

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2018-409-40
[2021] NZHC 1000**

UNDER Trustee Act 1956

IN THE MATTER OF an application by the trustees for directions
under s 66 of the Trustee Act 1956

BETWEEN PUBLIC TRUST
Plaintiff

AND GEORGINA KAIN, GEORGE CHARLES
KAIN, GEORGE HARRY COUPER KAIN,
... continued over

Hearing: 19-20 October 2020

Appearances: B D Gray QC and A G Holden for Plaintiff
J W A Johnson and W L Porter for 1st to 4th Named First
Defendants
T C Weston QC and A V Foote for 5th Named First Defendant
M J Wallace for 6th to 18th Named First Defendants and
1st to 13th Named Second Defendants
J F Anderson QC for 19th to 21st Named First Defendants and
14th to 16th Named Second Defendants

Judgment: 6 May 2021

JUDGMENT OF MANDER J

This judgment was delivered by me on 6 May 2021 at 2 pm pursuant to Rule 11.5
of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

GEORGE MICHAEL KAIN, MARY
HUTTON, MARNIE COUPIE FORCER
KAIN, JACK KAIN, MOLLY KAIN,
RACHEL KAIN, STANLEY KAIN,
WOLSEY KAIN, GEORGE KAIN, ASTA
KAIN, MADELINE KAIN, GEORGE
KAIN, MICHAEL KAIN, RUPERT KAIN,
SAMUEL KAIN, GEORGIA
HUMPHREYS, CONSTANCE HUTTON
and HARRIET HUTTON
First Defendants

AND

MARNIE COUPIE FORCER KAIN,
JACK KAIN, MOLLY KAIN, RACHEL
KAIN, STANLEY KAIN, WOLSEY
KAIN, GEORGE KAIN, ASTA KAIN,
MADELINE KAIN, GEORGE KAIN,
MICHAEL KAIN, RUPERT KAIN,
SAMUEL KAIN, GEORGIA
HUMPHREYS, CONSTANCE HUTTON,
HARRIET HUTTON, DAVID WHYTE,
KIRSTY MARGUERITE COUPER
MASTERSON and ELIZABETH DIANE
COUPER FRENDIN
Second Defendants

[1] Public Trust has applied for directions under s 66 of the Trustee Act 1956 (the Act) in its capacity as trustee of the Waitaha and Middle Road Block Trusts. Both trusts are part of a larger group of trusts, estates and companies that are known to the parties, all of whom are related, as the “Couper-Kain Group”.

[2] By its application, Public Trust seeks the Court’s guidance on issues that it says are matters of law that are in contention between the parties regarding the scope of its discretion to make distributions from the trusts. Similar directions are sought in respect of each trust. While Public Trust maintains that it takes a neutral position and does not seek a particular outcome or form of direction, it has provided the Court with its view of what it considers to be the correct legal position.

[3] The defendants are either beneficiaries of the Waitaha Trust or of both that Trust and the Middle Road Block Trust. They fall into two opposing factions of the family that either support or oppose Public Trust’s initiative to obtain directions. The present application is the latest chapter in a prolonged contest between members of the family regarding the administration of the family trusts. The parties are deeply divided over the factual narrative that sits behind the long running dispute. However, the following background has been rehearsed in a number of prior judgments and is uncontroversial.

Factual background

[4] From about 1920, Ernest and Helen Couper owned farmland in Hawke’s Bay. They had two children, Janet Kain and WAX Couper, who was known as Tom Couper. Before Ernest’s death in 1976 and Helen’s death in 1989, the couple had acquired significant farming interests that were inherited or gifted to Tom and Janet.

[5] Janet married George Thomas Kain. She died in 1986 and her husband died in 2017. They had six children, of whom Michael, Harry, Georgina and Charles (the Kain siblings) are the first four first defendants.¹ A fourth son, Tom Kain, died in 2013. Another daughter, Mary Hutton, is the fifth named first defendant. The sixth to

¹ All of the four Kain brothers have George as a first Christian name. For convenience, they have been referred to by the name by which they are commonly known.

18th named first defendants are the children of the Kain siblings and the deceased Tom Kain (the Kain grandchildren). The 19th to 21st named first defendants are Mary Hutton's children (the Hutton grandchildren). The first defendants are all beneficiaries of the Waitaha Trust.

[6] The Kain grandchildren are the first to 13th named second defendants, the Hutton grandchildren the 14th to 16th named second defendants, and the children of Tom Couper's cousin (the Whyte children) are the 17th to 19th second defendants. They are all beneficiaries of the Middle Road Block Trust. Neither the Kain siblings nor Mary Hutton are beneficiaries of that Trust. Tom Couper married in 1986 but divorced without issue in 2003. He died in 2019.

[7] Between 1951 and 1989, 15 trusts were established by Ernest and Helen Couper, Janet Kain and Tom Couper to settle farming assets in respect of the family's greater Hawke's Bay interests. Those trusts and the estates of Ernest Couper and Janet Kain, together with associated companies, formed an interconnected web of trusts, companies and assets that became known as the Couper-Kain Group. The beneficiaries of the trusts and estates that comprise this Group are differently constituted but, for the purposes of this application, include or included some or all of the Kain siblings, Mary Hutton, the Kain grandchildren and the Hutton grandchildren.

[8] Around 1981, the Couper Farming Partnership was formed. This was the first of a series of parent entities that were used by Tom Couper to manage the farming operations of the various entities that comprised the Couper-Kain Group. These entities were conducted in an interdependent way and run essentially as a partnership.² This operating structure necessitated a profit sharing system, and resulted in a complex network of inter-entity advances and liabilities that were largely recognised by book entries which were carried through to the annual financial statements for each entity. The management of the various entities in this way reflected Tom Couper's intention at the time "to accumulate farming assets for the benefit of the family as a whole".³

² The Couper Farming Partnership was succeeded by Couper Farming Trust and the WAX Couper Farming Co Ltd.

³ *Kain v Hutton* (2004) 1 NZTR 14-022 (HC) at [35].

[9] Over the years, as the farming operation generally prospered, the assets of the Couper-Kain Group were used by Tom Couper to facilitate external borrowings that allowed him to purchase additional land, which in the main was settled on new trusts. By this means, the asset base of the Couper-Kain Group grew. The extent to which these assets were derived from the original wealth of Ernest and Helen Couper, or resulted from the industry of Tom Couper, is an ongoing source of dispute between the beneficiaries. Throughout this period, the Kain siblings, Mary Hutton and Tom Kain, from time to time received assistance to varying degrees from the trusts within the Couper-Kain Group.

[10] In 1994, Tom Kain approached Tom Couper for assistance to obtain a loan for his and Charles Kain's company, Apple Fields Ltd. Westpac advanced \$1 million to Tom Kain, which was secured by a guarantee provided by Tom Couper and George Thomas Kain (Janet's widower) as trustees of the ED Couper Estate and the Kain Trust, which were both Couper-Kain Group entities. The guarantee was supported by a registered first mortgage over Waipuna Station, which was a property owned by the two trusts in equal shares. The loan from Westpac was required to be refinanced in November 1997. For reasons that are much disputed — “[w]ildly different perceptions exist concerning the Waipuna loan saga” — the refinancing exercise did not proceed and the events that followed became a source of deep division within the family.⁴

[11] As part of the effort to refinance the Westpac loan, a deed of arrangement was signed in June 1997 between Charles and Tom Kain as indemnifiers, and the four other Kain children as beneficiaries (the 1997 deed). The terms of the deed relevantly provided:

BACKGROUND

...

- B. The Westpac Loan Facility has not been repaid with the Guarantee being released and the Mortgage discharged as envisaged pursuant to the Deed of Indemnity. The Parties now wish to record the basis upon which the Waipuna Property can continue to be used as security by the Indemnifiers.

...

⁴ *Kain v Hutton*, above n 3, at [43].

7. **UNEQUAL ASSISTANCE**

- 7.1 The Parties to this Deed agree that there has been unequal assistance provided from the family's South Canterbury and Hawke's Bay interests. The parties agree to work toward ascertaining a fair statement over the amounts received by each party and working towards a position which will ensure, in so far as practicable, that all parties are or will be treated equally. [the Equality Clause]

...

9. **FURTHER ACTS**

- 9.1 Each party shall sign and deliver any documents and undertake any acts, matters and things which are reasonably required or requested by the other party to carry out and give effect to the intent and purpose of this Deed.

[12] As a consequence of events relating to the Waipuna loan and Tom Couper's subsequent purchase of the Westpac debt, the relationship between Tom Couper and the Kain siblings broke down. In 2000, the Kain siblings and Tom Kain filed proceedings against Tom Couper and the other trustees of trusts in the Couper-Kain Group. The Kain siblings sought various remedies, including replacement of the trustees with an independent professional trustee and the distribution of some of the trusts. Numerous issues arose in that litigation, including the status and effect of the 1997 deed, in particular and relevantly the "Equality Clause", and a proposal to unwind or unpick the book entry transactions between the various entities in the Couper-Kain Group.

[13] Following the judgment of Panckhurst J in December 2004, Public Trust was appointed sole trustee of the trusts and estates in the Couper-Kain Group, including the Waitaha and Middle Road Block Trusts.⁵ The litigation also approved the implementation of the proposal to unravel the advances and liabilities between the Couper-Kain entities recorded in the 1996 to 2005 current accounts. This process would allocate assets and a share of partnership profits to each entity and settle the current account balances of the beneficiaries. It requires the restatement of the 1997–2006 financial statements for each of the entities in the Couper-Kain Group. As a result, the opening balances for the 2006 year will not be available until the whole of

⁵ *Kain v Hutton*, above n 3.

the unwind exercise has been completed. This task is ongoing and may still take some years to complete.

[14] The two trusts in respect of which Public Trust seeks directions are the Waitaha Trust and the Middle Road Block Trust.

Waitaha Trust

[15] The Waitaha Trust was settled by Tom Couper in June 1974. Its primary asset is its 100 per cent shareholding in Waitaha Holding Co Ltd which owns Waitaha Station in northern Hawke's Bay and is leased back to the Trust. Its land and livestock have an approximate value of some \$10 million.

[16] Public Trust has a discretion in respect of both income and capital distributions to the beneficiaries, being the children and grandchildren of Tom Couper (of which there are none) and the children and grandchildren of Janet Kain. In default of the trustee's discretion being exercised, the income and capital beneficiaries are the same children and grandchildren who are alive at the date of distribution as tenants in common in equal shares. The date of distribution for Waitaha Trust is 13 June 2023 but Public Trust may by deed appoint an earlier date of distribution.

Middle Road Block Trust

[17] Tom Couper settled Middle Road Block Trust in March 1981. Its principal asset is a block of land in Havelock North, known as Middle Road Block. It has an approximate value of between \$2 and \$3 million.

[18] The discretionary income beneficiaries of the Trust are the children of Tom Couper (of which there are none), the grandchildren of Janet Kain, and the children of Alister Couper Whyte. The discretionary capital beneficiaries are the children of Tom Couper (of which there are none) and the grandchildren of Janet Kain. In default of the trustee's discretion, the income beneficiaries are the children of Tom Couper (of which there are none), the grandchildren of Janet Kain, and the children of Alister Couper Whyte who are alive at the date of distribution as tenants in common in equal shares. The capital beneficiaries in default of the trustees exercising their discretion

are the children of Tom Couper (of which there are none) and the grandchildren of Janet Kain who are alive at the date of distribution as tenants in common in equal shares. The date of distribution is 16 March 2031, but Public Trust has a discretion to by deed appoint an earlier date of distribution.

The application for directions

[19] While Public Trust maintained that it did not seek a particular outcome or form of direction, it set out in its pleadings the directions it contends accurately represent the correct legal position that it is required to take to the exercise of its discretion, and to particular matters that may bear on its discretionary powers of distribution. Although the directions proposed in respect of each trust largely mirror each other, there are some material differences. The directions Public Trust seeks in respect of both trusts when exercising its discretion to vest or make distributions “of any kind and at any time” are:

- (a) Public Trust must act consistently with the terms of the trust deed.
- (b) Public Trust is required to take into account the interests of the beneficiaries. This depends on the particular circumstances of the trust and the beneficiaries, but may include the extent to which a beneficiary would benefit from a distribution, the financial needs of the beneficiaries and, if the beneficiaries are children, the extent to which their needs will be met by their parents.
- (c) Public Trust is not required to take into account what the beneficiaries who are also beneficiaries of other trusts have received from the other trusts in the Couper-Kain Group.
- (d) Public Trust is required to take into account the wishes and subsequent wishes of the settlor, Tom Couper, provided that they are not inconsistent with the terms of the trust. Where subsequent wishes are inconsistent, Public Trust is entitled to consider the most recent wishes as overriding earlier wishes.

[20] In respect of the Waitaha Trust, it also seeks directions to the effect that when exercising its discretion to vest or make distributions:

- (a) The 1997 deed is not binding on Public Trust.
- (b) Public Trust may take the 1997 deed into account but it is not required to.
- (c) Public Trust is not required to ensure that all of the beneficiaries of the Waitaha Trust receive equal amounts from that Trust.
- (d) Public Trust is not required to ensure that all of the beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the Group.

[21] In relation to the Middle Road Block Trust, Public Trust seeks the following additional directions when exercising its discretion to vest or make distributions:

- (a) The 1997 deed is not binding on Public Trust and cannot be taken into account.
- (b) Public Trust is not required to ensure that all of the beneficiaries of the Middle Road Block Trust receive equal amounts from that Trust.
- (c) Public Trust is not required to ensure that all of the beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the Group.

[22] In the alternative to making the pleaded directions, the Court is invited to make other orders as it considers just.

The opposition

[23] The Kain siblings and the Kain grandchildren oppose the application for directions. They submit the directions should either be recast in accordance with their respective proposals, or not be made at all. They argue the directions are dependent on a view of the facts which is strongly disputed, and that, if the directions relate only

to issues of legal principle, it is unlikely that the making of such directions will avoid future litigation or have any utility.

[24] The Kain siblings and the Kain grandchildren argue that if Public Trust, as it maintains, does not have any particular distribution in mind it could leave the two Trusts to vest by default and avoid unnecessary legal fees. They are suspicious of Public Trust's intentions, which they believe are to make distributions in favour of the Huttons, to the exclusion of the Kains. They submit that is the logical inference to be drawn from putting the "principle of equality" contained in the 1997 deed to one side, ignoring previous distributions, and taking into account the most recent wishes of Tom Couper.

Public Trust's response

[25] In response, Public Trust emphasised that the proposed directions are only concerned with the scope of its discretion and not its exercise. Approval of proposed distributions from the trusts is not sought, nor directions as to what weight should be given to particular considerations or who should receive a distribution, nor how much they should receive or for what reasons.

[26] Public Trust acknowledges that the beneficiaries and past trustees, including the late Tom Couper, have been involved in complex, long-running litigation relating to the administration of the Couper-Kain Group, and that there has been a breakdown in family relationships. It is against that background, and in the knowledge that some beneficiaries hold opposing views on what matters Public Trust should take into account in exercising its discretion, including aspects of Panckhurst J's 2004 judgment, that has led it to take this precautionary step. It considers it to be in all parties' interests for the beneficiaries to be heard before further distribution decisions are made.

[27] Public Trust submits that the points of principle raised by the proposed directions are capable of argument without having to engage in disputes over entitlement, and that it will benefit from directions about the scope of its discretion. In that regard, Public Trust refers to the observation of Venning J, in his decision on its earlier leave application, that it is in the interest of all parties to have preliminary

directions resolved, which may assist Public Trust in the exercise of its duties as trustee.⁶

Other preliminary issues

[28] The Kain siblings also made submissions regarding the timing of Public Trust's application for directions.' They noted that Public Trust's application has only now been made, despite it having already made substantial distributions in respect of other trusts and previously declined in 2010 to refer a substantial distribution from another trust to the Court for directions. The Kain siblings also expressed concern about some attempt to characterise their approach as unreasonable and vexatious. These matters were mentioned as being relevant to the context of the present application but they appear to relate to an apparent sense of grievance held by the Kain siblings towards Public Trust and I do not consider them material to the Court's present task.

[29] Of more direct concern are issues raised regarding the factual matrix or the evidential foundation upon which the directions are sought to be made. Prior to the hearing of the application, Public Trust took issue with the content of affidavits filed by the Kain siblings and the Kain grandchildren that canvassed disputed historical factual matters. Public Trust considered the evidence to be irrelevant to what it submitted were the narrow questions of law being put before the Court for its consideration. Conversely, the Kain siblings maintained that the Court would need to be apprised of the factual disputes and contentious matters which they argue are relevant to whether directions can be made and, if so, their form and ultimate effect.

[30] An impasse regarding the affidavit evidence and the need to have two of Public Trust's deponents cross-examined was avoided by the parties agreeing that the affidavits be read only for the purpose of understanding the full extent of the historical factual disputes. It is agreed that the affidavits are put forward for contextual purposes only. There is no expectation that the Court will make any factual findings in respect of the matters raised in the affidavits, the content of which is disputed. It is on that basis that the evidence has been received.

⁶ *Public Trust v Kain* [2018] NZHC 1547, (2018) 4 NZTR 28-012 at [50].

The approach to be taken to the application for directions

[31] A trust can apply for directions under s 66 of the Act:

66 Right of trustee to apply to court for directions

- (1) Any trustee may apply to the court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.

...

[32] In *Chambers v S R Hamilton Corporate Trustee Ltd*, the Court of Appeal observed that s 66 represented an enactment of the broad equitable jurisdiction that had long resided in the Chancery Courts.⁷ Reference was made to Lord Oliver's summary of the English jurisdiction in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*:⁸

A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper and professional advice and, if so advised, to protect his position by seeking the guidance of the court.

[33] Section 66 may be used to resolve any uncertainty as to the exercise of a power.⁹ However, "[t]he Court's function is not purely advisory, or to be invoked to resolve abstract hypotheses".¹⁰ It is essential there exists a dispute, or at least a doubt, as to the proper exercise of a power,¹¹ but an application for directions on a substantive issue that is in dispute will not usually be appropriate where important facts are contested.¹²

[34] Public Trust seeks directions regarding whether it must, may, or must not take into account certain matters in the exercise of its discretion when making distribution decisions in respect of the two trusts. When exercising discretionary powers a trustee has a duty to take relevant matters into account and to put to one side irrelevant

⁷ *Chambers v S R Hamilton Corporate Trustee Ltd* [2017] NZCA 131, [2017] NZAR 882 at [32].

⁸ *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] All ER 198 (PC) at 201.

⁹ *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [46].

¹⁰ At [47].

¹¹ At [47].

¹² *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 7, at [34].

matters.¹³ A trustee is under a duty to inform itself of matters material to its decision before exercising its discretion.¹⁴ The failure to consider a relevant consideration, or the taking into account of an irrelevant matter, may amount to a breach of fiduciary duty and lead to the trustee’s decision being set aside.¹⁵

[35] Public Trust stressed that it has not presently formed a view of what distribution(s) it intends to make and that, while, as is evident from the application itself, a “contemplated course of action” is being reflected upon, s 66 does not require the trustee to have a particular outcome or decision in mind.¹⁶ The directions sought do not therefore fall into the category of what are sometimes described as “blessing” orders.¹⁷

[36] There is significant dispute in relation to most of the directions sought by Public Trust. The Kain siblings argue that the factual narrative set out in Panckhurst J’s 2004 judgment does not provide sufficient context to allow directions to be made. In furtherance of their position, they referred to the observations of Lord Walker in *Pitt v Holt*.¹⁸ In that case, Lord Walker, delivering the judgment for the Court, noted the “important distinction” between trustees acting outside the scope of their powers, and an error in failing to give proper consideration to relevant matters in making a decision within the scope of their powers.¹⁹

[37] As previously canvassed, Public Trust’s position is that it is seeking guidance on issues of law and interpretation only. It maintains it is not seeking the Court’s approval of a proposed distribution from the trusts, nor directions on what weight should be given to each consideration that is identified as being relevant. The Kain siblings dispute that position and argue that, contrary to Public Trust’s characterisation of its application, the directions it is seeking are largely concerned with the second

¹³ Greg Kelly and Chris Kelly *Garrow and Kelly: Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at [19.24(v)]; and *Gailey v Gordon* [2003] 2 NZLR 192 (HC) at [89].

¹⁴ *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [10], citing *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) at 717.

¹⁵ *Pitt v Holt*, above n 14; *Gailey v Gordon*, above n 13, at [89].

¹⁶ *Re Allen-Meyrick’s Will Trusts* [1966], 1 WLR 499 (Ch) at 743–744.

¹⁷ See *Re PV Trust Services Ltd* [2017] NZHC 2957, [2018] 3 NZLR 160 at [42], citing the unnamed judgment of Robert Walker J repeated in *Public Trustee v Cooper* [2001] WTLR 901 (Ch D).

¹⁸ *Pitt v Holt*, above n 14.

¹⁹ At [60].

type of error identified by Lord Walker — namely, a failure by the trustees to give proper consideration to relevant matters in making a decision within the scope of their powers. They argue that the issues relating to the directions sought do not go to the scope of Public Trust’s discretion but to whether, in considering certain matters and disregarding others, it will have breached its duties to beneficiaries.

[38] I do not accept the premise of the Kain siblings’ argument that the directions sought in respect of the exercise of Public Trust’s discretion turn on the adequacy of its consideration of relevant matters. To the contrary, I understand what is largely being sought is the identification of what are or are not relevant matters, and clarification of Public Trust’s obligation to take them into account in an endeavour to accurately delineate the scope of its discretion. I consider there is a body of established fact, as a result of the prior litigation, that provides an adequate foundation on which to make that assessment. However, I accept that if the validity of the directions sought are not capable of a binary answer without reference to the disputed evidence it may not be possible to provide the guidance sought.

[39] The Kain siblings are of the view that most of the directions would result in Public Trust breaching its duty to them. They submit that there can be no “laundry list” of matters that must, or may, or must not be taken into account by the trustee and that the adequacy of the process by which it exercises its discretion cannot be ascertained without an assessment of all the circumstances. The Kain siblings argue that, because of the long and extensive background to the dispute between members of the family, to do otherwise would be for Public Trust to breach its duties as a trustee.

[40] It may be that divorced from the context of the disputed facts of this case it is not possible to properly assess the directions sought or provide them in the terms sought. However, so long as the Court is mindful of the Kain siblings’ argument, the Court is not barred from undertaking an analysis of the proposed directions and the particular issues to which they give rise. Similarly, the extent of any immunity Public Trust will receive as a result of it obtaining directions may be limited by the level of deliberation that will be required by the trustee of the factual context against which it will have to exercise its discretion. That may limit the utility of such a direction. For itself, Public Trust acknowledges that in the event of any challenge to the way it has

exercised its discretion it would only have protection in respect of the legal issue to which the particular direction gives rise.

[41] The Kain siblings point out that it may be difficult to determine where consideration of legal principles end and the trustee exercising a discretion based on disputed facts begins. That will be something I will need to assess in relation to each of the directions sought by Public Trust. However, if directions can be provided that do not turn on disputed facts between the beneficiaries, then the impediment of contested fact is avoided. Where, however, the direction is dependent on an assessment of conflicting views of the facts, the application for such directions in the terms sought will have to be declined.

[42] The present case has some parallels with *New Zealand Māori Council v Foulkes*.²⁰ That case involved a long history of litigation and disagreement. The trustees were in dispute regarding their powers and duties, but agreed to have a series of questions addressed by the Court on the basis of essential uncontested background facts that did not require the Court to resolve the disputed factual matters. Kós J (as he then was) observed that while the existence of a dispute is not fatal to the exercise of the jurisdiction, the relief sought must not involve resolution of any disputed issues or facts. It was noted that “the s 66 procedure is entirely unsuited to resolving such issues”, proceeding as it does on the basis of affidavit evidence alone.²¹ After noting the failure by the parties to supply an agreed summary of facts or “at least, a good unilateral draft”,²² Kós J stated:

[54] The approach I have taken to the facts has been indicated already.²³ I have identified in the first part of this judgment the bare background facts that I need to answer the issues posed. Those at least should be largely undisputed. In answering the issues, I may need to refer to some additional facts. They, likewise, should be substantially undisputed. Where the issues posed do not require the analysis of contested factual positions, I shall answer them. Where they do, I shall not.

[43] Public Trust maintains that the resolution of disputed factual matters is not required for the type of directions it seeks, although it acknowledged it may need to

²⁰ *New Zealand Māori Council v Foulkes*, above n 9.

²¹ At [47] and [49].

²² At [53].

²³ *New Zealand Māori Council v Foulkes*, above n 9, at [10].

consider such factual issues when it ultimately exercises its discretion. I intend to follow the same course charted by Kós J in *New Zealand Māori Council v Foulkes*. Whether that path will allow me to properly address the directions that are sought notwithstanding the factual disputes and hostile litigation that characterises this case will have to be assessed in relation to each of the proposed directions.

[44] I now turn to the specific directions sought by Public Trust.

The directions

Public Trust must act consistently with the terms of the Trust deed

[45] In respect of both the Waitaha Trust and Middle Road Block Trust, Public Trust seeks a direction that when exercising its discretion to vest or make distributions of any kind it must act consistently with the terms of the trust deed. It is uncontroversial that a trustee must adhere to the terms of the trust deed.²⁴ A direction expressed by reference to acting “consistently” with the terms of the Trust deed is sought because that language better aligns with the exercise of discretionary powers, which is the focus of the present application.

[46] The reformulation of this fundamental rule of trust law was sought by Public Trust in order to emphasise that its duties are governed by and limited to the terms of each individual trust deed and the law as it applies to each. In exercising its discretion, it cannot take into account nor follow the terms of other trust deeds where they are inconsistent and may have different beneficiaries. To do so would be to breach its obligation to adhere to the trust deed. The approach Public Trust must take requires it to have regard to the terms of the individual trusts the subject of this application. It must be cognisant that a collective approach to the Couper-Kain Group may be inconsistent with the terms of the individual trust deeds.

[47] The Kain siblings observe that because the proposed direction articulates such an elementary concept of trust law, there is no need for the Court to make a direction

²⁴ Greg Kelly and Chris Kelly, above n 13, at [20.12]–[20.13], citing *Attorney-General v Downing* (1767) Wilm 1 at 23; and *Ravy v Ridehalgh* (1855) 7 De GM & G 104 at 108. See Trustee Act 1956, s 2(4).

but if one is to be made it should be that Public Trust must *adhere* to the terms of the Trust as expressed in the trust deed. Public Trust agrees with that formulation.

[48] I doubt whether there is much utility in making the directions sought. The position is clear. While there is sense in restating such a bedrock proposition as a prelude to argument in relation to other directions, I doubt that a professional trustee would be assisted by such a direction beyond the restatement of the principle in this judgment. Public Trust explained that the reason it has sought directions on matters that would ordinarily be accepted as non-controversial is to “avoid any impression that [it] was not aware of all matters it must consider”. However, as observed by counsel for Mrs Hutton, to the extent it is necessary to signal such an awareness, “that signal has now been sent”.

Public Trust is required to take into account the interests of the beneficiaries

[49] In respect of both trusts, Public Trust seeks a direction that when exercising its discretion to vest or make distributions of any kind and at any time:

[Public Trust] is required to take into account the interests of the beneficiaries. This depends on the particular circumstances of the trust and the beneficiaries, but may include the extent to which a beneficiary would benefit from a distribution, the financial needs of the beneficiaries and, if the beneficiaries are children, the extent to which their needs will be met by their parents.

[50] As a statement of principle, I do not consider this formula to be controversial. The Kain siblings queried the ambit of the beneficiaries’ “interests” but, other than a requirement that such interests be broadly related in some way to a beneficiary’s present or prospective financial position and capabilities, or their economic outlook, or plans, I do not consider how or why they may benefit from a distribution needs to be subject to any greater prescription.

[51] For the same reasons discussed at [48], I do not consider such a recognised principle relating to the exercise of a trustee’s discretion need be the subject of a direction under s 66 of the Act.

Public Trust not required to take into account what the beneficiaries who are also beneficiaries of other trusts have received from other trusts in the Couper-Kain Group

[52] In respect of both trusts, Public Trust seeks a direction that when exercising its discretion:

[It] is not required to take into account what the beneficiaries who are also beneficiaries of other trusts have received from the other trusts in the Couper-Kain Group.

[53] Public Trust submits that where there are multiple trusts in a group of related trusts, with overlapping but not identical beneficiaries, it is not appropriate for the trustees to treat the assets of all the trusts as a common pool for the family as a whole. I accept that is an accurate statement of the law. Where classes of beneficiaries overlap but are not identical it will be an error to treat the assets of all the settlements as a common pool for the family as whole.²⁵ It is also trite that trustees of a particular trust owe duties solely to the beneficiaries of that trust. They cannot exercise powers to benefit non-beneficiaries or non-objects of the trust and must adhere to the terms of the trust deed.²⁶ However, it does not follow from those two propositions that a trustee is prevented from taking into account what beneficiaries have received from other settlements where there are a number of interconnected trusts.

[54] Public Trust itself acknowledges that it may consider distributions received from other trusts in the Couper-Kain Group insofar as that is relevant to the interests of the beneficiaries. That consideration extends to the particular beneficiary's financial circumstances and the extent to which that beneficiary may have benefitted from a distribution from another trust. It would therefore be proper for a trustee when considering whether or how to benefit a given beneficiary out of one trust to take into account that same beneficiary's entitlement or expectation under another trust.²⁷

[55] Public Trust cannot distribute to the Kain siblings the assets of the Middle Road Block Trust, being a trust in respect of which they are not beneficiaries. However, the Kain siblings do not accept that Public Trust may ignore the distributions that have

²⁵ Lynton Tucker and others *Lewin on Trusts* (20th ed, Thomson Reuters, London, 2020) at [29-057].

²⁶ *Wong v Burt* [2005] 1 NZLR 91 (CA) at [30]; *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589.

²⁷ Lynton Tucker and others, above n 25, at [29-057].

previously been made from other related trusts when making a decision as to the distribution of the Waitaha Trust. They point to what they submit is a contradictory position taken by the Public Trust regarding the wishes of the settlor, Tom Couper, who at times expressed his wishes by reference to what benefits had already been received by certain beneficiaries. A direction that Public Trust take into account the wishes of Tom Couper on such a basis cannot, on the Kain siblings' submission, be reconciled with it not being required to take into account what other beneficiaries have received from other trusts in the Couper-Kain Group.

[56] The Kain siblings and grandchildren argue that, in any event, the broader context of the Couper-Kain Group precludes a direction that Public Trust not be required to take into account what beneficiaries receive from other trusts. In their submission, the trusts are inextricably linked, with the equity of one trust being used to acquire assets that were settled on other trusts so as to grow the family empire. They point to the observation of Panckhurst J in the 2004 litigation about how the farming operations of the trusts were intertwined:²⁸

The pattern of inter-entity advances and borrowings (intermingling) became a fact of life. Trust assets were used as security to facilitate external borrowings. Thereby Mr Couper purchased additional land which in the main was settled on new trusts.

[57] The Kain siblings argue that this broader context influenced the Judge's approach to other issues. They cite, for example, the Kain siblings' challenge to the resettlement of the Mangaheia Trust, which removed them as beneficiaries in favour of Mr Couper's ex-wife and her children. In rejecting the Kain siblings' argument on that point, Panckhurst J stated:²⁹

Not only was she an object of the old Trust, but as Mr Couper's wife of about 10 years (as at 1999), it was not surprising that a decision should be taken to make provision for her. At the same time the plaintiffs' contingent rights to income and capital are removed. *But this outcome is to be assessed in the overall context. In particular they remain as beneficiaries of other trusts.* In these circumstances I am not persuaded that this is a clear situation in which it is appropriate for this Court to intervene.

(emphasis added)

²⁸ *Kain v Hutton*, above n 3, at [252].

²⁹ *Kain v Hutton*, above n 3, at [228].

[58] When assessing the exercise of the trustee's discretion to resettle the Mangaheia Trust on Mr Couper's ex-wife and her children, Panckhurst J took into account as a relevant consideration the fact that the Kain siblings were beneficiaries of other trusts. The Court of Appeal, in agreeing with Panckhurst J's reasoning, accepted that the desire to benefit Mr Couper's wife, in the context of the Mangaheia Trust, being one of the few trusts where she was able to benefit, was a proper decision for the trustees to make.³⁰

[59] However, it does not necessarily follow from this discrete part of Panckhurst J's reasoning in the 2004 litigation justifying the Court's refusal to intervene in a trustee's absolute discretion, that it is a mandatory requirement to take into account what beneficiaries have received from the other trusts in the Couper-Kain Group. As was acknowledged by Public Trust, however, the proposed direction is largely superseded by the issues that arise in relation to the 1997 deed and the contested concept of equality as between the beneficiaries.

The issue of equality

[60] The issue of equality as between the beneficiaries is the subject of four proposed directions in respect of the Waitaha Trust:

- (v) The [1997 deed] is not binding on [Public Trust].
- (vi) [Public Trust] may take the [1997 deed] in to account but it is not required to.
- (vii) [Public Trust] is not required to ensure that all of the beneficiaries of the Waitaha Trust receive equal amounts from that Trust.
- (viii) [Public Trust] is not required to ensure that all of the beneficiaries of the trusts in the Couper-Kain group receive equal amounts from the Group.

[61] In respect of the Middle Road Block Trust, three directions are sought, the first of which is worded differently and is to different effect:

- (v) The [1997 deed] is not binding on [Public Trust] and cannot be taken into account.

³⁰ *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 at [100].

- (vi) [Public Trust] is not required to ensure that all of the beneficiaries of the Middle Road Block Trust receive equal amounts from that Trust.
- (vii) [Public Trust] is not required to ensure that all of the beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the Group.

[62] In Panckhurst J’s 2004 judgment, a number of observations were made relating to the 1997 deed, the relevant parts of which are set out earlier at [11] and repeated below. As between the beneficiaries, the effect of the “Equality clause” as expressed in the deed is deeply contentious. Public Trust is concerned that, whatever approach it takes to the 1997 deed, it is likely to be challenged and it seeks the Court’s guidance as to the proper interpretation and application of Panckhurst J’s judgment. The relevant passages from the judgment are set out in full.³¹

[50] A further deed of arrangement was signed in June 1997 between Charles and Tom Kain as indemnifiers and the four remaining Kain children as the beneficiaries. The genesis of the deed was the need to roll over the Westpac loan to Tom Kain which was secured over Waipuna Station. The beneficiaries agreed to an extension of the Westpac loan to the end of August 1998 or, if Mr Couper would not agree to an extension to that date, then the beneficiaries consented to the loan facility remaining in place until the end of August 1997.

[51] However, the terms of the deed which were of enduring significance were these:

7. ***Unequal Assistance***

7.1 *The Parties to this Deed agree that there has been unequal assistance provided from the [family’s] South Canterbury and Hawke’s Bay interests. The parties agree to work toward ascertaining a fair statement over the amounts received by each party and working towards a position which would ensure, [in] so far as practicable, that all parties are or will be treated equally.*

...

9. ***Further Acts***

9.1 *Each party shall sign and deliver any documents and undertake any acts, matters and things which are reasonably required or requested by the other party to carry out and give effect to the intent and purpose of this Deed.*

Throughout this proceeding this document has been referred to as the 1997 Deed. At various times parties to the deed contended that they were not bound

³¹ *Kain v Hutton*, above n 3.

by the equality clause but, ultimately, all six siblings accepted that the principle of equality was binding.

...

[303] Happily this is one area of the case in relation to which agreement ultimately reigned. *The plaintiffs and Mrs Hutton agree that the deed of arrangement dated 19 June 1997 is binding upon them, in particular with reference to clause 7 that they will work towards establishing the value of benefits received so that all parties may be treated equally (refer paragraph [50]). It follows that the parties to the deed are also in agreement, and I so record, that the trustees of the various trusts need to recognise the principle of equality when discretionary decisions are taken.* This need further emphasises, in my view, the wisdom of there being one professional trustee with overarching responsibility for all of the trusts, save perhaps for those which are all but administered.

[304] In order to implement the ideal recognised in the deed the parties are also in agreement that there should be a declaration requiring each of the parties to provide information as to the benefits received by them, so that equality may be achieved. It is also accepted that the declaration should also contain an authorisation to the trustees, or trustee, to defer decisions in relation to at least capital distributions until after completion of the benefits exercise. I expect that counsel will be able to agree upon the exact terms of such a declaration for my approval. In particular I anticipate that machinery terms may be required with reference to information to be provided and as to by when provision is to be made. Accordingly the exact terms of the declaration are reserved on this basis.

[305] In response to my request at the end of the hearing for the parties to identify the issues requiring determination, the plaintiffs posed as a question that achieving equality “should include consideration of the consequences of the consent order on equality, to the extent that the orders are implemented”. I do not consider that there is a pleading which raised this as an issue. Even the second amended statement of claim did not advert to the relationship between the 1997 deed and the October 2002 consent order. The question has not been aired. It would be wrong for me to broach it. It may well be a matter upon which the new trustee will require directions. It is a matter which can, and should, be left in the meantime.

(emphasis added)

...

[329] Given the number of issues in the case I shall briefly record the decisions reached:

...

[j] That, by consent, the ideal of equality expressed in the Deed of Arrangement dated 19 June 1997 is binding upon the parties to the deed, with the terms of a declaration required to implement that ideal reserved for the further consideration of the affected parties.

[63] Public Trust is concerned that the observations made by Panckhurst J regarding the terms of the 1997 deed are open to different interpretations. In its submissions, it contrasts the Judge recording that the 1997 deed is binding on the signatories, in particular the Equality Clause, with the observation that the “trustees of the various trusts” *need* to recognise the “principle” or “ideal” of equality when discretionary decisions are taken. Public Trust highlights that distinction and notes that those statements suggest the Equality Clause is only binding on its signatories, not the trustee when exercising its discretion in respect of the trusts.

[64] Public Trust is not sure what the Judge contemplated by his remark that the trustees “need to recognise the principle of equality” when making discretionary decisions. It surmises that it may suggest that the trustees may or, alternatively, must equalise between the signatories when making distributions from the Couper-Kain Group trusts. Alternatively, that it suggests it may or must take into account the agreed Equality Clause or the derived “principle of equality” when making distribution decisions from Couper-Kain Group trusts.

[65] The beneficiaries have conflicting views as to the effect of the 1997 deed and the application of the 2004 judgment.

The Kain siblings

[66] The Kain siblings argued that the Equality Clause is binding on Public Trust and that, by the 2004 judgment, it is required to take into account and give effect to the 1997 deed. The siblings assert the Equality Clause unambiguously states that the Kain siblings, including Tom Kain and Mary Hutton, would work to ensure, insofar as practicable, they be treated equally and, pursuant to clause 9, that they would do all things necessary to give effect to that. They emphasised Panckhurst J’s observation regarding the benefit of there being one professional trustee with overarching responsibility for all of the trusts to facilitate the “principle of equality” when discretionary decisions are made and that this was part of the rationale for Public Trust’s appointment as the sole trustee across all the trusts. In their submission, Panckhurst J considered Public Trust’s appointment was based on the need for the new trustee to recognise and take into account the Equality Clause that had been agreed by

the siblings. The siblings point to previous instances where Public Trust has appeared to recognise the effect of the 1997 deed.

[67] For example, in relation to the distribution of the Te Mata Trust, Public Trust explained in a letter dated 25 September 2008:

Public Trust also took into account the existence of the Deed of Equality, and the fact that it has been ratified by the High Court, such that it would protect the interests of the other potential (contingent) beneficiaries of the trust.

[68] In a letter to the Kain family dated 29 August 2013, Public Trust then stated:

Public Trust is not a party to the Deed of Equality. The only parties are the six Kain siblings. The deed is something which Public Trust is bound to take into account, which it has done, but not at the expense of its obligations as a trustee of this group of trusts. It remains open to the Kain siblings to bring about any equality they have agreed to themselves.

[69] The Kain siblings maintained Public Trust must not act inconsistently to the detriment of certain beneficiaries by relying on the terms of the 1997 deed to justify distributions in the past but then to ignore it in making future distributions. They raised the spectre of previous distributions being rendered voidable should a different approach be taken to the 1997 deed to that previously adopted by Public Trust. They argued that for Public Trust to fail to take into account the effect of the 1997 deed would be to assist beneficiaries who are otherwise bound by that agreement to breach the deed. It was submitted that for a trustee to exercise its discretionary power in such circumstances would be to exercise the power for an improper purpose. For these reasons, the Kain siblings seek a direction that Public Trust “must take into account and give effect to the [1997 deed] and the principle of equality as contained therein”.

Mrs Hutton

[70] Mrs Hutton’s position is that the 1997 deed does not create any binding obligation on Public Trust. In her submission, Public Trust cannot take the Equality Clause into account. She maintained that the 1997 deed does not prescribe “an equalisation mechanism” between her and her siblings. Insofar as the Middle Road Block Trust is concerned, Mrs Hutton submitted that the deed cannot be taken into

account in any distribution from that trust because no beneficiary of that trust is a signatory to the deed.

[71] Mrs Hutton objected to the 1997 deed being referred to by the parties as a “deed of equality” because it mischaracterises the purpose of the document that is entitled “Deed of Arrangement”. Mrs Hutton’s point appears well made. The deed was entered into between Thomas and Charles Kain, as “the indemnifiers”, and the other Kain siblings, including Mary Hutton, as “the beneficiaries”. Its purpose was to record the basis upon which a Trust property (that is, the Waipuna Property) could continue to be used as security by the indemnifiers in respect of an unpaid loan provided by Westpac. Much of the deed’s content relates to arrangements to safeguard Mrs Hutton’s position. She maintained the Equality Clause, which is headed “Unequal Assistance” was for the purpose of protecting her position, and that the clause refers to the family’s South Canterbury and Hawke’s Bay interests and the unequal assistance provided from those sources. By that clause, the parties agreed to work towards ascertaining a fair statement regarding the amounts received by each party and working towards a position which would ensure, insofar as practicable, that all parties are or will be treated equally.

[72] Mrs Hutton submitted that the proceeding before Panckhurst J in 2004 was wide-ranging and that the 1997 deed was not a primary issue or the focus of the case, which she characterises as primarily relating to the ownership of various farm properties, the validity of resettlements, and the exercise of the trustees’ powers. Nevertheless, I am bound to observe that a consent order was made that records the agreement of the parties to the 1997 deed to be bound by “the ideal of equality” expressed in that document. The order therefore represents the parties’ renewed agreement to be bound by the Equality Clause — hence Public Trust’s concern regarding the proper approach it should take to the Court’s ratification of the parties’ agreement that they be treated equally.

[73] Mrs Hutton submitted that there is uncertainty as to the meaning of the “decision” reached by Panckhurst J “by consent”, which recorded that “the ideal of equality” expressed in the 1997 deed was to be binding upon the parties to the deed. The terms of a declaration that was required to implement that ideal were reserved for

the further consideration of the affected parties. Mrs Hutton highlighted that, despite the passage of 16 years, no steps have been taken, as were contemplated by the Judge, to provide the necessary information regarding the benefits received by the signatories to enable the consent order to be given effect. As a result, in the absence of any of the parties having agreed to the machinery terms of the contemplated declaration requiring the parties to provide information of the benefits they have received in order for equality to be achieved,³² the order cannot be given effect to and the judgment has therefore never been perfected.

[74] Furthermore, Mrs Hutton submitted this type of contemplated exercise was always difficult and remains impractical. It would involve retrospectively having to take into account different distributions received at different times over a period spanning from the 1970s onwards and would include different classes of assets that have appreciated differently. It was noted that some assets had been used for investments with varying results, while others had been developed and improved, and that differing income streams had eventuated from different assets, whereas others had not generated income. Across those difficulties lies the overarching factual disputes and deeply divided accounts about the history of the various trusts and what has been received by each beneficiary. In the circumstances, Mrs Hutton submitted, any obligations under the deed or the consent order are no longer enforceable and that a third party such as the Public Trust should not be required, even as a matter of discretion, to take the Equality Clause into account.

[75] In summary, Mrs Hutton advanced four propositions. First, the 1997 deed was not relevant to the Middle Road Block Trust because the parties to the deed are not beneficiaries to that Trust. To take the 1997 deed into account when considering the Middle Road Block Trust would amount to acting in the interests of non-objects.

[76] Second, the 1997 deed cannot create any binding obligation on Public Trust in respect of the Waitaha Trust. That Trust's deed enjoins the trustee to hold the capital of the Trust for the named beneficiaries alive at the date of distribution "in such proportions as the Trustees in their absolute discretion shall determine". It was

³² See *Kain v Hutton*, above n 3, at [304].

submitted that, if the 1997 deed were to be taken as binding on the trustee, it would amount to a fettering of its discretion and, in the absence of all beneficiaries being in agreement and of age, that cannot be permitted.³³ It was further submitted that other considerations that would normally be taken into account in the exercise of the trustee's discretion would have to be put to one side because "a subset of beneficiaries had decided that it should be so".

[77] Third, Mrs Hutton accepted as a matter of broad principle that if all the signatories to the 1997 deed were in agreement as to the meaning and effect of that document, or if its meaning was clear, then, provided it was not inconsistent with other obligations, the trustee could arguably take the Equality Clause into account. However, she submits that is not the position here and that the meaning and effect of the deed is disputed and unclear. In furtherance of that argument, Mrs Hutton submitted that the Equality Clause only refers to the parties to the 1997 deed working towards a future position and one that was never completed. Mrs Hutton also maintains that it is unclear as to what is meant by the parties being treated "equally", particularly where individual trusts name particular beneficiaries but not necessarily all of the Kain siblings. She further submitted that any interpretation of the 1997 deed would have to be informed by the surrounding context, including its overall purpose, which was to provide benefit for two of the beneficiaries, Tom and Charles Kain, from vested trust property at the expense of others.

[78] Mrs Hutton submitted that the 1997 deed does not bind Public Trust and that the trustee should not be placed in the position of having to be the arbiter of what the Equality Clause means. Mrs Hutton emphasised other difficulties arising in the absence of the exercise contemplated by Panckhurst J having been progressed by the parties. These included the factual inquiry the trustee would have to embark upon regarding past distributions from trusts, many of which it did not or does not administer, and the difficulty in calculating the relative values of those distributions at the time they were made. It was argued the controversy and debate that would follow from such a process would create immense practical difficulties and essentially

³³ Lynton Tucker and others, above n 25, at [53-003].

involve the Public Trust engaging in an exercise that it is not required to perform either by the Waitaha Trust deed or by its general duties as a trustee.

[79] Mrs Hutton maintained that it is not for the Public Trust to consider the effect of the Equality Clause, which is not binding on the trustee, where its meaning is disputed and the factual basis otherwise unascertainable. She submitted that the preferable course would be to make it clear to Public Trust that the Equality Clause is not a relevant matter for its consideration.

[80] Finally, Mrs Hutton observed that because the grandchildren were not parties to the 1997 deed, its terms are not relevant to the exercise of Public Trust's discretion as to whether a distribution should be made to them. Distributions to their parents are not distributions to them.

The Hutton grandchildren

[81] The Hutton grandchildren endorsed the position of their mother that the 1997 deed is not binding on Public Trust and that it should not take the 1997 deed into account in exercising its powers and discretions under either the Waitaha Trust or the Middle Road Block Trust. In regard to the latter Trust, it was noted that the signatories to the deed are not beneficiaries under that Trust and it was submitted that for the trustee to take into account the 1997 deed would be to consider the position of non-objects. The Hutton grandchildren maintain there is no justification, either in principle or on the facts, for viewing the grandchildren as extensions of their parents for that purpose. The youngest Hutton child was not yet born at the time of the 1997 deed and the oldest was only 14 years.

[82] The Hutton grandchildren argued that the imposition on Public Trust of an equalising obligation as between the signatories to the 1997 deed who are beneficiaries of the Waitaha Trust would effectively superimpose new terms on the trust deed and fetter the trustee's discretion with respect to both the Hutton grandchildren and the other grandchildren, none of whom were signatories to the 1997 deed. The trust deeds explicitly give the trustee absolute discretion with respect to appointment of income and capital. A trustee is required to adhere to the terms of the particular trusts for the benefit of the beneficiaries of that trust. As a result, the Hutton grandchildren

submitted it would be plainly impermissible under the Middle Road Trust deed to fetter the discretion of Public Trust on the basis of an agreement of signatories who are not beneficiaries of that Trust.

[83] The Hutton grandchildren submitted that Panckhurst J's discussion of the 1997 deed in the 2004 judgment can be taken no further than the terms of the consent order, which is not binding on them. In making that order, the content of a declaration required to implement the so-called "ideal of equality" was reserved for further consideration. In the absence of any such further declaration having been made despite the passage of over 15 years, the continuing effect of the consent order is said to be questionable.

The Kain Grandchildren

[84] While not directly involved in the dispute between the signatories of the 1997 deed, the Kain grandchildren are supportive of the position taken by their parents as to its meaning and effect. The Kain grandchildren submitted that Panckhurst J should be taken as having in mind the signatories' children when he noted the parties' continued agreement to the Equality Clause and the need for the trustees of the various trusts to recognise the principle of equality when making discretionary decisions. The wisdom of there being only one professional trustee with overarching responsibility for all of the trusts was suggested as being consistent with such an approach. It was argued that it would be artificial to distinguish between different generations because the trusts were settled to benefit the family. Now, with only the two trusts left, it was submitted that the "principle of equality" should apply even in respect to the Middle Road Block Trust. Having regard to the wider family context, it was argued that by applying the principle of equality in respect to that Trust, Public Trust would not be benefiting a non-object of the discretionary power, nor would it offend against the rule that a trustee must not act other than in the interests of the beneficiaries.

[85] While it was acknowledged Public Trust was not required to ensure that all beneficiaries of the two trusts receive equal amounts from the respective trusts, the Kain grandchildren drew attention to the default position under the Middle Road Block Trust of equal sharing amongst all of the grandchildren. It was also accepted that the

Public Trust was not required to ensure that all beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the group. However, it was argued that a coda to any such direction should be that when exercising its discretion, either on vesting or distribution, Public Trust must take account of the principle of equality recognised by the 1997 deed and the default provisions of the Middle Road Block Trust. It was submitted that to do otherwise would ignore the basis upon which Public Trust was appointed to administer the remaining Couper-Kain Group trusts and the 2004 judgment and consent order.

Discussion

[86] Public Trust accepts that it is bound by Panckhurst J's judgment as a successor trustee. It follows that, on the face of the 2004 judgment, Public Trust is obliged to recognise the agreement reached between the signatories to the 1997 deed that binds them to the Equality Clause. The signatories effectively recommitted to that clause during the 2004 proceeding and that confirmation was marked by the making of a consent order to that effect. However, the extent of any such recognition is dependent on the degree to which the principle of equality can be reconciled with the mandatory obligations of the trustee in exercising its discretion and the feasibility of doing so in the absence of the signatories advancing the "benefits exercise" upon which the practical effect of the agreement was dependent.³⁴

[87] The 1997 deed addressed a discrete event that concerned the use of a trust asset by two of the Kain siblings for the purpose of their commercial interests and sought to safeguard the position of Mrs Hutton. However, the deed was given fresh status in the 2004 judgment as a result of all the siblings, including Mrs Hutton, accepting the 1997 deed, in particular the Equality Clause, remained binding upon them. The renewed standing the Kain siblings and Mrs Hutton were prepared to afford to the 1997 deed appears to reflect a view that was mutually held, at least at that time, that the trusts in the Couper-Kain Group and, as is apparent from the wording of the Equality Clause, the family interests in South Canterbury, were to be treated collectively for the overall benefit of the signatories of the deed.

³⁴ See *Kain v Hutton*, above n 3, at [303]–[304].

[88] That view of the position may well have been the product of the way in which the Couper-Kain Group was managed and operated by Tom Couper, with assets utilised as a collective pool to purchase further properties and the interdependence of the various entities joined by a network of interrelated liabilities and advances. The parties appear to have held a mutual outlook that overlooked the distinct nature of the individual trusts that made up the group, their separate assets and, importantly, the varying makeup of the beneficiaries of the individual trusts. In that regard, the Court of Appeal remarked in the course of earlier litigation:³⁵

[297] The difficulties have stemmed in large part from a fundamental misunderstanding of the nature of trusts on the part of [Tom Couper] and of discretionary trusts on the part of the Kain children. [Tom Couper] considered that, given his role in building up the assets of the trusts, he was entitled to keep the assets under his control, albeit largely for the benefit of his wider family. The Kain children, despite being merely discretionary beneficiaries of most of the trusts, appear to believe that the assets belong to them.

[89] The need to treat each trust separately with distinct beneficiaries and separate beneficial interests is reflected in the court-ordered reallocation and unwind process that resulted from the 2004 litigation. The ordering of the implementation of that unwind process to achieve the separation of the affairs of the trusts and the companies involved in the farming operation conducted under the control of Mr Couper in the greater Hawke's Bay, recognises the separate status of the individual entities that made up the Couper-Kain Group.

[90] Therefore, it is perhaps surprising that the collective approach anticipated by the Equality Clause was endorsed so readily by Panckhurst J. However, I think it likely that the rare consensus between the signatories of the 1997 deed, coupled with the anticipated agreement to machinery provisions to allow for the accurate compilation and provision of information regarding the benefits received by each of the parties to the 1997 deed, and the appointment of a sole professional trustee, may well have appealed as providing a constructive way forward. Sixteen years later, however, the benefits exercise remains unadvanced. The parties to the 1997 deed have not worked towards establishing the value of benefits received by each of them.

³⁵ *Kain v Hutton*, above n 30.

[91] Panckhurst J held that in order to implement the “ideal of equality” as it was recognised in the deed, there should be a declaration requiring each of them to provide information as to the benefits received by them. Such a declaration was also to contain an authorisation to the trustees (as they were then) or trustee to defer decisions in relation to at least capital distributions until after completion of the benefits exercise. The Judge anticipated that there would be agreement as to the exact wording of such a declaration for his approval and that machinery terms would be required with reference to the information to be provided and by when such provision would occur. The terms of the declaration were reserved on that basis but, despite the parties agreeing to that course, nothing more was done.

[92] The question that arises now is the extent to which, if any, in the wake of no apparent effort to implement the process the parties viewed as a prerequisite to giving effect to the Equality Clause and as providing the means by which the trustee could recognise the principle of equality in making discretionary decisions, there remains an obligation on Public Trust to recognise the principle of equality as between signatories to the 1997 deed.

[93] There are a number of further considerations that militate against the Equality Clause being taken into account by Public Trust in the exercise of its discretion. The signatories to the 1997 deed are not beneficiaries of the Middle Road Block Trust. A trustee cannot exercise its powers with the intention of benefitting a non-object of the discretionary power.³⁶ However the ideal or principle of equality was intended to be applied, it could not have been contemplated that it would have application to the administration of trusts of which the signatories were not beneficiaries. Nor is it tenable that Panckhurst J’s references to a “principle” or “ideal” of equality were to be construed as being anything other than what could be derived from the Equality Clause set out in the 1997 deed. I do not consider those terms were intended to embrace any wider concept or principle independent of the deed itself, or to be endorsing the equitable maxim “equity is equality”.

³⁶ *Wong v Burt*, above n 26, at [30]; *Kain v Hutton*, above n 26.

[94] In relation to the Waitaha Trust, the signatories to the 1997 deed are not the only beneficiaries of that Trust. The private arrangement made by those signatories regarding arrangements as between themselves can have no effect on the exercise of the trustee's discretion as regards potential distributions to other beneficiaries that were not a party to the deed. The deed was signed when the Kain and Hutton grandchildren were either minors or not yet born, and it remains unclear how an agreement entered into by some of the beneficiaries may influence the assessment of a distribution to one or more of their unrepresented children.

[95] One of the signatories to the deed, Tom Kain, is now deceased, although his only child, who is a minor, remains a beneficiary of both trusts. Public Trust is understandably concerned that consideration of an agreement entered into by some beneficiaries of the Waitaha Trust who were not beneficiaries of Middle Road Block Trust may amount to an unlawful fettering of the exercise of its future discretion in regard to possible distributions to the grandchildren and in a manner that is inconsistent with the respective trust deeds.³⁷

[96] Finally, as discussed, a fundamental premise of Panckhurst J's direction that the trustees need to recognise the principle of equality when making discretionary decisions is that it will have available to it the signatories' agreed value of benefits received by them. Representatives of Public Trust have deposed that, while some breakdowns have unilaterally been received from each side, they are incomplete and that no "fair statement" of the benefits received by each party as contemplated by the Equality Clause has been agreed by the signatories. That is perhaps unsurprising given the depth of the family conflict and, as stressed by Mrs Hutton in her submissions, that it is not clear how past distributions would be assessed or valued given the passage of time.

Decision

[97] I have come to the following conclusions regarding the effect of the 1997 deed and the application of Panckhurst J's 2004 judgment.

³⁷ Lynton Tucker and others, above n 25, at [29-095]; *Masters v Stewart* [2014] NZHC 2419, (2014) 3 NZTR 24-017 at [56] and [63].

[98] Public Trust was not a party to the 1997 deed, nor were most of the beneficiaries of the Waitaha Trust. None of the beneficiaries of the Middle Road Block Trust were signatories to the 1997 deed. It follows that the 1997 deed cannot bind Public Trust. The 1997 deed can have no bearing on distributions to beneficiaries who were not signatories. To do otherwise would amount to a fettering of Public Trust's discretion with respect to those beneficiaries' interests. In respect of the Middle Road Block Trust it would also amount to an intention to benefit non-objects.

[99] The Equality Clause should be taken into account by Public Trust when exercising its discretion to make distributions to the signatories to the 1997 deed insofar as it is able and practicable to do so. Because of the failure of the signatories to take the necessary steps to implement the "ideal of equality" by making the declaration requiring each of them to provide information as to the benefits they have received, and which was to include their family's South Canterbury interests, it will be for Public Trust to assess the extent to which it is possible to take into account the "principle of equality" as between the signatories.

[100] Public Trust's consideration of the "principle of equality" is limited to equality between the six signatories of the deed. It does not have wider application to other beneficiaries of either of the two trusts, or more generally to other beneficiaries in the group. Insofar as Public Trust is required to consider the "principle of equality" as it relates to the signatories of the 1997 deed, it only need do so to the extent it is practically able to carry out such an exercise, and able to make an informed and accurate assessment of the benefits received by the signatories, and to the extent that it is consistent with its other obligations as a trustee in exercising its discretion.

[101] The potential difficulties faced by Public Trust in making that assessment may have supported a simpler, and no doubt from Public Trust's position, more functional and flexible approach that is reflected in its proposed direction that it may take the 1997 deed into account but it is not required to do so. The outstanding factual disputes between the parties do not allow me to follow that proposal. To conclude, insofar as distributions involving the Kain siblings and Mrs Hutton are concerned, that the equality principle which Panckhurst J directed the trustee to be cognisant of can be put aside at the trustee's option, I would have to be satisfied that, as between the siblings,

the trustee could legitimately and without qualification put the principle aside in the exercise of its discretion.

[102] After due inquiry, Public Trust may, upon its assessment of the competing contentions of the siblings and the limitations and difficulties caused by the disputed factual narrative, come to the conclusion that the extent to which it can have any further regard to that consideration is severely limited or not realistically possible. However, such a position is not one that I can reach given the factual limitations of the present application. I am not in a position to undertake the necessary evidential analysis that might allow me to conclude that, notwithstanding this Court's earlier guidance, the Equality Clause and the derived principle of equality can properly be discarded by the trustee at its option.

[103] To summarise, in respect of the Waitaha Trust, Public Trust is required in exercising its discretion to make distributions to the Kain siblings and/or Mary Hutton to take cognisance of the principle of equality articulated in the Equality Clause of the 1997 deed. However, such a requirement is only applicable to the extent Public Trust considers itself reasonably able to do so and is practically able to make such an assessment, and only to the extent that doing so is consistent with its other obligations as trustee in exercising its discretion.

[104] Public Trust is not obliged to take into account either the 1997 deed or the principle of equality when considering distribution decisions to the Kain or Hutton grandchildren in respect of the Waitaha Trust. Because they are not signatories to the deed and played no part in the 2004 litigation their interests remain unaffected by their parents' agreement regarding equality. For the same reason, Public Trust is not obliged to take the 1997 deed into consideration when exercising its discretion in respect of the Middle Road Block Trust. None of the signatories to the deed are beneficiaries of that Trust. Neither the Equality Clause nor any principle of equality relating to the Kain siblings and Mrs Hutton's recommitment to that clause in 2004 bears on distribution decisions relating to this separate Trust. To rule otherwise could amount to the trustees acting in the interests of non-beneficiaries.

[105] Public Trust may take into account prior assistance or distributions received by beneficiaries insofar as such matters are of relevance to their interests and needs as beneficiaries. That may include consideration of benefits received by the Kain siblings and Mary Hutton when considering potential distributions to the Kain or Hutton grandchildren, to the extent such prior assistance or distributions are relevant to their interests as beneficiaries. As to whether Public Trust should consider past assistance or distributions received by beneficiaries who are also beneficiaries of other trusts in the Couper-Kain Group that have been received from those trusts, the prior assistance or distributions should be taken into account as between the signatories to the 1997 deed. However, such assistance or distributions should only be considered to the extent that Public Trust considers itself able to make an accurate and informed assessment of the benefits received by the siblings and Mrs Hutton.

[106] Such benefits will extend beyond the Couper-Kain Group and, as anticipated by the Equality Clause, include the family's South Canterbury interests. Whether Public Trust will consider itself in a position to carry out such an exercise and make a valid determination will be a matter for its judgment. Such a process will likely involve the assessment of benefits received from trusts of which it is not the trustee. The practical difficulty of retrospectively reconstructing and valuing distributions and benefits that date back a number of decades, and the intractable positions taken by the parties to the 1997 deed to their version of the narratives relating to these past events, are all matters to be taken into account. After due consideration the trustee may conclude the issues are insoluble and cannot be further advanced for the purpose of exercising its discretion in relation to those beneficiaries.

[107] I accept that Public Trust is not required to ensure that all beneficiaries of either the Waitaha Trust or the Middle Road Block Trust receive equal benefits from those trusts. To require otherwise would be contrary to the trust deeds and would represent an unlawful fetter on the trustee's discretion. Similarly, Public Trust is not required to ensure that all the beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the group. The Equality Clause of the 1997 deed and the principle or ideal of equality derived from that agreement encompasses the family's South Canterbury and Hawke's Bay interests. In any event, to place such a mandatory requirement on the trustee when only some of the beneficiaries have mutually agreed

to such a course would amount to an unlawful fetter on the trustee's discretion and again would be contrary to the trust deed.

Directions

[108] I make the following directions in respect of the Waitaha Trust:

- (a) That when exercising its discretion to vest or make distributions of any kind and at any time the 1997 deed is not binding on the Public Trust.
- (b) That when exercising its discretion to make any distributions to the Kain siblings and/or Mary Hutton Public Trust is required to recognise the principle of equality derived from the Equality Clause of the 1997 deed but only so far, in its assessment, as it is reasonably able to do so and only to the extent that it is consistent with its other duties as a trustee.
- (c) Subject to (b), Public Trust is not required to take into account what the beneficiaries who are beneficiaries of other trusts have received from the other trusts in the Couper-Kain Group.
- (d) Public Trust is not required to ensure that all of the beneficiaries of the Waitaha Trust receive equal amounts from the Trust.
- (e) Subject to (b), Public Trust is not required to ensure that all of the beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the Group.

[109] I make the following directions in respect of the Middle Road Block Trust:

- (a) The 1997 deed is not binding on the Public Trust and cannot be taken into account.
- (b) Public Trust is not required to ensure that all of the beneficiaries of the Middle Road Block Trust receive equal amounts from the Trust.

- (c) Public Trust is not required to ensure that all of the beneficiaries of the trusts in the Couper-Kain Group receive equal amounts from the Group.
- (d) Public Trust is not required to take into account what the beneficiaries who are beneficiaries of other trusts have received from the other trusts in the Couper-Kain Group.

Statements of wishes

[110] After settlement of the Waitaha and Middle Road Block Trusts, Tom Couper provided memoranda of wishes. Public Trust sought a direction regarding these statements of wishes which is best divided into two separate directions:

- (a) that it is required to take into account the wishes and subsequent wishes of Tom Couper, provided they are not inconsistent with the terms of the Waitaha Trust deed and the Middle Road Block Trust deed; and
- (b) where subsequent wishes are inconsistent, it is entitled to consider the more recent wishes as overriding earlier wishes.

[111] Mrs Hutton and her children agree with the directions sought. The Kain siblings and their children are opposed.

[112] Public Trust stresses that the directions are sought only on the basis of the matters of principle to which they give rise and that ultimately it will be for it to determine the weight to be afforded to Mr Couper's specific wishes and to assess the disputed facts as they relate to that assessment. It appreciates there are contested factual issues regarding the content of the various memoranda of wishes and that it may need to address the extent to which it should have regard to those wishes, taking into account the nature and strength of the disagreement between the parties and the other concerns raised in respect of them.

[113] Public Trust does not seek directions in respect of those issues that would involve the resolution of historical factual disputes between the parties. The

consideration of such contested matters, including those related to the content of the various memoranda of wishes, remain for it to assess in the exercise of its discretion.

[114] Public Trust seeks guidance in relation to two issues about which it is concerned there is some uncertainty. First, as to whether wishes and subsequent wishes are *mandatory* or *permissible* considerations. Second, whether subsequent wishes are entitled to be treated by the trustee as overriding earlier inconsistent wishes.

[115] The Kain siblings oppose consideration of the directions sought. They maintain that the directions are grounded in the facts and that the legal position with respect to statements of wishes is relatively clear. The Kain siblings contend that consideration of a settlor's statement of wishes is not mandatory but permissive. Public Trust, on the other hand, proposes a direction to the effect that it is required to take into account the wishes of the settlor.

[116] Clarification of the position, at least as between the parties, would appear to be beneficial. Insofar as the disputed facts may intrude on the analysis of the legal position or render the utility of the directions redundant, that possible conclusion will only be apparent from an analysis of the issues to which the proposed direction gives rise.

“Mandatory” or “permissible”

[117] Public Trust submits that it is clear that trustees are entitled to take the settlor's memoranda of wishes into account but it is not certain whether trustees are bound to do so or not. It contrasts Panckhurst J's statement of the law in his 2004 judgment that suggests that the settlor's wishes are mandatory considerations with passages cited from judgments of the Court of Appeal. Panckhurst J held that:³⁸

The legal position with reference to a statement or letter of wishes is clear, namely that trustees *must take* serious account of the settlor's wishes but always appreciating that the ultimate decision is theirs. It follows that trustees may properly decide to act contrary to the settlor's wishes after taking account of all the relevant circumstances.

(emphasis added)

³⁸ *Kain v Hutton*, above n 3, at [301].

[118] Whereas on appeal in respect of the same case, Glazebrook J stated:³⁹

It is *perfectly proper* for trustees to take a settlor's wishes into account. This can even lead to decisions that the trustees would not otherwise have made, as long as trustees appreciate that the ultimate decision is theirs.

(emphasis added)

[119] And in *Chambers v S R Hamilton Corporate Trustee Ltd* the Court of Appeal expressed the view that:⁴⁰

[36] Settlor's are entitled to express their wishes for the benefit of trustees, and *trustees are entitled to take them into account*. They can be important guidance to them in the exercise of discretionary powers. However trustees, whatever a settlor's wishes, must conscientiously apply their independent discretion in exercising their powers. ...

(emphasis added)

[120] Both Panckhurst J and the Court of Appeal cited the New South Wales Court of Appeal decision of *Hartigan Nominees Pty Ltd v Rydge* as authority for their respective statements regarding a trustee's treatment of a settlor's wishes.⁴¹ In *Hartigan*, a beneficiary sought declarations concerning the trustees' obligations. Mahoney JA observed that:⁴²

It is not uncommon for trustees holding property upon discretionary trusts to have from the settlor or instigator of the trust information as to his or her wishes as to how the discretionary powers are to be exercised. Trustees have, in such cases, taken into account the wishes of the settlor or instigator of the trust.

...

It would, I think, be strange if the trustee could not have regard to such matters. ... The assumption has been that precatory trusts may be taken into account or put into effect notwithstanding that they impose no obligation upon a trustee; there would appear to be no reason in principle why a non-binding wish expressed in the trust document should be given effect but such a wish outside it must be ignored.

...

There has, I think, been no dissent from the view that a trustee *may take into account the views of the settlor and of other beneficiaries as to the exercise of*

³⁹ *Kain v Hutton*, above n 30, at [272].

⁴⁰ *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 7.

⁴¹ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (NSWCA) at 429–431.

⁴² At 423, 429 and 431.

discretionary powers ... There is, in my opinion, no distinction to be drawn between the views of a settlor expressed during the administration of the trust and those expressed before the constitution of it. Provided that the trustee is satisfied that views expressed before the constitution of the trust remain those of the settlor or would have been such, he may act upon or in accordance with those wishes.

I am therefore of opinion that there is in principle no reason why the trustees should not have regard to the memorandum. As I have said, the court does not know the contents of the memorandum and in this proceeding is not concerned with the exercise of a power in a particular way. There may be circumstances such that the memorandum may not be referred to or given effect. But the plaintiff's claim is made in terms of the principle and it is sufficient to conclude that, in principle, the claim should not be accepted.

(emphasis added)

[121] I do not consider the language used by the Court of Appeal or the New South Wales Court of Appeal in *Hartigan* to be read as expressing a view that is inconsistent with the settlor's wishes being treated as a mandatory consideration by a trustee. Nor should those statements in the respective Court of Appeal judgments be viewed as being inconsistent with the United Kingdom Supreme Court's observation in *Pitt v Holt* that "[the] settlor's wishes are always a material consideration in the exercise of fiduciary discretions."⁴³ In both the *Kain* and *Chambers* decisions the Court of Appeal was commenting on the legitimacy of trustees taking into account a settlor's wishes rather than addressing the issue of whether doing so was mandatory or permissive. The statement in *Pitt v Holt* was adopted by this Court in *Harrison v Harrison* as part of Faire J's citation of the following passage from *Lewin on Trusts*:⁴⁴

The significance of the settlor's wishes has grown with the growth of wide discretionary trusts and powers in preference to trusts comprising wholly or mainly fixed interests. Without some guidance from the settlor, trustees would often have difficulty in identifying who ought to benefit. "The settlor's wishes", the Supreme Court has held, "are always a material consideration in the exercise of fiduciary discretions". It was previously well-established that the trustees are entitled to take serious account of the settlor's wishes and it is the better view that they are bound to do so; the notion that the trustees may be entitled to take it into account but not bound to do so is in our view wrong, for it is either a relevant consideration which in view of its importance ought to be taken into account or an irrelevant one which should not.

⁴³ *Pitt v Holt*, above n 14, at [66].

⁴⁴ *Harrison v Harrison* [2015] NZHC 2935, (2015) 4 NZTR 25-029 at [53], citing Lynton Tucker and others *Lewin on Trusts* (19th ed, Sweet & Maxwell, United Kingdom, 2014) at [29-162]–[29-163].

[122] Notwithstanding a settlor's wishes, a trustee must conscientiously apply their independent discretion. A settlor's wishes can only be taken into account if they are not inconsistent with the purposes of the trust as appear from its written terms.⁴⁵ Subject to that requirement, the settlor's expressed wishes can provide important guidance to the trustees when exercising their discretionary powers. However, the trustee must make an independent assessment of the appropriate course of action, taking into account not just the expression of wishes by the settlor but all material considerations.⁴⁶ As the Court of Appeal observed in *Chambers v S R Hamilton Corporate Trustee Ltd*:⁴⁷

Trustees should not blindly obey all settlor instructions. It is necessary for trustees to read and understand a memorandum of guidance to discern the settlor's wishes, and then with those wishes in mind make an independent assessment of the appropriate course of action, taking into account not just the memoranda, but all relevant factors.

(footnote omitted)

[123] A trustee is therefore obliged, as part of the exercise of its discretion, to have regard to a settlor's wishes for the purpose of making its independent assessment of the appropriate course of action. The trustee may ultimately decide to put those wishes to one side but in order to do so it must have had regard to the content of those wishes. They cannot be ignored and disregarded without the trustee having done so. It follows that a trustee is required to take into account the settlor's wishes.

Subsequent inconsistent wishes

[124] In opposition to the directions sought by Public Trust, the Kain siblings placed much emphasis on the requirement that a trustee administer the trust in accordance with its purpose, as derived from the trust deed. The Kain siblings argued that where there is ambiguity as to the trust's purpose, the surrounding circumstances may be taken into account to discern the meaning of the instrument, including any statement of wishes from around the time the trust was settled. It was argued that later statements of wishes were less likely to shed any light on the purposes of the trust at the time it

⁴⁵ *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 7, at [36], citing *Hartigan Nominees Pty Ltd v Rydge*, above n 41, at 431 and 445.

⁴⁶ *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 7, at [36].

⁴⁷ *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 7, at [36].

was settled in comparison to earlier wishes that may have been expressed at the time the trust was established. Where those later wishes are inconsistent with the earlier wishes it was suggested that those subsequently expressed wishes cannot carry the same weight as wishes expressed contemporaneously with the settlement of the trust. The argument has some attraction but its application is limited to where a trust's purpose is not discernible from the terms of its deed.

[125] The Kain siblings submitted that the purpose of the Waitaha Trust was to provide for the children and grandchildren of Tom Couper (of which there are none) and Janet Kain, and that there was no hierarchy of beneficiaries expressed in the trust deed. They emphasised the default position, whereby beneficiaries are to share equally. It followed, the Kain siblings argued, that the purpose of the Trust was not to benefit one particular child or grandchild. However, that analysis overlooks the purely discretionary nature of the Trust and the largely unfettered discretion available to the trustee to make distributions of both capital and income.

[126] Reliance was also placed on earlier statements made by Tom Couper that he wished there to be equality in a more general sense by factoring in distributions from other trusts. However, introducing the settlor's wishes to influence the discernment of the purpose of the Trust is to conflate two different issues, each of which the trustee must have regard to, namely, the purpose of the Trust as gleaned from its written terms and the exercise of its discretionary powers to make distributions. The Kain siblings submitted that a view expressed by Tom Couper some 35 years after the Trust was settled cannot logically shed any light on the purpose of the Trust at that time, but that presupposes that it is necessary to shed light on the trust instrument, the purpose of which is not otherwise apparent from its terms.

[127] The Kain siblings argued that Public Trust appeared to be trying to establish a blanket rule that later wishes will always override earlier wishes without regard to context. However, I do not consider that is the effect of the direction sought. Public Trust has been at pains to emphasise that it is seeking the direction only as a matter of principle, namely, that where subsequent wishes are inconsistent it is ordinarily entitled to presume that the most recent wishes override earlier wishes. Public Trust acknowledged that whether the latter wishes of Mr Couper will override the view he

expressed earlier is one for it to assess in the exercise of its discretion, taking into account all relevant considerations.

[128] As a starting point, which is no more than what the direction can be in the absence of any consideration of the disputed factual background, it appears plain that, all things being equal, subsequent statements of wishes by a settlor that are inconsistent with prior expressed wishes will supersede those earlier statements. That is the effect of the Court of Appeal's decision in *Chambers*.⁴⁸ In that case, two memoranda of guidance were provided by the settlor that were issued some four years apart. An addendum that effectively revoked the substance of the second statement of wishes was issued some three months later. The Court of Appeal identified the relevant expression of wishes to be used as guidance by the trustees in exercising their discretion were those extracted from the last memorandum, as amended by the addendum.⁴⁹

[129] So long as they are consistent with the trust deed, there is a compelling logic for a trustee endeavouring at the time of exercising its discretion to view the most recent expression of wishes as being more relevant to its task than earlier inconsistent wishes. Understanding a settlor's wishes at the time the trustee is exercising its discretion necessarily requires the trustee to take into account the most recent current guidance offered by the settlor. Whether that guidance is followed remains a matter for the trustee to weigh in the exercise of their discretion. In so doing, the trustee will have regard to whether those wishes are consistent with the terms of the trust's deed, and to all other relevant considerations, including the circumstances that applied at the time the settlor expressed their wishes.

[130] The Kain siblings reiterated that, in the absence of any known wishes expressed by the settlor at the time of settlement, the relevance of later wishes were more limited because they said nothing about the objective purpose of the Trust. However, as already discussed, it is not necessary for the statement of wishes to serve such a purpose. The only requirement is that such wishes are able to be aligned with

⁴⁸ *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 7, at [38].

⁴⁹ At [38].

the purpose of the trust that is discernible from the terms of its deed and the discretionary powers granted to the trustee.

[131] The Kain siblings also sought to place emphasis on how Mr Couper's wishes had changed markedly over time. Reference was made to the well-traversed narrative of how Tom Couper's outlook changed as a result of the "Westpac loan saga" that was said to be the catalyst for his belief that some of his nephews had benefitted disproportionately at the expense of other siblings and, in particular, that an imbalance between the male Kain siblings and their sisters required correction. The development of that changed view is said to be reflected in the wishes expressed by Tom Couper from around that time. That change in attitude grew more entrenched in the wake of the Kain siblings filing proceedings against him and his fellow trustees. However, all this family history, background and context, much of which is in dispute, including Tom Couper's hostility as the settlor towards the Kain siblings are matters to be weighed by Public Trust in the exercise of its discretion, and as part of its assessment of the changing wishes of Tom Couper.

[132] Finally, and I mention the matter only briefly, the Kain siblings raised the issue of whether Tom Couper had been influenced by others in his statements of wishes. Questions were sought to be raised as to the authorship of some of the correspondence and statements of wishes. Details were canvassed of various examples that were said to illustrate that allegation. These are not matters that can be pursued in the context of an application for directions relating to issues of legal principle. The Kain siblings submitted that it would be inappropriate to place weight on statements of wishes where there are doubts about their authorship, particularly if the author stood to benefit from them. However, that is a matter for the trustee's consideration and does not bear on the legal principle put forward for my assessment.

[133] Similarly, a submission that Tom Couper was labouring under a mistake as to the origins of the Waitaha Trust assets is a matter for the Public Trust to assess as it sees fit in weighing the statements of wishes, as is the alleged background of hostility held by Tom Couper towards the Kain siblings and, as a result, it was submitted, towards the Kain grandchildren.

Directions

[134] I am satisfied the following directions are appropriate in respect of the Waitaha Trust and the Middle Road Block Trust:

- (a) Public Trust is required to take into account the wishes and subsequent wishes of the settlor, Tom Couper, provided they are not inconsistent with the terms of the Trust and its purpose.
- (b) Where subsequent wishes are inconsistent, Public Trust is in principle entitled to consider the most recent wishes as overriding earlier wishes. However, it remains a matter for Public Trust's assessment, in the exercise of its discretion to vest or make distributions, whether in the circumstances the subsequent wishes of the settlor, Tom Couper, should have that effect.

Result

[135] Directions regarding the need for Public Trust to act consistently with the terms of the trust deed and requiring it to take into account the interests of the beneficiaries are declined.

[136] Directions regarding the issue of equality are made at [108] in respect of Waitaha Trust, and at [109] in respect of the Middle Road Block Trust.

[137] Directions regarding the wishes of Tom Couper regarding both trusts are made at [134].

[138] For the avoidance of doubt, the directions include the reasons for the judgment and not merely the stated directions.

Costs

[139] The issue of costs was addressed by Venning J in his leave judgment:⁵⁰

⁵⁰ *Public Trust v Kain*, above n 6, at [51].

- (c) If Public Trust pursues an application for directions, its costs of bringing the application and all appearances in support are to be met from the assets of the Trusts.
- (d) If Public Trust pursues an application for directions, the costs of all respondents incurred in responding to the application and presenting argument in relation to the directions sought are to be paid from the assets of the Trusts subject to:
 - (i) the costs must be necessarily and properly incurred for the benefit of the Trust in resolving the issues for determination; and
 - (ii) the costs are to be confirmed and payable at the conclusion of the proceeding.

[140] Leave is reserved for submissions to be filed if costs are in issue. They will need to be concise (no more than three pages) and filed and exchanged within 20 working days.

Solicitors:

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Vicki Ammundsen Trust Law Limited (19th to 21st named first defendants) (14th to 16th named second defendants)