider the extent to which that approach was consistent with the scheme of the Act. He submitted that the Court below failed to consider the objective that Māori land will be retained, occupied, developed, utilised and controlled for the benefit of its owners and their whānau.

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27 *Naera v Fenwick* [2013] NZCA 353 at [93]

[41] In terms of the management of the conflicts of interest, Mr Bidois submitted that the Court below took the view that trustees must not participate in decisions that benefit close relatives. He says that view is based on an incorrect interpretation of s 227A whereby a trustee will be "interested or concerned" in a matter if their close relatives have an interest. Counsel argued that such view cannot be reconciled with the scheme of the Act, which is directed at facilitating retention of Māori land as a taonga tuku iho, and at the development of that land for the benefit of its owners, their whānau and hapū. Those objectives can never be achieved if trustees cannot make decisions for fear that it might benefit an owner closely related to them.

[42] Mr Bidois also submitted that the Court below misinterpreted the decision in *Fenwick v Naera* by finding that the sibling relationship amongst the Butler's was caught by s 227A. He argued that the Supreme Court did not make the findings the Court below applied and did not consider the issue of whether a trustee will be "interested or concerned" in terms of s 227A solely because of a close relative having an interest or concern in the matter. Rather, the Supreme Court's findings that s 227A (1) has "very wide wording" was specifically in response to submissions that the self-dealing rule was confined to purchases only.

[43] Mr Bidois contended that the better interpretation of s 227A is that the words "interested or concerned" are limited to the personal interests or concerns of the individual trustees. He argued that the overarching duty of loyalty that trustees have will provide adequate protection for owners. That duty provides that where a decision in favour of a spouse or relative is challenged, the trustee must produce evidence to allay suspicion that his or her mind was improperly influenced by the relationship. However, there is no strict prohibition on trustees dealing with close relatives. Mr Bidois argued that, had the Court taken that approach, it would have found sufficient evidence to allay suspicion that the trust's decision making had been improperly influenced by the family relationships.

[44] On that note he referred to evidence the forestry contracts had been publicly advertised in four newspapers, that it is difficult to find forestry contractors willing to accept contracts in remote areas like Matangareka 3B, that there were no other applicants apart from Thomas and John Butler and therefore no real risk that the trustees would wrongly prefer their sibling ahead of other applicants, and evidence that the trustees were still inviting expressions of interest from other beneficial owners.

[45] Mr Bidois submitted that Judge Reeves misconstrued the conflicts procedure the trustees had followed. He argued that the process that the Court described of "non-

participation of the conflicted trustee" was precisely the process that s 227A requires the trustees to follow.

[46] Counsel contended that if this Court agrees with the second appellants on these previous two grounds, there was no basis for the continuation of the injunction. He therefore sought an order cancelling the injunction.

[47] Mr Bidois submitted that the Court below acted on a wrong principle when it based its decision to rescind the forestry contracts, in part, on the supposition that the decision to award the contracts had not been made by a majority of trustees. He argued that the preliminary judgment only stated that it "appeared" s 227A of the Act had been breached but stopped short of making a factual finding that the contracts had not been approved by a majority of trustees. Counsel submitted that, in the absence of such finding, and if the Court had correctly determined the conflict issue, there would have been insufficient factors to then rescind the contracts.

[48] Regarding repayment, Mr Bidois submitted that the Court failed to consider the trustees' right of indemnity, the benefit the owners have received from the services, and the extent to which the owners will be unjustly enriched at the expense of the former trustees. The trustees are empowered under s 38(2) of the Trustee Act 1956 to reimburse themselves or pay or discharge out of trust property, all expenses reasonably incurred in or about the execution of the trusts or powers. However, the effect of the repayment orders is to transfer the whole of the trust's administration and secretarial costs over a three-year period ($40,000 paid to Robyn Power) onto the trustees *personally*, together with the cost of roading work necessary to prepare the trust forest for harvesting to commence ($50,000 paid to ECL).

[49] Mr Bidois submitted that those costs would have had to be paid in any event and there is no evidence that failure to obtain the Court's leave has added to those costs. As they stand, the orders will leave the former trustees out of pocket for expenses that were incurred to advance the objects of the trust, and the owners will be unjustly enriched at the former trustees' expense if the orders are not revoked.

Submissions for Mr Machitt

[50] Counsel for Mr Matchitt, Ms Wara, did not oppose the appeal by Mrs Pook on this ground. She did submit, however, that the Court below did not err in finding there was a conflict of interest and that the trustees failed to manage that conflict properly. Thus, she

argued that the challenge by the Butlers was inappropriate. Ms Wara submitted that, even if the point of appeal were reframed, the finding was not one that could be seen as being so irrational that it was not open to a reasonable decision maker. On that basis, she argued the point of appeal must fail.

[51] In the alternative, if this Court was of the view that the finding was one of law, Ms Wara submitted that the sibling relationship between the Butlers was indeed one that fell within the range of potential conflict contemplated in the *Naera v Fenwick* cases.[28] She argued that such conflicts have been considered at length by the Court of Appeal and Supreme Court, with the starting point being the Supreme Court's finding that general trust law applies to trusts under the Act, but only to the extent that this is consistent with the scheme of the Act. Under the common law, trustees have a clear obligation of single-minded loyalty to their principal, and to establish a breach of this duty, it is sufficient to show that the trustees have placed themselves in a position of *potential* conflict. Counsel contended that it has long been recognised that transactions between a trustee and a close relative give rise to strong grounds of suspicion, which, if not dispelled, is sufficient to require a transaction to be set aside.

[52] Ms Wara rejected the Butlers' assertions that the scheme of the Act is not consistent with the duty of loyalty to beneficiaries. She argued that the duty is not fettered by the objectives of retention, occupation, development and control, rather, it is one to be upheld in the pursuit of these objectives. Consistent with the scheme of the Act, ss 17(1)(b) and 17(2)(c), (e) and (f) are clear indicators that the Māori Land Court has the authority to make pragmatic assessments and ensure fairness in dealings. This includes assessing the processes of those administering the land, and whether such functions have been carried out in a fair and rational way. Ms Wara submitted that the Court below correctly formed the view that the sibling relationship within the trustees fell within the range of potential conflicts, due to the risk of nepotism having an influence on decision making.

[53] In terms of the management of the conflicts, Ms Wara submitted that the Court below was correct when it found the second appellants failed to manage the conflicts adequately, and that three of the six trustees - the Butlers - should not have participated in the decisions to award the forestry contracts. Its decision was not founded on an incorrect interpretation of s 227A of the Act.

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[28] *Naera v Fenwick* [2013] NZCA 353, *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354

[54] Regarding the second judgment, Ms Wara submitted that the Court did not commit an error of law in its application of s 227A. She contended that in considering the scope of s 227 and 227A, the Supreme Court in *Fenwick v Naera* stated that the wording is expansive and designed to mirror the position of equity. The Supreme Court agreed with the Court of Appeal that all trustees participating in decision making must "bring to bear a mind unclouded by any contrary interest" to remove the risk the other decision makers may be influenced by a person with divided loyalties. Counsel argued that if the point of s 227A is to remove the risk of influence on other decision makers, this cannot be achieved where the other decision makers have a loyalty to the conflicted trustee. Ultimately the rules against conflicts and s 227A are designed with a prophylactic effect, to avoid the appearance and risk of conflict.

[55] Ms Wara submitted that in the present case, the two contracts with ECL and EWL involved both conflicted trustees and potential conflicts. Tom Butler, as the director and shareholder of EWL, was conflicted in relation to the EWL contract. He is recorded as not participating in the discussions to award his contract but there is no evidence of him leaving the room. His two brothers, however, did vote on the contract. Counsel submitted that the situation is the same with ECL, where John Butler is the director and shareholder. He is recorded as not participating in the discussion but again there is no evidence of him leaving the room. His two brothers voted on the ECL contract. Ms Wara submitted that the *quid pro quo* nature of the awarded contracts resulted in a significant risk of influence. The brothers clearly had divided loyalties, particularly Tom and John Butler, who had an interest or concern in the contracts being awarded. Therefore, s 227A(2) applies and they should not have participated in the decision-making process.

[56] However, if the Court below did commit an error of law in its application of s 227A, Ms Wara argued that it was still open to determine that the contracts be rescinded. She contended that the Court of Appeal in *Naera v Fenwick* determined that s 227 and 227A were specific alterations of the common law of fiduciary obligations. Where neither s 227 or 227A apply, the common law approach will prevail.[29] At common law, the remedies for a breach of trust include rescission. Ms Wara argued that the Court below found the former trustees were in breach of trust and the provisions of s 227A, and correctly identified several factors that weighed in favour of rescission. Therefore, even if the Court was wrong in relying on s 227A, the finding of breach of trust is sufficient to rescind the contracts.

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[29] *Naera v Fenwick* [2013] NZCA 353 at [96]

Discussion

[57] Section 227A of the Act sets out the approach for dealing with situations where trustees may have an interest in dealings with the trust. 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.

[58] In *Fenwick v Naera*, the Supreme Court made the following comments with regard to the scope of both ss 227 and 227A of the Act:[30]

> [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".
>
> [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 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.
>
> [54] Far from being restrictive, it seems to us that the wording is designed to mirror the position in equity, subject to excluding the situation where the only interest (or concern) in a contract is as a trustee of another trust.77 This exclusion does not, however, mean that trustees of multiple trusts can put themselves in a position where their duty and interests conflict as Mrs Fenwick (and possibly Mr Eru) did in this case because they were also beneficiaries.
>
> [55] We also do not accept the Trustees' submission that ss 227 and 227A constitute a code. That cannot be right as they do not deal with the consequences of any breach. We agree with the Court of Appeal that general trust law applies to trusts under the Act, but only (as will appear) to the extent that this is consistent with the scheme of the Act.

[59] That Court confirmed that, by being beneficiaries in another trust which was party to an agreement with the trust, at least one of the trustees may have had something to gain from the transaction and was therefore conflicted. This meant that s 227A (2) applied and she should not have participated in the discussions surrounding the transaction or in the voting.[31] The Court went on to state:

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30 *Fenwick v Naera* [2015] NZSC 68

31 Ibid at [60]

> [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).

[60] It is well settled that a trustee may not profit from their office.[32] Such a profit can be made directly or indirectly.[33] 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.[34] 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.

[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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32 *Robinson v Pett* (1734) 3P Wms 249
33 *Rochefoucauld v Boustead* [1898] 1 Ch 550 (CA)
34 *Re Thompson's Settlement* [1986] Ch 99 at 115

[62] The same prohibition applies to the engagement of close family members as employees or contractors of the trust. It will be a breach of trust even where the profit is made by a third party and that can include the children of the trustee.[35] By that reasoning, spouses and close friends are included in the same prohibition. 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.[36] 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. Consequently, this ground of appeal must fail.

[63] In relation to Mrs Pook, we disagree with the approach taken by Judge Reeves. In her discussions concerning the management of conflicts, she attributed the actions of some trustees to all. For example, discussions and a resolution to pay Robyn Power $40,000 took place on 29 June 2016. Mrs Pook was not present at that meeting nor is there any evidence that she agreed with the resolution.

[64] On 26 August 2016, the trustees resolved to pay ECL $50,000 for road clearing. In her final decision, Judge Reeves states that the resolution was passed by all six trustees. That does not appear to be correct. Mrs Pook is not recorded in the minutes as arriving until *after* the resolution was passed. There is no evidence that Mrs Pook ever supported that resolution - in fact the opposite is the case.

[65] We also agree with Mr Webster that Mrs Pook could not have been in breach of s 227A, given she was not closely related in any way to the other parties, as the Butler brothers were.

[66] What was required by the Judge was a separate consideration of Mrs Pook's actions, including the letter she sent to the Court on 4 November 2016 seeking a judicial conference and directions about the actions and alleged conflicts of her fellow trustees. No such separate

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35 *Willis v Barron* [1902] AC 271 (HL)

36 G E Dal Pont *Equity and Trusts in Australia* (6th ed, Thomson Reuters, Australia, 2015) at [22.15] "A trustee's plainest and overriding duty is to obey the terms of trust. This is because a trustee is duty-bound to give effect to the settlor's intention as expressed in the trust instrument, irrespective of how seemingly insignificant its terms may appear. The duty of obedience qualifies virtually every other duty of a trustee. The trust instrument is the trustee's "charter", by which he or she must constantly be guided. Failure to fulfil a duty prima facie renders the trustee liable for breach of trust."

consideration took place. That, together with the fact, as we discussed earlier, that she was not aware that such findings might be made against her, mean that part of the judgement is in error.

Were the trustees entitled to indemnity or any and relief from liability?

Submissions for Mrs Pook

[67] Mr Webster submitted that there was no consideration of Ms Pook's position either in relation to whether she should be liable or whether she should be granted relief. He contended that charging Ms Pook with joint and several liability for repayment was not warranted and the Court should have granted her relief per ss 38 and 73 of the Trustee Act 1956. Mr Webster argued that the Court below should have adopted the approach followed in *Tamaki – Paremata Milau A7A1*, where responsibility to repay the relevant trust funds rested primarily with the trustee who personally received them in breach of trust and who also received an indirect benefit through a sibling relationship.[37]

[68] Mr Webster also contended that Ms Pook acted honestly and reasonably, did not profit in any way from the relevant payments and was not involved in those decisions. As she had sought directions from the Court, she did not need to be excused in that regard per s 73. Mr Webster submitted that, in the overall circumstances, it would be unfair for Mrs Pook to bear any liability for the gains made by her fellow trustees.

[69] Regarding liability, Mr Webster submitted that the Court below conflated the threshold for breach of trustee duty and removal with liability for the sums paid to ECL and Robyn Power. He submitted that, while the Court was entitled to consider removal of trustees, the removal of Mrs Pook was arguable, as this was not a case of a non-active trustee not doing enough to protect the trust assets, as in *Rameka v Hall*.[38] The relevant events for this trust occurred within a short space of time, involving much smaller amounts of money, and Mrs Pook applied to the Court for assistance in relation to the more significant forestry contracts. In addition, even if removal was warranted, Mrs Pook should not have been found liable to repay the fund received by others. For these reasons, counsel submitted that this Court should

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37 *Tamaki – Paremata Mokau A7A1 (Mokau Marae)* (2017) 163 Taitokerau MB 256 (163 TTK 256) at [10]

38 *Rameka v Hall* [2013] NZCA 203

annul the earlier orders that held Mrs Pook liable to repay trust funds received by her fellow trustees in breach of trust.

Submissions for the Butlers

[70] As foreshadowed, Mr Bidois submitted that the Court failed to consider the trustees' right of indemnity, the benefit the owners have received from the services, and the extent to which the owners will be unjustly enriched at the expense of the former trustees. He argued that the trustees are empowered to reimburse themselves from trust property, all expenses reasonably incurred in or about the discharge of their duties.

[71] However, the effect of the repayment orders he argued was to transfer all the trust's administrative costs onto the trustees personally, together with the cost of roading work necessary to prepare the trust forest for harvesting to commence. Mr Bidois submitted that those costs were unavoidable and there is no evidence that failure to obtain the Court's leave has added to those costs. Counsel contended that the orders will leave the former trustees out of pocket and the owners unjustly enriched at the formers' expense if the orders were to stand.

Submissions for Mr Machitt

[72] Ms Wara again did not oppose the appeal by Mrs Pook on this ground. Regarding the Butlers, she submitted that the onus was on them to allay suspicions regarding the transactions in question. They had to show they had not improperly preferred a relative in the allocation of work, and that the processes had been properly used to manage the potential conflicts. Counsel argued that the Butlers failed on both limbs and ultimately the Court below correctly found the existence of both actual and potential conflicts. Ms Wara pointed to several relevant factors. These included that three of the six trustees were brothers, that the number of trustees meant a majority decision was not possible without the participation of at least one brother, and that such risks were drawn to the attention of the trustees at the annual general meeting and the Court hearing.

[73] In addition, counsel contended that the trustees received legal advice which gave recommendations to demonstrate a fair process. That advice was not followed. Ms Wara noted that the factors which the second appellants referred to in their submissions were considered by the Court below and found not to displace the trustees' failure to demonstrate that proper process was followed to manage the conflicts. Counsel underscored as significant the fact that Mr Bidois' submission for the second appellants contradicted the legal advice his

firm gave prior to the transactions being entered into. She submitted that this is essentially an appeal against his own firm's advice.

[74] Regarding the final judgment, Ms Wara opposed the appeal of the orders made for the repayment of $40,000 and $50,000 as against John Butler, Tom Butler and Stewart Butler. She rejected the second appellants' claim that the Court below failed to consider the trustees' right of indemnity, arguing that their claim for relief was considered at length.

[75] In relation to the $40,000 payment to Robyn Power, Ms Wara argued that the second appellants' assertion that this was a reasonably incurred expense per s 38 of the Trustee Act 1956 cannot be sustained. It was unclear whether her services prior to 2016 were voluntary, whether the payment was reasonable for her services, and there is no evidence as to how the payment was calculated. In addition, the Court below found there were multiple breaches of trust associated with the payment which meant that it was correct to deny relief per s 73 of the Trustee Act 1956.

[76] Similarly, in relation to the $50,000 payment to ECL, Ms Wara submitted that the second appellants cannot claim this as a reasonably incurred expense. There was no principled basis for paying the money directly to ECL. The trustee meeting minutes record that the road clearing on the block needed to start. John Butler advised that his digger was too big for some of the tracks and requested $50,000 to help with the start of the clearing. Ms Wara argued that the second appellants have simply failed to produce any evidence that this expense was "reasonably incurred" and therefore relief is not available per s 38 of the Trustee Act 1956.

[77] In addition, the Judge found the trustees breached their duty of loyalty by improperly preferring ECL and had breached s 227A of the Act and cl 4 of their trust order by failing to manage the conflicts of interest properly. Accordingly, counsel stressed that the Court was correct to deny relief per s 73 of the Trustee Act. Overall, Ms Wara submitted that the respondent is opposed to any orders being made for relief under s 56(1)(b) of the Act.

Discussion

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

> **38 Implied indemnity of trustees**
>
> (1) A trustee shall be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any bank,

> broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.
>
> (2) A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust:
>
> provided that the court may on the application of the trustee allow such costs as in the circumstances seem just.

[79] The general principle that trustees be reimbursed for costs reasonably incurred was considered in *Hall v Opepe Farm Trust – Opepe Farm Trust*.[39] In that decision the Court found that what constituted "properly incurred" will fall to be decided on the facts of each case. However, in order to be indemnified the expenses must relate to the scope of the trustee's role. *McDonald v Horn* was also cited, where the High Court stated:[40]

> In the case of a fund held on trust, therefore, the trustee is entitled to his costs out of the fund on an indemnity basis, provided only that he has not acted unreasonably or in substance for his own benefit rather than that of the fund.

[80] Where a trustee has been found to have acted in breach of trust then to avoid the consequences of that conduct, the affected individuals must seek relief from the Court per s 73 of the Trustee Act 1956, which states:

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

[81] Section 73 provides that trustees may be granted relief from personal liability, if the they have acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain directions from the Court. If *both* criteria are met, then there is a discretion whether to grant relief and to what extent. In *Moeahu v Winitana – Waiwhetu Pā No 4*, the Māori Land Court considered the application of s 73, noting that while there is a specific authority empowering the Court to grant relief, this remedy will not be given lightly.[41]

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39 *Hall v Opepe Farm Trust – Opepe Farm Trust* (2014) 104 Waiariki MB 54 (104 WAR 54)

40 Ibid, at [54] citing *McDonald v Horn* [1995] 1 All ER 961 at 970

> [26] It is well settled that in assessing whether relief from liability should be granted under s 73, the onus of proof is on the trustee. All of the requirements must be met to satisfy s 73 and the Court has a wide discretion both whether to grant relief at all and if so the level of such relief. While there is specific statutory authority enabling the Court to grant relief, that remedy is not lightly given: in *re: Tauhara Middle 4A2B2 C-Opepe Farm Trust*. In this decision Judge Savage was critical of trustees who had used trust resources incorrectly even though they had relied on advice.

[82] Trustees will not be entitled to relief where they have either failed to act honestly or reasonably or failed to seek directions or have acted contrary to legal advice.[42] In this case, we are satisfied that relief from liability for the Butlers is not appropriate. That they did not appear to understand that three siblings participating in trust hui and passing resolutions to pay significant amounts of trust funds that would benefit one or more of those siblings, and in the case of one sibling their partner, is inexplicable. The trustees should have known better and sought directions from the Court, especially where their absence from a trust hui, because of these conflicts, would have rendered such a meeting inquorate.

[83] Had the issue been before us, it might also have been argued that their failure to engage in proper processes of tendering for the larger contracts and their seemingly haphazard investment approach to KLHL simply exacerbated their existing conflicts. In summary, their conduct was not reasonable with the result that they cannot successfully claim relief from liability. Whether the amounts ordered against them can be properly sustained on appeal is a separate question that we consider below.

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

[85] In any event, there are two issues relevant to the claims of conflict against the affected trustees that require further consideration. First, the amount paid to Robyn Power for

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41 *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166) at [26]. See also *Tauhara Middle 4A2B2CBlock - Opepe Farm Trust* (1996) 68 Taupō MB 27 (68 TPO 27)

42 *Rātima v Sullivan - The Tataraakina C Trust* (2015) 41 Tākitimu MB 102 (41 TKT 102) at [209]-[231]

secretarial duties over a three-year period. In our assessment, on the available evidence, taking into account the nature and size of the trust, its asset base and income, the frequency of meetings, the state of the trust's records, the lack of a formal process of advertising and appointment and related considerations, we consider that an allowance of $3,000 per annum as an honorarium for the period in review would be appropriate in the circumstances.

[86] This is on the proviso that there are records that can confirm the duties that were undertaken by Ms Power. These might include invoices, receipts, timesheets and related supporting documents. Without that confirmation, then we cannot see how these payments can be justified. Rather than referring this matter back to the Court below, counsel should submit these documents to the Registrar for assessment within two months from the date of this judgment. If we are satisfied with their veracity, then the allowance we have indicated as appropriate will be confirmed and deducted from the total amount due for repayment by the affected trustees.

[87] Second, the amount claimed for roading preparatory work of $50,000. It is said that this money was advanced to ensure that the roading network for access to the trust's land was going to be suitable for harvesting and extraction purposes. For this amount to be properly claimed, then there needs to be appropriate evidence to support the assertion that the trust itself needed to be responsible for this cost and that the amount paid was reasonable in the circumstances. In the absence of such evidence, then we cannot take the claim for deduction for unjust enrichment further. Counsel has two months to file further evidence that supports the assertion that the amount paid was the responsibility of the trust and that the cost was fair and reasonable. To avoid doubt, if no such evidence is provided to our satisfaction then the orders of Judge Reeves for repayment on this issue will be affirmed.

Were the trustees formally removed?

[88] At paragraphs [130]-[142] of the final judgment dated 12 June 2018, the Judge sets out her reasoning for the removal of the trustees.[43] In paragraph [142] she states: "I find that in relation to the various breaches of trust, that all the trustees failed to perform their duties satisfactorily, warranting their removal as trustees." Judge Reeves engaged with the relevant tests set out in s 240 of the Act and the accompanying case law. However, in the formal orders at the end of the decision, there is no reference to removal, other than confirmation that the tenure of the interim trustee was to be extended. We note that the trustees had agreed to step

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43 *Matchitt v Butler – Matangareka 3B* (2018) 189 Waiariki MB 74 (189 WAR 74)

aside following which the interim and advisory trustees were appointed. But even so, this appeal included the principal grounds for their removal, namely the failure to properly manage conflicts of interest. So, as foreshadowed, we have approached that ground of appeal as being against the removal of the second appellants.

[89] To avoid doubt, we consider it appropriate to confirm that, in respect of the Butlers, orders for removal were both appropriate and necessary for the reasons set out in the decisions of the Court below and as identified in this judgment. Taken cumulatively, their breaches of trust were so egregious that removal was really the only sensible outcome. We therefore reject the arguments of counsel that the removal provisions were misapplied by Judge Reeves and that her application of the *Naera v Fenwick* line of authorities was incorrect. To avoid doubt, there are formal orders now issued for the removal of all three second appellants.

[90] Once again, the position of Mrs Pook is quite different. Three points are relevant. First, the natural justice issue remains apposite. As foreshadowed, we consider that Mrs Pook was not properly notified that serious consequences and penalties were in play when she attended Court with her former counsel or soon thereafter. We also, therefore, consider that it was reasonable for her to have apprehended that the real issues of conflict and consequences lay with the second appellants. Our conclusion is that her conduct was reasonable in the circumstances.

[91] Second, the Judge determined that Mrs Pook's absence from the June and November 2016 meetings without tendering apologies or having her dissent recorded in writing meant that she remained personally liable for the decisions of her colleagues. We disagree. The evidence does not support a conclusion that Mrs Pook endorsed the Butlers' conduct. While it would have been preferable for her to have raised concerns with the Court below soon after the June 2016 meeting of trustees, or once she had received the draft minutes, given her absence from that meeting, Mrs Pook did eventually express her concerns before the November 2016 hearing took place by sending a letter to the Court on 4 November, the very the same day as a trustees' meeting.[44] Her letter could not in any manner be construed as support for the activities of the majority of trustees. That Mrs Pook might have done more earlier than they eventually did to better protect the interests of the trust beneficiaries once their suspicions and concerns had been raised, is certainly arguable in the context of these proceedings.

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[44] The request is mentioned in para [139] of the 12 June 2018 decision

[92] In any event, had that request for a judicial conference been granted then it may have resulted in proper notice of the risks to Mrs Pook being articulated at a much earlier stage of the process. Moreover, it appears that the omission to either grant a judicial conference or to provide reasons for declining that request was a factor contributing to the apparent confusion of Mrs Pook as to whether she needed to defend her position with evidence and submissions. Had she done so, following such a judicial conference, then the eventual result may have been different. We accept that this is merely speculation, but the fact remains that Mrs Pook took reasonable steps to seek directions which were not advanced.

[93] Third, we consider that the findings of the Court below, that Mrs Pook was at fault and therefore deserving of removal, were, with respect, misplaced because she was neither an active participant in nor an enabler of the misconduct of her colleagues. It would be quite a different result had Mrs Pook taken no steps at all to seek directions or alert the Court to her concerns. A trustee who does nothing while serious breaches of trust are taking place where the assets of the trust maybe put at risk cannot be found to have acted prudently or reasonably. Here, Mrs Pook did take steps, albeit later than might have been ideal. Even so, we do not consider the finding that her actions were "too little, too late" was an appropriate characterisation of those events, given the circumstances.

[94] For these reasons, we do not consider that it was necessary for the Court below to make a finding of removal for cause as against Mrs Pook. While we acknowledge the reality that Mrs Pook resigned, it is important to underscore the distinction between the two sets of trustees as to the positive misconduct of the second appellants on the one hand and the unease and eventual concern of Mrs Pook on the other.

Decision

[95] The appeal is allowed in part. The payment orders against Tuihana Pook are annulled.

[96] Counsel for the second appellants has two months from the date of this decision to file evidence supporting the payment of $40,000 to Robyn Power. If that evidence is filed, further directions may be issued.

[97] Counsel for the second appellants has two months from the date of this decision to file evidence supporting the payment of $50,000 to ECL. If that evidence is filed, further directions may be issued.

[98] To avoid doubt, there are orders pursuant to s 240 of the Act removing the second appellants as trustees.

[99] In all other aspects, the decision of the Māori Land Court is affirmed.

[100] Counsel may file memoranda regarding costs within one month.

Pronounced at 2.45pm in Wellington on Friday this 12th day of April 2019.

C L Fox	L R Harvey	S R Clark
DEPUTY CHIEF JUDGE (Presiding)	**JUDGE**	**JUDGE**