IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA315/2021
[2021] NZCA 685

BETWEEN	GEORGINA KAIN, GEORGE CHARLES KAIN, GEORGE HARRY COUPER KAIN and GEORGE MICHAEL KAIN Appellants
AND	PUBLIC TRUST First Respondent
	MARY HUTTON, MARNIE COUPIE FORCER KAIN, JACK KAIN, MOLLY KAIN, RACHEL KAIN, STANLEY KAIN, WOLSEY KAIN, GEORGE COUPER MCHARDY KAIN, ASTA KAIN, MADELINE KAIN, GEORGE PAVEY KAIN, MICHAEL KAIN, RUPERT KAIN, SAMUEL KAIN, GEORGIA HUMPHREY, CONSTANCE HUTTON and HARRIET HUTTON Second Respondents
	MARNIE COUPIE FORCER KAIN, JACK KAIN, MOLLY KAIN, RACHEL KAIN, STANLEY KAIN, WOLSEY KAIN, GEORGE COUPER MCHARDY KAIN, ASTA KAIN, MADELINE KAIN, GEORGE PAVEY KAIN, MICHAEL KAIN, RUPERT KAIN, SAMUEL KAIN, GEORGIA HUMPHREY, CONSTANCE HUTTON, HARRIET HUTTON, DAVID WHYTE, KIRSTY MARGUERITE COUPER MASTERSON and ELIZABETH DIANE COUPER FRENDIN Third Respondents

CA316/2021

	BETWEEN	JACK KAIN, MOLLY KAIN, RACHEL KAIN, STANLEY KAIN, WOLSEY KAIN, GEORGE COUPER MCHARDY KAIN, ASTA KAIN, MADELINE KAIN, GEORGE PAVEY KAIN, MICHAEL KAIN, RUPERT KAIN, SAMUEL KAIN and MARNIE COUPIE FORCER KAIN Appellants
	AND	PUBLIC TRUST First Respondent
		GEORGINA KAIN, GEORGE CHARLES KAIN, GEORGE HARRY COUPER KAIN, GEORGE MICHAEL KAIN, MARY HUTTON, GEORGIA HUMPHREY, CONSTANCE HUTTON and HARRIET HUTTON Second Respondents
		GEORGIA HUMPHREY, CONSTANCE HUTTON, HARRIET HUTTON, DAVID WHYTE, KIRSTY MARGUERITE COUPER MASTERSON and ELIZABETH DIANE COUPER FRENDIN Third Respondents
Hearing:	6 October 2021	
Court:	French, Venning and Cull JJ	
Counsel:	J W A Johnson and W L Porter for Appellants/Kain Siblings B D Gray QC and A G Holden for Public Trust T C Weston QC, A V Foote and G J D Mander for Mary Hutton J F Anderson QC for Hutton Grandchildren D A T Chambers QC and S R C Barber for Kain Grandchildren	
Judgment:	16 December 2021 at 9 am	

JUDGMENT OF THE COURT

A The appeal is dismissed insofar as it relates to the directions at [108](b), [108](c), [109](d) and [134](b).

B **The appeal is allowed in relation to the directions at [134](a). The direction at [134](a) is set aside and replaced with the direction that:**

> **Public Trust is entitled to take into account the wishes and subsequent wishes of the settlor, Tom Couper, and to enable it to do so, it is necessary for Public Trust to read and understand those wishes. However Public Trust can only take account of the wishes and subsequent wishes to the extent they are not inconsistent with the terms and purposes of the trust.**

C **Cost are reserved. Public Trust is to file submissions within 15 working days. The Hutton interests are to file submissions 10 working days thereafter. The Kain interests are to file submissions 10 working days thereafter. Public Trust can file a reply in five working days. The memoranda are to be limited to five pages in each case. The Court will then deal with costs on the papers.**

REASONS OF THE COURT

(Given by Venning J)

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[1] This appeal concerns the administration of two trusts, the Waitaha and Middle Road Block Trusts. Both trusts were settled by WAX (Tom) Couper. Public Trust was appointed as trustee by agreement following the direction of the High Court that the original trustees be removed.[1]

[2] The beneficiaries of the trusts primarily fall into two opposing factions of the Kain family: the Kain siblings and Kain grandchildren on the one hand, and Mary Hutton (nee Kain) and the Hutton grandchildren on the other.[2]

[3] Public Trust applied for directions under s 66 of the Trustee Act 1956. In a judgment delivered on 6 May 2021 Mander J made directions on Public Trust's application.[3] The Kain siblings and Kain grandchildren appeal a number of the directions.[4]

Factual background

[4] We take the factual background from the summary in the judgment:[5]

> [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.

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1 *Kain v Hutton* (2004) 1 NZTR 14-022 (HC) [the 2004 judgment].
2 The Kain siblings are the appellants in CA315/2021 and the Kain grandchildren are the appellants in CA316/2021.
3 *Public Trust v Kain* [2021] NZHC 1000 [Judgment under appeal].
4 The Whyte children are also beneficiaries of the Middle Road Block but have taken no steps in this appeal.
5 Judgment under appeal, above n 3 (footnotes omitted).

[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. A fourth son, Tom Kain, died in 2013. Another daughter, Mary Hutton, is the fifth named first defendant. The sixth to 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. 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".

[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.

[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**
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> …
>
> 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.
>
> …
>
> 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. [The existing trustees were removed, not for breach of trust, but as they and the beneficiaries were "out of sympathy".[6]] 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 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.

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6 As recorded by Panckhurst J in the 2004 judgment, above n 1, at [329](g).

The Trust deeds

[5] As noted, both trusts are discretionary. The deeds confirm an absolute discretion in the trustee(s) both as to income and capital. The Kain siblings and Mrs Hutton are beneficiaries only of the Waitaha Trust. The Kain grandchildren and Hutton grandchildren are beneficiaries of both the Waitaha and Middle Road Block Trusts.

The directions sought in the High Court

[6] Public Trust sought the following directions in relation to both trusts:[7]

(i) Public Trust must act consistently with the terms of the trust deed;

(ii) 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.

(iii) 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.

(iv) 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.

[7] Public Trust also sought the following further directions in relation to the Waitaha Trust:[8]

(i) The 1997 deed is not binding on Public Trust.[9]

(ii) Public Trust may take the 1997 deed into account but it is not required to.

(iii) Public Trust is not required to ensure that all of the beneficiaries of the Waitaha Trust receive equal amounts from that Trust.

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7 Judgment under appeal, above n 3, at [19].
8 At [20].
9 The 1997 deed is also referred to as the Deed of Equality. We refer to it as the 1997 deed.

(iv) 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.

[8] Finally, Public Trust also sought the following further directions in relation to the Middle Road Block Trust:[10]

(i) The 1997 deed is not binding on Public Trust and cannot be taken into account.

(ii) Public Trust is not required to ensure that all of the beneficiaries of the Middle Road Block Trust receive equal amounts from that Trust.

(iii) 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.

[9] Public Trust's application for directions was opposed by the Kain siblings and the Kain grandchildren. They submitted that the directions should either be recast in accordance with proposals they had made or should not be made at all.

The High Court judgment

The general directions[11]

[10] Mander J doubted whether there was much utility in making the first direction sought. While Public Trust may have been concerned to avoid any impression that it was not aware of all matters it must consider, the Judge accepted that, as observed by counsel for Mrs Hutton, to the extent it was necessary to signal such an awareness, the signal had been sent.[12]

[11] Nor did the Judge consider it necessary to make a declaration or give a direction that Public Trust was required to take into account the interests of the beneficiaries, such interests to be broadly related to the beneficiary's present or prospective financial position and capabilities, or their economic outlook, or plans. That obligation was a well-recognised principle.[13]

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10 At [21].
11 We refer to the first three directions noted at [6](i) to (iii) as the general directions.
12 Judgment under appeal, above n 3, at [48].
13 At [51].

[12] As to the third general direction, Mander J concluded it did not necessarily follow from the 2004 judgment that it was a mandatory requirement for Public Trust to take into account what beneficiaries have received from the other trusts in the Couper-Kain Group. However, he considered the proposed direction was largely superseded by the issues raised in relation to the directions concerning the 1997 deed and the contested concept of equality as between the beneficiaries which he then dealt with under the specific directions sought in relation to the separate trusts.[14]

The specific directions in relation to the 1997 deed

[13] The Judge went on to consider the specific directions in relation to the Waitaha Trust, noting that the issue of equality was the subject of four directions sought.[15] Mander J made the following directions in respect of the Waitaha Trust:

> [108] …
>
> (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.

[14] In respect of the Middle Road Block Trust the Judge noted that three directions sought engaged the 1997 deed and the principle of equality.[16] Mander J made the following specific directions:

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14 At [59].
15 Noted above at [7].
16 Noted above at [8].

[109] …

(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.

Statement of wishes' directions

[15] The Judge then went on to consider the directions sought regarding the statements of wishes provided by Tom Couper after the settlement of the Trusts.[17] In relation to the statements of wishes the Judge ruled:

> [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.

[16] Finally, at [138] of his judgment, Mander J confirmed that the directions include the reasons for judgment not merely the stated directions.

The Kains' appeals

[17] The Kain siblings appeal. They say the High Court erred by:

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17 Noted above at [6](iv).

(a) making the direction that 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 (the [108](c) direction);[18] and

(b) making (or appearing to make) findings relating to the 1997 deed and the principle of equality despite the apparently legal nature of the directions application, and the agreement between the parties that affidavit evidence would be used for contextual purposes only;

(c) as a result of the above, qualifying the direction that Public Trust is required to recognise the principle of equality derived from the equality clause of the 1997 deed, by including the proviso, "but only so far, in its assessment, as it is reasonably able to do". Such a qualification adds an additional requirement not found in the 2004 judgment (the [108](b) direction);

(d) making a direction that: "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" (the [134](a) direction); and

(e) making a direction that: "[w]here 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 … whether in the circumstances of the subsequent wishes of the settlor, Tom Couper, should have that effect" (the [134](b) direction).

[18] They seek to have the directions made at [108](b) (but only to the extent noted above at (c)), [108](c), [134](a) and [134](b) set aside and alternative directions made as the Court sees fit.

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[18] Judgment under appeal, above n 3, at [108](c). The direction at [109](d) in relation to the Middle Road Block Trust is to similar effect.

[19] The Kain grandchildren also appeal. They say the High Court erred by:

(a) Making a direction that 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.

(b) Making a direction that: "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" (the [134](a) direction).

(c) Making a direction that: "[w]here 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 … whether in the circumstances of the subsequent wishes of the settlor, Tom Couper, should have that effect" (the [134](b) direction).

[20] The Kain grandchildren seek orders setting aside the directions made at [108](c), [109](d), [134](a) and [134](b) of the judgment.

The Huttons' response

[21] Mr Weston QC confirmed that Mrs Hutton opposed the appellants' attempt to set aside the directions at [108](b) and [108](c) of the High Court judgment in relation to the Waitaha Trust (which he characterised as primarily concerned with the 1997 Deed and its effect).

[22] Mr Weston also confirmed that Mrs Hutton's position was and remained, that Public Trust should not take clause 7 (the equality clause) of the 1997 deed into account where its meaning was disputed and the factual basis was otherwise unascertainable, but she accepted the Court's directions on the basis that [108](c) and the proviso to the direction at [108](b) was maintained. She also supports the directions made by the High Court in relation to the directions at [134] concerning Tom Couper's wishes.

[23] The Hutton grandchildren support Mrs Hutton's position and rely on Mr Weston's submissions to the extent they are relevant to the direction at [109](d). On their behalf, Ms Anderson QC carried the argument supporting the judgment on the issues arising from the directions at [134] concerning Tom Couper's statements of wishes.

Public Trust's position

[24] Mr Gray QC advised that Public Trust takes a neutral position and abides the Court's decision on whether the directions given by the High Court are upheld or are set aside and replaced. Mr Gray said the submissions advanced on behalf of Public Trust were to express its view, not because it advocates for a particular position, but in order to assist the Court.

[25] In particular, Mr Gray clarified that:

(a) Public Trust had sought the directions because practical and principled issues had arisen and will arise in respect of what was agreed in relation to the 1997 deed and the directions made by Panckhurst J. It is not its position that it wishes to set aside the 1997 deed and its rationale.

(b) Public Trust has no view on the weight to be given to Mr Couper's wishes and will exercise any discretion independently having regard to all relevant considerations.

(c) As trustee of discretionary trusts Public Trust understands it must turn its mind to making discretionary distributions, but it is not bound to do so.

The general direction – Public Trust is not required to take into account what the beneficiaries have received from the other trusts in the Couper-Kain Group

The Kain siblings' submissions

[26] Mr Johnson submitted that the Judge had short-cut his analysis by concluding the general direction was largely superseded by the consideration of the issues raised

by the 1997 deed. That had led him into error in making the direction that Public Trust was not required to take into account what the beneficiaries had received from the other trusts in the Couper-Kain Group.

[27] Mr Johnson made a preliminary point. He noted that Mander J had expressed surprise at the "collective" approach by Panckhurst J given:[19]

> [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 [judgment]. 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 Hawkes Bay, recognises the separate status of the individual entities that made up the Couper-Kain Group.

[28] Then, in the following paragraph Mander J had gone on to say:[20]

> [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.

[29] Mr Johnson submitted the Judge had taken an impermissible leap in logic in reasoning in [89] that, because the entities were separate, the benefits received from each of them did not need to be taken into account. He suggested that the Judge's error arose because he misunderstood the unwind process. The Judge was wrong to accept Public Trust's submission that the unwind process was designed to achieve the separation of the affairs of the trusts and a number of companies involved in the farming operation. Mr Johnson submitted the principal purpose of the unwind was not to achieve the separation of the affairs of the trusts as such, as the trusts would remain related and interconnected through their historical connection and shared business activities. Rather the purpose was to reallocate the profits that the trusts were entitled to, but which had been taken by the farming entity controlled by Mr Couper

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19 Judgment under appeal, above n 3, at [89].
20 At [90].

personally. He suggested that error appeared to have coloured the directions the Court made, as was evident by the surprise expressed by the Judge in his [90] at Panckhurst J's comment.

[30] The Kain siblings do not accept that Public Trust can ignore distributions made from other, related, trusts within the broader Couper-Kain Group when considering a distribution under the Waitaha Trust. They argue that by concluding the first consideration was largely superseded by the other directions relating to the 1997 Deed, the Court did not undertake the necessary analysis, and as a result ignored vital context.

[31] Mr Johnson submitted that s 21 of the Trusts Act 2019 expressly recognised context as a guiding principle and the importance of context was also supported by the authors of *Lewin on Trusts* in the following passage:[21]

> It often happens that members of a single family are beneficiaries of several settlements, perhaps many. The settlements may have the same or much the same trustees. Where the classes of beneficiaries overlap but are not identical it is a frequent error to treat the assets of all the settlements as a common pool for the family as a whole. When considering whether or how to benefit a given beneficiary out of one settlement, it is, of course, proper to take into account his entitlement or expectation under another. But it is not proper to exercise the powers conferred by one settlement so as to benefit someone who is not a beneficiary of that settlement.

[32] Mr Johnson submitted that in the present case the context was that the trusts were, by their nature, related. The assets of one trust were used to acquire assets settled on other trusts as was recognised in the 2004 judgment.[22] Panckhurst J had referred to the pattern of inter-entity advances and noted that borrowing had become a part of life.

[33] Mr Johnson also noted that Panckhurst J had taken into account the Kain's interests as beneficiaries of other trusts when considering the exercise of the trustees' discretion in relation to the resettlement of another trust, the Mangaheia Trust, in favour of Mrs Couper and her children.[23] Similarly, in the present case, he noted

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21 Lynton Tucker and others *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [29-057].

22 The 2004 judgment, above n 1, at [32]–[35] and [254].

23 This Court approved that reasoning at *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349, (2007) 2 NZTR 17-009.

that the Waitaha Trust is the only discretionary trust the Kain siblings remain beneficiaries of.

[34] Mr Johnson next emphasised that the trusts were, by their very nature, related. The operation of the businesses was intertwined. The family themselves viewed the trusts in that way. He noted that in one of his statements of wishes Tom Couper had expressly referred to the assistance Tom Kain and his brothers had received from other trusts when requesting the settlement of a trust in Mrs Hutton's favour.

[35] Mr Johnson then submitted that the direction Public Trust was not required to take into account what the beneficiaries have received from other trusts in the Couper-Kain Group was inconsistent with the Court's own recognition that the financial consequences of prior distributions are relevant.[24]

[36] Mr Johnson argued that if the Court's conclusion was applied generally then trustees could close their eyes to the family and trust context when making distribution decisions. He submitted that could not be right. Trustees are obliged to take into account relevant factors and put to one side irrelevant factors.

[37] Mr Johnson submitted that a contrary direction should have been made by the High Court, confirming that prior distributions from other trusts are relevant and *must be considered*, or alternatively, no direction should have been made on the issue at all.

[38] On behalf of the Kain grandchildren Ms Chambers QC supported Mr Johnson's submissions on this point as it also relates to the direction at [109](d) which affects the grandchildren's interests under the Middle Road Block Trust.

Mrs Hutton's response

[39] In response, Mr Weston submitted that there was no inconsistency in the Judge's direction. Public Trust may take account of entitlements or distributions from other settlements but is not required to do so. The basis for the direction was set out earlier in [53] and [54] of the judgment. In [53] the Judge had correctly accepted that

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[24] Judgment under appeal, above n 3, at [105].

it would be an error for a trustee to treat the assets of all settlements as a common pool, but he had then gone on to accept that the trustee could take into account, when considering a distribution, the beneficiaries' entitlement or expectation under a different trust.[25]

[40] Mr Weston submitted that Mander J was correct to note that the trustee of one trust may take account of distributions from related trusts, to the extent they may be relevant to assessing the financial circumstances of a particular beneficiary. However, the fact that trusts in the Couper-Kain Group were largely settled by the same person or fell within the same family group or were intermingled did not mean that their assets should be treated as part of one collective pool.

[41] Mr Weston submitted Mr Johnson's submissions mischaracterised the unwind process. It was wrong to suggest the process was solely intended to return profits directed to the farming company back to the trusts.

[42] He next submitted there was no inconsistency in Mander J's approach. The overarching principle stated by the Judge was correct. It is trite that trustees of a particular trust owe duties solely to the beneficiaries of that trust. It is also correct that 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 a whole. Nevertheless, as Mander J's conclusion to [53] recorded:

> … 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.

[43] Mr Weston then submitted that there could be no real suggestion the High Court somehow intended Public Trust to close its eyes to the family and trust context when making distribution decisions. The Judge's reasoning made that clear.

[44] Next, he submitted the appellants' reliance on the resettlement of the Mangaheia Trust was taken out of context. It dealt with a particular issue and did not stand for any broader proposition.

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[25] Judgment under appeal, above n 3, at [53]–[54].

[45] Mr Weston noted that s 21 of the Trusts Act and the statement of principle cited from *Lewin on Trusts* and relied on by the Kain siblings were not in dispute. The issue was whether trustees are required to take entitlements or expectations held in relation to distributions from other settlements into account. The Judge was, in Mr Weston's submission, alive to that issue as was apparent from the way he dealt with it.

Analysis

[46] There are two issues raised by the directions at [108](c) and [109](d). First, consideration of the inter-related nature of the trusts in this case. Second, the law as to the matters a trustee must take into account when considering whether to make a distribution.

[47] We do not accept that the Judge erred in the way he dealt with the issue of the inter-relationship of the trusts in this case. Further, in the relevant parts of his judgment he accurately stated the law as to the matters a trustee is required to take into account.

[48] The Judge was not in error in how he dealt with the unwind process. It was considered in some detail by Panckhurst J in his 2004 judgment. He referred at [14]–[16] to the fact that Mr B G Hadlee had been retained by the then trustees in 2000 and had prepared a scheme, referred to as an "unwind proposal", designed to achieve the separation of the affairs of the trusts and a number of companies involved in the farming operation conducted under Tom Couper's control. However, in November 2003, and in preparation for the substantive hearing, Panckhurst J appointed Mr G R Graham as a court expert to inquire into and report on the various accounting issues raised in the context of the proceeding.[26] Mr Graham then worked in consultation with Mr Hadlee and another Christchurch accountant, Mr S C Hardie, who had worked with a number of the Kains.

[49] For present purposes, the major points Panckhurst J said were to be drawn from Mr Graham's report to the High Court were:[27]

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26 The 2004 judgment, above n 1, at [15].
27 At [324]–[326].

- there was a need to rework the allocation of farming profits to all contributing entities within the Group (including Tom Couper);

- that profits were to be allocated to such entities upon the basis of net assets contributed by them to the farming operation in whatever form; and

- the rework exercise was to extend back to 1 July 1996.

[50] However, the Judge then went on to note that a further major aspect of Mr Graham's report concerned the unravelling of the web of inter-entity advances. As to this, the methodology first proposed by Mr Hadlee was still favoured. It contemplated:[28]

- a single settlement process through a clearing account on a nominated day;

- a sum to be borrowed from an external source and paid into the clearing account in order to facilitate the settlement process; and

- before the exercise could be effected, resolution had to be achieved in relation to the respective entitlements of all the entities within the group.

[51] Panckhurst J noted that elements of the process were still to be addressed and directed Mr Graham was authorised to proceed with the implementation of the proposals.[29]

[52] So although the phrase "unwind proposal" was originally referred to in relation to the initial exercise undertaken by Mr Hadlee, the "unwind process" effectively incorporated both the processes referred to by Panckhurst J, as the Judge noted.[30]

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28 At [327].
29 At [327]–[328].
30 At [328].

[53] Mander J only referred briefly to the unwind process at [89] of his judgment. His statement that it recognised the separate status of the individual entities that made up the Couper-Kain Group is not contrary to or in conflict with recognition of the principle of equality.

[54] We also consider the Judge correctly applied the law in relation to the trustee's obligation to take into account all relevant considerations and to refrain from taking into account any irrelevant considerations.[31] We note that, at [138] of the judgment, Mander J confirmed the directions included the reasons for the judgment and not merely the stated directions. Those reasons included paragraphs [53] and [54] of his judgment:[32]

> [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. 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. 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.
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> [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.

[55] The Judge correctly identified that it was not appropriate for the trustees to treat the assets of all the trusts as a common pool for the family as a whole. The same point about the separate nature of each trust was made by this Court on the appeal from the 2004 judgment. At [162] of that judgment this Court noted:[33]

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31 In *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).
32 Judgment under appeal, above n 3, at [53]–[54] (footnotes omitted).
33 *Kain v Hutton*, above n 23.

> The Kain children had a tendency in some of their arguments before the Court to treat all of the trusts as trusts for the benefit of themselves and Mrs Hutton. This is misleading (although it does seem to have been the way the partnership and Mr Springford operated). The trusts do not follow a standard pattern and the provisions as to income and capital differ between the trusts. The trusts are in the main discretionary trusts where the trustees or the settlor have a power of appointment of one or more of the beneficiaries to the exclusion of others. Each trust therefore has to be viewed separately. It cannot be assumed that the ultimate beneficiaries are or will be the same in each trust and thus the trusts cannot properly be treated as one entity.

[56] Importantly, Mander J then went on to record that it would be proper for the trustee to take into account what a beneficiary has received or may be entitled to under another trust. Public Trust may do so, but is not required to do so.

[57] We consider Mr Johnson's reliance on the comments in the 2004 judgment and the subsequent appeal judgment in relation to the Mangaheia Trust to be misplaced. The Court's decision about the resettlement of the trust in that instance does not support the proposition Mr Johnson seeks to advance. The context of that particular resettlement is important. In July 1999 the assets of the Mangaheia Trust (which were primarily two farms) were resettled on two newly established trusts. The shareholding of one farming company was transferred to Tom Couper's wife, Annette Couper and she established a trust for herself, her children, remoter members of her family and other persons who might be appointed. The shares in another farm were resettled on a new Mangaheia Trust. Mrs Couper, her children, Mrs Hutton and the grandchildren of the late Mrs Janet Kain were the beneficiaries. The Kain siblings had been beneficiaries of the old Mangaheia Trust but were not beneficiaries of the resettled trust. They challenged the settlement as improper.

[58] In the High Court Panckhurst J upheld the resettlement, noting that the onus was on the person seeking to review the exercise of a trustee's decision to demonstrate bad faith. The applicants could not meet that onus. Mrs Couper was an object of the old trust and, 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. The plaintiffs' contingent rights to income and capital were removed but that outcome had to be assessed in the

overall context. The Judge noted that they remained as beneficiaries of other trusts. The Judge was not persuaded it was a situation where the Court should intervene.[34]

[59] On appeal this Court agreed with Panckhurst J that, even if some of the Kain siblings and Kain trustees' points had validity they did not reach the high threshold required before the Court would intervene to upset the exercise of the absolute discretion contained in a trust deed. The desire to confer a benefit on Mrs Couper in circumstances where this trust was one of the few trusts where a benefit could be conferred on her was an entirely proper decision for the trustees (and indeed they may even have been open to allegations of capriciousness had they not done so).[35]

[60] The Court's references to the Kain siblings' interests in other trusts and Mrs Couper's limited interest in such trusts was not to treat the trust entities as related, but rather to acknowledge the practical situation that the trustees could have regard to the means or potential means of Mrs Couper in making the resettlement for her. Moreover, when considering the impact of that resettlement on the other beneficiaries, the trustees could properly consider what other expectations or entitlements they may have in other trusts. The reasoning is consistent with the passages at [53] and [54] of Mander J's judgment.

[61] Similarly, s 21 of the Trusts Act 2019 provides:

> **Guiding principle in performing duties**
>
> In performing the mandatory duties set out in sections 23 to 27 and (except to the extent modified or excluded by the terms of the trust) the default duties set out in sections 29 to 38, a trustee must have regard to the context and objectives of the trust.

That principle and the passage cited from *Lewin on Trusts* are not controversial and are accepted. The passage from *Lewin on Trusts* in particular confirms that it is proper for a trustee to take into account entitlements or expectations under other trusts, but it does not make it a requirement. Mander J's statement of principle at [54] of his judgment is again consistent with these principles.

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34 The 2004 judgment, above n 1, at [226]–[228].
35 *Kain v Hutton*, above n 23, at [100].

[62] In summary, we do not consider the Judge was in error in finding that the trusts are to be treated as separate trusts rather than as inextricably linked. Further, the Judge's finding was that it is:[36]

> … 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.

This is an orthodox proposition and a correct statement of the law. It is not inconsistent with the direction that Public Trust is *not required* to take into account those entitlements or expectations.

[63] Finally on this issue, we record that in his submissions Mr Gray noted Public Trust accepts that in giving effect to the direction, it is proper for it to consider the entitlement or expectations of beneficiaries under other trusts as part of the assessment of the needs and interests of beneficiaries.

The [108](b) directions as to the proviso

Kain siblings' submissions

[64] Mr Johnson submitted that it was important to note the fact Public Trust is required to take into account the principle of equality contained in the 1997 deed had not been challenged by any party and is not an issue before this Court.

[65] The Kain siblings challenge the proviso to the direction at [108](b) that the requirement for Public Trust to recognise the principle of equality was "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".

[66] Mr Johnson submitted that in adding the proviso, the Judge went beyond the agreement reached by the parties about contentious and incomplete evidence in the proceeding. He argued the Judge was influenced in adding the proviso by his conclusion that the parties had not taken steps to implement the agreement contemplated by the 2004 judgment. By engaging in that exercise, there was potential

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[36] Judgment under appeal, above n 3, at [54] (footnote omitted).

for significant substantive unfairness. There was little evidence before the Court as to the steps taken to give effect to the equality clause.

[67] Mr Johnson noted that some efforts had actually been made to implement the agreement and that the reality of assessing past benefits was straightforward. The Kain siblings had prepared a schedule of distributions and Mrs Hutton had herself prepared a detailed "summary of assistance". It was not for Mander J to determine what steps had been taken to provide information or how successful they might have been. While it was accepted the declaration envisaged by the 2004 judgment had not been made, it was not correct to say that no effort had been made to advance the exercise. The difficulty of the exercise had been exaggerated by Mrs Hutton and Public Trust and the need for accuracy overstated by the Court.

[68] The Kain siblings say that the High Court's direction should be unequivocal. It should provide that the equality clause must be recognised as between the Kain siblings and Mrs Hutton on the basis of a "fair estimation".

Mrs Hutton's response

[69] Mr Weston noted that Public Trust had sought the direction because of the uncertainty around the orders of Panckhurst J. The orders contemplated certain steps would be taken, but they had not yet been taken.

[70] He submitted that the proviso or caveat was an integral part of the overall direction at [108](b) and could not be de-coupled from it. It was a significant part of the Judge's conclusion in making the direction. Without it, Public Trust might be required to undertake an assessment that it could not reasonably make.

Analysis

[71] At the outset, while Mr Johnson is correct Public Trust is required to take into account the equality principle in the 1997 deed, it is also relevant that the direction that the deed is not binding on Public Trust is not challenged on appeal.

[72] In his 2004 judgment Panckhurst J had made orders to advance the resolution of issues between the parties. At the summary of his conclusions, at [329] of the 2004 judgment, Panckhurst J noted:

> [j] That, by consent, the ideal of equality expressed in the [1997 deed] 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.

[73] That followed the earlier, more detailed discussion in the judgment where the Judge had noted:

> [303] Happily this is one area of the case in relation to which agreement ultimately reigned. The plaintiffs and Mrs Hutton agree that the [1997 deed] 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.
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> [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.

[74] Panckhurst J's orders contemplated the parties would take steps to settle the term of a declaration. They acknowledge this has not occurred.

[75] As a starting point on this issue Mander J stated the issue:[37]

> [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

[37] Judgment under appeal, above n 3 (footnote omitted).

> 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.

[76] The concluding sentence of that paragraph merely recognised the practical constraints on Public Trust giving effect to the equality principle. Then, later, after discussing Panckhurst J's endorsement of the collective approach, Mander J went on to say:[38]

> 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.

[77] Mander J may have gone too far in noting that, after 16 years the benefits exercise remained unadvanced. As noted, the parties had taken steps to identify the respective benefits each had received and the unwind process is still being undertaken by Mr Graham. Mr Gray also noted the unwind process was not far from complete. The 2003 restated accounts have been circulated and the 2004-05-06 accounts are expected to follow over the next six months. It is likely specific directions will be sought in relation to the unwind process.

[78] But we do not consider that any "overstatement" of the position affected Mander J's directions on the correct approach Public Trust should take. It cannot be disputed that the exercise contemplated by Panckhurst J has not been completed. That is a different issue to whether the parties may have sought to calculate the respective benefits received by them. As Mr Gray submitted, the references at [91]–[92] of Mander J's judgment are consistent with the Judge noting the lack of steps taken to implement the declaration as agreed before the Court, not the absence of any steps by the parties to unilaterally calculate what they consider the benefits received to have been.

[79] We agree with Mr Weston's submissions that [101]–[102] of Mander J's judgment acknowledged there might be difficulties for Public Trust in making an assessment, such that any assessment would be severely limited or even, realistically,

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[38] At [90].

impossible, but confirmed this was not a decision the Judge could make on the evidence before him. The Judge stated:

> [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.

[80] Again, in relation to the latter points, the Judge was careful to note that he was not in a position to make findings on factual matters. On an application for directions, it is not for the Court to seek to resolve disputed matters of fact. The Judge recognised that principle both implicitly and expressly in the course of his judgment.

[81] Finally, in response to Mr Johnson's submissions there were severely strained relationships between the Kain beneficiaries and Public Trust, we record Mr Gray's submission that Public Trust does not accept that to be the position. Public Trust understands that while it may take a different view about certain issues ultimately, it must act independently and consider the interests of the beneficiaries when making decisions as trustee.

The statements of wishes

The Kains' submissions – the [134](a) direction

[82] On the issue of the settlor's wishes, Mr Johnson submitted that the degree of hostility Mr Couper had shown for the Kain siblings should disqualify any relevance

his statements of wishes otherwise may have had. Given Panckhurst J had accepted that, as trustee, Mr Couper was so out of sympathy with the beneficiaries of the trusts as to make his continuing as trustee untenable then, as a matter of principle, Mr Couper should not have substantial influence over the future disposition of trust assets. Mr Johnson confirmed that otherwise the Kain siblings adopted the submissions for the Kain grandchildren.

[83] For the Kain grandchildren, Ms Chambers challenged the High Court's direction that Public Trust is required to take into account the wishes and subsequent wishes of Mr Couper, who settled the trusts, provided they are not inconsistent with the terms of the trust and its purpose.

[84] Ms Chambers submitted that Public Trust is not "required" to take into account the settlor's wishes. Trustees are entitled to take the wishes into account, but are not required to do so.

[85] She submitted that the direction at [134](a) was inconsistent with the relevant authorities. First, in *Chambers v S R Hamilton Corporate Trustee Ltd* this Court held the trustees are entitled to take into the settlor's wishes but are not required to do so.[39] Similarly, in *Easton v New Zealand Guardian Trust Co Ltd (No. 3)*,[40] Cooke J expressly rejected authorities that suggested statements of wishes are a mandatory consideration. Cooke J had stated that trustees are not obliged to take the wishes into account if they do not think they should be given any weight.[41] Further, in the leading Australian authority of *Hartigan Nominees Pty Ltd v Rydge*, Mahoney JA held a trustee may take into account the views of the settlor.[42] She submitted Mander J was incorrect in saying that the statements in *Chambers*, *Kain* and *Hartigan* were not inconsistent with settlor's wishes being treated as a mandatory consideration.[43]

[86] Ms Chambers also submitted the Judge had erred by placing too much weight on the obiter comment of Lord Walker in *Pitt v Holt* that "[t]he settlor's wishes are

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39 *Chambers v S R Hamilton Corporate Trustee Ltd* [2017] NZCA 131, [2017] NZAR 882 at [36].
40 *Easton v New Zealand Guardian Trust Co Ltd (No. 3)* [2021] NZHC 2084.
41 At [101].
42 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (NSWCA) at 431.
43 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39; *Kain v Hutton*, above n 23; and *Hartigan Nominees Pty Ltd v Rydge*, above n 42.

always a material consideration in the exercise of fiduciary discretions".[44] She submitted he had also placed too much weight on a passage from *Lewin on Trusts* that it was "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".[45] That was an opinion of the authors rather than a correct statement of the law.

[87] Next, Ms Chambers submitted that the Judge erred by making the direction in a factual vacuum. There had been no findings or consideration of the 37 statements of wishes and it was impossible to give each one equal status without considering them individually to determine whether the statements were expressed to be binding or were mere guidance. The issue could not be determined in the absence of context. The context included Mr Couper's undisputed hostility towards the Kain siblings and Kain grandchildren and the capricious nature of his statements of wishes; the disputed authorship of some at least of Mr Couper's statements of wishes; and also, the disputed source of funds of the trusts' assets. An analysis of the source of funds would show that Tom Couper was not the economic settlor of the trusts.

Subsequent statements of wishes – the [134](b) direction

[88] Ms Chambers submitted that the direction at [134](b) regarding subsequent wishes was wrong in several respects.

[89] Ms Chambers submitted that the weight to be given to subsequent statements of wishes (and the issues that such subsequent wishes might create) had not been directly considered by New Zealand Courts. The law on the point was not settled in the United Kingdom either.[46] While the position seemed clear in Australia, the wishes were only relevant provided they were consistent with the settlor's wishes before the settlement of the trust.[47] If the subsequent wishes were inconsistent, the trustee could not act on them.

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44 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [66].
45 *Lewin on Trusts*, above n 21, at [29-046].
46 *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2008] 3 WLR 698 at [5].
47 *Hartigan Nominees Pty Ltd v Rydge*, above n 42, at 431.

[90] She argued that Mander J had misunderstood the effect of *Chambers*. The Court in that case had not considered the status of subsequent statements of wishes. In his last statement of wishes, the settlor had effectively reverted to his original position, and the Court focused on that.

[91] Ms Chambers submitted that, as a matter of principle, statements of wishes written well after the settlement of a trust should be treated as irrelevant. The subsequent statements of wishes violated the most fundamental principle of trust law that settlors dispose of their property to a trust and in doing so, give up control, as recognised in a number of texts and academic articles.[48]

[92] She argued that it was impossible to reconcile the direction regarding subsequent wishes with that fundamental principle. The Court's supervisory jurisdiction over the trusts necessarily includes regulation and oversight to ensure the trusts are operated properly.

[93] Next, Ms Chambers submitted the Judge was again incorrect in making directions in a factual vacuum and without considering the context and individual statements.

[94] She submitted Mr Couper's subsequent statements of wishes were an irrelevant consideration and should not be taken into account. The direction at [134](b) should be set aside.

The Huttons' response – the [134](a) direction

[95] Ms Anderson QC, counsel for the Hutton grandchildren, responded to Ms Chambers' arguments in relation to the statements of wishes. Mr Weston adopted Ms Anderson's submissions for Mrs Hutton.

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[48] Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [1.37]–[1.38]; Lionel Smith "Massively discretionary trusts" (2019) 25 T & T 397; Keith Robinson "Letters of Wishes: adequate deliberations" (2014) 20 T & T 820; Stephen Moverley Smith QC and Andrew Holden "Letters of wishes and the ongoing role of the settlor" (2014) 20 T & T 712; David Russell AM QC and Toby Graham "Letters of wishes and understanding the purposes of a trust" (2019) 25 T & T 277; and James Penner "Justifying (or Not) the Office of Trusteeship with Particular Reference to Massively Discretionary Trusts" (2021) 34 CJLJ 365.

[96] Ms Anderson first addressed the appellants' proposition that the practice of writing statements of wishes after a trust had been settled could not be reconciled with the principle a settlor has no right to direct trustees in relation to the disposition of trust property. She submitted it is contrary to repeated explicit and implicit recognition of the place of statements of wishes in New Zealand law and more generally in Commonwealth case law. It is also contrary to the relevant provisions of s 45 of the Trusts Act and leading textbook authorities. She submitted there was no conflict between the law relating to statements of wishes and the fundamental principle of trust law that property settled on a trust is no longer that of the settlor.

[97] Ms Anderson referred to Lord Walker's statement from *Pitt v Holt* that:[49]

> [t]he settlor's wishes are always a material consideration in the exercise of fiduciary discretions.

She submitted that was a powerful response to the appellants' submission that New Zealand courts would be unorthodox in concluding that statements of wishes are required to be taken into account. Ms Anderson said that *Pitt v Holt* should not be read down on the basis it was a tax law case.[50] It was relevant to trust law in New Zealand and had been applied in several cases.

[98] Ms Anderson submitted that correctly interpreted, *Chambers*[51] and *Easton*[52] supported the proposition that it was necessary for trustees to read the wishes and they were then entitled, but not obliged, to take them into account. Ms Anderson submitted that the cases confirmed a trustee was not required to act on wishes where, after exercising their discretion and judgment, they did not consider it appropriate.

[99] In addition to case law, Ms Anderson submitted that *Lewin on Trusts* also confirms a settlor's wishes are a material consideration:[53]

> No particular formality is required to convey or record the settlor's wishes, though a written letter or memorandum is convenient for obvious reasons. His wishes are a material consideration for trustees even when the wishes are not

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49 *Pitt v Holt*, above n 44, at [66].
50 *Unkovich v Clapham* [2020] NZHC 952, (2020) 5 NZTR 30-004, and the cases cited therein.
51 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39.
52 *Easton v New Zealand Guardian Trust Co Ltd (No 3)*, above n 40.
53 *Lewin on Trusts* above n 21, at [29-047] (footnotes omitted).

> formally recorded. Moreover, trustees are entitled to have regard to the settlor's wishes expressed from time to time and are not confined to those expressed contemporaneously with the creation of the trust.

[100] Ms Anderson next submitted that to the extent the academic articles referred to by Ms Chambers (which had a focus on off-shore trusts) suggested otherwise they did not reflect the settled law.

[101] Ms Anderson then submitted that the direction at [134](a) did not affect Public Trust's ability as trustee to independently and conscientiously decide what weight to give the wishes. The requirement the trustee must have regard to the content of the wishes did not compel Public Trust to give effect to those wishes.

[102] She accepted that it is trite that a trustee is not entitled to slavishly follow the wishes of the settlor and must apply their independent judgment to exercising the powers and discretions under the trust deed but she submitted the decision was appropriately qualified in that way:[54]

> [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.

[103] On the factual issues Ms Chambers had said it was necessary for the Judge to consider, Ms Anderson submitted it would be wrong to single out certain factual aspects when Public Trust did not approach the Court on that basis or invite directions on that basis in the course of the hearing. For the record, Ms Anderson confirmed the suggestion that the statements may not have been Mr Couper's own independent wishes was emphatically rejected.

[104] Ms Anderson submitted that, importantly, the statements of wishes in the present context were not being referred to on the issue of the scope of a power, to interpret the trust deed, to direct the trustees or to reframe the purposes of the trust.

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54 Judgment under appeal, above n 3.

The Huttons' response – the [134](b) direction

[105] Ms Anderson submitted the [134](b) direction relating to more recent wishes, was consistent with the decision in *Chambers*.[55] She submitted the appellants' submission that the Court in *Chambers* was not required to consider the issue as the settlor had reverted to his original wishes mischaracterised the Court's analysis. In that case both the High Court and Court of Appeal had focussed on the settlor's most recent statement of wishes.

[106] Ms Anderson then submitted that it did not necessarily follow that the subsequent wishes cannot carry the same weight as wishes expressed contemporaneously with a trust's settlement. Circumstances may have changed markedly since the trust was formed and a trustee must consider circumstances when exercising the power.

[107] Again, Ms Anderson noted that Mander J had made it clear that whether the guidance contained in the most recent expression of the wishes was followed would remain a matter for the trustee to consider in the exercise of its discretion.[56]

[108] Ms Anderson noted that the appellants' proposition appeared to be that a statement of wishes deviating from the general provision for an equal distribution in default of the exercise of an absolute discretion would be inconsistent. In response to that proposition she referred to the following passage from *Snell's Equity*:[57]

> Where assets are held by trustees on a discretionary trust, and a court is compelled to order execution, it would similarly be an error to believe that equal division between the objects of the trust will be the presumptive result. The intention of the settlor is the chief reason justifying the existence of the trust, and, particularly where there is a large class of objects, equal division may well be the last result the settlor would have intended.

[109] In summary, Ms Anderson submitted that, provided the settlor was not directing the trust and the trust was not a sham, there was no theoretical or practical

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55 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39.

56 Judgment under appeal, above n 3, at [129].

57 John McGhee (ed) Snell's Equity (34th ed, London, Sweet & Maxwell, 2020) at [5-012], citing *McPhail v Doulton* [1971] AC 424 (HL) at 451.

issue with the Court accepting (and directing) that subsequent statements of wishes are relevant.

Public Trust's position – statement of wishes generally

[110] Mr Gray clarified Public Trust did not seek directions on the weight, if any, to give to Mr Couper's specific wishes or their contents. That is a matter for it in the exercise of its discretion. He submitted the decisions in *Chambers* and *Easton* distinguished two discrete propositions:[58]

(a) that trustees are required to take into account wishes, by reading and having regard to them, and ascertaining their meaning; and

(b) that trustees are not required to take into account wishes in the sense of giving particular weight to them in the ultimate exercise of the discretion, having regard to all relevant factors.

[111] The directions sought by Public Trust were directed to the first proposition, not the second. Mr Gray noted that Mander J observed:[59]

> [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.

[112] Mr Gray said Public Trust accepts or understands the scope of the direction but that the phrase "take into account" may have caused confusion. Nevertheless, Public Trust is cognisant that it must exercise independent judgment. It may be after taking into account all relevant factors and having considered Mr Couper's wishes, it would give little or no weight to their contents. Those are however matters for Public Trust and do not go to whether the wishes are relevant and have to be read and considered.

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58 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39; and *Easton v New Zealand Guardian Trust Co Ltd (No 3),* above n 40.

59 Judgment under appeal, above n 3.

Analysis

Public Trust is required to take the settlor's wishes into account — the [134](a) direction

[113] The orthodox view of the role of a settlor is stated by Thomas and Hudson:[60]

> The role of settlor is simply that of creator. Once creation has taken place, then there is no evident role for the settlor in the operation of the trust in his capacity as settlor … . The settlor … drops from the picture absolutely and has no rights *qua* settlor, either to direct the trustees how to deal with the trust property or to reclaim the property which has been settled on trust.

[114] However, despite the absolute terms of that statement, the courts in all jurisdictions where trust law applies have in practice accepted that the settlor's wishes expressed independent of the provisions of the trust are a relevant consideration for trustees.

[115] Settlor's wishes have been described variously as:[61]

> … a document addressed by a settlor to trustees which is not binding upon the trustees, but which indicates the settlor's thoughts and wishes as to how the trustees might exercise their discretionary powers.

And:[62]

> The essential characteristic of a wish letter … is that it is a mechanism for the communication by a settlor to trustees of the settlement of non-binding requests by him to take stated matters into account when exercising their discretionary powers.

[116] The acknowledged non-binding nature of the wishes is consistent with the definition of a wish as an expression of desire rather than obligation.

[117] The justification for taking a settlor's wishes into account is said by *Lewin on Trusts* to be that the settlor has provided the property settled on the trust:[63]

> In a conventional family trust the funds comprised in the settlement are the settlor's bounty. Except to the extent that he has reserved powers to himself

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60 Thomas and Hudson, above n 60, at [1.37]–[1.38] (footnotes omitted).
61 *Re Rabaiotti 1989 Settlement* [2000] JLR 173 at 185.
62 *Breakspear v Ackland*, above n 46, at [5] per Briggs J.
63 *Lewin on Trusts*, above n 21, at [29-045]–[29-046].

> or conferred them on third parties, the trustees are the means that he has chosen to benefit the beneficiaries out of a property of his own. …
>
> Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form, before his death.

[118] Ms Chambers was right to accept that trustees are entitled to take into account settlor's wishes. Section 45(h) of the Trusts Act confirms that any letter or memorandum of wishes from the settlor is a document relating to the trust which the trustee must keep so far as is reasonable. That provides express statutory recognition of the status of the expression of wishes.

[119] The issue in relation to the direction in the present case at [134](a) arises from the wording used in the application for directions and the subsequent direction that Public Trust "**is required to take into account**" the settlor's wishes.

[120] The Kain siblings and grandchildren do not challenge the general proposition that trustees are entitled to take into account the settlor's original wishes, but say that the direction went too far and effectively made them a mandatory consideration.

[121] The wording used in the direction and how it is used in this context is important. "Required to" imports an obligation. When read with "take into account" it mandates they be taken into account. But that begs the question of what that taking into account requires the trustee to do. A requirement or obligation is different to an entitlement. An entitlement is a right which may or may not be exercised. In the present case Public Trust is entitled to take the wishes into account but it is ultimately for Public Trust to determine whether to act in accordance with the wishes. The current wording of the direction leaves some ambiguity about the nature of Public Trust's duty in this context.

[122] In *Chambers* this Court considered the effect of the settlor's wishes. It stated:[64]

> [36] Settlors 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

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64 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39, at [36] (footnotes omitted).

> discretion in exercising their powers. Wishes can only be taken into account if they are not inconsistent with the purposes of the trust as appear from its written terms. 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.

[123] That passage distinguishes between the need for trustees to consider the wishes and whether and how they may be taken into account.

[124] At issue in *Chambers* was the sale of a trust asset, a home in Mt Maunganui close to the beach. Three adult beneficiaries of the trust were given an option by the trustees to purchase the property. The settlor's intentions had been expressed by memorandum and they were that each of the three beneficiaries should share equally in the trust. The issue was whether the directions made by the Judge in the High Court were properly made. The appellant contended the Judge had gone too far in giving directions that he thought were appropriate rather than limiting himself to making or refusing to make the specific orders sought by the trustees. In the course of the judgment this Court discussed the principles relating to statements of wishes.

[125] While at [36] of *Chambers* this Court said it is necessary for trustees to read and understand the statement of wishes to discern the settlor's views, having done so, the trustees must then make an independent assessment of the appropriate course of action. That is, whatever the settlor's wishes, the trustees must consciously apply their independent discretion in exercising their powers and discharging their obligations as trustees. This Court confirmed that trustees could take the wishes into account (in other words, they were entitled to) but were not required to do so. It seems at [123] of the judgment Mander J accepted that proposition:[65]

> [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.

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[65] Judgment under appeal, above n 3.

Read as a whole, we consider the Judge's use of "required" in this context was a requirement for the trustee to make themselves aware of the wishes rather than to take them into account.

[126] Cooke J's conclusion in *Easton*[66] is consistent with this Court's reasoning in *Chambers*.[67] In *Easton* the plaintiff was one of three beneficiaries of the Moutoa Trust. The other two beneficiaries were his sisters. The principal asset of the trust was a family farm. On their parents' death the farm had been left to the trust. The farm was ultimately to be sold with the proceeds distributed equally among the three siblings. The parents had expressed a wish that the distribution not take place for 10 years to allow Mr Easton to remain employed on the farm and provide him an opportunity to arrange his affairs so he could purchase the farm. In relation to the expressed wishes, after referring to the above passage from *Chambers* Cooke J stated:[68]

> [101] There is authority for the proposition that such wishes are a mandatory relevant consideration. But they are only mandatory in the sense that the trustee must inform themselves of what the memorandum of wishes means if there is one. They are not obliged to take those wishes into account if they do not think they should be given any weight in the circumstances they are faced with, or if they are irrelevant as a matter of a proper appreciation of the power in the trust instrument. So saying that such wishes are a relevant consideration is true as a generalisation, but the real significance of the wishes will depend on the circumstances.
>
> [102] It follows from the above analysis that it is important to assess what the wishes are, and how they are relevant to the decision to be made by the trustee.

[127] The above authorities are consistent with *Hartigan Nominees Pty Ltd v Rydge* and *Breakspear v Ackland*.[69]

[128] In *Hartigan*, for example, Mahoney JA noted the position to be:[70]

> 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 discretionary powers.

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66 *Easton v New Zealand Guardian Trust Co Ltd (No. 3)*, above n 40.
67 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39.
68 *Easton v New Zealand Guardian Trust Co Ltd (No. 3)*, above n 40 (footnote omitted).
69 *Hartigan Nominees Pty Ltd v Rydge,* above n 42; and *Breakspear v Ackland*, above n 46.
70 *Hartigan Nominees Pty Ltd v Rydge,* above n 42, at 431 (reference omitted).

[129] Mahoney JA did not go so far as to suggest the trustees are obliged to take the wishes into account.

[130] A similar approach has taken by the Royal Court of Jersey, which has considered a number of cases that raise this issue. In *Re Rabaiotti 1989 Settlement* the Court noted that a letter of wishes was "an informal document which the trustees are free to ignore".[71]

[131] It has, however, been suggested that in *Pitt v Holt* the Supreme Court articulated a different approach by characterising wishes as a material consideration on all occasions.[72] In that case Lord Walker said:

> [66] … [Offshore trusts] are usually run by corporate trustees whose officers and staff (especially if they change with any frequency) may know relatively little about the settlor, and even less about the settlor's family. The settlor's wishes are always a material consideration in the exercise of fiduciary discretions. But if they were to displace all independent judgment on the part of the trustees themselves (or in the case of a corporate trustee, by its responsible officers and staff) the decision-making process would be open to serious question. The *Barr* case [2003] Ch 409 illustrates the potential difficulties of unquestioning acceptance of the settlor's supposed wishes.

[132] There is also a slight or apparent divergence of opinion in the academic texts on the issue. In *Underhill and Hayton Law Relating to Trusts and Trustees* the authors state:[73]

> The settlor's wishes are always a material consideration to be considered in the trustees' exercise of their discretionary powers. …

They cite *Pitt v Holt* as authority for the proposition, although later they go on to clarify:[74]

> However, so long as the trustees do take into account the legally significant letter of wishes the decision is theirs, so that they can properly decide to act contrary to the settlor's wishes taking account of all the relevant circumstances or they can properly decide to act in accordance with the settlor's wishes without such compliance sufficing to indicate that the trust is a sham.

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71 *Re Rabaiotti 1989 Settlement*, above n 61, at 189.

72 *Pitt v Holt*, above n 44, at [66].

73 David J Hayton, Paul Matthews and Charles Mitchell (eds) *Underhill and Hayton Law Relating to Trusts and Trustees* (19th ed, LexisNexis, London, 2016) at [4.11] (footnote omitted).

74 At [4.12] (footnotes omitted).

[133] The authors of *Lewin on Trusts* say:[75]

> Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form, before his death. … 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".[76]

They go on to say:[77]

> 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.

[134] The principal authority cited for "the better view" are Panckhurst J's comments in the 2004 judgment at [301]. However, that paragraph does not directly support the proposition. Panckhurst J said:[78]

> [301] … 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. As to these propositions see for example the discussion in Underhill and Hayton, *Law of Trusts and Trustees* (15th ed) at p 47 and the decision in *Hartigan Nominees Pty Ltd v Ridge* (1992) 29 NSWLR 405.

[135] Further, on appeal this Court said:[79]

> [272] … 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.

[136] In summary, and having regard to the above, we consider the more accurate direction in the present case to be:

> Public Trust is entitled to take into account the wishes and subsequent wishes of the settlor, Tom Couper, and to enable it to do so, it is

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75 *Lewin on Trusts*, above n 21, at [29-046].
76 *Pitt v Holt*, above n 44, at [66].
77 *Lewin on Trusts*, above n 21, at [29-046] (footnotes omitted).
78 The 2004 judgment, above n 1.
79 *Kain v Hutton*, above n 23.

> necessary for Public Trust to read and understand those wishes. However, Public Trust can only take account of the wishes and subsequent wishes to the extent they are not inconsistent with the terms and purposes of the trust.

The [134](b) direction

[137] We agree that no New Zealand case has yet been directly required to expressly consider the status of subsequent or inconsistent wishes.

[138] However, both the *Chambers* and *Easton* cases dealt with wishes expressed after settlement and did not raise any particular issue about them.[80]

[139] The authors of *Lewin* state:[81]

> Moreover, trustees are entitled to have regard to the settlor's wishes expressed from time to time and are not confined to those expressed contemporaneously with the creation of the trust.

[140] In support they cite *Chambers* and also in *Re R Trust* as cases which impliedly support that proposition.[82] They also cite *Schmidt v Rosewood Trust Ltd* and *Re the Esteem Settlement* as examples of cases where the Court has expressly accepted reliance on subsequent wishes.[83] In both cases the reference was passing. In *Schmidt*, the trust was established on 20 June 1995. In a letter of 31 October 1995, the settlor, who was also a beneficiary, expressed a wish to benefit his son in the event of his death. The Court recognised that the letter provided clear evidence of his wishes and confirmed "that the appellant may have a particularly strong claim on the trustees' discretion".[84]

[141] In *Re the Esteem Settlement*, the Royal Court of Jersey stated:

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80 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n39. In *Chambers* there were three statements of wishes made a number of years after the trust was established; and *Easton v New Zealand Guardian Trust Co Ltd (No. 3)*, above n40. In *Easton* the wishes were made over a year after the creation of the trust.

81 *Lewin on Trusts*, above n 21, at [29-047].

82 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 39, at [36]–[38]; and *Re R Trust* [2019] SC (Bda) 36 Civ.

83 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709; and *Re the Esteem Settlement* [2003] JRC 092, [2004] WTLR 1.

84 *Schmidt v Rosewood Trust Ltd*, above n 83, at [33].

> [166] In our judgment, where the requests made of trustees are reasonable in the context of all the circumstances, it would be the exception rather than the rule for trustees to refuse such requests. Indeed, as Mr Journeaux accepted, one would expect to find that in the majority of trusts, there had not been a refusal by the trustees of a request by a settlor. This would no doubt be because, in the majority of cases, a settlor would be acting reasonably in the interests of himself and his family. This would particularly be so where there was a small close-knit family and where the settlor could be expected to be fully aware of what was in the interests of his family. Indeed, in almost all discretionary trusts, the settlor provides a letter of wishes which expresses informally his desires in relation to the administration of the settlement. Furthermore he may change his wishes from time to time. In our judgment it is perfectly clear that trustees are entitled (see *Abacus Trust Company (Isle of Man) Ltd v Barr* [2003] 1 All ER 763) to take account of such wishes as the settlor may from time to time express provided, of course, that the trustees are not in any way bound by them. The trustees must reach their own independent conclusion having taken account of such wishes.

[142] The statement "Furthermore he may change his wishes from time to time" is not supported by reference to authority other than the case of *Abacus Trust Company (Isle of Man) Ltd v Barr*.[85] In the *Abacus Trust Company* case the principal issue was the status of an appointment made in error.

[143] In this Court's decision in *Chambers* the issue of whether the trustee could take account of subsequent wishes was not directly in issue, but the Court did implicitly accept it would be proper for the trustees to have regard to subsequent wishes.[86] In that case, following his wife's death the settlor had executed two statements of wishes intended to provide guidance to the trustees about how they should deal with the trust's assets after his death. The trust was settled on 7 November 2003 by Mr White Snr and his wife. The final beneficiaries of the trust were the Whites' three children. Mr White also executed a third document, an addendum to the second statement. The documents were dated 13 August 2006, 8 February 2010 and 10 May 2010. In the first statement Mr White proposed upon his death a current market value of the property be obtained and an offer made to all three beneficiaries or any one of them to purchase on the proposed basis. It was stated the children were to be treated equally. In the second statement Mr White limited the option to purchase to Dr Chambers, the appellant, giving her an exclusive right to acquire the property on the basis of an up-to-date registered valuation. Only if she did not wish to exercise it would the property then

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85 *Abacus Trust Company (Isle of Man) v Barr* [2003] EWHC 114, [2003] Ch 409.
86 *Chambers v S R Hamilton Corporate Trustee Ltd*, above n 33.

be offered to the other two children. Again, it was stated the three children were to be treated equally.

[144] The addendum dated 10 May 2010 reverted in general terms to the original statement of wishes that all three children be given an option to purchase and it removed the preferential option for Dr Chambers only. The Court noted that even in the second statement, which provided for the right of Dr Chambers to purchase the property, the wish was expressed that all three children be treated equally. The Court then noted the preference for Dr Chambers was withdrawn in the addendum so that the two themes to be extracted from the last statement of wishes was that all be treated equally and also that, if possible, the property stay in the hands of the beneficiaries or one of them with no preference for Dr Chambers. Implicitly then this Court accepted that the trustees could take into account subsequent statements of wishes.

[145] In *Hartigan*, Mahoney JA accepted that subsequent wishes could be taken into account:[87]

> 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.

[146] In principle there seems no reason why that should not be so. For example, a settlor of a trust who settles a farm into the trust may express a wish that the farm be retained within the family but then, as events and circumstances later change, might take the view that it was no longer appropriate or in the best interests of the family for the farm to be retained. The settlor could then change that particular wish so that the trustees would not have to consider that former wish when making decisions as to dispositions under the trust.

[147] We agree with Ms Anderson's point that it is relevant this is an unqualified discretionary trust. The fact that the trust deed provides for an equal distribution in default of the exercise of discretion to appoint income and capital is not, in some way, a dominant or overriding consideration. While the default provision of equality is a

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87 *Hartigan Nominees Pty Ltd v Rydge*, above n 42, at 431.

relevant consideration, it is no more than that. A statement of wishes that deviated from that purpose is not solely for that reason to be discarded or put to one side as inconsistent. We do however note that the passage Ms Anderson cites from *Snell's Equity* to support the proposition[88] appears to be derived from the case of *McPhail v Doulton*,[89] a case quite different to the present. In that case the trust established a fund for the benefit of the staff of a company, their relatives and dependants, so it truly involved a large class of beneficiary. Of interest, in *McPhail* the Court observed:[90]

> Equal division may be sensible and has been decreed, in cases of family trusts for a limited class, here there is life in the maxim "equality is equity," but the cases provide numerous examples where there has not been so, and a different type of execution has been ordered, appropriate to the circumstances.

As is often the case, context and the individual circumstances of the particular case will determine the appropriate outcome.

[148] We conclude that the Judge was correct to accept the status of subsequent wishes and that his direction at [134](b) accurately reflects the law.

[149] The Kain siblings and grandchildren take issue with passages of the judgment at [132]–[133] where Mander J noted that the family history, background and context, much of which was in dispute were matters to be weighed by Public Trust in the exercise of its discretion.[91]

[150] However, we consider that the Judge was correct to leave the issue of context in that way. While Public Trust must inform itself of the statements of wishes by reading them, whether it takes them into account and the weight to be given to them when making relevant decisions is still to be informed by the family history, background and circumstances, and with regard to the content and context of the statements of wishes, bearing in mind Public Trust's obligations as trustee. The relevance of the family history, background and circumstances are factual matters for Public Trust to consider, not the Court on an application for directions.

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88 John McGhee, above n 57, at [5–012].
89 *McPhail v Doulton* [1971] AC 424 (HL).
90 At 451 per Lord Wilberforce.
91 Judgment under appeal, above n 3, at [131].

Result

[151] The appeal is dismissed insofar as it relates to the directions at [108](b), [108](c), [109](d) and [134](b).

[152] The appeal is allowed in relation to the directions at [134](a). The direction at [134](a) is set aside and replaced with the direction that:

> Public Trust is entitled to take into account the wishes and subsequent wishes of the settlor, Tom Couper, and to enable it to do so, it is necessary for Public Trust to read and understand those wishes. However, Public Trust can only take account of the wishes and subsequent wishes to the extent they are not inconsistent with the terms and purposes of the trust.

Costs

[153] At the request of counsel, we reserve the issue of costs. Public Trust is to file submissions within 15 working days. The Hutton interests are to file submissions 10 working days thereafter. The Kain interests are to file submissions 10 working days thereafter. Public Trust can file a reply in five working days. The memoranda are to be limited to five pages in each case. The Court will then deal with costs on the papers.

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