IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2017-442-52
[2021] NZHC 3015

BETWEEN	MARK JAMES MCLAUGHLIN and ANDREW ASHLEY MCLAUGHLIN (as beneficiaries of the Ashley Trust) Plaintiffs
AND	JOHN DAVID MANUEL MCLAUGHLIN (as trustee of the Ashley Trust) First Defendant
AND	GLASGOW HARLEY TRUSTEE LIMITED Second Defendant
AND	BRETT MCLAUGHLIN Interested Party

Hearing:	17 May 2021 – 2 June 2021; 24 – 25 June 2021
Memoranda Filed:	16 and 25 June 2021, 9, 16, 23 and 28 July 2021 and 3 August 2021
Appearances:	J W A Johnson, J R Halligan and N G Lawrence for the Plaintiffs N S Gedye QC, O D Peers and G Dill-Russell for First Defendant J Bierre for Second Defendant J H McGuigan for Interested Party Brett McLaughlin
Judgment:	9 November 2021

JUDGMENT OF GENDALL J

This judgment was delivered by me on 9 November 2021 at 1.30 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .

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Introduction

[1] These proceedings involve the McLaughlin family and their family trust settled by the parents (both now deceased), James John Ashley McLaughlin (Jim) and Edna Burton McLaughlin (Edna), on 26 February 2004. The principal asset of the Ashley Trust (the Trust) was approximately 100 hectares of land (the Trust land) previously farmed by Jim and Edna in the Marsden Valley, Nelson. Jim and Edna had purchased this land in the 1960s, they transferred it to the Trust in April 2004 and subsequently gifted the $9.9 million purchase price.

[2] Jim and Edna have four sons, John David Manuel McLaughlin (John), the first defendant, Mark James McLaughlin (Mark), the first-named plaintiff, Andrew Ashley McLaughlin (Andrew), the second named plaintiff, and Brett Gardner McLaughlin (Brett), an interested party in this litigation.

[3] The discretionary beneficiaries of the Trust were Jim and Edna, their children, John, Mark, Andrew and Brett, together with any spouse, widow or widower of those children, any grandchild or later issue, and any further trust or body appointed by deed. The final beneficiaries were Jim and Edna's children. The settlors of the Trust in 2004, Jim and Edna, appointed as the initial trustees themselves, their son John and their solicitor, Brian Nelson (Mr Nelson), who worked in the Nelson legal firm, Glasgow Harley. Mr Nelson was later superseded as a trustee of the Trust by the second defendant, Glasgow Harley Trustee Limited (GHTL). Later changes of some of the trustees has occurred.

[4] Sadly, over the last 12 or so years, major disputes over the Trust and a widening rift has unfolded between the McLaughlin brothers. The present proceeding issued in 2017 was a significant product of this.

[5] At its core, this case involves claims of breach of fiduciary and equitable duties by some of the trustees at the time, specifically John and GHTL.

[6] Mark and Andrew say that John and GHTL as trustees have mismanaged the Trust's property and exercised their powers in breach of their obligations largely by way of a persistent course of development of the Trust land in particular.

[7] This course of action, the plaintiffs contend, breached the John and GHTL's obligations as trustees in several ways:

(a) it did not assess the needs and interests of the beneficiaries;

(b) it did not assess alternative investment strategies; and

(c) it created and then allowed a conflict whereby John, as a trustee, was also project manager for the development, his alleged inexperience and the fact his own land, neighbouring and previously part of the Trust block, benefitted from the development of the Trust land.

[8] Mark and Andrew contend the land development was seriously misguided and that a stubborn persistence to proceed with this land development course of action by the trustees has cost the Trust and the beneficiaries dearly. They complain that to the exclusion of any alternatives each of them to date has received inadequate distributions from the Trust, these amounting only to $550,000 each. In total those distributions from the Trust have been $2.2 million which the plaintiffs contend was well below what was promised.

[9] In these proceedings, Mark and Andrew seek the removal of John as a trustee as well as compensation and an account of profits. Compensation is also sought from GHTL for breach of equitable duty and also to the extent John might fail to account for profits he has obtained.

[10] Finally, by way of introduction, I note that this proceeding has already spawned significant and acrimonious litigation. An opposed Beddoe application was made to this Court and it was only partially successful.[1] Further, an interim injunction application was initiated by Mark and Andrew to restrain the trustees from proceeding with a particular stage of development of the trust property.[2] This failed. Attempts at mediation between the parties have also failed.

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1 *McLaughlin v McLaughlin* [2018] NZHC 3198, [2019] NZAR 286.
2 *McLaughlin v McLaughlin* [2019] NZHC 2597, [2019] NZFLR 299.

First words

[11] It is appropriate in this litigation that the first words should fall to Edna. With her husband, Jim, Edna was a settlor and a discretionary beneficiary of the Trust. She was one of its initial trustees, a role she actively continued for some years, and she was the mother and in some respects the matriarch of the family, living for many years on part of the Trust property until a short time before her death. And finally, it was Edna and Jim who started matters off as they had owned the farm since the 1960s and effectively gifted it to the Trust to become largely the Trust's sole asset. Sadly, Edna died on 28 May 2021, midway through the trial in this proceeding. In her affidavit sworn 7 November 2016 and filed in this proceeding, Edna, then aged 94, used these words:

> [2] I am advanced in age and my health is not so good these days. I am aware that Mark and Andrew have threatened legal action against the trustees. I am swearing this affidavit now to make sure that Jim's and my views and intention in relation to the trust are made known to any Court or tribunal that might need to hear or decide any Trust issues that Mark and Andrew, or anyone else, might pursue.

And, in conclusion in this affidavit in part she deposed:

> It would sadden me greatly if this issue had to go to court.

[12] Regrettably for all concerned, Edna's wish was not fulfilled. The longstanding and unfortunate dispute between the brothers did go to court, and is the subject of these proceedings filed by Mark and Andrew in 2017. That dispute too has no doubt been extremely costly to all concerned, both in monetary, personal and other terms. It has involved many interlocutory and pre-trial skirmishes, an almost three-week hearing in this Court, and protracted disagreements subsequently over appointment of a new trustee.

[13] So far as Edna's 7 November 2016 affidavit is concerned, somewhat belatedly Mark and Andrew raised objections before me as to its general admissibility and also as to certain parts of the affidavit. Other evidence admissibility issues were also raised at trial. I will address further all these admissibility questions below. But, in the meantime, I note that much of the objection to Edna's 7 November 2016 affidavit was based upon, first, the unavailability of Edna as a witness at trial, given her advanced

age and, secondly, what was said to be her failing health and impressionability when the affidavit was sworn in November 2016.

[14] This November 2016 affidavit from Edna was accepted as admissible evidence in earlier interlocutory hearings between these parties. The current objections have surfaced at a late stage.

[15] On that issue, I find the affidavit is admissible in its entirety and reject any objections to it advanced on behalf of Mark and Andrew. Before me, an independent and experienced Nelson solicitor, Donald James Turley (Mr Turley), who was present and witnessed Edna's signature when the affidavit was completed, provided useful and affirmative evidence as to her position and understanding at the time the affidavit was sworn. In addition, by November 2016, it is accepted Edna had spent some 11 and a half years as an active and engaged trustee of the Trust, participating in trustees' decisions to carry out the subdivision development.[3] What she deposes to in her affidavit simply confirms what she and the other trustees ensured would come to pass.

[16] It is also useful at this point to note a special and rather unique provision which, according to the evidence of Mr Nelson, was included at cl 9.2 in the Trust Deed at Jim and Edna's request in 2004. In a sense, the words chosen in this cl 9.2 were Edna's (and Jim's) first words too.

[17] The cl 9.2 provision outlined Edna and Jim's wishes as settlors. It expressly provided that the trustees should:

> Realise the value of the farm property by way of subdivision into individual or lifestyle allotments to better benefit the discretionary beneficiaries.

More discussion on this provision will follow later.

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[3] Indeed, in evidence before me it is confirmed that whilst she was a trustee of the Trust, Edna attended every meeting of the trustees without fail, bar one.

Background

(a) The Marsden Valley farm

[18] Jim and Edna (and their family) came to the rural Marsden Valley in the Nelson area, purchasing a significant part of the trust property in the late 1960s. At the time it was farmland and for some years Jim, Edna and their family farmed and broke in areas of the land. Clearly, however, Jim and Edna had a long-term view to it being turned into a residential subdivision development as they could see its potential even at that time.

[19] Later, in 1979, John and his wife, Wendy, purchased five hectares of land which formed part of the farm from Jim and Edna. Some time after that, John assisted Jim in the preparation and pursuit of various subdivision and rezoning applications for both the farmland owned by Jim and Edna, and the adjoining land owned by John and Wendy.

[20] The farmland in question was a small farm-holding. Largely, it comprised two blocks on either side of the Marsden Valley Road, the first known as the Ching's Block and the second known as the Homestead Block. The Ching's Block was subject to a local authority plan change in 1994. The land was then zoned rural/residential but with a minimum lot size for subdivision.

[21] Prior to his death on 21 May 2007, Jim took steps to have the overall farmland rezoned more closely for residential subdivision purposes.

[22] This involved an extensive resource consent process. In December 2006 the Trust, and neighbours John and Wendy made a joint application to subdivide the Ching's Block. At that time the Trust's portion of the Ching's Block comprised around 12 hectares, and the application overall was to create a staged subdivision with a total of 117 residential lots. This followed at least two earlier (generally unsuccessful) resource consent applications made by Jim on behalf of the family in the 1990s.

[23] The resource consent process was still ongoing when Jim died in May 2007. Resource consent was subsequently granted for the Ching's Block by the Nelson City

Council in November 2007. That consent provided for a 117 lot residential subdivision to be carried out in accordance with the December 2006 application as amended by a scheme plan in September 2007.

(b) The McLaughlin family

[24] It is useful here to set out a little more fully, details of the McLaughlin family, who are (or have been) affected by these proceedings.

Jim and Edna

[25] Jim and Edna, as parents of the four boys, were married for nearly 60 years when Jim died in May 2007. Edna, his widow, aged 98, died on 28 May 2021.

[26] Jim and Edna came to the Nelson region in the late 1960s (with their family). Originally, they purchased the Homestead Block farm area in the Valley. They farmed this initially on a part time basis when Jim obtained work in Nelson City. Subsequently, they acquired the neighbouring Ching's Block. Jim, it is said, was a determined and single-minded man and throughout had it in mind that their farm, being close to Nelson City, would be ripe for residential subdivision in the future.

[27] Both Jim and Edna were two of the original trustees of the Trust. Jim had health issues and died in 2007.

[28] Edna continued on as one of the trustees of the Ashley Trust until she resigned in 2017.

[29] Both Jim and Edna were named as two of the discretionary beneficiaries in the Trust.

The sons

[30] Jim and Edna's four sons who have survived them, again are: John, who, as I understand it, is now aged 71, Mark now aged 68, Andrew now aged 66 and Brett now aged 63.

[31] John and his wife at the time, Wendy, lived in the Marsden Valley on a portion of the Ching's Block comprising about five and a half hectares which was sold to them by Jim and Edna from about 1979. John and Wendy have three children.

[32] Mark and his wife have four children. He is a doctor and medical specialist residing in Christchurch.

[33] Andrew was a veterinarian and previously owned a farm on the West Coast which the parties say proved to be unsuccessful. Andrew has three children.

[34] Brett has lived and worked on the farm in Marsden Valley for many years. He is single. Brett still resides in his home on a small block in the Valley, adjacent to the Trust property, which effectively was gifted to him by his parents and the Trust over the years. Brett currently suffers from ill health with heart issues. Although he is not a named plaintiff in this proceeding, he is an interested party and, as I have noted, he says he supports Mark and Andrew in their claim against John and GHTL. Brett's essential complaint against John and GHTL (and indeed other trustees) here is that he says they have been entirely hostile towards him and his interests throughout.

[35] All the brothers, John, Mark, Andrew and Brett, are both discretionary beneficiaries and, whilst described in the Trust Deed as "child beneficiaries", are effectively the residuary beneficiaries under the Trust. Brett's position as a residuary beneficiary is slightly different to that of his brothers John, Mark and Andrew, which I outline below.

[36] In 2004, John was appointed by Jim and Edna to be one of the initial trustees of the Trust. He remains as a trustee up to the present.

The grandchildren

[37] The children of John, Mark and Andrew, who are grandchildren of Jim and Edna, are discretionary beneficiaries under the Trust. Brett has no children.

[38] So far as the grandchildren are concerned, at the outset, Mark and Andrew's children filed applications noting they were interested parties.

[39] Since that time, however, as best I can tell, those grandchildren have taken no effective steps in the substantive proceeding. They were not represented at the hearing of this matter before me and they have taken no formal steps since filing their original applications noted above.

[40] John and Wendy's children (also grandchildren of Jim and Edna and accordingly discretionary beneficiaries under the Trust), have taken no steps in this proceeding.

Formation of the Trust

[41] The Trust as I have noted was settled by Jim and Edna on 26 February 2004. As settlors of the Trust, they appointed as initial trustees themselves, John, and Brian Nelson. A further trustee, Fred Westrupp was appointed shortly after the Trust was settled.

[42] The power of appointment (and removal) of trustees under the Trust Deed was vested in Jim and Edna acting jointly (or the survivor of them). Afterwards this power of appointment was to vest in the person or persons appointed by the survivor of Jim and Edna by deed or will. There was a caveat however regarding trustee appointment that at all times there was not to be less than two trustees, at least one of whom was not to be a discretionary beneficiary.

[43] The discretionary beneficiaries under the Trust Deed are Jim, Edna, their children John, Andrew, Mark and Brett (who were described as the child beneficiaries), any spouse, widow or widower of those child beneficiaries, any grandchild or remoter issue of the settlors and any trust or body appointed by the trustees by deed which has as its sole or principal object the benefiting of any of the discretionary beneficiaries.

[44] The Trust period to run until the date of distribution was to be such date as was chosen by the trustees, with a maximum period 80 years from the formation date, 26 February 2004.

[45] The Trust Deed had standard provisions regarding distributions to be made at the discretion of the trustees to discretionary beneficiaries.

[46] As to the final distribution on the date of distribution under the Trust, the Trust Deed provided that the trustees:[4]

> … shall stand possessed of such of the capital and income of the Trust Fund as may then remain upon trust for the child beneficiaries as shall then be living and if more than one in equal shares as tenants in common absolutely PROVIDED HOWEVER the share of the said **Brett Gardner McLaughlin** shall not be paid to him but shall be retained by the trustees for twenty years and on his death paid to his children, failing any children to the child beneficiaries under this clause. The trustees shall have power to request the capital if they think desirable to maintain Brett in a suitable standard of living and care.

[47] It is apparent, therefore, the final beneficiaries under the Trust are John, Mark, Andrew and Brett.

[48] The Trust Deed also contains relatively standard investment powers along with limitation of liability clauses which are set out as follows:

> 7 INVESTMENT OF TRUST FUND
>
> …
>
> 7.3 Limited liability for loss – Notwithstanding any provision of law to the contrary the Trustees will not be liable for any loss resulting from any investment made by the Trustees in good faith.
>
> …
>
> 12 TRUSTEES' LIABILITY
>
> The Trustees shall not be liable for (and shall be indemnified out of the Trust Fund for) any loss or liability which they may incur by reason of the exercise, manner of exercise or non-exercise of any of the powers, authorities or discretions conferred on them by this deed or by law.

Before settling the Trust in 2004 Jim had also provided a "Memorandum of Wishes" dated 8 June 2001. It is Mark and Andrew's position that this "Memorandum of Wishes" was intended to be a direction to the trustees of the Trust, notwithstanding it

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[4] In the Trust Deed the "child beneficiaries" are defined as John, Mark, Andrew and Brett.

was signed nearly three years prior.

[49] In the "Memorandum of Wishes", Jim stated:

> I direct that in all major decisions my Trustees consult my sons before making that decision.
>
> I understand that my sons have no voting power however. My trustees are to put the proposal in writing to each to allow them to comment and make submissions within a stipulated period.
>
> If they so request or the Trustees decide, a meeting may (if the Trustees desire) be called to resolve any differences.

The subdivision activities

[50] In December 2006 some six months before Jim's death, the Trust and John (and Wendy) together made a joint application to the Nelson City Council to subdivide the Ching's Block to create a staged subdivision totalling 117 residential lots. Resource consent was granted by the Council in November 2007, some six months after Jim's death. That consent provided for the 117 lot residential subdivision.

[51] By this time Fred Westrupp (Mr Westrupp) had been added as a trustee of the Trust at Jim's request.

[52] Following Jim's death in August 2007, Mr Westrupp raised a number of issues regarding the future and direction of the Trust as clearly he had misgivings about his future as a trustee.

[53] Subsequently on 21 September 2007, Mr Westrupp retired as a trustee. Mr Nelson also retired around this time to be replaced by his law firm's trust company, GHTL.

[54] Once the resource consent was obtained in November 2007, Edna, John and GHTL as continuing trustees made the decision to proceed with the physical subdivision development of the Ching's Block. At that point the trustees wrote to Mark and Andrew advising them of this with the comment:

> The next stage will be the preparation of engineering plans and as the Trust does not have sufficient funds for this, it will be necessary to raise funds by

> way of a bank mortgage over the Trust's property. John hopes that work can start once the engineering plans are completed and accepted by the Council in October 2008.

[55] Then, in May 2008, an application for a further Plan Change was lodged with the Nelson City Council. It requested the Council adopt a Plan Change to rezone all of the Trust's land owned as residential. This Plan Change was adopted by the Council in late 2008.

[56] The trustees and John around this time had also made an application to amend the resource consent for the Ching's Block to reflect an altered subdivision layout and numbering. This was successful, increasing the available lots from 117 to 130. This amendment benefitted both the Trust's land and John (and Wendy's) land.

[57] At that point the trustees entered into a Heads of Agreement with John and Wendy which provided that they would contribute to the Trust $40,000 (excluding GST) towards the costs of obtaining the initial resource consent. That total cost was originally estimated to be around $130,000 but, as I understand it, the cost was said to increase to $220,000 in a subsequent funding application which was lodged. The true cost, in evidence before me however, was said to be around $300,000. The original arrangement, however, was never revisited. John and Wendy made no further contribution to this cost other than the original $40,000 agreed. Mark and Andrew complain about this and the fact John made no further contributions to the subdivision costs. These costs related to the Council's Plan Change, amendments to the original consent, subsequent resource consent applications, appeals regarding existing consent conditions and physical subdivision works such as roading and the installation of services to the boundary of what is said to be his otherwise landlocked land.

[58] In June 2008 with subdivision development work soon to commence, John was installed by the Trust as project manager for the development on a fulltime basis at an agreed salary of $120,000 (plus GST) per annum. At that time, the Trust also purchased machinery to undertake the development. It seems also that in July 2008 the trustees agreed that the Trust's accounting activities would be transferred from accountants, Thompson & Daly, who had worked for Jim and Edna for some time, to John's own accountants, W H K Hintons.

[59] Bank funding for the initial development stages was arranged through Westpac and work began. By the end of 2008, however, the trustees were aware of a potentially depressed property and section sales market caused by the Global Financial Crisis (GFC) and had already instituted a slowdown in work.

[60] Various bank funding applications for the Trust were drafted. Mark and Andrew make something of the fact that John and the Trust's accountants in June 2009 had forecast a return on the Ching's Bock of something over $12 million and Duke & Cooke had provided a valuation of that block in August 2008, updated in November 2008, based on a 90 lot subdivision at $6.76 million.

[61] From late 2008 to early 2011, the trustees continued to undertake the development of Stage 1 of the Ching's Block. Mark and Andrew complain now that this was without reference to them. From about July 2011, Andrew and Mark sought updates on progress. A report from the Trust dated 16 December 2011 noted that only four lots on Ching's Block Stage 1 had been sold as the market had slowed significantly over the past 15 months since development had commenced. Later, in April 2012, a further update to the beneficiaries was provided by the trustees. This update noted that reduced section prices and increased costs meant that each lot to be sold would only produce a net taxable profit of $100,000. Mark and Andrew complain that, notwithstanding this, the development of Stage 1 continued.

[62] Mark and Andrew's concerns about the development in late 2011 or early 2012 led them to engage Kendons, chartered accountants, and, later, the solicitors Hannan Seddon to make a number of enquiries of the trustees on their behalf. In light of these concerns, in October 2012 the trustees engaged Mr Mick Hollyer (Mr Hollyer) to review the Trust's activities. At that time, Mark and Andrew also engaged their independent expert, Mr Peter Mahony (Mr Mahony), to conduct a review which produced the Mahony report.

[63] Following this, in 2013 Mark and Andrew instructed barrister Nicholas Davidson QC (as he then was). Thereafter, the Trust made distributions totalling $550,000 to each of the child beneficiaries, John, Mark, Andrew and Brett in March and December 2014. These distributions which totalled $2,200,000, according to

Mark and Andrew, were made "in a bid to placate the beneficiaries". They complained that this did not, however, address their concerns which primarily focused on decision-making, financial forecasting and timeframes for the Trust. They also held concerns around what they say was the evident intention of the trustees to go on to develop the Homestead Block.

[64] In early 2015, a meeting chaired by John Marshall QC and Nicholas Davidson QC aimed to resolve all issues between the parties. No resolution was achieved. However, the trustees did begin discussions about the appointment of additional independent trustees. In April 2015 Ian Kearney (Mr Kearney) was appointed as a trustee and he was joined by Mark Russell (Mr Russell) as an additional trustee later in 2015. At this point revised agreements with John and his related entities regarding his employment, equipment-hire and profit sharing were entered into.

[65] Early in 2016, however, Mr Kearney retired as a trustee. The remaining trustees also around that time engaged Tony Sewell (Mr Sewell) to prepare a report on the merits of proceeding with development of the Homestead Block. As I understand it, his reports were favourable and he recommended the development of that Block proceed.

[66] Additional complaints around this time as to access by the beneficiaries to information regarding the Trust were made. The Sewell report was provided to Mark and Andrew in December 2016. They commissioned their own expert financial analysis relating to the Trust from accountants, Hussey & Co, and this was provided in June 2017.

[67] The last sales of sections for the Ching's Block occurred between 31 March 2017 and 31 March 2018, although the development at that stage remained incomplete as nine hill sections on the block (known as Ching's 4B) remained unsold. Mark and Andrew contend it is unlikely those nine sections can be developed for a profit, given the difficulty and expense of doing so. This is strongly disputed by the trustees and others, including Mr Sewell who firmly believes they will have significant value when sold.

[68] In the meantime, from around 2015, it seems that John (and Wendy) started and completed their own subdivision on their land which was previously part of the Ching's Block. Mark and Andrew complain, first, that these actions created competition for the unfinished Ching's Block sections and, secondly, that John's subdivision also stole attention from the proposed commencement of the Homestead Block development.

[69] As a result of Mark and Andrew commencing these proceedings in November 2017, work on the development of the Homestead Block was put on hold. The trustees continued to progress various resource consent related matters and obtained certain valuations.

[70] In November 2018, the trustees also sold a lot in the overall subdivision known as Lot 143 (which was located on the Ching's Block side of Marsden Valley Road and had previously been intended to be developed in conjunction with that block). This sale of Lot 143 was as an undeveloped block of land at a sale price of $590,000.

[71] Then in July 2019, the trustees resolved to progress development of Stage 1 of the Homestead Block. Efforts were also made to identify an independent trustee company to replace GHTL which had expressed the wish to retire.

[72] The trustees' plans to proceed with the development of Stage 1 of the Homestead Block led Mark and Andrew to seek an interim injunction from this Court in October 2019 to halt the development. This was declined by Dunningham J.[5]

[73] Subsequently, in August 2020, the trustees entered into a Heads of Agreement with Jennian and Milestone Homes for the sale of the balance of the Homestead Block (excluding Stage 1 and the land surrounding Edna's house) for the sum of $6.7 million. This sale, as I understand it, is due to settle shortly.

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5 *McLaughlin v McLaughlin & Ors* [2019] NZHC 2561 (Result Judgment) and [2019] NZHC 2597 (Reasons Judgment)

The pleadings

[74] This proceeding commenced when Mark and Andrew filed their initial statement of claim dated 24 August 2017. That statement of claim named John, GHTL and Mark William Russell (Mr Russell), trustees of the Trust at the time, as first defendants and Mr Nelson, the ex-trustee, as second defendant.

[75] The defendants named in that statement of claim filed their statement of defence on 3 November 2017.

[76] On 1 November 2017, Edna filed a notice of appearance indicating that she wished to appear and be heard in the proceedings.

[77] On 4 December 2017, a notice of appearance by interested parties was filed by Mr Colin Smith, a Greymouth solicitor, on behalf of Aaron McLaughlin, Olivia Campbell, Chelsea McLaughlin and Brittany McLaughlin (beneficiaries of the Trust) who, I understand, are grandchildren of Jim and Edna. My understanding is also that they are Mark's children and may have been represented at the earlier hearing of a Beddoe application in this proceeding.

[78] Then, on 30 January 2018 a further notice of appearance by interested parties was filed by Mr Colin Smith, this time on behalf of James McLaughlin, Louise McLaughlin and Callum McLaughlin (also beneficiaries of the Trust). They are also grandchildren of Jim and Edna, being Andrew's children.

[79] Despite the two notices of appearance,[6] and some of those grandchildren opposing the trustees' Beddoe application, as best as I can tell, none of the named grandchildren have played any further part in this proceeding. As I have noted above, they did not appear, nor were they represented at the final hearing of this matter before me.

[80] Returning to the plaintiffs' pleadings here, on 31 January 2020, an amended statement of claim was filed in this proceeding by Mark and Andrew as plaintiffs

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6 Noted at [77] and [78] of this judgment.

against John as first defendant and GHTL as second defendant, trustees of the Trust at the time.

[81] On 9 March 2020, a statement of defence to this amended statement of claim was filed.

[82] Then, on 15 September 2020, a second amended statement of claim was filed in this Court by Mark and Andrew as plaintiffs. An amended statement of defence to this second amended statement of claim was then filed on behalf of the defendants dated 10 February 2021.

[83] A statement in reply was filed on behalf of Mark and Andrew on 19 March 2021.

[84] A short time later, on 23 April 2021, a cross-claim was filed by GHTL as second defendant against John as first defendant and on 31 May 2021 a cross-claim was filed by John against GHTL.

[85] I interpolate at this point one further comment. Although matters generally challenged by Mark and Andrew relate to decisions made by the trustees of the Trust at relevant times, and on some of these occasions Edna was a trustee, she is not named as a defendant in these proceedings. I say more on this later.

Remedies sought in their pleadings by Mark and Andrew

[86] In their claim, Mark and Andrew seek orders for:

(a) the removal of John as a trustee of the Trust;

(b) an account of profits from John for the project management fees paid to him;

(c) for a further accounting for:

(i) the profit received from the subdivision of the land (forming part of the Ching's Block) previously owned by John;

(ii) the difference between John's contribution to the cost of the resource consent process and development works and the contribution actually required of him;

(iii) the benefits accruing to John from the use of machinery and equipment purchased by the Trust used for the development of his land;

(d) that the defendants (John and his former co-trustee, GHTL) pay compensation calculated on the basis of what an alternative involvement strategy would have delivered to the Trust;

(e) that John and GHTL repay various legal and associated costs paid by the Trust, seemingly in contravention of orders made by this Court; and

(f) for costs against John and GHTL together with an order that the Trust indemnify Mark and Andrew for any unmet portion of their costs.

Causes of action

[87] In seeking the remedies I outline above, essentially there are three causes of action pleaded by Mark and Andrew. These are:

(a) a first cause of action – for removal of John as a trustee of the Trust;

(b) a second cause of action – pleading breach of duty as trustees by John and GHTL;

(c) a third cause of action – pleading breach of fiduciary duty relating particularly to a conflict of interest on the part of John and, secondly, issues over the involvement of Trust assets;

[88] As to GHTL's liability, Mark and Andrew claim that GHTL as a trustee knew of a breach or threatened breach of trust by its co-trustee, John, and took no active measures for the protection of the interests of the beneficiaries. This means, they say, that GHTL is liable for the consequences of that breach. Effectively they contend GHTL is jointly and severally liable with John. Therefore, GHTL is liable to account for profits made by John and also for compensation to be ordered in respect of the second cause of action for breach of the duty of prudent investment.

[89] Issues arise here too regarding limitation of liability and, in particular, what effect the limitation of liability clauses in paras 7 and 12 of the Trust Deed might have.[7]

Costs and repayment of legal fees

[90] Although this does not seem to be pleaded in any of their statements of claim, at the hearing before me Mark and Andrew appeared to seek orders that John and GHTL repay various legal and associated costs which were paid by the Trust seemingly in contravention of orders made by Thomas J in the Beddoe application:[8]

> The *Beddoe* application is granted in respect of the reasonable and proportionate legal and associated costs of defending the second cause of action of the Substantive Proceedings only.

[91] The Court was advised in the course of the Beddoe application that as at 31 October 2018 the legal costs invoiced by the trustee's solicitors were:

(a) costs in substantive litigation - $96,204.61 (plus GST);

(b) costs in Beddoe application - $187,692.73 (plus GST) and

(c) third party disbursements - $60,915.75 (plus GST).

[92] It seems at 10 May 2021 the trustees' costs and disbursements met by the Trust in respect of this substantive litigation and the Beddoe application totalled some

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7 Noted at [48] of this judgment.
8 *McLaughlin v McLaughlin*, above n 1, at [133].

$405,054.61. Issues may well arise concerning this possible indemnification of trustees' costs. More on this later.

Admissibility of evidence

[93] As I note at [13] above, certain evidence admissibility issues were raised by counsel at this trial. I now address these.

[94] Issues concerning admissibility of evidence at a trial such as this are determined by reference to the Evidence Act 2006. In terms of r 9.7(4) of the High Court Rules 2016 a witness' brief of evidence must not contain evidence that is inadmissible.

[95] Fundamental to the principle of admissibility is relevance. Irrelevant evidence is not admissible in terms of s 7(2) of the Evidence Act.[9] To assess relevance a question must be asked whether the evidence in issue has a tendency to prove or disprove anything of consequence to the determination of the proceeding.[10] Further limits on the admissibility of evidence include rules regarding hearsay evidence and (expert and lay) opinion evidence.

[96] With certain exceptions, hearsay statements made by a person other than a witness that are relied upon for the truth of their contents are prima facie inadmissible.[11] The principal exception to the hearsay rule is set out in s 18 of the Evidence Act.

[97] As to opinion evidence, a factual witness (as opposed to a recognised expert witness) may state an opinion only if that opinion is necessary to enable the witness to communicate or the factfinder to understand, what the witness saw, heard or otherwise perceived.[12] Section 25 governs the admissibility of expert opinion

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9 See also *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at [29].
10 Evidence Act 2006, s 7(3).
11 Section 4(1).
12 Section 24.

evidence which is generally admissible subject to a "substantial helpfulness" criterion.[13] In this regard, an expert is defined as:[14]

> a person who has specialised knowledge or skill based on training, study or experience

and, expert evidence as:

> the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion.

[98] The position adopted on behalf of Mark and Andrew here is that much of the evidence advanced by John and GHTL should be regarded as inadmissible. Notwithstanding this, Mr Johnson for Mark and Andrew suggested before me that not much in this case turns on questions of admissibility given that he acknowledges there are faults which have occurred on both sides. Mr Johnson, however, did make something of what he described as two real issues here on the admissibility question.

[99] The first related to the evidence of Edna contained in her affidavit before the Court and also what he described as hearsay evidence provided on behalf of John and GHTL relating to the alleged wishes of Edna and Jim here. The second real issue recognised by Mr Johnson related to evidence advanced for John and GHTL which was said to be expert evidence but which he claimed was neither truly qualified or independent and, further, on occasions it breached the impartiality requirement.

[100] On these admissibility questions, Mr Gedye for John and GHTL submitted that this is not a case which should turn on the admissibility or otherwise of specific pieces of evidence other than specifically the affidavit of Edna which he said bears directly on central issues here, is inherently reliable, and must be accepted as admissible. Mr Gedye goes on to suggest that many parts of the evidence advanced for Mark and Andrew represent submissions rather than fact and, further, that various reports obtained by them from authors who were not called as witnesses before me (for example, Mr Mahony and Mr Hussey) should not be received as proof of their contents. Mr Gedye claims these matters were raised prior to trial but that, in any

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13 Section 25(1).
14 Section 4(1).

event, insofar as any such evidence simply forms part of the narrative of events which have occurred, no objection is raised to the Court admitting them simply for that purpose. Mr Gedye also maintains that the expert briefs of Brett Smithies (Mr Smithies) and Grant Graham (Mr Graham) provided on behalf of Mark and Andrew contain evidence which is beyond their fields of expertise and this needs to be seen as inadmissible too. On this aspect, Mr Gedye notes that Mr Smithies, a valuer, endeavours to give evidence in relation to subdivision practices including development costs and John's project management fees. This Mr Gedye claims occurs in a situation where he does not accept Mr Smithies could be seen as a properly qualified and experienced property developer/subdivider able usefully to assist the Court with opinions on these matters. This part of Mr Smithies' evidence, Mr Gedye says, should not be admitted pursuant to s 25 of the Evidence Act. Further, it seems Mr Smithies to some extent criticises the reliability of evidence provided by other witnesses here, which Mr Gedye complains is not a proper role for him as an expert in this case. Mr Gedye says too that Mr Smithies' credibility generally should be questioned because of his gratuitous support for Mark and Andrew's case. As a result, his impartiality is questioned. I say more on this aspect later.

[101] As to Mr Graham, the chartered accountant expert called by Mark and Andrew, Mr Gedye complains that in his brief Mr Graham also ventures into the realm of opinion evidence on property development and subdivision matters, fields in which he has no qualifications or expertise. Much of this evidence too is said to be opinion and merely speculative and Mr Gedye maintains it should not be admitted. Clearly, I accept here that Mr Graham gives expert evidence only as a chartered accountant. He is not giving evidence as an expert professional trustee or a property developer.

[102] Lastly, so far as Edna's evidence is concerned, this is contained in her 7 November 2016 affidavit. I have already referred to this and found it admissible here at paras [13]–[15] above. In a joint memorandum of counsel dated 15 September 2020 filed in this proceeding, it was agreed Edna's affidavit could be accepted as read, save only for the specific areas of challenge identified in that memorandum. I understand too that Edna's affidavit without objection was accepted as admissible evidence in earlier interlocutory hearings in this proceeding. For the reasons I outline at [13]–[15] above, I am satisfied her evidence is inherently reliable here and fulfils

the requirements of s 18 of the Evidence Act. Given her advanced age and health at the time of the trial in this matter, by agreement Edna was not called as a witness but her affidavit was before the Court. I accept that affidavit is important here and bears directly on central issues between the parties. Mr Turley's independent evidence relating to Edna's affidavit and the consequent reliability of her evidence is useful and confirming, as I note at [15] above. I confirm my finding that Edna's evidence in this affidavit is admissible, in particular as to the settlors' intentions in setting up the Trust, and the general operation of the Trust as confirmed too by her later actions as a trustee.

[103] As a result, Edna's 7 November 2016 affidavit was read and accepted at trial and I will give such weight to it as I feel is appropriate in all the circumstances.

[104] Lastly, I turn to Mr Johnson's concern raised on behalf of Mark and Andrew relating to the evidence of Mr Sewell, the subdivision and property development expert called on behalf of John and GHTL. As to Mr Sewell, Mr Johnson suggested I should approach any view expressed by him regarding the success of the Ching's Block or other subdivision here with some scepticism. Mr Johnson contended his evidence must be seen as being on the borderline of impartiality, particularly as he had written a report for the trustees and provided advice on their subdivision matters (particularly relating to the Homestead Block) over the last five years. This, Mr Johnson says, coloured his evidence which in part related to comments on what was said to be his own work and advice in the past. All this Mr Johnson said supported the view that Mr Sewell might be considered as a "hired gun" for John and GHTL.

[105] For reasons which will become apparent as this judgment unfolds, I do not accept these criticisms of Mr Sewell's general experience and his broad independence here. I reject these criticisms advanced by Mr Johnson.

[106] Further, so far as other evidence admissibility questions are concerned, where required I will address relevant aspects as this judgment unfolds. Where evidence is clearly inadmissible it will not be taken into account. I do need to say, however, that many admissibility objections raised before me related to relatively unimportant matters and they are properly left on one side.

FIRST CAUSE OF ACTION — Removal Of Trustee

(a) Removal of John as a trustee

[107] At paragraph 73(a) of Mark and Andrew's final 11 September 2020 pleading in this proceeding, John's removal as a trustee was sought and his replacement with a professional trustee on the basis John misconducted himself in the administration of the Trust. John opposed his removal as a trustee and pleaded:

> …
>
> (f) there is no justification for, or benefit to, removing John as a trustee and replacing him with a professional independent trustee (assuming that one could be found who would be willing to take appointment);
>
> (g) removing John as a trustee would be to the detriment of the beneficiaries as John has significant institutional expertise and knowledge of the Trust's development activities which cannot be replaced and he has provided personal guarantees which are necessary for Bank funding purposes;
>
> (h) removing John as a trustee would be detrimental to the efficient administration of the Trust and Comac does not support his removal.

[108] Throughout the hearing before me from 17 May 2021 to 2 June 2021, John continued this opposition to his removal as a trustee.

[109] That hearing was originally scheduled to take two weeks from 17 May 2021, concluding on 28 May 2021. Two extra hearing days to 2 June 2021 were allowed but this was still insufficient to hear counsel's final submissions. Therefore, by agreement, on 2 June 2021 the proceeding was adjourned for me to hear final submissions from counsel on 24 and 25 June 2021.

[110] That hearing of final submissions took place. Again, however, the additional two-day time allocation proved to be insufficient.

[111] In the meantime, on 16 June 2021, counsel for John filed a memorandum in this Court which stated:

> 2. John McLaughlin is prepared to resign as a trustee, and we advise the Court of this now to save any party preparing any unnecessary closing submissions in respect of the first cause of action.

> 3. John has indicated for some time that he is not fixated on remaining as a trustee and will be prepared to resign.
>
> …
>
> 5. However, having reviewed the position following the hearing, he [John] is now prepared to resign. He proposes to present submissions only in relation to the timing of resignation and the question of a replacement trustee.
>
> …
>
> 9. Further submissions will be made in closing on the above resignation issues, but it seems appropriate to advise the Court and the plaintiffs of this position now because, if there is no need for a disputed determination of the removal application, that should substantially narrow the factual scope of matters for the Court's consideration and determination in its judgment…

[112] On that issue, further disputes arose between Mark and Andrew (with the concurrence of Brett) on the one hand, and John on the other, over his retirement and the identity of a replacement trustee. This spawned a series of further memoranda from counsel.

[113] On the question of John's retirement as a trustee, the initial position advanced by Mark and Andrew was that John was not purporting to retire unconditionally and that in any event, John wished his retirement to be delayed. John roundly disputes this. He asserts his retirement as a trustee was, and always had been, unequivocal. In any event, matters have moved on. All parties now seem to accept that John is retiring, and they suggest the Court should make an order confirming his removal or retirement without delay.

[114] That said, s 112 of the Trusts Act 2019 provides:

> **112 Court may make order for removal**
>
> Whenever it is necessary or desirable to remove a trustee and it is difficult or impracticable to do so without the assistance of the court, the court may make an order removing a trustee.

[115] John has agreed to retire as a trustee. His counsel has confirmed that this can occur almost immediately, suggesting a seven-day period for this to take effect, and that a court order pursuant to s 112 is appropriate.

[116] An order is to follow, therefore, confirming that, pursuant to John's expressed wish to retire as a trustee of the Trust, which the Court accepts, he does so retire and is removed as a trustee. This is to be effective from a date being five working days from the date of this judgment.

[117] The issue then arises as to the identity of a replacement trustee, given the present requirement in the Trust Deed that there are at least two trustees.

(b) Replacement trustee

[118] Despite provisions in the Trust Deed specifying who might appoint a replacement trustee, in view of what was a significant impasse between them, all parties agreed before me that this Court might make the appointment.

[119] As to this aspect, s 114 of the Trusts Act 2019 provides:

> **114 Court may appoint or replace trustee**
>
> (1) Whenever it is necessary or desirable to appoint a new trustee and it is difficult or impracticable to do so without the assistance of the court, the court may make an order appointing a new trustee.
>
> …
>
> (3) If the court proposes to appoint Public Trust as the replacement trustee, the court must, before making the appointment, give Public Trust an opportunity to be heard on the matter.
>
> (4) If the court (except on application by a supervisor within the meaning of section 6(1) of the Financial Markets Conduct Act 2013) appoints Public Trust as the replacement trustee, Public Trust—
>
> (a) must accept the appointment; and
>
> (b) may charge fees for acting as trustee.

[120] In their request for the Court to appoint a replacement trustee, Mark, Andrew (and Brett), have suggested this should be David Stuart Vance (Mr Vance). John, in turn, opposes the appointment of Mr Vance and has suggested instead that Paul Dorrance (Mr Dorrance) should be appointed. The appointment of Mr Dorrance is opposed by Mark, Andrew and Brett.

[121] Accusations, claims and counterclaims on this issue have flowed. The level of trust between the brothers, as I see it, appears to be at an all-time low. This issue of a replacement trustee, like other issues concerning the Trust, has also developed into a further partisan battle.

[122] Mr Vance is an experienced chartered accountant residing in Wellington who, although previously a partner in a range of accounting firms, now works on his own account. With a background in insolvency matters, Mr Vance says his areas of specialisation have increasingly turned to restructuring and valuation advice and assistance in disputes involving financial and/or accounting matters. He states in a 27 July 2021 affidavit:

> 7. Throughout my career, including taking appointments as liquidator and receiver, I have investigated and reviewed the affairs of a significant number of stressed companies. This has involved assessments of business' financial strengths and weakness, taking control of and running businesses to either rehabilitate and/or realise their assets and assessments of the conduct of shareholders/directors.

[123] Mr Vance has several Court appointments, some as a replacement trustee of trusts which were the subject of a breakdown in family relationships. Mr Vance has met with Mark, Andrew and Brett and made contact with various legal advisors.

[124] Mr Dorrance is a solicitor in Christchurch and has been a partner in the firm Duncan Cotterill since 1997. He has been described as a leading private trust lawyer, and it seems he has considerable knowledge in New Zealand trust law, having many appointments as an independent trustee or advisor. Evidence is before the Court that he has acted for or been involved with over 320 trusts. These range from small family trusts to trusts of high net worth individuals and intergenerational groups. His CV before the Court claims that in many of these trusts Mr Dorrance has played an active advisory role for the family concerned, including often taking a role as director of associated companies.

[125] In passing, it is noted that Mr Dorrance's firm, Duncan Cotterill, although operating principally from Christchurch, also has a branch office in Nelson, the city in which the Trust property is situated. This may be seen as advantageous here.

[126] After Mr Vance's meeting with Mark and Andrew, Mr Johnson confirms that Mark and Andrew were "impressed by his credentials and measured approach" and "they consider he would make a good independent trustee and would support the participation of all beneficiaries in significant decisions regarding the future administration of the trust".

[127] Following Mr Vance's meeting with Brett, Ms McGuigan confirms that Brett also prefers Mr Vance as the replacement trustee here.

[128] It is understood that Mr Vance also offered to meet with John but this offer was not taken up by John.

[129] So far as Mr Dorrance is concerned, as I understand it, he has spoken with Mr Johnson but has expressed the view that he should not at this point meet with beneficiaries here. Accordingly, he has not met with Mark, Andrew or Brett despite their requests to meet with him.

[130] The question remains for the Court: who to appoint as a replacement trustee to join with Comac, the remaining trustee? The Court's role involves an overarching consideration of the welfare of the beneficiaries. The exercise of the Court's supervisory jurisdiction involving removal and appointment of a trustee is always guided by this concept.

[131] The subjective views of Mark, Andrew and Brett (supporting the appointment of Mr Vance) and also John's support for Mr Dorrance have been provided. Although perhaps of limited interest by way of background, in my view, they do not assist the Court here. The objective merits and suitability for the job of each of the candidates must be the major matters of relevance to the Court when making a decision such as this.

[132] And finally, the position of related beneficiaries of the Trust, other than the four brothers, on the issue of a replacement trustee, is simply unknown to the Court. The most important criteria for appointment must be independence, competence,

experience and ability to act effectively in what is regrettably a highly contentious case.

[133] Submissions before me from Mr Johnson hint at some connection Mr Dorrance is said to have with John's solicitors and the fact he might be too busy to provide appropriate attention to the interests of this Trust. On independence questions, Mr Johnson contends that Mr Vance should be preferred. There is little in these aspects.

[134] I turn now briefly to the principles to be applied here. In *Mendelssohn v Centrepoint Community Growth Trust*, Tipping J, delivering the judgment of the Court of Appeal, said:[15]

> In the *Tempest* case Turner LJ stated certain principles in relation to the appointment of new trustees by the Court. In short they are: consideration of settlors' intentions; neutrality between beneficiaries; and promotion of the purposes of the trust. As to the first, Turner LJ was considering cases in which either expressly or implicitly the Court could discern that the intention of the author of the trust was that a person or persons of a certain description should not be appointed trustees. If, conversely, it can be seen that either expressly or implicitly the author intends the trustees to be of a certain description, the Court will give considerable weight to that expression of the author's wishes. But, as stated earlier, the Court is not bound by those wishes and is entitled to depart from them if good cause is shown.

[135] Generally, it seems there are no hard and fast principles regarding the selection of a replacement trustee. It is essentially a matter for this Court's discretion which requires a practical judgment call.

[136] A test commonly applied refers to Tipping J's comments in *Mendelssohn v Centrepoint Community Growth Trust* where he stated that the Court's task is: "to appoint the person or persons best suited to administer the trust in the circumstances prevailing".[16]

[137] It is clear too that in ascertaining a settlor's intentions, the Court can be guided by the words of the Trust Deed and the context in which that Trust was created.

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15 *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88 (CA) at [97] citing *Re Tempest* (1866) Ch App 485.

16 *Mendelssohn*, above n 15, at [97].

[138] In this case, as I have noted, the settlors, Jim and Edna, initially appointed as trustees of the Trust themselves, their son John and Mr Nelson, their solicitor at the time.

[139] A possible argument follows that, with John now retiring as a trustee and, given the heated relationship to date between immediate members of this family, his replacement might be an appropriately experienced trust lawyer with legal knowledge and expertise. This would, to an extent, equate with the wishes of Jim and Edna at the outset to have a lawyer as one of the trustees of the Trust.

[140] Comac, as a corporate trustee, continues as a trustee of the Trust. Although Mr Vance has spoken to those individual beneficiaries of the Trust outlined above, he has not consulted with the existing independent trustee, Mr Fitzpatrick, of Comac. Clearly, it is important that a productive and functional relationship with a co-trustee is a useful prerequisite when considering issues as to the proper administration of an ongoing trust. By way of contrast, Mr Dorrance, as I understand it, has spoken to Mr Fitzpatrick and Comac has confirmed its advice that it supports Mr Dorrance's appointment as the replacement trustee. This is perhaps of significance given that in the normal course Comac, as the remaining trustee, would hold the power of appointment in terms of ss 92 and 113 of the Trusts Act 2019.

[141] By way of an aside, I note that in cases where an impasse as to appointment of a new trustee has developed, the Public Trustee on occasions has been appointed by this Court. In the present case the Public Trustee has not been approached nor have they participated in any way with respect to this Trust. Despite the provisions of the Trust Act, and the obvious desirability in cases of impasse to enlist the independence of the Public Trustee, this is not sought by the parties here. Nor is a further trustee corporation to join Comac as the continuing trustee appropriate in this case.

[142] Instead, here, the desirability of a neutral impartial trustee who is suitably qualified and has professional experience to carry out the role in what has proven to be a difficult family relationship, in my view, is critical.

[143] In Mark and Andrew's pleaded first cause of action they sought an order for the appointment of a professional trustee without any further limitations or stipulations. As I see it, the selection process for a replacement trustee needs to focus on the merits and capability of the individual candidates and involve an objective assessment of their experience and the skills they hold in the area. Subjective views from beneficiaries as to which candidate they might prefer, even if based on an initial meeting with a prospective trustee, are not matters that should carry weight. It is the Court's role, not that of the beneficiaries of a trust, to assess who may be best suited as a replacement trustee to administer the Trust in all the circumstances that prevail.

[144] Any replacement trustee candidate must be independent and have relevant professional experience and expertise. That experience and expertise here, needs to encompass work as a professional trustee together with significant commercial experience, in this case perhaps also involving property development and subdivision matters.

[145] On these aspects, Mr Dorrance, from his CV, shows clearly that he has significant experience both in a wide range of trust matters and also residential development projects, both as a legal advisor and as a professional trustee. This is directly relevant to the situation facing the Trust here where, amongst other issues, significant decisions remain for the trustees as to whether (and how) to develop or sell the remaining land assets. On behalf of Mark and Andrew, Mr Johnson has endeavoured to challenge Mr Dorrance's suitability as John's solicitors, Buddle Findlay, acted on a previous occasion on Mr Dorrance's behalf. In my view, there is nothing in this complaint. Nor, as I see it, does any issue arise from the fact Mr Dorrance for some years has acted as legal advisor to the Christ's College Board of which Mr Johnson is a member. Christchurch and its professional community is relatively small, and broad connections are routinely managed.

[146] I conclude that there are no issues here with Mr Dorrance's independence when considering his suitability as a replacement trustee. Nor do any independence issues arise in relation to Mr Vance. Any suggestion from John, therefore, that if independence or other issues had arisen to disqualify Mr Dorrance here, then another experienced lawyer, Mr Christopher Darlow could be considered as an alternative

replacement trustee candidate, slip away. There is no need, as I see it, to bring Mr Darlow into the mix.

[147] A further complaint against Mr Dorrance advanced strongly on behalf of Mark, Andrew and also Brett, is that he has chosen not to meet with them as beneficiaries. I read nothing into this. Indeed, I accept Mr Dorrance's view that it could be seen as inappropriate for a prospective trustee to be undertaking unilateral meetings with select beneficiaries at a time when a selection process is underway. I leave these aspects entirely on one side.

[148] Overall, I have considered all the material before the Court and the CVs and information provided relating to Mr Dorrance and Mr Vance. Mr Dorrance is an experienced trust lawyer with an office of his firm in Nelson. He has advantages over Mr Vance given the settlors' original wishes that a lawyer be amongst the trustees they wished to appoint. On balance, it is my view Mr Dorrance would be an appropriate appointment as a replacement trustee in all the circumstances. Mr Dorrance's overall experience and legal knowledge, in particular in relation to difficult trust matters, would assist too. His location in Christchurch, albeit with an office of his firm in Nelson, given modern communication techniques provides no impediment to his undertaking his trustee role fully.

[149] None of this is in any way to cast aspersions upon Mr Vance (or indeed Mr Darlow who has also been suggested) who, in my view, would have been proper appointments as replacement trustees.

[150] Given the requirement here for neutrality and independence obviously favouring the appointment of a professional trustee, Mr Dorrance with both his legal and also his specific trust experience gained over the years (no doubt including negotiation and mediation techniques), is well placed to guide and ensure the welfare of all the Trust beneficiaries. I am satisfied Mr Dorrance is a highly competent trusts lawyer, with a good reputation and acknowledged commercial skills, in particular in the areas required, he is clearly independent of any parties and he has specific experience in managing difficult family trust affairs.

[151] He has researched and is prepared to undertake the role as a replacement trustee. The Court now appoints him as that new trustee subject to him completing an appropriate consent to act. An order to this effect will follow.

SECOND CAUSE OF ACTION – Breach of Duty

[152] Under the second cause of action Mark and Andrew broadly contend that John and GHTL as trustees breached their duty of prudent investment with respect to the decision to embark upon, and the subsequent carrying out of, the Ching's Block subdivision.

(a) Pleadings

[153] In their statement of claim, Mark and Andrew plead the basis for this claim as follows:

> 70 As trustees, John and Glasgow Harley Trustee owe and / or owed duties to the beneficiaries of the Trust.
>
> 71 These duties include:
>
> (a) an obligation to administer the Trust under the Trust Deed;
>
> (b) the duty to act in good faith;
>
> (c) the duty to act in the best interest of the beneficiaries;
>
> (d) the duty not to act in a position of conflict;
>
> (e) the duty not to delegate their duties and powers as trustees, including to co-trustees;
>
> (f) the duty to actively participate in trust-related decisions;
>
> (g) the duty to protect and preserve Trust assets;
>
> (h) a duty of care and skill in undertaking a business through the Trust;
>
> (i) the duty of prudent investment of Trust assets; and
>
> (j) the duty to account to beneficiaries.
>
> 72 The defendants have breached the above duties for the following reasons:
>
> (a) In the circumstances, the Ching's Block subdivision has failed to provide a reasonable return on investment.

(b) The defendants failed to consult the beneficiaries regarding the decision to subdivide Ching's Block, which was a significant decision affecting the Trust Property and was inconsistent with the Memorandum of Wishes.

(c) In the circumstances, the subdivision of Ching's Block was an inherently risky investment.

(d) The defendants failed to take appropriate and adequate expert advice on the merits of undertaking, and continuing with, the Ching's Block subdivision.

(e) The defendants failed to reassess the merits of continuing with the development of Ching's Block following the initial decision to subdivide.

(f) The defendants failed to appoint a suitably qualified and experienced project manager to manage the Ching's Block subdivision.

(g) The defendants acted unreasonably in purchasing significant amounts of machinery and equipment, and by having the Trust undertake earthworks itself.

(h) The defendants failed to adequately monitor the financial performance of the Ching's Block subdivision, including by not comparing forecasted with actual results.

(i) The defendants failed to provide the plaintiffs with financial information and accounts to allow them to assess the financial performance of the Ching's Block subdivision.

(j) The defendants, and in particular John, have shown themselves to be hostile to the beneficiaries.

(k) In the case of John, by acting in positions of conflict of interest.

(l) In the case of Glasgow Harley Trustee, by allowing and / or assisting John to act in positions of conflict of interest.

(m) As a result of John's conflicts of interest, the subdivision of Ching's Block was undertaken in John's self-interest, rather than for the purpose of better benefitting the beneficiaries.

73 As a result of these breaches of duty, the Trust has suffered the following loss:

(a) The difference between the return achieved on the development of Ching's Block and the return which would have been achieved had the development been undertaken absent the above breaches.

(b) Alternatively, the difference, as at today's date, between the return achieved on the development of Ching's Block and the

return which would have been achieved had the property been sold in 2008 (or subsequently) and the proceeds invested in an alternative investment.

74 The exclusion clause at clause 12 of the Trust Deed (**Exclusion Clause**) is invalid at law being too wide in its scope.

75 To the extent that the Exclusion Clause is valid:

(a) John cannot rely on the Exclusion Clause because the breaches at paragraphs 72(a)-(m) above were knowingly undertaken.

(b) Glasgow Harley Trustee cannot rely on the Exclusion Clause because it was drafted by the firm of which it is the corporate trustee, namely, Glasgow Harley, in circumstances where that firm failed to advise the settlors to seek independent advice on it.

Wherefore the plaintiffs seek:

(a) Equitable compensation payable to the Trust in the sum of:

(i) The difference between the return achieved on the development of Ching's Block and the return which would have been achieved had the development been undertaken absence the above breaches.

(ii) Alternatively, the difference, as at today's date, between the return achieved on the development of Ching's Block and the return which would have been achieved had the property been sold in 2008 (or subsequently) and the proceeds invested in an alternative investment.

a. Interest.

b. Costs.

(b) Trustees' duties

[154] On this aspect, it is clear that trustees owe beneficiaries a duty to act with due diligence and prudence in the discharge of their duties.[17]

[155] In *Re Speight*,[18] Jessel MR stated:

> …on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee.

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17 *Re Mulligan* [1998] 1 NZLR 481(HC) at 500.
18 *Re Speight* (1883) Ch D 727 (CA) at 739.

[156] Trustees, however, are also required to administer the trust generally in accordance with the provisions of the trust instrument.

[157] And, as the authors of *Garrow and Kelly* also note:[19]

> Circumstances may arise in the administration of the trust which make it appear necessary or beneficial that the trustee should deviate from the strict letter of the trust; but if this is done the trustee acts at the risk of later having to satisfy the Court that the deviation was necessary or beneficial.

[158] A court, in considering the performance of trustees, must always be careful to avoid hindsight judgments. In *Jones v AMP Perpetual Trustee Company NZ Limited* the Court said: "…[trustees'] performance must be judged, not by hindsight, but by facts which existed at the time of the occurrence."[20]

[159] At times it may be difficult to avoid hindsight considerations but, nevertheless, rigour is needed to achieve this.

[160] Throughout submissions advanced for Mark and Andrew by Mr Johnson, he contended that, in large measure, the need for trustees to discharge their duty of prudent investment often came down to issues of process. Whilst that is a factor, it does not tell the entire story. In defining the duty to act prudently, in my judgment, trustees who operate a highly process-driven system are not necessarily able to say the decisions they have made are prudent ones. This is particularly the case in a close family trust context where trustees often confer frequently and informally and they have a significant level of knowledge of what is occurring. It is unrealistic in that situation to suggest such trustees must always impose heavy layers of process to discharge their duties of prudence. Quality decision-making, on occasions, can be masked by substituting detailed processes and procedures for careful thought and wise reflection.

[161] Before me, Mr Sewell, a highly experienced expert on subdivision and residential developments, provided useful evidence. He clearly supported the trustees' position here and thought generally they acted properly on subdivision matters in this

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19 Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees,* (7th ed, Lexis Nexis, Wellington, 2013) at [20.15], citing *Harrison v Randall* (1851) 9 Hare 397 at 407.

20 *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690 (HC) at 707.

case. In doing so, Mr Sewell noted that proper process in a medium or large residential subdivision like this one, related to all aspects of risk management in the development. This included marketing, sales strategies, evaluation of costings, consenting and planning, quality control, earthworks and construction programming and management and so forth. He made clear that a court should not take an overly narrow view of proper process in considering the quality of a trust's decision-making in undertaking a residential subdivision.

[162] As to business judgment issues for trustees, in a relatively recent decision, *Little v Howick Trustees DL Ltd*, Brewer J considered that "…truly egregious trustee decision-making" is required before the Court would intervene in the exercise of a trustee's discretion.[21] He saw this as: "an appropriately high threshold given the slight nature of a discretionary beneficiary's interest in trust property".[22] Matters such as bad faith or improper motive, misinterpretation of the Trust Deed, taking into account irrelevant considerations or failing to consider relevant considerations, or reaching a decision that is perverse or capricious would be required for the Court to intervene.[23]

[163] In this case Mark and Andrew have endeavoured to raise and pursue a range of issues relating to judgment matters surrounding the development. They have advanced certain submissions relating to this, but generally without calling what I see as authoritative evidence from an experienced, long-standing expert in subdivision matters. Mark and Andrew did call Brett Smithies (Mr Smithies), a registered property valuer, suggesting he was an expert in this area. Mr Smithies prepared a retrospective valuation for the Ching's Block as at 1 August 2008. He also gave evidence on residential subdivision costings and budgeting matters generally. In doing so however, in my view Mr Smithies strayed into areas beyond his specific expertise (expertise which excluded any hands-on experience of undertaking residential subdivision developments), such as his criticisms of John's remuneration and his manager role that he suggested should not have been a fulltime one. Also, he erred at times, first, in his attempts to challenge truly expert evidence of Mr Sewell and others, and secondly, in situations where he endeavoured to express opinions and conclusions on positions

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21 *Little v Howick Trustees DL Ltd* [2018] NZHC 1884, (2018) 4 NZTR 28-013 at [31].

22 At [31].

23 At [49], citing *Wrightson Ltd v Fletcher Challenge Nominees Ltd* HC Auckland CP129/96, 21 August 1998 at 41-42.

favourable to Mark and Andrew, positions which were unsupported and, in any event, again outside his experience and expertise. And in 2013, Mark and Andrew retained Mr Mahony as a property and subdivision expert and he provided the Mahony Report. Perhaps inexplicably, Mr Mahony, however, was not called as a witness before me. As I see it, this was a particularly notable omission, given the significant evidence advanced for the defence from John, Mr Sewell and Mr Newton in relation to subdivision and development matters.

[164] John and GHTL also object here to the content of Mr Mahony's report being before the Court. This is on the basis that they say they are inadmissible hearsay if used to establish the truth of their contents or the substance of Mr Mahony's opinions. I accept generally this is the case, given that, as far as I am aware, Mr Mahony was available to be called as a witness but Mark and Andrew elected not to call him. Further, Mr Gedye contends the criteria in s 18 of the Evidence Act 2006 cannot be satisfied here, and broadly I agree.[24]

[165] Mr Mahony could have been called as a witness, but he was not. And, in any event, even if Mr Mahony's untested report(s) are considered here, they make little difference to the issues before me. As will appear later, the evidence as to subdivision matters from Mr Sewell called by John and GHTL, I find, is particularly compelling. Mr Sewell too was open, frank and unshaken in both his evidence-in-chief and particularly in the detailed cross-examination to which he was subjected. Mr Sewell's long and direct involvement, experience and knowledge of significant residential and other subdivision developments in this country equip him well to provide expert evidence on this aspect. As such, his views expressed in detail in the extensive evidence Mr Sewell provided to the Court in my view are significant and they confirm the quality of the Marsden Valley subdivision and the Ching's Block development in particular undertaken here. In his evidence Mr Sewell confirms:

> Marsden Park is a high quality residential development. That has resulted in an increase in value in terms of the price now achieved for the recent sale of the Homestead Block (except Stage 1) and the options remaining for the trustees in terms of the residual blocks of land.

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[24] *National Standards Committee (No 1) of the New Zealand Law Society v X* [2021] NZHC 821 at [24].

And:

> …the development of the Trust's land…into a very good residential suburb would not have occurred without prudent and competent foresight, planning and execution. In order to attract a market, the staging and design had to be well thought through and of a high quality. In my opinion, John and the other Trustees have achieved this in the way they approached the Marsden Park subdivision.

And:

> The fact that a development might not meet initial budget projections does not mean it has not performed well.

And:

> …it was the correct decision for the trustees to commence the development of the Ching's Block as they did. Ching's Block has been a successful undertaking which has made profit for the Trust and substantially enhanced the value of the balance of the land.

And, as to the nine Ching's Stage 4B hill sections:

> In my opinion these lots will easily sell for over $300,000 per site – they are very good sections.

[166] Mr Newton, a surveyor called by John and GHTL, I accept has particular experience in residential subdivisions too. Mr Johnson queries his impartiality here given his involvement with the Marsden Park subdivision over the years. In my view there is little in this complaint. Mr Newton was balanced and unshaken in his evidence. He confirmed that the expertise and professional input applied to, and the outcomes achieved, by the Trust's Marsden Park development were considerably above those which he had experienced from the many ordinary residential subdivision developments he had encountered over the years. The Valuers Society excellence award this subdivision had achieved was testament to this.

[167] In this case, interpretation issues relating to the Trust Deed also loom large. John and GHTL place reliance on the basic proposition repeatedly set out in cases such as *Erceg v Erceg* that the primary duty of trustees is to administer the trust in accordance with the trust deed.[25] The terms of the trust deed will largely define and,

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[25] *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [51] and [60].

in some cases, delimit that duty. Thus, in the present case, a proper interpretation of the terms of the Deed is centrally important to a consideration of the allegations from Mark and Andrew. Their claim, as I see it, depends to a significant degree on the meaning they have asserted before me as to one particular clause in the Trust Deed, being cl 9.2.

[168] On this aspect, s 2(4) of the Trustee Act 1956 states:

> The powers conferred by or under this Act on a trustee who is not a corporation are in addition to the powers given by any other Act and by the instrument, if any, creating the trust; but the powers conferred on the trustee by this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

[169] Under this s 2(4), the terms of the instrument creating the Trust may override general principles of trust law and the Trustee Act. Expressing this in another way, the duties of trustees are always to be read as subject to the terms of the trust deed. This is subject to the limitation expressed in *Armitage v Nurse*[26] where Millet LJ said that obligations to act honestly and in good faith for the benefit of the beneficiaries constituted an "irreducible core" of trustees obligations.

[170] A proper construction of trust documents needs to be approached in the same manner as the construction of contracts.[27] In *Powell v Powell* the Court of Appeal applied an express analogy with the approach to context in the construction of commercial contracts.[28]

[171] These principles are to mirror the current approach to contract interpretation as stated by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Limited t/a Zurich New Zealand*.[29] The Supreme Court's judgment there affirmed that context is a necessary element of the interpretive process but, nevertheless, the text remained centrally important.[30]

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26 *Armitage v Nurse* [1998] Ch 241 (CA) at 253-254.

27 *Edge v Bourke* [2020] NZHC 1185, [2020] 3 NZLR 522 at [14], citing *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129; and *Powell v Powell* [2015] NZCA 133, [2015] NZAR 1886.

28 *Powell v Powell*, above n 27.

29 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432.

30 At [63].

(c) Clause 9.2 of the Trust Deed and the settlor's intentions

[172] In the present case, a proper interpretation of the Trust Deed and cl 9.2 in particular in my view is likely to bear directly on the merits of the plaintiffs' causes of action. Evidence of Jim and Edna's intentions as settlors and the purpose of the Trust, as I see it, is relevant to any assessment of the conduct of the trustees in this case.[31] If I am to find the settlors wished and intended that their farm be fully subdivided into residential sections then, on its face and subject to general prudence, the complaint by Mark and Andrew that the trustees breached their duties in their initial decision to carry out the subdivision might well be seen as proceeding on a misconceived footing. On this aspect, even Mr Fitzgerald, a trust expert called by Mark and Andrew, agreed in his evidence before me that a clear statement of wishes by the settlors would be "highly influential".

[173] Given the importance of this cl 9.2 here, it is useful to repeat the cl at this point:

> 9. SETTLOR'S WISHES
>
> …
>
> 9.2 It is declared as the further wish of the Settlor that the Trustees shall realise the value of the farm property by way of subdivision into individual or lifestyle allotments to better benefit the discretionary beneficiaries.

[174] This cl 9.2 is not a common form of boilerplate clause in a trust deed. It is a unique direction, as Mr Nelson confirmed in his evidence, inserted in the Trust Deed as a specific requirement by Jim and Edna. In his evidence, Mr Nelson confirmed that at the time Jim in fact wanted the stipulation about subdivision to be mandatory but Mr Nelson had advised him against this as it would inappropriately fetter the trustees' discretion. Before me Mark and Andrew endeavoured to argue that the words "by way of subdivision" in cl 9.2 meant only to obtain a resource consent for the division of the farm into residential lots and nothing more.

[175] As to the true meaning of this clause, however, the *Collins Dictionary* definition of "subdivision" says this is: "The action of subdividing or being

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[31] On this see generally *Powell v Powell*, above n 27, and *Clement v Lucas* [2017] NZHC 3278 at [87] and [112].

subdivided":[32] The *Concise Oxford English Dictionary* includes as its definition: "The act or process of subdividing or fact of being subdivided".[33]

[176] In my view the obtaining of a resource consent is simply part of a legal process which enables activities which would not otherwise be permitted under a district plan to be carried out. It is not, on any normal use of the term "subdividing", an action or process or the fact of a property being subdivided. A consent simply enables the later actions of subdividing to be carried out but quite clearly they are different processes. Obtaining a resource consent is no more than a step in the entire process of subdividing into lots for sale and, indeed, an early or initial step at that.

[177] The outcome stated to be achieved in cl 9.2 is "subdivision into individual or lifestyle allotments". In normal usage this would mean separate and individual sections produced and created by the development of the land, including the issues of titles. These allotments are not produced or created by the granting of a resource consent.

[178] Clause 9.2 ends with the stated objective or purpose: "to better benefit the discretionary beneficiaries". Mark and Andrew placed particular reliance on these words. Throughout the hearing, it became clear that the words "to better benefit the discretionary beneficiaries", according to Mark and Andrew, meant practically to make substantial distribution payments to them as soon as possible after Jim's death. Possible meanings, which might be seen as more natural, namely to benefit *all* beneficiaries in the fullness of time by a long term and careful programme of property development to extract the best value possible (consistent with prudence) from the Trust's landholdings it seems have been largely ignored in the present claim. The Trust was set up as having a possible term of up to 80 years. The trustees' assessment and decision-making was clearly required to be linked to extracting the best value over time from the landholding, the principal asset of the Trust.

[179] Mark and Andrew's further submissions before me suggested that the words to "better benefit" the discretionary beneficiaries here meant that a comparative exercise

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32 *Collins Online Dictionary* (Harper Collins, Glasgow, Scotland).
33 *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2004).

needed to be undertaken to require assessment of other investment options rather than a full subdivision of the Trust's Marsden Valley land. At a particular level I reject this submission. In my view, it is an unnatural interpretation of the words in cl 9.2. This clause already assumes that subdivision would better benefit the beneficiaries and does not call for any assessment of this to be made by the trustees.

[180] The words in issue in cl 9.2 do not say: "by way of subdivision provided that subdivision will be the most beneficial option", or anything of that nature. With the words in question, I am satisfied no comparative exercise is called for. Otherwise, the meaning suggested by Mark and Andrew would deprive Jim and Edna's wishes, expressed in cl 9.2, of any useful meaning or weight as in each case their wishes would be entirely subordinate to the trustees' comparative exercise. As settlors, they were clear in their wish that a "subdivision" of the farm property "into individual or lifestyle allotments" which would "better benefit the discretionary beneficiaries" would be carried out.

[181] The plain meaning of cl 9.2, in my view, is clear. Based on Mr Nelson's discussions with Jim and Edna as his clients when the Trust Deed was prepared, Mr Nelson confirms their intention was to underline their wish to complete a subdivision of the land, so as to make a profit and maximise the benefit to all beneficiaries.

[182] Implied in all of this, with the exhortation to "realise the value of the farm property" was that a proper value would be realised. This would be achieved as the addition of the further words make clear: "by way of subdivision into individual or lifestyle allotments". All this really should go without saying. It was supported too by significant evidence of the plans and hopes held and expressed by Jim and Edna that I refer to below. I am satisfied that selling the land with only a resource consent (and particularly without obtaining engineering plans) would not normally optimise its full potential value. This was because the uncontested evidence before me confirmed that no developer would pay a price for undeveloped land commensurate with the ultimate return or which did not leave them with a significant margin.

[183] Credible evidence was before me too that Jim, throughout, expressed the view that he did not want a developer to secure the "golden egg" of a full subdivision and sale of the individual sections. He wanted the Trust to do this.

[184] And, in my view, a textual review of the words in cl 9.2 confirms what they say and emphasises the intention of the settlors' that the trustees are to obtain the necessary consents and then develop and sell the subdivided land in individual sections to maximise its value. Evidence before me was that Jim in particular was a careful, deliberate and precise person and, indeed, even Andrew said he was a: "clear thinker", a "good strategic planner", and a "man of few words, he said what he meant and especially meant what he wrote".

[185] This interpretation of cl 9.2 is also supported by cl 11(g) of the Trust Deed which sets out one of the specific powers which was to "subdivide and develop property". This expressly contemplated subdivision into sections to be sold and with its reference to land agents clearly implied a process ending up with the sale of sections.

[186] Turning now to contextual matters as an aid to interpreting cl 9.2, I am satisfied as at February 2004, the following matters, known to Jim and Edna at the time, assist in this interpretation of the Trust Deed:

(a) The Trust land had proved it was not an economic farm unit and Jim wanted to realise its value in another way which probably drove the entire process.

(b) Jim, in particular, and also Edna, had been pursuing a long term consenting and zoning programme for the Trust land to enable residential subdivision development for some 20 years prior to 2004.

(c) Jim had given significant thought to how the subdivision of the Trust land might be structured and implemented.

(d) Previous efforts to test the market had demonstrated the Trust land was not readily saleable as bare undeveloped land certainly not for a proper value. Evidence was before me to this effect.

(e) Jim chose, as one of his trustees, John, it seems, because of John's interest in and aptitude for pursuing Jim and Edna's plans for subdivision. They, and Jim in particular, as the evidence of Edna and others confirmed, believed John had the experience and skills for the job.

(f) Jim expressed the view that he did not want any of his other sons to be a trustee as they did not have sufficient interest in his development plans nor, in his view, did they have the requisite experience and skills.

(g) Jim and Edna's intentions as settlors in 2004 were not new. I accept the Trust was expected to carry on a project planned and pursued by Jim since the 1970s. Jim continued to pursue the project with John after the Trust was settled in 2004 and until he died in May 2007. In his evidence, Mr Nelson described the subdivision as being dear to Jim.

(h) Finally, I accept the subdivision of the farm was Jim and Edna's longstanding plan as the original owners of the land. Over time they effectively gifted the land to the Trust to carry out their intended subdivision purpose. Clause 9.2 of the Trust Deed was simply their request to the trustees to continue and complete their longstanding plan, as Edna confirms in her affidavit.

[187] Later, the affidavit of Edna, sworn 7 November 2016, provides unequivocal direct evidence of the settlors' intentions. Mark and Andrew endeavoured to question Edna's position, when they raised without more, suspicions as to her mental competence in and around 2016. They also seem to question comments she made in this 2016 affidavit in light of allegations they hint at of duress or undue influence on her at the time. In my view, however, there is no substance in either of these objections. Evidence before me of Donald James Turley (Mr Turley), an experienced

Nelson solicitor, regarding Edna's affidavit (which he witnessed) and her competence, confirms the veracity and reliability of her deposition. As to these aspects, Mr Turley impressed as a measured and straightforward witness. His evidence was direct and clear and I found him to be reliable in all respects. He had also sworn an almost contemporaneous affidavit dated 14 November 2016 directed specifically at Edna's November 2016 affidavit.

[188] In this 14 November 2016 affidavit, Mr Turley confirms he was present when Edna swore her affidavit, he took her oath and witnessed her signature. Mr Turley's affidavit and oral evidence made clear that Edna, although an elderly lady who appeared to be frail at the time, was very alert. Mr Turley confirmed:

> It [was] clear to me that Mrs McLaughlin was of sound mind. I was left in no doubt that she entirely understood everything that was said.

[189] As to the process adopted on 7 November 2016, each paragraph of her affidavit was read to Edna and approved by her. This was a process which Mr Turley said took around 20 minutes. Again, his affidavit was unequivocal in confirming he was satisfied Edna was fully aware of what was said and what she was being asked to do in swearing her affidavit.

[190] I accept Edna's affidavit is reliable, given also that there is simply no evidence before me to substantiate broad suggestions made by Mark and Andrew that she did not have the capacity to provide the evidence she did in her affidavit. Further, I am satisfied there is simply no evidence of any kind before me that she was unduly influenced or under some form of duress in providing that affidavit.

[191] In my view, there is no better evidence of the intentions and wishes of both Jim and Edna than Edna's comments in this 7 November 2016 affidavit, backed up by her actions both as a trustee and a leader of the family supporting and encouraging the subdivision throughout. This included her decisions joining with her co-trustees in voting to proceed with all aspects of the subdivision from her time as an initial trustee. In particular, she deposes in her affidavit:

> 2. …I am swearing this affidavit now to make sure that Jim's and my views and intention in relation to the Trust are made known to any

Court or tribunal that might need to hear or decide any Trust issues that Mark and Andrew, or anyone else, might pursue.

…

17. John and Wendy purchased from us about five hectares at the back of Ching's Block and built a house there. The property was purchased [in around 1979] with a mortgage back to Jim and me. This was partly so that the property could not be resold to someone else who might oppose Jim's subdivision plans…I recall that one of the reasons Jim thought it was a good idea to sell part of the property to John and Wendy was that it set a precedent for subdivision which Jim thought would assist the overall subdivision development.

…

18. Jim always thought that our land would have subdivision potential because it was so close to the city…Jim had previously pursued subdivision proposals with the Waimea Council. After the land became part of the Nelson area, Jim applied to Nelson City Council to subdivide the whole property. Consent was given which included an area of residential subdivision but Jim was not happy at the large section size required with an average of one acre. He thought it was silly for the Council to permit larger sections when he thought it inevitable that these sections would be subdivided into smaller residential lots. He kept persisting with attempts to get consent for smaller sections.

…

19. …He [Jim] felt we should subdivide the land to get as much return from it as we could.

…

20. Jim and I settled the Trust in 2004. By that stage Jim's health was not good. Setting up the Trust seemed like the right thing to do. We wanted to keep the land safe for the family and to ensure that Jim's subdivision wishes would be carried through.

…

21. Essentially the idea to subdivide the land and set up the Trust was about protecting the assets and getting the best return we could for the family. Jim, in particular, was very clear that he wanted to subdivide the land. I agreed with this. This was carried over into the Trust Deed.

…

22. …He [Jim] was not going to give the land to the City Council nor did he want to sell it. That really left subdividing the land as the natural option.

…

> 23. We had both worked very hard to get the land to where it was…To sell the land without realising its potential would not have been Jim. Jim's view was that the land was hard-earned. He would not have liked the idea of one of the neighbours, or a property developer, buying the land and taking the benefits of subdivision when in Jim's view those benefits should be for the family.
>
> …
>
> 24. We made it clear in the Trust Deed that the intention was that the land would be subdivided.
>
> …
>
> 26. Jim and I always intended that John would succeed Jim in managing and carrying out the subdivision. I believe Jim felt that John was reliable and had the experience to manage the subdivision.
>
> …
>
> 27. …I remember that, before he died, Jim asked John to carry out the subdivision work and finish what he had started. John was reliable and trusted. Both Mark and Andrew were out of town and had busy professional lives. Further, unlike John, they had not shown any particular interest in the subdivision.
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> …
>
> 30. …In my experience as a trustee all of the trustees have always had a genuine belief that subdividing the property is in the best interests of all the beneficiaries.
>
> …
>
> 32. Like I said above, Jim would never have been happy had the land been sold and someone else had come along to do what John has now done. That was exactly what Jim wanted to avoid.
>
> …
>
> 33. I have been happy to support the subdivision project along the way as it was what Jim and I wanted.

[192] It is important to repeat that any suggestion of a lack of mental competence or alleged duress or undue influence on Edna hinted at by Mark and Andrew was unsupported by any evidence before me. Mr Turley's evidence provided me with reassurance that Edna knew her own mind and freely exercised her will in November 2016 when the affidavit was sworn. It also appears to say similar things to her 2014 affidavit which is before the Court, but I need place little emphasis on this last aspect.

[193] Edna's concurrence with the plans and steps taken to subdivide the Ching's Block up to the time she resigned represents, in my view, a form of subsequent conduct of a trustee that is specifically referable to the meaning of cl 9.2 intended by her and Jim as settlors.[34]

[194] Other evidence before me, including that of Mr Nelson and John, adds further weight to this conclusion.

[195] As to Mark and Andrew's evidence to the contrary relating to what they claimed were Jim and Edna's intentions as settlors, I find their comments are simply not credible in all the circumstances here. Indeed, in a rather unguarded letter from Andrew and Mark sent to Mr Russell, a trustee at the time, around September 2015, they referred to their father Jim, when alive, anticipating that tenders would be called for all works relating to the subdivision of the Trust farm in the context of managing what was to be an ongoing subdivision development. Specifically, in this letter Andrew and Mark stated:

> Andrew and I have always had grave concerns about John's employment and remuneration…The Trust therefore has failed to engage in an appropriate process of employment. However, while Jim was alive he specifically rejected the concept of project manager and had anticipated that tenders would be called for all works under the guidance of experts in relevant fields. In this light we believe the Trust should consider alternative methods of managing the subdivision which are more cost effective.
>
> (emphasis added)

[196] Mark and Andrew also refer to the 2001 Memorandum of Wishes signed by Jim. What seems clear is that this Memorandum of Wishes was prepared for Jim's will in 2001 and, therefore, was irrelevant to the Trust settled later in 2004. This memorandum, in any event, simply refers to a wish that trustees of Jim's 2001 will might consult with beneficiaries. Consultation from the trustees did occur from time to time here, albeit not at a level Mark and Andrew now say they wanted. As I see it, and in any event, the Memorandum pre-dates and does not bear upon the meaning of cl 9.2 of the Trust Deed.

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[34] See *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 47, [2008] 1 NZLR 277.

[197] Overall, I find that cl 9.2 is sufficiently clear here that little other evidence as to its proper interpretation is needed. Notwithstanding this, Edna's unequivocal evidence, in particular in her 2016 affidavit, as well as other evidence before me from Mr Nelson, makes clear the purpose of cl 9.2. This was to emphasise the intention and desire of Jim and Edna as settlors that their original farm land gifted to the Trust would be subdivided by the Trust into individual sections to be sold.

[198] I acknowledge that cl 9.2 did not bind the trustees to adhere to it in a mandatory or inflexible way. Whilst the trustees still had to satisfy themselves that proceeding with the subdivision was a prudent course, the wishes of Jim and Edna as settlors were justifiably given substantial weight. They formed the foundation for the trustees' implementation of the clear directions outlined in the Trust Deed. The trustees' foremost duty was to administer the Trust in accordance with the provisions of the Trust Deed, which is what they did.

(d) Did the Trustees breach their duty of prudent investment?

[199] I turn now to the further approach advanced by Mark and Andrew under the second cause of action that this is a prudent investment case. In advancing this cause of action, they appear to rely on ss 13A to 13Q of the Trustee Act and authorities including *Re Mulligan*.[35] Mark and Andrew raise what they say is a fundamental issue under their second cause of action as to whether the Ching's Block subdivision was an appropriate investment undertaking for the Trust to embark on in any event.

[200] On this, John and GHTL respond with the contention that ss 13A to 13Q of the Trustee Act have no application as the trustees in this case did not have a cash sum to invest. They say the reference in s 13A to trust funds is clearly anticipating the existence of cash funds to be invested.

[201] They contend too that *Re Mulligan* has no direct application here. Mr Gedye argued that *Re Mulligan* involved a number of key factors, all of which are not present in this case. Those factors include:

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35 *Re Mulligan*, above n 17.

(a) A deceased estate where the widow was entitled to the income for life with 10 nieces and nephews entitled to the remainder of capital after her death.

(b) A duty of impartiality between the interests of a life tenant (the widow) and remainderman in a deceased estate trust – described as being at the heart of the dispute.

(c) A finding that each of the three principal professional trust managers involved identified the corrosive effects of inflation and the prudence of diversifying investments to preserve capital, advised the life tenant, Mrs Mulligan, to diversify and to invest in equities, but were put off by her adamant refusal.

(d) The case did involve an actual substantial loss of capital value over some 25 years.

(e) Many of the aspects of the judgment are coloured by the High Court Judge's finding that the trustees' failures were at a level of departure described at various parts as "stark" and "totally inadequate".

[202] Important facts in *Re Mulligan* which, I accept, are absent in this case included the fact Mrs Mulligan, the widow, as life tenant insisted throughout the relevant 25 year period that she wanted to maximise the income payable to her and she required investment on fixed interest securities to achieve that. Further, as life tenant she was absolutely intransigent in the face of the professional co-trustees' advice to diversify. She strongly rebuffed over a long period of time all of the many approaches by the other trustee to diversify (including the suggestion she purchase shares) even though she had her own undisclosed share portfolio personally. Her conduct as a joint trustee was not impartial and she had no regard to the interests of the residuary beneficiaries. And, she would not let her professional co-trustee send accounts or reports to the residual beneficiaries.

[203] In addition, Mrs Mulligan was granted an interest free loan so she could buy a property in her own name, being partly an investment property. The trustees did not acquire this property for the estate so it would enjoy its capital gain but rather made a fixed loan to the widow, interest free. This further eroded the capital of the estate.

[204] The capital sum initially available to the estate in 1965 was $108,000, a substantial sum at the time. When the widow died some 25 years later, only $102,000 capital remained, a huge decrease suffered by the residuary beneficiaries in real terms.

[205] The Judge in that case found in favour of the residual beneficiary claimants. He determined the professional trustee could and should have sought directions from the Court in the face of Mrs Mulligan's intransigent refusal to diversify.

[206] In my view, the key issues in the *Re Mulligan* case and the basis upon which it was decided are very different from the present case. Here, there were no different classes of beneficiaries (life tenants versus remaindermen) and the duty of impartiality between classes did not arise. Also, in this case, the sole asset of the trust at the time was the farm property. There was no cash sum requiring investment to provide any life interest or otherwise. The trustees had an approximately 100 hectare parcel of land and a specific direction as to the settlors' wishes in cl 9.2 of the Trust Deed as to how to realise the value of that farm property. This was supplemented by an express power to subdivide outlined in cl 11(g) of the Trust Deed.

[207] The surviving settlor, Edna, also clearly supported the development of the land for the lengthy period she remained a trustee of the Trust. That development of the property is still only part way through. Investment decisions in the sense directly applicable in *Re Mulligan* here, in my view, simply do not arise.

[208] In the present case there is also no evidence to suggest the trustees over decades repeatedly ignored advice that a different course should be followed, nor did any trustee adamantly rebuff considered advice from co-trustees that a different course should be followed.

[209] On the general question whether the trustees complied with their duties here, Mark and Andrew contend that John and GHTL:

(a) failed to analyse and understand the needs of the beneficiaries;

(b) failed to consider and/or analyse alternative investments;

(c) failed to take advice on alternative investments;

(d) failed to adopt a proper decision-making process; and

(e) failed to consider financial progress.

[210] Before turning to consider each of these matters, it might be useful to draw together the threads of Mark and Andrew's overall claim against the trustees here. In doing so, they raise a number of contentions. First, Mark and Andrew say the trustees decided to embark on a high risk subdivision based on the "apparent" wish of the settlors to do so. In embarking on the subdivision, Mark and Andrew say the trustees ignored wider considerations and focused solely on the subdivision itself even when confronted with real problems.

[211] They say too the trustees continued to develop the subdivision in an unfavourable market when they should have stopped and considered alternative investment possibilities. This would have provided regular distributions for the beneficiaries. As a result, Mark, Andrew, Brett and the other beneficiaries were provided with very limited support, despite a significant asset base and no real return being achieved on the land being developed.

[212] Next, and at the same time, they complain that John, as a trustee, personally benefitted from the subdivision in two ways:

(a) he received significant fees for managing the project; and

(b) he owned adjacent land that benefitted from the work undertaken.

[213] Mark and Andrew say that John and GHTL should be liable for this.

[214] I turn now to consider the specific claims by Mark and Andrew, that John and GHTL have not complied with their duties as outlined above.[36]

(i) Failure to analyse and understand the needs of the beneficiaries?

[215] Mark and Andrew contend in the process the trustees adopted they never attempted to properly understand the needs of the beneficiaries of the Trust. This submission, they say, is particularly glaring in the case of Brett. He had higher needs than his brothers and yet Mark and Andrew contend he bore the brunt of the "trustees' hostility" shown to beneficiaries generally.

[216] Mr Fitzgerald, who provided evidence on behalf of Mark and Andrew, described the extent to which trustees should enquire into the needs of their beneficiaries. He said this needed to be a significant enquiry in all the circumstances.

[217] Instead, Mark and Andrew argue that John and the other trustees mistakenly conflated the success of the Marsden Valley subdivision with the needs of the beneficiaries despite the two not necessarily being aligned. The risks of a subdivision undertaken were therefore given inadequate consideration.

[218] To a large extent I reject this contention. During the bulk of the development of the Ching's Block subdivision their mother, Edna, was a trustee along with John and others. Throughout she maintained a relationship with Mark, Andrew and Brett and, indeed, with her grandchildren, as she confirms in her affidavit. Particularly from about 2011 onwards, the trustees, as I see it, went beyond what might be considered as reasonable in responding to a barrage of information requests received, in particular, from Mark and Andrew and others they had instructed. It was apparent, as Mark and Andrew confirmed, that throughout they made repeated requests for more money by way of distributions from the Trust. No evidence was before me, however, from any of the other discretionary beneficiaries in the Trust of their wishes or needs. And, as I

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[36] At [209] of this judgment.

note above, distributions of $550,000 each to John, Mark, Andrew and Brett were made.

[219] Also, from evidence before me, it was doubtful whether, perhaps with the exception of Brett, the precise needs of Mark and Andrew as beneficiaries were at any time spelled out to the trustees. It is likely that some discussions may have taken place with their mother, Edna, from time to time and no doubt, with her active involvement as a trustee, she would have discussed this with John and GHTL but Mark and Andrew's focus here appears to be directed purely at John and GHTL.

[220] The Trust was set up for the overall benefit of the extended McLaughlin family as a group. In a sense Mark and Andrew, as I see it, have been unable to satisfy the burden upon them of establishing that the trustees here are in breach of their obligations by failing to take into account or to properly understand their needs as beneficiaries of the Trust.

(ii) Failure to consider and/or analyse or to take advice on alternative investments?

[221] Mark and Andrew complain here that from the outset John and, through Mr Nelson, GHTL were on a mission to complete the Ching's Block subdivision with no consideration of any alternatives. They claim there are no trustees meeting minutes or correspondence between trustees showing them to be seriously considering what else they could do with Trust assets besides a subdivision. Indeed, the contention is advanced that the trustees generally acknowledge they did not turn their minds to any alternative. Similarly, Mark and Andrew complain the trustees did not seek or take any advice on alternatives to subdivision.

[222] What remains clear is the sole asset of the Trust was the farmland, which included the Ching's Block. No possibility of alternative investment could have arisen unless the farm or a part of it was sold. Any sale, I accept, was contrary to the clear wishes of Jim and Edna expressed in the Trust Deed itself and otherwise. Although the trustees were not bound by the expression of these wishes, clearly, they were influential and not least because Edna at the operative times remained a trustee of the Trust.

[223] Subdivision and sale of the lots resulting was always likely to be a long term undertaking too, as the expert evidence of Mr Sewell and others made clear.

[224] Mr Nelson, as a lawyer, and later Mr Russell, as an experienced commercial lawyer, Mr Westrupp, Mr Kearney, accountants (including Mr Hinton) and others who advised the trustees were well versed in, and there is no doubt from the evidence, from time to time they themselves discussed with the trustees possible investment or development alternatives for the Trust. These included issues over whether all or part of the land might be sold.

[225] In my view, Mark and Andrew have failed to meet the onus upon them of establishing to the required standard that there was simply a blind or obstinate failure on the part of the trustees to consider alternative investments other than subdivision of the land.

(iii) Failure to adopt a proper decision-making process?

[226] Mark and Andrew complain that not only did John and GHTL fail to properly analyse alternative investments, they also failed to even adopt a semi-formal process which may have prompted such consideration when the trustees were involved in decision-making. For example, from 2009 to 2011 they say there are no minutes of trustee meetings which was unsatisfactory. Also, they complain there was never a masterplan for the Trust, despite assertions to the contrary. Decisions, they say, were made by the trustees in an ad hoc manner.

[227] Mark and Andrew point to the reports of Mr Hollyer and Mr Mahony which recommended more formal procedures should have been adopted. All this, according to Mark and Andrew, means the trustees were hampered in their ability to consider investment alternatives from the outset.

[228] On this aspect, I note once again that this Trust, like many similar trusts, involved one family and began generally under Jim's guidance in a significantly informal manner. This is not unusual. Although perhaps a greater degree of formality and record-keeping would have been desirable at the outset it must be borne in mind that attention to process only is no substitute for wise and sound decision-making on

the part of trustees. Particularly in later years, and with the involvement of other professional trustees such as Mr Russell, the recording of processes for this Trust improved. The evidence before me indicated that, at the operative times complained of by Mark and Andrew, all trustees were fully involved and consulted, and decisions were taken by all. Edna, too, remained as a trustee throughout these periods but Mark and Andrew's complaints do not appear to target her.

[229] Overall, I find there is little of substance in this complaint.

(iv) Failure to consider financial progress of the subdivision

[230] Finally, Mark and Andrew maintain that an important failure on the part of the trustees here is the absence of consolidated accounts or progress reporting against budgets from the outset. They complain that at best the trustees had simply relied on cashflow accounts and forecasts when making their decisions and, therefore, had no idea how the Ching's Block subdivision was tracking against profit forecasts, nor if it would meet profit expectations.

[231] With this focus on cashflow and with no consolidated accounts at the time, Mark and Andrew suggest the trustees were never in a position to consider the true profitability of the Ching's Block venture, nor whether they would be better off, in their words, "taking the off-ramp" halting the subdivision work, and diversifying the Trust's investments. A failure to include John's significant project management fees in the forecasts for the Ching's Block is also said to create a distorted impression here.

[232] On this aspect, Mark and Andrew's arguments largely miss the point as I see it, that even at the present stage, the Ching's Block subdivision is still only partially completed. Nine hill sections remain to be sold. From reliable evidence before me the development of the Ching's Block too, clearly as the first step, set a marker for the success of the Trust's entire Marsden Valley subdivision. It played an integral part in later development of the balance of the Trust's land. To endeavour to ringfence Ching's Block Stage 1, with all the initial costs necessarily met and absorbed by it, and to try to identify and complain about its total profitability when it was not yet completed is artificial. Later, I will address more on the Ching's Block development. But, at this point, it is useful simply to refer to the approving evidence of Mr Sewell

and others as to the initial decision to subdivide that block, a decision the trustees did not make in isolation. I accept they saw it as the first stage in an integrated and multi-staged development of the whole remaining 87 hectares, being the major part of the Trust's land. With all this in mind, I accept that the trustees throughout were adequately aware of the general financial progress of the Trust and the overall subdivision.

(e) The Ching's Block subdivision

[233] At this point it is useful to address in more detail that initial decision of the Trustees to commence and develop Ching's Block Stage 1.

[234] Paragraphs 72(a), (b) and (c) of Mark and Andrew's statement of claim outlined effectively the first form of breach of duty pleaded against John and GHTL and addressed contentions that the decision in 2008 to subdivide the Ching's Block was risky. It followed a failure to consult with beneficiaries, the decision failed to provide a reasonable return, and it was a breach of their duties as trustees.

[235] In particular, and to repeat, pleadings at para 72(c) and (d) were as follows:

> 72. The defendants have breached the above duties for the following reasons:
>
> …
>
> (c) In the circumstances, the subdivision of Ching's Block was an inherently risky investment.
>
> (d) The defendants failed to take appropriate and adequate expert advice on the merits of undertaking and continuing with, the Ching's Block subdivision.

[236] Relating to all these pleadings, I need to bear in mind, too, the usual caution that any consideration of past behaviour on the basis of hindsight always requires great care. Evidence advanced on behalf of Mark and Andrew, and questioning on their behalf of the various witnesses before me, ranged widely in relation to many aspects of the Marsden Valley subdivision between 2007 and the present. Those principles relating to the need for caution in applying hindsight apply particularly in cases

involving subdivisions which necessarily take some time and involve unforeseen occurrences which commonly occur.

[237] Here, the initial decision by the trustees to embark on the Ching's Block subdivision was one made in light of the terms of the Trust Deed and, in particular cl 9.2, which I accept defined the outset of their duty in the first place. I have explored this aspect above and repeat my finding that it must favour the position advanced for John and GHTL here.

[238] As to the contention advanced for Mark and Andrew that the trustees closed their minds to options other than the subdivision development from the outset, as I have noted above, I do not accept there is independent and reliable evidence before me which clearly substantiates this contention. Alan Hinton (Mr Hinton), the Trust's former accountant and advisor to the trustees throughout, gave clear and straightforward evidence before me. He deposed that the trustees were assessing the subdivision development option against other options before embarking on it. This is supported, as I see it, by other evidence of John and Mr Nelson and by the comments of Edna and other contemporaneous documents before me.

[239] Mr Johnson in his submissions placed much emphasis on the circumstances of Mr Westrupp's resignation as a trustee and his 27 August 2007 memorandum I refer to above. It is clear, however, that at the time Mr Westrupp was aged around 78. This evidence demonstrates no more than his disinclination as a retired man of advancing years who did not wish to participate in the cut and thrust of a Trust beginning to embark on an active development business. His primary concerns also appeared to relate to the ability of the Trust to fund the subdivision development after Jim's death, and it is clear too from contemporaneous documents that the conduct of Brett towards Mr Westrupp and the trustees at the time may also have been a factor in his resignation decision.

[240] Next, I am satisfied that the trustees' decision to subdivide the Ching's Block was not one that was made in isolation. It was seen by the trustees as the first stage in what was an integrated and multi-staged development of the whole of the Trust's land. Any decision to sell the approximately 12 hectare Ching's Block at the time would

have cut across and jeopardised the development of the remaining 87 hectares, the great majority of the land owned by the Trust. A sale of the Ching's Block to a developer who then embarked upon a low cost and unattractive subdivision in the as yet undeveloped Marsden Valley would have detrimentally affected and possibly ruined any ability for the Trust to subdivide and target a better and more lucrative market for the balance of its land.

[241] The theory advanced for Mark and Andrew that the Trust should have sat back and waited for the adjoining land to be developed which would have saved the Trust some of the cost incurred, although not pleaded as a breach of the trustees' duties, nevertheless is quite at odds with intentions made known to the trustees by Jim and Edna as settlors. It cut across the deliberate arrangement that the Ching's Block and then the Trust's other sections would be finished and marketed first, to avoid competition with those from adjoining land developments.

[242] A possible argument was at one point suggested by Mark and Andrew that a cost sharing arrangement should have been pursued at the outset to "encourage" a neighbour to contribute to infrastructure costs. On this, it is important to note the evidence of Mr Sewell that it would be unusual for adjoining owners to agree to share costs on any proposed subdivision. The reason for this is simply because any adjoining land owner would know it had the opportunity to benefit later in any event without having to contribute a payment. Mr Newton, too, in cross-examination confirmed the unusual nature of any neighbour choosing to make a contribution towards infrastructure costs of a subdivision on adjoining land, because title could be sold at any time, and it is the natural way of development that everyone benefits from downstream infrastructure.

[243] These arguments as to the benefit an owner of adjoining land might enjoy from the Trust's Ching's Block development are inherent in any development. They apply also to some extent with the subsequent subdivision of John's adjoining land originally part of the Ching's Block. There is an aspect that the overall Ching's Block development needed to be planned and approached in a combined and integrated way between the Trust and John as, amongst other reasons, the resource consent granted by the Council treated the proposed subdivision as one project. In any event, Jim and

Edna's original intentions were clear. The Ching's Block development was intended to include John's land and then later to integrate with subdivision of the Homestead Block and beyond.

[244] The basis, too, for Mark and Andrew's complaint about John obtaining the benefit of connecting services as I see it is also without substance here. Any neighbour would obtain this when the Trust embarked upon the Ching's Block development. It is true too, as Mr Newton confirmed in his evidence, that in the resource consent provided for Ching's Block the Council would not have permitted strip buffers (which prevent adjoining land owners benefiting from amenities on subdivided land) between the land owned by the Trust and any land owned by adjoining owners, including John.

[245] The next argument relating to the Ching's Block subdivision advanced by Mark and Andrew was that it performed poorly and as para 72(a) of the plaintiffs' statement of claim pleads:

> (a) In the circumstances, the Ching's Block subdivision has failed to provide a reasonable return on investment.

[246] On this aspect, the evidence advanced for and questioning on behalf of Mark and Andrew here repeatedly referred to an early 2009 indicative forecast profit for the Ching's Block subdivision of $12 million. This was very early in the piece and was later superseded in about 2014 when more information was available to the trustees with a profit forecast of $7 – 8 million. As to this aspect, John and GHTL note that the Ching's Block development is still incomplete with Stage 4B (the unsold nine hillside sections) yet to be sold. They contend too that the forecast of $7 – 8 million in fact will substantially be met or exceeded when all of the Ching's Block sections are sold. That remains to be seen however. But, in any event, I am satisfied the weight of the evidence before me was that the Ching's Block subdivision, in particularly trying circumstances at the outset, did perform, and is continuing to perform, well. This conclusion is reached against objectively measurable criteria and in particular expert evidence which I accept to the following effect:

> (a) The evidence of Mr Sewell, an expert with 40 years' experience in the construction and property subdivision area, confirms that the overall

gross surplus percentage return for the Ching's Block of $82,324 per lot or 25.67 per cent (with cost of land accounted for) is in the top quartile for residential subdivisions. Mr Sewell's other evidence is to the effect that the Ching's Block subdivision was carried out in an excellent manner. It set the tone, he said, for the remainder of the Trust's Marsden Valley land subdivision and, accordingly, it significantly increased the value of that other land.

(b) Mr Newton, a professional surveyor with knowledge of Nelson residential developments gave evidence that the Marsden Valley development was routinely seen in industry circles as an excellent example of a high-quality subdivision development which created a residential market out of an "isolated and remote valley area". He also referred to the Ching's Block subdivision as "a standout subdivision" and "something of a pioneer for its design features".

(c) Mr Smithies, the valuation expert called by Mark and Andrew, himself conceded that in considering the Ching's Block subdivision: "it's a successful subdivision".

(d) So far as financial analysis from the accountants' (Mr Smith for John and GHTL and Mr Graham for Mark and Andrew) are concerned, on a close consideration, and leaving on one side administration costs for the Trust entity (increased in my view as a result of the ongoing need for more independent trustees, and increased accounting and reporting requirements to meet requests from the beneficiaries) there seems to be little major difference between forecast profit and gross margin figures for the Ching's Block development.

[247] I note in passing that in his evidence Mark and Andrew's valuer, Mr Smithies, did not seem able to fully address critical issues concerning the profitability of the entire Ching's Block development. Notably, as I see it, this was because it might have undermined the opinion he endeavoured to advance before me several times (and which I reject as being without substance) that the nine Ching's Block 4B sites could

not be developed and sold as individual lots, and his view that at best they would need to be combined and sold as two lots only.

[248] Overall, on the evidence I conclude that the Ching's Block development is still incomplete and that, when finished and the nine 4B hillside sites sold, its fair overall profitability is likely to be in the general $7 – $8 million forecast area outlined by the trustees in 2014.

[249] Lastly, as to risk assessment and risk management questions relating to the decision to embark on the Ching's Block development, I am satisfied there is little in Mark and Andrew's complaint in this area. In my view, there is no reliable evidence before me to establish that the trustees did anything other than take a prudent approach to this development with appropriate advice. This included advice from planning and subdivision experts, accountants, tax advisors and through the engagement of an urban design team. Initial bank funding through overdraft, and later on a more permanent basis, was obtained at appropriate levels. This enabled the initial development of engineering plans and the engagement of planning experts, and later for the subdivision construction. The Westpac Bank clearly scrutinised these matters carefully with bank funding for Stage 1 construction based on development costs approved by the Bank's appointed quantity surveyor.

[250] I am satisfied from the evidence before me that initial risks were appropriately addressed through a range of decisions taken. These included management of section sale prices, slowing the construction programme when required, and later focusing on building sales momentum after the market slump at the time of the GFC had bottomed out.

[251] Mr Sewell confirmed that any development of this nature does involve risk but that is not a reason to avoid subdivision decisions. His evidence throughout I find was informed, concise and reliable. Effectively it was not subject to any significant challenge. I bear in mind too that Mark and Andrew did not adduce evidence from any similarly qualified subdivision expert.

[252] Allegations from the plaintiffs that the trustees, and John in particular, lacked experience and failed to employ competent staff are simply unsupported by evidence. Mr Sewell in particular, along with other evidence advanced for John and GHTL, fully counters this. Even in Brett's evidence, the foreman engaged by John from an early time, Darryl Gibbons, was described as a "very experienced construction man".

[253] Overall, for all the reasons I have outlined above, I find the choice made by the trustees to proceed with the subdivision of the Ching's Block was an appropriate and prudent decision in all the circumstances here, and it did not breach the trustees' duties.

[254] I turn now to the second aspect of Mark and Andrew's claim. This was that the Ching's Block subdivision performed poorly, and involves the question whether the trustees should have abandoned that development when it was partly completed. This claim is effectively advanced in paras 72(d), (e) and (h) of Mark and Andrew's statement of claim which I usefully repeat:

> 72. The defendants have breached the above duties for the following reasons:
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> …
>
> (d) The defendants failed to take appropriate and adequate expert advice on the merits of undertaking, and continuing with, the Ching's Block subdivision.
>
> (e) The defendants failed to reassess the merits of continuing with the development of Ching's Block following the initial decision to subdivide.
>
> (h) The defendants failed to adequately monitor the financial performance of the Ching's Block subdivision, including by not comparing forecasted with actual results.

[255] These allegations clearly concern matters of business judgment exercised by the trustees in particular in 2008 and 2009. On questions such as this relating to the wisdom of trustees' actions, obviously the actions concerned cannot be judged solely by outcomes. In his decision in *Jones v AMP Perpetual Trustee Company NZ Ltd*,[37] Thomas J said:

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[37] *Jones v AMP Perpetual Trustee Co NZ Ltd*, above n 20, at 707

> It is clear that a trustee is neither an insurer nor guarantor of the value of a trust's assets and that the trustee performance is not to be judged by success or failure, that is whether she was right or wrong. While negligence may result in liability, a mere error of judgment will not.

[256] Generally, it is likely to go without saying that hindsight in 2020 or 2021 as to decisions made over a decade earlier cannot often be considered as a correct approach.

[257] Addressing this aspect overall, I find that Mark and Andrew's arguments are without substance and can be dealt with in reasonably short measure. I find that, once the Ching's Block subdivision development was underway in early 2008, and the section sales and general economic conditions with the GFC worsened in late 2008 and 2009, the judgment calls made by John and GHTL and the other trustees at the time were reasonable and fair. Evidence before me of a significant slump from late 2008 in the property market generally, and in the Nelson market for sections in particular, was not really contested in any sense. That slump occurred after the decision to develop the Ching's Block was made by the trustees and largely after initial earthworks were started in October 2008.

[258] On these matters, essentially Mark and Andrew and some of their expert evidence seems to suggest, as I note at [231] above, that at this time the trustees should have "taken the off ramp" (i.e. abandoned the partly completed development) and at least sold the Ching's Block. This, without question, would have involved dumping this land in a depressed sale market. In my view, this could hardly be seen as a viable strategy. Little more needed to be considered than the experienced evidence of Mr Sewell who addressed this aspect directly. He said in evidence that this would have been the worst possible thing the trustees could have done in the circumstances. Subdivision was inherently a long-term project he said and that here the ultimate success of the Ching's Block development and this Stage 1 would have a significant effect on the value of the remainder of the Trust's land. Even the evidence of Mark and Andrew's valuer, Mr Smithies, was that developers had "closed the gates" over this period.

[259] John, in part as a local Nelson observer too, in an email to his co-trustee, Mr Nelson, dated 18 December 2008, stated:

> Market appears to be collapsing very quickly, no sections in any price bracket selling at all now in Nelson…state of the economy showing signs of potential dramatic collapse…could be a two year sort out…

This contemporaneous comment from John at the time confirms the trustees were not ignoring and were well aware of the worsening economic position in December 2008.

[260] The evidence of both John and Mr Nelson, too, was that they chose not to abort the development of Ching's Block part way through because the trustees, including Edna, had faith in its overall viability and the longer term market post-GFC.

[261] In my judgment, abandoning the Ching's Block partly finished at this time probably would have negated the whole subdivision masterplan for Marsden Valley. The Ching's Block was about 12 per cent of the total Trust land area. To abandon its development at that time and place it on the market partly developed could have had disastrous results for the Trust overall, given the likely effect it would have had on the remaining 88 hectares of Trust land.

[262] From the evidence too, it is clear the trustees were able to complete the early bank-funded stages within budget, and they were able to obtain more bank funding, eventually getting to the point of being largely able to self-fund later stages. Mr Newton in his evidence deposes that completing the initial stages within budget was no mean feat, given that bank lending at the time was tight and finances were strictly monitored by the Bank. Nevertheless, the Bank throughout was supportive. It also is true from evidence before me that later, the trustees were looking ahead to the possibility of distributions from the Trust.

[263] Linked to these aspects are complaints from Mark and Andrew that certain management decisions of the trustees may have caused loss for the Trust and that, in any event, John and GHTL failed to provide adequate monitoring processes for the financial performance of that Ching's Block subdivision.

[264] Mark and Andrew contend that important here are the views of Mr Kearney and Mr Russell, when they first became involved as trustees, who said that certain processes of the Trust could be improved. Whilst that is so, in my view, what they say

falls well short of evidence of any breach of duty on the part of the other trustees. These matters essentially relate to improvement in processes of the Trust and really address peripheral management matters.

[265] And I note too that, so far as monitoring financial performance of the Ching's Block subdivision is concerned, the accountant Mr Hinton was involved from the outset, and provided regular accounting and financial material and advice throughout.

[266] John and GHTL confirmed in their evidence that the trustees did not abort the Ching's Block Stage 1 development part way through because they had faith in its overall viability and the longer term market post-GFC. This was they said a reasonable belief at the time and, as it has now turned out, their expectation that it would be profitable it seems is proving to be correct. I say this given the remaining sections of Ching's Block 4 are still to be sold and also I acknowledge the overall positive effect of the Ching's Block subdivision on the Homestead Block and the remainder of the development.

[267] On these aspects, Mark and Andrew did endeavour to give some prominence to a 29 August 2009 Duke & Cooke valuation of the Ching's Block at a figure of $6.75 million. They say this valuation is relevant in that it should have convinced the trustees at the time that abandonment of the development as the GFC struck was the prudent course for the Trust to take. I take issue with this contention, however, bearing in mind particularly the expert evidence before me of Mr Sewell that endeavouring to sell the partly commenced subdivision development into that market at the time would only have achieved a disastrously low sale price, if any at all. At that time, too, profits from the Ching's Block had been estimated by way of an indicative budget around $8 million and, although this was not a mature budget or final assessment, again it indicated that significant profit could be expected down the track, rather than simply making an attempt to quit the property undeveloped.

[268] I find too that prudent trustees who might be considering an abandonment of the Ching's Block development where borrowings of $770,000 towards the development had been incurred at that time, would have assessed the negative consequences of doing so. I am satisfied that occurred here, given also the negative

consequences which would have occurred for the trustees' overall subdivision plans for the entire property which would have been detrimentally affected. The evidence before me showed too that the bankers for the Trust, Westpac Bank, were supportive throughout. This was, given also the normal industry understanding, confirmed in the evidence of Mr Smith and Mr Graham, that subdivision costs would necessarily be higher at the earlier stages and, conversely, profitability higher towards the conclusion of any development.

[269] For all these reasons, I reject the suggestion from Mark and Andrew here that the defendants should have abandoned the development of the partly completed Ching's Block in 2008/2009 when the GFC and significant altered market conditions hit.

(f) Failure of Trust management processes and budgeting?

[270] Linked to these complaints by Mark and Andrew were additional contentions that management decisions taken by the trustees for the Ching's Block subdivision were wrong and have caused loss. No compelling evidence to suggest this is before me, however. Issues involving, for example, the views of Mr Kearney and Mr Russell when they first became trustees of the Trust that certain processes could be improved (such as documentation, minute-taking and the like) as I have noted above fall well short of evidence of breach of duty on the part of the trustees.

[271] The only matter which could possibly be of any substance in this area is the allegation made by Mark and Andrew that the trustees failed to monitor the financial performance of the Ching's Block subdivision as it developed. I reject this, however. The expert subdivision evidence before me from Mr Sewell in particular makes clear that the quality of budgeting and costing in this case was entirely adequate. In response to a cross-examination question "Do you consider that those 2008 budgets fell short against best practice?", Mr Sewell replied:

> No, I looked at those 2008 budgets and they were detailed. They weren't as detailed as what I was used to, but when I looked at them, I didn't think they were at a point where there was things left out and not addressed. In fact, some of the things were far more detailed than I would do. So my comments here … were looking at the balance of the site and how this was going to operate. And I hope there's some really important things to note here. The

> first one is the accounting processes that were being used. In my career, I've come across this many times. Organisations, be they trusts, private family holdings, companies, concentrating on their annual tax accounts. And driving everything off cashflow. You do get a similar result, but it's just not the way that I've been trained. For instance, when I worked for Ngai Tahu, they had about $70 million of assets and they were running a process just like that. Although it could give me a fair idea of where we were going, and I could pick up any issues that were appearing there, it just wasn't the way I had been trained and the way I was trained by Fletchers at the time, I think doing it this way produces a better result. Not everybody agrees with me. There are still plenty of outfits around that are still going through their annual tax account basis and running their projects successfully.

[272] Direct evidence on budgeting, costing and financial analysis undertaken by the trustees was provided by John, Mr Nelson and the accountant Mr Hinton. They all confirm in their evidence too that the trustees did monitor and understand the financial position of the trust and the Ching's Block development on an ongoing basis throughout.

[273] Whilst Mr Sewell's comments noted at para [271] above regarding a possible higher level of budgeting and reporting might be seen as some criticism of the trustees here, as I understand his comments, they were simply that the practices used by the trustees in this case were widespread and that they gave a "similar result" to what Mr Sewell himself might have achieved. And he added too that, in any event, "not everyone agrees with me". None of this, in my view, substantiates any serious claim of breach of duty of prudence on the part of the trustees here.

[274] I note, too, that many budgets and cashflow documents were produced by John and Mr Hinton and scrutinised by Mr Nelson and all other trustees here. They were updated too as frequently as proved to be necessary. Budget and cashflow information was also periodically provided to Westpac who no doubt scrutinised these carefully. At no time did they find these deficient. In fact, to the contrary, Westpac continued to provide support to the project throughout, a factor in my view of some significance.

[275] Mr Sewell noted too in his evidence that in a subdivision budgets are constantly being updated to reflect changing circumstances. Mr Russell also confirmed this, observing that, "Subdivisions almost never turn out exactly as you planned."

[276] It is clear to me that a simple failure to attain budget by itself cannot constitute a breach of trustees' duties in a situation like the present. And, overall in his evidence Mr Sewell, while recommending a certain degree of increased formality in the Trust's reporting processes might have been desirable, in particular for the Homestead Block, endorsed what he described as the competence shown and excellence achieved in the Ching's Block project. His overall message commended highly the Ching's Block development, the overall Marsden Valley subdivision and the work of John and the trustees here. Finally, I note that effectively what Mark and Andrew are asking the Court to do here is to second guess commercial assessments made by the trustees at the time at a particularly minute level. This is not appropriate in my view. Complaints as to the level of formal budgeting or reporting in this case cannot be seen as the "gold measure" of proper process for the Trust nor, in my view, is there any evidence before me that this to any extent caused loss here.

(g) Failure to appoint a suitable and qualified project manager

[277] The next alleged breach of duty on the part of the trustees here is claimed to arise in the appointment of John as project manager for the Ching's Block development and overall. This is pleaded at para 72(f) of the statement of claim as follows:

> (f) The defendants failed to appoint a suitably qualified and experienced project manager to manage the Ching's Block subdivision.

[278] This pleading, Mark and Andrew contend relates solely to the competence of John to act as project manager here. The question of his being paid fees and whether there might be any basis to recover any part of those fees arises in their third cause of action which I address below.

[279] And I note at the outset that, although failure to appoint a competent project manager could in the right situation and in theory amount to a breach of trustees' duty, a causation of loss always remains an essential element.

[280] For the reasons that follow I find, therefore, that this pleaded allegation by Mark and Andrew fails both on the facts before me as I am satisfied John was a competent project manager but also because his appointment, as I see it, caused no loss.

[281] First it is unquestioned here that, between 2004 and 2007 when Jim died, John was actively involved in pursuing development plans for the Marsden Valley land while he was a trustee. This was undertaken at Jim's request and certainly with the agreement of Edna and the other trustee or trustees at the time. In the early period John assisted Jim and eventually took over a lead role with his father and mother's approval. John continued this after Jim died with the concurrence of all trustees, including in particular Edna throughout. I find, therefore, that John was effectively pre-selected as project manager by both the settlors and the trustees here. No doubt this was because all had confidence in John because of what was seen as his commercial background and the genuine belief that he would be able to do a competent and effective job in this project because of his interest in, and commitment to it, throughout. Mark and Andrew's complaint that John has been employed and paid as project manager or director throughout, in my view, is effectively a complaint about the settlors' clear intentions that he carry out this role approved over the years by a range of different and independent trustees of the Trust.

[282] Further, all parties knew that John and Wendy owned a portion of the adjoining land and that development of both parts of the original Ching's Block would be advantage to the Trust as the initial resource consent made clear. Noting potential conflict of issues, this aspect, as I see it, enhanced rather than detracted from the reasons for having John manage the overall development.

[283] As to John's competence to act on the subdivision and development tasks he was asked to perform, the results as seen by Mr Sewell and others with some knowledge in the area, as I see it, clearly contradict the adverse view held by Mark and Andrew of their brother's capabilities. John's role appeared to be much more than just that of a project manager as he appeared to direct the entire development, including the consenting process and the like. His brothers appeared to ignore this and their evidence about John's capabilities indicated more their hostility towards him than any other objective assessment.

[284] The weight of all the evidence before me from Mr Nelson, Mr Hinton, Mr Kearney, Mr Russell, Mr Newton and Mr Sewell confirms that John provided

excellent performance here as project manager for the overall development. By way of example, a few comments in evidence before me are usefully repeated here:

(a) From Mr Kearney, who Mark and Andrew contend was particularly critical of the development in its early stages – he wrote to the trustees stating that he was "impressed with the standard of this development and plans for future work".

(b) Mr Newton in his evidence stated:

> I can confidently say that the design and planning process for Marsden Park has been to a high standard and has involved detailed input from highly experienced professionals in each sphere of the development process including engineers, surveyors, landscape architects and planners.
>
> In this case John McLaughlin and the trustees have adopted the very professional, consultant driven development project.
>
> This considered and incremental approach has also been used on the Homestead Block and almost certainly has allowed better consents than what may have been obtained if the trustees tried to consent all the land in 2008.
>
> …Managing a consent and appeal process involves significant skill, patience and tenacity. Negotiating through the consenting process is time consuming, frustrating, and difficult, which many people may not realise. John has put in an enormous amount of work to manage this aspect of the project.

(c) In his evidence Mr Hinton states:

> I note the criticisms of John and the trustees that they lack commercial experience or were essentially unqualified amateurs. I strongly disagree with this. John is commercially savvy…My recollection is that the trustees had a more than sufficient understanding of the Trust's financial performance to make informed decisions about the direction of the development.
>
> The Marsden Valley subdivision has developed as a destination where people want to live.

(d) Mr Sewell in his report reviewed John's performance in his role as project manager or director and found:

> - John is a hard task master who demands clear outcomes at a reasonable price. He only engages the consultants to do what is

necessary; he does not allow them to take control of the project as that is his role…

- …The management of the consenting process is critical to the success of any subdivision process. John is relentless in his pursuit of the right outcomes for Marsden Park. At times he could be seen as impossible to deal with, but it is his tenacity that is providing the outcomes that add value. His recent work on consents for the next stage, particularly the issues around traffic design, clearly show how outcome focused he is. Many others would have given up but in my view John's persistence has achieved the right outcome. The outstanding feature of John's work on these critical items is that he adds the value without significant costs.

- …The quality of the work and the approvals and clearances from Council on completed work are evidence that the decision of the trustees to do the work inhouse was the correct one.

And finally in his evidence Mr Sewell stated:

> I understand that Mark and Andrew McLaughlin have alleged that John is not adequately qualified to act as project manager and that his performance is substandard. I do not agree with these criticisms and elaborate on my reasons…In my view the above matters show that the Marsden Park subdivision has been competently planned and executed. I think it is particularly notable that successful and prudent developers like Jennian Homes and G J Gardner have now purchased land in the development. This reinforces the value of the trustees' incremental and cohesive approach to the development. This has generated market interest from significant players and allowed the Trust to extract value.

(e) Mr Russell in his evidence stated:

> …In general John is always in favour of following objective independent advice on Trust issues. While John is a very focused individual, during any of my involvement I have found him to be rational and democratic in his decision-making participation. Over the course of my dealings with John I have come to respect him for his straightforward honesty and business acumen.
>
> …I would say that John was frugal, careful, methodical and thorough. These are qualities that any successful project manager must exhibit. I consider John to be an effective and shrewd property development manager.

(f) And Mr Nelson also stated in his evidence:

> Without John I doubt the consenting process initiated by Jim would have been completed, nor (in almost all certainty) would the development have been able to be undertaken by the trustees.

> I strongly disagree with Mark and Andrew's assertions to the effect that John is not a competent project manager. Any subdivision is complex, but a greenfield one (such as Marsden Valley) where no Council services were available is particularly challenging. I think the success of the Ching's Block development is testament to John's skill and ability.
>
> …An early example of John's competence was his idea to initiate a Plan Change to rezoning Marsden Valley as residential.

[285] The comments from the evidence I have noted above, comments which were effectively unchallenged in any real way before me, speak for themselves. Some witnesses who gave evidence on behalf of Mark and Andrew endeavoured to some extent to question John's capabilities. Mark, Andrew and also Brett, in scathing comments about John they expressed in their evidence, made clear they had in recent years formed adverse views of him and his abilities. None of this in any way, however, changed or challenged the very favourable comments, including those from knowledgeable experts, about John's work and position outlined above. Nor, as I understood the evidence, did Mark and Andrew object to John's role as project manager/director in the early stages or even make comments regarding this. Early invitations to them to meet onsite it seems were also not taken up. John was allowed simply to carry on this role. In my view, his early understanding that his brothers knew their father Jim in particular, and also Edna, wanted him to do this and that living in Marsden Valley on adjoining land he was very well placed to do so, was entirely reasonable.

[286] I conclude that there is nothing in the suggestion from Mark and Andrew that the appointment of John as project manager/director for the Ching's block subdivision, as they have pleaded, represented a breach of trustees' duties here.

[287] Two final complaints pleaded in this second cause of action by Mark and Andrew are quickly disposed of.

(h) Failure to provide financial information?

[288] The first is the contention that John and GHTL breached a duty in terms of the provision of financial information to the plaintiffs. This raises the question of the nature and extent of information which beneficiaries like Mark and Andrew at the time

are properly entitled to. They assert that their attempts to get information from the trustees throughout have been met with a "hostile reaction". On the evidence before me, however, this assertion cannot be justified. Very many requests were made for information over latter years and, as I see it, they have been answered by the trustees who have gone out of their way in their endeavours to keep Mark, Andrew and Brett well informed.

[289] In my view, the trustees here have moved significantly beyond their disclosure obligations as set out by the Supreme Court in *Erceg v Erceg*[38] in relation to providing information to beneficiaries. When others, such as Mr Davidson QC, Mr Smith and counsel for Mark and Andrew, Wynn Williams, became involved, much additional financial and other information was provided. Mr Mahony too was assisted when he was instructed by Mark and Andrew to prepare his report.

[290] Issues arise too as to whether any suggested failure to provide information to the beneficiaries could have caused any loss. However, I am satisfied the trustees here acted in good faith throughout and endeavoured to engage in a level of co-operation with Mark, Andrew and Brett (no doubt at significant additional cost to the Trust) at times beyond the norm.[39]

[291] This claim by Mark and Andrew is also rejected.

(i) Failure to consult with beneficiaries?

[292] Finally, claims were made that the trustees breached their duty to Mark and Andrew by failing to consult with them. In this regard, Jim's 2001 Memorandum of Wishes is referred to. I have noted above the context of this Memorandum of Wishes signed some three years before the Trust was formed. Notwithstanding this, I am satisfied there is nothing in this claim that the trustees breached their duty to Mark and

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38 *Erceg v Erceg*, above n 25.

39 In the recent Supreme Court decision, *Lambie Trustee Ltd v Addleman* [2021] NZSC 52, the Court, referring to *Erceg v Erceg*, said:

> [54] … Trustees are not usually required to disclose to discretionary beneficiaries their reasons for exercising their discretion in the manner they did.

And:

> [56] … The Court expected that trustees would normally provide to close beneficiaries on request, if not proactively, trust accounts and other documents showing how the Trust had been administered and what had become of the Trust property.

Andrew by failing to consult. In the early period of the Trust operation, Mark and Andrew did not appear to make contact with trustees or respond to information provided to them. Their complaints arose later and, as I see it, the trustees went out of their way to provide information and material as to ongoing progress with the Trust.

(j) Causation of loss?

[293] Further, I am satisfied that Mark and Andrew here can establish no causation of any loss to the Trust either in relation to non-consultation or even more specifically relating to profitability of the Ching's Block, a development which still remains to be completed. And I find too that the imposition of a duty to consult in any event would be inconsistent with the recognition by the Supreme Court outlined in *Erceg* that trustees' decision-making processes are confidential and that it is their task always to make prudent commercial and other decisions on behalf of the Trust.[40] In passing I comment too that there is nothing before the Court to suggest the interests of the beneficiaries here, and in particular Mark and Andrew, were not adequately considered. Comments from them that they had been promised money three years after 2009 were simply unsupported by any clear corroborative evidence. Again, I reject any argument that a breach of duty has occurred here because of a lack of consultation or consideration of the interests of the beneficiaries by John and GHTL.

[294] Whilst there is no issue that Mark and Andrew have standing to bring this proceeding and to advance their second cause of action seeking equitable compensation, I note by way of aside that their claim is one by persons who have not been able to show they have suffered any specific loss. Therefore they may not be able to seek any financial remedy payable directly to themselves here. They are discretionary beneficiaries of the Trust (with a future contingent interest). Their interest is a "mere expectancy"[41] or a "mere interest" to be considered as the recipient of a distribution.[42] As such, there is a reasonable argument as I see it that they do not have any vested rights or interests at law capable of being harmed.

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40 *Erceg v Erceg*, above n 25.
41 *Muollo v Hunt* [2003] 2 NZLR 322 (CA) at 325.
42 *Erceg v Erceg*, above n 25, at [77].

[295] Although I am satisfied this does not disqualify the claim they have brought here, this Court is able to take into account the limited nature of their interest in the Trust in the exercise of its discretion in relation to whether or not equitable compensation should be awarded.

[296] And, as to that discretion, even if I had been satisfied that Mark and Andrew had established a breach of John and GHTL's duties as trustees under their second cause of action (and I have found otherwise) this Court has a discretion whether or not to grant relief.[43]

[297] In *Enright v Enright* Palmer J in this Court stated:[44]

> …The law of equity in New Zealand is now so mingled with common law that a range of remedies is available, whatever the cause of action. Relevantly, that may include orders for equitable compensation or damages. In general, the judicial discretion to grant equitable remedy should be exercised so as to do justice in the circumstances of the particular case. To the extent reasonable and practicable, the purposes of equitable damages, in particular, is to restore successful plaintiffs to the real position in which they would have been if the inequitable wrongdoing had not occurred.

[298] This discretion of the Court in relation to whether in any event relief should be granted is to be exercised in accordance with certain general principles including:

(a) Whether the defendant trustees in this case have acted honestly and reasonably (being a criterion under s 73 of the Trustee Act but in any event applicable under the general discretion).

(b) Whether the plaintiffs have suffered prejudice. Of particular relevance under this particular head will be the status of Mark and Andrew here as discretionary beneficiaries with a mere expectancy.

(c) Whether the plaintiffs' claim is speculative and/or uncertain to a degree which risks injustice if a remedy is granted.

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43 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [41-073].

44 *Enright v Enright* [2019] NZHC 1124 at [209].

(d) Whether it is equitable and just that the defendant trustees here be held liable for any loss suffered by Mark and Andrew.

(e) Whether Mark and Andrew, as plaintiffs having had adequate knowledge of the relevant facts, have stood by and allowed the trustees to act as they did.

(f) Whether Mark and Andrew have delayed in seeking a remedy, particularly where the damage for which they seek recompense was ongoing.

(g) Whether arguably it could be said that Mark and Andrew declined to meet or confer with or otherwise communicate with the trustees when there was an expectation that they do so.

(h) Whether Mark and Andrew may have acted inequitably in relation to the claim – the equivalent of the "clean hands" principle in equity.

(i) The terms of any governing instrument and particularly here the Trust Deed.

[299] Bearing in mind all these considerations, as I see it there are a number of particular matters in this case which, in any event, would go some way in supporting the Court here in exercising its discretion in favour of John and GHTL. These include the following:

(a) The failure of Mark and Andrew in the early period of operation by the Trust and the Ching's Block development to respond in any meaningful way to the activities of the Trust. This included what seems to be their failure to respond to the 2007 – 2008 reports from the trustees (assuming they were received) and the trustees' requests for comments from and a meeting with the beneficiaries and, further, their failure to raise objections or to advise the trustees of their views prior to 2013.

(b) Largely, Mark and Andrew were silent in the early period despite their knowledge that the trustees were embarking on and pursuing the subdivision of the Ching's Block in particular, undertaking bank borrowing and committing to major expenditure for the Trust. A reasonable argument exists here, in my view that, after a significant period of relative silence on their part, Mark and Andrew embarked on a process that might be seen as attacking the trustees' decisions and seeking financial damages from the Trust.

(c) It is arguable that Mark and Andrew have not accepted the entitlement of the trustees to rely on independent advice at times here and have alleged breaches of duty on the part of the trustees regardless.

(d) Generally they have refused to accept as valid the decision of the trustees to acknowledge Edna's intentions (and her explanation of Jim's wishes) regarding the Trust Deed and cl 9.2 in particular. So far as Edna is concerned, they have inferred she has not been independent but rather she has been improperly coerced by other trustees.

(e) When independent trustees have been appointed (such as Mr Kearney and Mr Russell) it seems they have criticised their conduct to a point which ultimately has seen those trustees resign.

[300] And, even if this Court was to find there had been a breach of duty on the part of John and GHTL relating to this second cause of action (and I have found otherwise) a further issue arises as to whether any actual resultant loss has occurred from the pleaded breaches to provide a basis upon which equitable damages could be awarded here.

[301] As I see the position, this is not a case of direct loss such as occurred in the *Mulligan* case.[45] There has been no erosion of real value in the land held by the Trust but rather a claim that if all the land had been sold at the outset followed by an investment of the resultant cash, this might have yielded more profit to the Trust. In

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45 *Re Mulligan*, above n 17.

this area, the Court is being asked to make orders of restitution to the Trust as part of its supervisory jurisdiction. On this, it is clear that evidence of actual dissipation or depletion of the Trust fund is required and that this is to be assessed not by reference to imaginary or speculative values but by reference to actual evidence.

[302] Some evidence was provided before me related to this suggested loss. I need not address this in any depth other than to say that, in my view, this evidence does indicate that to date some profit over and above the accounting cost of the Ching's Block Land (some $2.8 million) does appear to have been made from Ching's Block sales. There is also without question, in my judgment, additional revenue to be achieved from the sale of the unsold sections remaining as Ching's Block 4B. I find these are clearly saleable and, with what is likely to be an upsurge in section values and prices, may well lead to significant profits being added to the overall Ching's Block development in the future. But what is clear at this point is that the complaint from Mark and Andrew that the Ching's Block has not made enough profit, first, is likely to be somewhat premature and, secondly, ignores in any event the positive effect this significant development has achieved for the remainder of the Trust's subdivision development.

[303] Overall, I need say nothing more regarding the loss case pleaded by Mark and Andrew here other than to suggest that it would, in any event, be likely to face difficulties for the reasons I have outlined above.

[304] I conclude that Mark and Andrew's claim in their second cause of action for compensation for alleged breach of John and GHTL's duties as trustees of the Trust fails. It is dismissed.

(k) Exemption clauses in Trust Deed and s 73 Trustee Act 1956

[305] Given my conclusions above, it is not strictly necessary here for me to consider arguments advanced on behalf of John and GHTL regarding exemption clauses in the Trust Deed and s 73 of the Trustee Act. These have been pleaded as affirmative defences to Mark and Andrew's claim. Notwithstanding this, for the sake of completeness, I will briefly address these arguments.

[306] First, John and GHTL rely on the provision in cl 12 of the Trust Deed which they say exempts them from liability here. That clause states:

> The Trustees shall not be liable for (and shall be indemnified out of the Trust Fund for) any loss or liability which they may incur by reason of the exercise, manner of exercise or non-exercise of any of the powers, authorities or discretions conferred on them by this deed or by law.

[307] In *Armitage v Nurse*,[46] the English Court of Appeal held that the meaning of a similarly expressed clause was "plain and unambiguous" and its effect was to exempt the trustee from liability for loss or damage to the Trust property "no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly."[47] That case clearly excluded from the operation of such a clause, certain irreducible obligations of honesty and good faith faced by trustees. Mark and Andrew's position here is that cl 12 is too wide in scope and should not apply. The decision in *Armitage v Nurse* however has been accepted in this country as correctly stating the law on this point.[48]

[308] On these aspects, in *Spencer v Spencer;*[49] French J held:

(a) Limitation or exclusion clauses are valid;

(b) There is, however, an irreducible core of obligations, namely the duty of the trustee to perform the trust honestly and in good faith for the benefit of the beneficiaries;[50]

(c) The trustees bear the onus of establishing they are protected by an exclusion/limitation of liability clause;[51]

(d) The exemption clause is to be construed narrowly against the trustees;[52]

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46 *Armitage v Nurse*, above n 26.
47 *Armitage v Nurse*, above n 26, at [250] and [251].
48 *Jacomb v Jacomb* [2020] NZHC 1764 at [82], citing *Spencer v Spencer* [2012] 3 NZLR 229 (HC) at [189]; and *Gillespie v Guest* [2013] NZHC 669 at [48].
49 *Spencer v Spencer*, above n 48.
50 *Armitage v Nurse*, above n 26.
51 *Wong v Burt* [2005] 1 NZLR 91 (CA).
52 *Walker v Stones* [2001] 2 WLR 623 (CA).

(e) Acting dishonestly simply means not acting as an honest person would in the circumstances;[53]

(f) The standard is an objective one;[54] and

(g) The trustees may still be held to have acted dishonestly even though they do not stand to gain personally for the impugned actions.[55]

[309] The authorities make clear that for the purposes of these clauses, irreducible core obligations do not include "the duties of skill and care, prudence and diligence."[56]

[310] Mark and Andrew in their pleadings have not specifically alleged bad faith or dishonesty on the part of John and GHTL. Allegations of this nature need to be clearly and directly pleaded if they are to be pursued.

[311] The limitation or exclusion clause in cl 12 of the Trust Deed is a reasonably wide one and on its face there is a reasonable argument that it might exculpate the trustees from any liability incurred here. I am satisfied this is not a case of bad faith or dishonesty of the trustees and that, if it became a relevant matter, it is arguable the exemption in cl 12 of the Trust Deed (although construed narrowly against the trustees) might apply to assist John and GHTL's position.

[312] Turning now to s 73 of the Trustee Act 1956, both John and GHTL plead an affirmative defence under this section, on the basis this Court may have made prima facie findings against them in respect of the second and third causes of action, which has not been the case.

[313] The essential requirements under s 73, however, are that the trustees:

(a) acted honestly and reasonably; and

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53 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).
54 *Wong v Burt*, above n 51.
55 *Armitage v Nurse*, above n 26.
56 *Armitage v Nurse*, above n 26 at [253].

(b) ought fairly to be excused for both breaching the Trust and omitting to obtain directions from the Court.

[314] The discretion under this section is fact dependent. Honesty is an objective standard.[57]

[315] From the authorities it seems that two factors are relevant to the availability of relief.[58] The first raises the question, is the conduct in accordance with the terms of the Trust? The second asks, would it have been desirable that an application for directions was made to the Court? Such an application for directions will be appropriate in connection with issues of interpretation and the extent of rights and powers arising under and incidental to the Trust Deed.

[316] Here, the decision to undertake the Ching's Block development without question was made in the light of cl 9.2 of the Trust Deed[59] and the applicable context factors which I have discussed above. It was a decision made by all the trustees including both Edna, one of the original settlors, and Mr Nelson, an independent solicitor trustee at the time.

[317] Any suggestion from Mark and Andrew that multiple trustees including an independent solicitor trustee and one of the original settlors, Edna, were complicit in a dishonest design to benefit John personally, to the exclusion of beneficiaries, despite acting in accordance with the Trust Deed, is simply not supported by the facts here.

[318] On a preliminary basis, there is a reasonable argument that s 73 of the Trustee Act would apply in this situation, given the trustees likely acted honestly and reasonably and ought fairly to be excused for any breaches of Trust.

[319] I conclude that if a decision on this aspect had been required, s 73 is likely to apply to provide an affirmative defence to John and GHTL if I had found them otherwise to be liable for breach of trust in this case.

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57 *Wong v Burt*, above n 51, at [53].

58 *Wong v Burt*, above n 51; and *Jones v AMP Perpetual Trustee Co NZ Ltd,* above n 20.

59 Clause 9.2 is the clause in the Trust Deed indicating that it was the wish of the settlors that the trustees subdivide.

THIRD CAUSE OF ACTION – Account of profits

[320] The third cause of action in Mark and Andrew's statement of claim seeks an account of profits against both John and GHTL in relation to all profits and increases of value with respect to the adjoining land, a disgorgement of project management fees paid to John or his company, a contribution to shared consent costs and a contribution for the use of the Trust's machinery. As to this last claim concerning the use of machinery, before me Mr Johnson confirmed that Mark and Andrew were not proceeding with this allegation.

[321] A key issue requiring determination here is whether there has been a breach of fiduciary duty in that John has obtained a benefit whilst acting in a position of conflict of interest and in circumstances where that conflict was neither authorised or excused nor waived under the express terms of the Trust Deed. So far as the claim against GHTL is concerned, the substance of the allegation is that GHTL, as a co-trustee, allowed or assisted John to act in positions of conflict and to profit thereby.

[322] It is Mark and Andrew's contention that, in short, if a breach of fiduciary duty on the part of John and GHTL is established and a profit has been made, in this case by John, an account must follow.

(a) Pleadings

[323] It is useful to set out this pleading in full:

> The plaintiffs repeat paragraphs 1 to 67 above and say further:
>
> 76 At all material times, a fiduciary relationship existed between John and Glasgow Harley Trustee (as trustees) and the plaintiffs (as beneficiaries).
>
> 77 The fiduciary duties owed by John and Glasgow Harley Trustee to the plaintiffs included:
>
> (a) A duty to act in good faith in the plaintiffs' interests.
>
> (b) A duty to take active measures to protect the plaintiffs' interests.
>
> (c) A duty not to act as trustee when their position as trustee conflicts with their personal interest.

(d) A duty not to act for their own benefit.

(e) A duty not to profit from their trusteeship.

78 John breached his fiduciary duties owed to the plaintiffs by:

(a) Undertaking the subdivision of Ching's Block and the Homestead Block in his self-interest rather than for the purpose of better benefiting the beneficiaries.

(b) Acting as trustee when his position as trustee conflicted with his personal interest.

(c) Himself and / or associated entities profiting from decisions made by him as trustee as follows:

(i) Management fees charged by John pursuant to the Management Agreement, as well as further amounts to be charged in respect of the development of Stage 1 of the Homestead Block.

(ii) John's contribution to the actual cost of the Initial Resource Consent Application and the Development Works being less than the pro-rata contribution required of him, as particularised at paragraphs 26 to 30 above.

(iii) The purchase of machinery and equipment by the Trust necessitating John and McQuarry Group undertaking earthworks on behalf of the Trust, and such machinery and equipment being used by John for the development of the Adjoining Land.

(iv) The benefits accruing to John and / or Keystone Partners Trust in respect of:

(1) The increase in value of the Adjoining Land as a result of the Initial Resource Consent Application and the Development Works.

(2) The profit from the sale of sections or lots comprised in the Adjoining Land.

79 Glasgow Harley Trustee knew that:

(a) John was at all material times in a position of conflict of interest.

(b) John was neither suitably qualified nor experienced to take on the role of project manager.

(c) John did not contribute further to the cost of the Initial Resource Consent Application or the Development Costs.

(d) John utilised equipment and machinery purchased by the Trust in respect of subdivision works on the Adjoining Land.

(e) Throughout the period in which the Trust was subdividing the Ching's Block, John and / or Keystone Partners Trust was subdividing the Adjoining Land and selling lots in competition with the Trust, at the same time as John was a trustee and the project manager for the development.

(f) John was hostile to the plaintiffs and Brett.

(g) Any breach of fiduciary duty committed by John would be to the detriment of the beneficiaries of the Trust.

80 In light of this knowledge, Glasgow Harley Trustee breached its fiduciary duties owed to the plaintiffs by:

(a) Consenting and being a party to all decisions made by the trustees while John was in a position of conflict of interest that benefited John and / or his related entities.

(b) Not requiring John to retire as a trustee of the Trust, in light of his conflicts of interest.

(c) Not putting in place appropriate reporting and supervisory mechanisms to manage John's conflicts of interest, to the extent any such conflict was able to be managed.

(d) Otherwise failing to take active measures for the protection of the beneficiaries' interest.

81 John cannot rely on clause 2.1(a) of the Trust Deed because he is not a professional project manager.

82 The Exclusion Clause is invalid at law being too wide in its scope.

83 To the extent that the Exclusion Clause is valid:

(a) John cannot rely on the Exclusion Clause because the breaches at paragraph 78(a)-(c) above were knowingly undertaken.

(b) Glasgow Harley Trustee cannot rely on the Exclusion Clause because:

(i) The breaches at paragraph 80(a)-(d) above were knowingly undertaken.

(ii) It was drafted by the firm of which it is the corporate trustee, namely, Glasgow Harley, in circumstances where that firm failed to advise the settlors to seek independent advice on it.

84 The Adjoining Land and any profit earned from subdivision was transferred by John and Wendy to the trustees of the Keystone Partners

Trust in around May 2017, in order that the trust take the benefit that would otherwise flow to John and Wendy directly from:

(a) any increase in value of the Adjoining Land; and / or

(b) the profit from the sale of lots comprised in the Adjoining Land.

85 The fact that either of the above benefits accrued to the Keystone Partners Trust, rather than John personally, does not affect John's and Glasgow Harley Trustee's personal accountability for profit earned in breach of fiduciary duty.

86 John and Glasgow Harley Trustee are liable to account to the Trust for profits made by John and / or persons and entities associated with him.

Wherefore the plaintiffs seek:

(a) An account of profits in respect of:

(i) Management fees charged by John pursuant to the Management Agreement totalling $1,777,500, plus further amounts to be quantified prior to trial.

(ii) The difference between John's contribution to the cost of the Initial Resource Consent Application, being $40,000 (plus GST), and the pro-rata contribution required of him to the actual cost of the Initial Resource Consent Application and the Development Works.

(iii) The benefits accruing to John and / or Keystone Partners Trust from the use of machinery and equipment purchased by the Trust being used by John for the development of the Adjoining Land.

(iv) The benefits accruing to John and / or Keystone Partners Trust in respect of:

(1) The increase in value of the Adjoining Land as a result of the Initial Resource Consent Application and the Development Works.

(2) The profit from the sale of sections or lots comprised in the Adjoining Land.

(b) Interest.

(c) Costs.

(b) A fiduciary's duties

[324] The key issue on this third cause of action is whether there has been a breach of fiduciary duty in that John, as a trustee, has obtained a benefit whilst acting in a

position of conflict of interest and in circumstances where that conflict was not authorised, excused nor waived.

[325] Here, as their pleadings make clear, Mark and Andrew as beneficiaries in their remaining claim seek an accounting of profits they allege John has made by way of:

(a) the management fees paid by the Trust;

(b) the difference between John's contribution to the cost of the initial resource consent application ($40,000 plus GST) and the pro rata contribution which should have been required of him relating to the actual cost;

(c) the benefits accruing to John and his family trust from the trust's subdivision of the Ching's Block as adjoining owners. This last claim is to include both the increase in value of this adjoining land as a result of the initial resource consent obtained and the development works, and also the profit from the sale of sections comprised in the adjoining land. Mark and Andrew say they will need these accounts and enquiries to be undertaken to identify what further orders should be made against John.

So far as their claim against GHTL is concerned, they contend GHTL is also liable here as it has assisted John to receive that profit. As beneficiaries, Mark and Andrew maintain they are entitled to the accounts and enquiries needed to carry out these purposes.

[326] The paradigm fiduciary relationship in the law applying here is that of trustee and beneficiary. The distinguishing obligation of a trustee as the fiduciary is an obligation of loyalty.[60] A trustee has an obligation to preserve and promote the interests of beneficiaries disinterestedly.[61] Two critical rules express this obligation – the "conflict rule" and the "profit rule".

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60 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at [18].
61 Peter Birks "The Content of Fiduciary Obligation" (2000) 34 Israel L Rev 3 at [32]–[33].

[327] The conflict rule requires that:

> …a trustee is not allowed to place himself in a position where his personal interest, or interest in another fiduciary capacity, conflicts or possibly may conflict with his duty.[62]

This rule operates to exclude even the possibility of conflict.

[328] The second rule, the "profit rule", is that a trustee:[63]

> …is not, in general, allowed to retain a benefit acquired or profit made by him from the use of trust property or in the course of and by virtue of his trusteeship.

[329] The purpose of the conflict and profit rules stems from the principle that the rules are intended to remove the temptation for trustees to breach other duties to their beneficiaries in order to profit themselves.[64]

[330] So far as the "profit rule" is concerned, *Lewin on Trusts* summarises the operation of the rule in this way:[65]

> A constructive trust is raised by a court of equity, wherever a person, clothed with a fiduciary character, without authority, gains some personal advantage by availing himself of his situation as trustee, whether directly or indirectly from the use of property subject to the trust or other fiduciary relationship, or in the course of the fiduciary relationship and by reason of his fiduciary position; for, as it is impossible that a trustee should without authority be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of the trust, the trustee, however good a legal title he may have, will be declared in equity to hold for the benefit of his beneficiaries.

[331] Generally, all parties accepted before me that the trustees knew from the outset that John was potentially conflicted in his position as a trustee. This was because, in addition to being a trustee and a beneficiary, he was also project manager of the Trust's subdivision, he provided a personal guarantee to the Bank of the Trust's development borrowings, and also he or his interests owned the land adjoining the Trust property.

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62 Tucker, Le Poidevin and Brightwell, above n 43, at [45-001]. Cited in *Newman v Clarke* [2016] EWHC 2959 (Ch) at [8]; *Bray v Ford* (1896) AC 44 (HL) at 51; and *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at [60]–[81].

63 Tucker, Le Poidevin and Brightwell, above n 43, at [45-001].

64 See *Bray v Ford*, above n 62; and *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.

65 Tucker, Le Poidevin and Brightwell, above n 43, at [45-044] (footnotes omitted).

[332] On these aspects, apart from circumstances where the informed consent of the court or of all the beneficiaries has been obtained, the main way the conflict and profit rules might be displaced is by:[66]

(a) specific provision in the terms of the trust; or

(b) implication in the terms of the trust.

[333] From the authorities it also seems apparent that it is necessary to mould fiduciary duties to the facts of each individual case. A closely held family trust context, like the present, needs careful consideration. Conflicts of interest in this setting can be and often are properly managed. I will address this further below.

[334] In the meantime, it is useful to consider the important exception to the no conflict rule which applies where a trustee is placed in the position of conflict by the settlors or by the terms of the trust.

[335] As Nourse LJ said in *Sargeant v National Westminster Bank Plc*:[67]

> At that stage the rule is expressed by saying that a trustee must not put himself in a position where his interest and duty conflict. But to express it in that way is to acknowledge that if he is put there, not by himself, but by the testator or settlor under whose dispositions his trust arises, the rule does not apply.

In circumstances where a trustee has been placed in a conflict position by the settlors or by the terms of the trust, the authorities indicate that the no conflict rule does not apply. John and GHTL contend this exception is directly engaged in the present case.

[336] In my view, it is reasonably arguable that John was placed in the position of conflict by the actions of Jim and Edna and the terms of the Trust itself.

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66 Kelly and Kelly, above n 19, at [20.173]; and Tucker, Le Poidevin and Brightwell, above n 43, at [46-010].

67 *Sargeant v National Westminster Bank Plc* (1996) 61 P. & C. R. 518 at 519.

[337] In a recent decision, *Justitiae Trustee Co Ltd v NZF Nominees Ltd*, this Court pointed out the operation of the exception to the no conflict rule, agreed that it applied there, and explained:[68]

> … that is the reality of what happened in this case, as is routine in family or other closely held arrangements, where the settlor can overlook such restrictions…

[338] And, conflict of interest situations, according to authorities in the past, have not automatically given rise to findings of breach of fiduciary duty. The context of particular cases is always important. As was said in *Jones v AMP Perpetual Trustee Co of NZ Ltd*[69] courts regularly mould fiduciary duties to the facts of each case and consider conflicts which can be appropriately managed with no detriment caused to the beneficiaries and no resultant breach of fiduciary duty. In those cases the law will not intervene.

[339] Were this not the case, then many family trusts both in New Zealand and elsewhere could not effectively operate, as commonly family members serving as a trustee are also a beneficiary and often engaged by the trust on a paid basis to carry out managerial or other functions for the trust.

[340] Indeed, at trial in this matter, Mr Fitzgerald, a lawyer called by Mark and Andrew as their independent trust expert, accepted it was common in a family trust context for inherent conflicts to be present from the inception but the important thing, he said, was how such conflicts were managed.

[341] Specifically, on this aspect, Mr Fitzgerald accepted in his evidence that:

> … trustees who are also beneficiaries, not uncommonly have management or executive responsibilities.
>
> … [and that they are often paid for their work and]
>
> … the important thing there is getting independent expert advice on the remuneration, so that there's no suggestion of favouritism or loading their remuneration because they're a trustee.

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68 *Justitiae Trustee Co Ltd v NZF Nominees Ltd* [2021] NZHC 659 at [135].
69 *Jones v AMP Perpetual Trustee Co NZ Ltd*, above n 20, at 711.

[342] The circumstances and nature of a particular trust are important. In *Jones v AMP Perpetual Trustee Co of NZ Ltd* the High Court said:[70]

> Whether there has been a breach of this underlying principle [as to the no conflict rule] will, to a large extent, be a question of fact and degree, and for that purpose the facts must be closely scrutinised.

(c) Discussion

[343] It is necessary in the present case to examine the context and circumstances surrounding this Trust to determine the nature and extent of the fiduciary duties owed and whether the exception principles noted above might apply. This involves determining whether the alleged conflicts relied upon by Mark and Andrew were authorised. This authorisation could be given expressly or impliedly under the Trust and/or inherent in the Trust setup, in that John was placed in a position of conflict by Jim and Edna, or by the terms of the Trust Deed. In this regard a number of contextual factors are relevant:

(a) The Trust Deed itself contained cl 9.2 with the specific subdivision direction and also cl 11(g) expanding the power of the trustees to include subdividing and developing property.

(b) The Trust Deed also contained cl 13 under the heading "Delegation and Professional Trustees" which stated:

> The Trustees shall not be bound in any case to act personally but shall be at full liberty to employ a solicitor or any other agent to transact all or any business of whatsoever nature required to be done under this Trust (including the receipt and payment of money) but not involving the exercise of any discretion and shall be entitled to be allowed and paid all charges and expenses so incurred…and further that any Trustee for the time being under these presents being a Solicitor or a Chartered Accountant or *other person engaged in any profession or business* shall be entitled to charge and be paid all usual or professional or other charges for business done by him or his firm in relation to the execution of the trusts of these presents whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a professional person.

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70 At 711.

(emphasis added)

So far as the scope and effect of cl 13 of the Trust Deed is concerned, a similar issue was considered in *Enright v Enright*[71] in relation to this type of clause. The clause there was not dissimilar and specifically referred to any "other person engaged in any profession, business or trade".[72] Palmer J in this Court considered the issue by reference to the fact the trust was engaged in the business of property development over the relevant period. He held accordingly the salary in question was authorised under the Trust Deed.

(c) As to cl 9.2 of the Trust Deed, no term for completing the subdivision was included, obviously bearing in mind that subdivisions are inherently long-term projects. The Trust too was set up for a maximum 80 year period and included provision not only for Edna and her four sons but also for their children and remoter issue and spouses.

(d) The adjoining land next to the Ching's Block was acquired by John and Wendy from Jim and Edna in 1979, some 25 years before the Trust was established. They did not acquire this adjoining land as a result of any circumstances arising out of the Trust. Certainly their acquisition occurred before there was any decision by Jim and Edna to create a trust.

(e) From it seems about 1979, and well before the establishment of the Trust, Jim had an eye on future subdivision and development of the farm which no doubt would have included a consideration of John and Wendy's ownership of the adjoining land and how all that might assist with reaching his subdivision objective. John's evidence was that he and Wendy initially wanted to move up north and they acquired the adjoining land at Jim and Edna's request in part because it was thought this would assist Jim's property development plans. This was because

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71 *Enright v Enright*, above n 44.
72 At [164].

it would "break the ice" on land use in the Marsden Valley and assist future re-zoning and consenting opportunities.

(f) These matters were all known to Jim and Edna as settlors when they settled the Trust and required the inclusion of cls 9.2 and 11(g) above. John's adjoining land interest was also seen as a definite advantage to the Trust's development.

(g) Once the Trust was established, in his lifetime Jim did not cede management to external parties as, on the evidence, it was precisely what he did not wish to do. Jim, it seems, wanted family direction with appropriate engagement of experts when required. On this, John's personal interests under the Trust both as beneficiary and as an adjoining landowner, along with his position as trustee, were part of the hard-wired structure established by Jim and Edna.

(h) The Trust itself also involved other potential conflicts for Jim and Edna. They were both settlors as well as trustees and beneficiaries and, because of their outstanding purchase price loans to the Trust for the land value, were also creditors.

(i) Any development of the Trust land would have provided a value uplift for all of the neighbouring land owners in the Marsden Valley. Obviously, this included John and Wendy.

(j) Brett also, as an owner of land adjoining the development area, would benefit in the same way. This was inherent in the Trust moving forward and an inevitable consequence of Jim and Edna's subdivision intentions as settlors.

(k) John in his evidence emphasised that he had no influence over who the trustees would be but from the outset he was selected by the settlors, his parents. Mr Nelson stated John was chosen because he was experienced in business and land development and also because. in

doing so for the Trust, he would be able to subdivide his smaller adjacent block. It is proper, in my view, to give particular weight to the settlors' choice of John as one of the initial trustees.

(l) The terms of the initial resource consent obtained from the Council covering both parts of the Ching's Block determined that any development of the land in that block would have to proceed in tandem with John's adjoining land. Evidence before me from John confirms that Jim understood it was necessary to include both blocks within the same consent, in order to obtain the best terms possible, because of the composite lots to maximise the number of sections and profit available.

(m) Prior to that 2006 consent application (resulting in the consent granted in 2007) for a long time Jim had been working on progressive consents and Plan Change processes in relation to the Ching's Block. Evidence is before me that these always included John's adjoining land. There is no contest as to this, nor that the Council consent process was an evolutionary one.

(n) Following inevitably from this was the fact that John and the Trust would have to share certain common costs arising out of the development of sections in Ching's Block Stage 1 and John's adjoining land. The resource consent cost, insofar as it concerned common matters, was regarded as such a shared cost. John (and Wendy) made an agreed contribution to that original resource consent work.

(o) The terms of the Council's consent obtained also meant that any development of the Ching's Block had to connect into the adjoining land owned by John and Wendy. This benefit to the adjoining land was inherent and integral in the system of carrying out the entire subdivision emanating from Jim's plans made even before the Trust was formed.

(p) "Connectivity" of services between the Ching's Block and John's adjoining land was a requirement of the consent process imposed by

the Council. It was not something that John procured by virtue of being a trustee. It was simply something that was necessary and imposed by the Council, because Marsden Valley at the time was a rural/residential zoned area and standard Council requirements were to apply.

(q) Inherent in all this was that John would be able to derive profit from developing his and Wendy's adjoining land from both the increase in land value and also revenue from selling their sections. This is land he and Wendy had acquired in 1979. Inherent in all of this was the fact that the combined development of both blocks also had potential to enhance the value of the Trust's remaining land for its benefit too.

(r) John effectively began his position as manager of the development as an inherent part of his role when he was selected as a trustee by Jim and Edna at the outset in 2004. Although his actual appointment by the trustees as project manager was only effected around July 2008, the evidence makes clear that this role (presumably unpaid) had started earlier.

(s) Jim and Edna, as settlors, specifically chose John to be a trustee in the context of their Trust Deed which stated a desire to subdivide in cl 9.2. John worked alongside Jim for many years prior to that as part of the consenting process and, as Jim's health deteriorated, John increasingly took the lead in this activity. The evidence before me confirmed that John's subsequent appointment as the project manager formalised in about July 2008. It simply gave effect to the purposes for which he was appointed in the first place. It confirmed and continued, albeit now in a paid position, the role he had been pursuing with Jim for the Trust and the family for some time prior.

[344] All of this context and the general circumstances surrounding the Trust were known to and accepted by Jim and Edna as settlors. A range of factors are relevant here. These included their long held farm land interest and their subdivision wishes, the usual dynamics applicable to many family trusts which often give rise to conflicts,

the ongoing local authority consenting process, the integration of the Trust's Ching's Block with the adjoining land held by John as part of that consenting and later development process, and finally the intentions of Jim and Edna that John would be involved in pursuing and managing the development. All these were important reasons John was chosen by them, first, as an initial trustee, and secondly, to succeed Jim as project manager for the entire development. Edna continued as a trustee once Jim had died and confirmed throughout that John's appointment as trustee and project manager was to continue.

[345] On these aspects the authors of *Lewin on Trusts*[73] observe that:

> …Where a self-dealing transaction comes within the authority of the trust instrument, it is freed not only from the application of the self-dealing rule but also from any less severe rule under which the burden of supporting the transaction is thrown on those seeking to uphold it.

[346] As I have noted above, John and GHTL suggested this was a complete answer to the third cause of action against them here. Largely, I agree. From the evidence it is clear the trustees always knew John was potentially conflicted in his position as trustee because he was project manager of the Trust's subdivision and, also, he owned the land adjoining the Trust's property. In my view, Jim and Edna authorised that conflict in relation to the adjoining land by appointing John as a trustee when he had an interest in that land. Any further conflict John had in acting as project manager was also effectively authorised by Jim and Edna as settlors through their actions from the outset. The authorities are clear that a conflict authorised by the settlors is excluded from the general rule that a trustee may not act in a position of conflict or profit from that conflict.[74] It necessarily follows therefore that the trustees were not required to manage what was John's authorised conflict.

[347] This conclusion goes some way to disposing of Mark and Andrew's third cause of action. But, in case I may be wrong on this aspect, I will go on to consider Mark and Andrew's further claims regarding alleged mismanagement by the trustees of John's acknowledged conflicts. At a general level in considering the beneficiaries' interests, I am satisfied the trustees here did take steps to ensure, first, that John was

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73 Tucker, Le Poidevin and Brightwell, above n 43, at [46-040] (footnote omitted).
74 *McNulty v McNulty* (2011) 3 NZTR 21–025 at [45].

not unduly benefitted by his interest in the adjoining land and, second, that he did not receive any unfair advantage from his role as project manager even though that role had been authorised by the settlors. I now outline my reasons for reaching those conclusions.

[348] So far as the adjoining land issue is concerned, the trustees did enter into two heads of agreement with John and Wendy. Those agreements were intended to ensure first that John and Wendy contributed a fair proportion to the cost of the initial Ching's Block resource consent that benefitted both parties and, secondly, to make clear, first, that once John's adjoining land subdivision did proceed, the resulting lots were not to be sold in competition with the Trust's lots and, secondly, to provide a mechanism to apportion the profits on composite lots.[75]

[349] Addressing the contribution John and Wendy made towards the costs of the initial resource consent (being some $45,000), evidence before me suggested this was set by the trustees at a fair amount at the time and the process followed to determine this contribution was a fair one. I will address this in more detail below.

[350] And, as to any conflict resulting from John's acting as project manager for the Trust, generally on the evidence I am satisfied the trustees did manage that conflict (even though, in any event, it may have had prior authorisation) in a proper way to remove any unfair advantage John may have received from that role. By way of example, both Mr Nelson, GHTL and other trustees ensured there was independent benchmarking of John's project management fees. The evidence before me showed also that John was excluded from decision-making procedures around the setting of these fees. Mr Hinton and Mr Nelson were involved also in settling the management agreement which governed John's role.

[351] As a result, I am satisfied on the evidence here, and in particular the expert evidence of Mr Sewell on this aspect, that John did not receive from his project management role more than what the trustees would otherwise have been required to pay an independent person to perform that role. It was a crucial role at the beginning

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[75] Composite lots were sections that were situated partly on the Trust's Ching's Block Stage 1 and partly on John's adjoining land.

and throughout the entire subdivision development and, indeed, Mr Sewell in his evidence suggested that if he had been trying to obtain a project manager in the Nelson area for a similar role at the time, it would be a "very tough job". It is true also, as I see it, that the Trust received additional benefits from having John as project manager in the sense that the evidence makes clear he was far more dedicated to achieving an outstanding result for the Trust, the project and the beneficiaries than any external project manager might normally have been.[76]

[352] The family trust at issue involves the entire McLaughlin family. Like many closely held family trusts, over the years it experienced varying measures of informality with regard to communication, reporting and governance. All this was to be expected. In the past general informality to some extent has also been regarded as acceptable in closely-held family trusts of this type.

[353] It follows too that, especially in standard family trusts like the present, conflicts of interest, actual or potential, are managed on an everyday basis with no actionable breach of fiduciary duty resulting. By way of example, in *Enright v Enright*[77] the High Court said:

> Appointment of the original trustees by the settlor when settling the trust may justify interpretation of the trust deed as authorising a conflict by implication, depending on the circumstances. The same rationale is not available in relation to subsequent trustees not appointed by the settlor, other than in exceptional circumstances.

[354] Here, John was appointed as an initial trustee by the settlors at the outset. This occurred too, from the evidence, with the knowledge that he was to be engaged as project manager for the subdivision.

[355] Mark and Andrew's trust expert, Mr Fitzgerald, accepted there were 300,000 to 500,000 family trusts in New Zealand and that potential conflicts would exist or arise in many of them. He agreed those conflicts can be and are managed regularly. I reject any suggestion which may have been made for Mark and Andrew that as a matter of law conflicts cannot be properly managed.

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[76] A number of comments as to the success of the entire Marsden Valley subdivision development undertaken by the Trust and a number of awards it received are in evidence before the Court.

[77] *Enright v Enright*, above n 44, at [160].

[356] The need in larger or more formal trust and governance structures for iron-clad rules of conflict avoidance and formalistic conflict policies are not necessary or appropriate in the many standard closely held family trust arrangements Mr Fitzgerald refers to such as the McLaughlins' family trust. In my view it is simply wrong to require that a trustee resign, if they are appointed notionally in a position of conflict in a family trust setup of the present type (for example where a trustee is also a beneficiary as was the case here with Jim, Edna and John). This can only thwart and frustrate the general purposes of such a trust and, in a case like this, the settlors' intentions. Similar objections too, in my judgment, apply with equal force to any other inherent conflicts which might arise.

[357] I turn now to consider how the conflicts which did arise for John as a trustee were managed specifically in this case. Clause 14 of the Trust Deed provided that any decisions of trustees were to be made by majority vote which must include at least one trustee who was not a discretionary beneficiary. This provided an inbuilt mechanism to ensure effective independence in any decision-making process. Mr Nelson in his evidence confirmed that cl 14 was drafted in these specific terms on the instructions of Jim and Edna as settlors and was a specific example of their intentions with respect to both John and themselves.

[358] Clause 8.2 of the Trust Deed provided also that at all times there were to be not less than two trustees of the Trust, at least one of whom could not be a discretionary beneficiary.

[359] The effect of these clauses 8.2 and 14 was that at all times there would be independent trustees with no possible self-interest and they would always be part of a majority decision. From the outset of the Trust, such independent trustees included variously Mr Nelson (later GHTL) and Mr Westrupp, and later Mr Kearney, Mr Russell and now Comac. For the period from early 2015 the Trust comprised five trustees. Three of these were independent, the other two being Edna and John. Edna had no interest in the project manager's role or the adjoining land. Even after Mr Kearney and Edna retired, there remained two independent trustees (Mr Russell and Mr Nelson or GHTL) until Mr Russell resigned in late 2017.

[360] While previously there were only three trustees (after Mr Westrupp resigned in 2007) and during the course of much of the Ching's Block activity, this included one of the settlors, Edna and the independent trustee, the solicitor Mr Nelson or GHTL. The trustees also took the step of utilising the services of the accountant, Mr Hinton, who advised, sat in on Trust meetings (as secretary) and acted as an informal advisor and sounding board to Edna and for all of the trustees. He was independent and, in detailed evidence and cross-examination he gave before me, impressed as a man of integrity and with significant concern and care for the Trust and for issues of good faith and proper decision-making.

[361] The evidence of Mr Nelson, Mr Hinton, Mr Russell and John confirms that the potential for John's conflict was known and accepted by all the trustees. Mr Hinton deposes that the potential for conflict with John's personal interests "was on the table from day one", and the trustees took steps to manage it. On some matters John abstained from involvement in decision-making steps such as the trustees' consideration of appropriate remuneration rates for him. Evidence before me showed that other trustees also considered the issues regarding John's involvement as a trustee in the combined development of John's adjoining land and the use of John as the paid project manager and director of the entire subdivision. As I see it, this was done on a transparent basis using external advice from acknowledged experts. From time to time Mark and Andrew were also informed of this. Formal agreements to address the issues, particularly from the time Mr Russell became a trustee, were produced. They took into account issues to avoid the potential for John to profit at the expense of the Trust.

[362] Around 2012/2013 the trustees sought advice from Mr Hollyer to conduct an independent overview of matters including the relationship between John, the Trust and its subdivision. His documentary evidence, although challenged on admissibility grounds by Mark and Andrew, I accept was admissible before me. It did not alert the trustees to any significant concerns with their arrangements with John or possible breaches.

[363] Assertions by Mark and Andrew that inherent conflicts John had were exacerbated by factors including his appointment as project manager, ignore the fact

that the process and permission for John to be appointed and paid in an ordinary course of business way may well have been permitted under cl 13 of the Trust Deed. This cl 13, as I have noted above at [343](b), provided a charging clause which allowed:

> … any trustee … being [an] other person engaged in any … business … [to] be entitled to charge and be paid all usual … charges for business done by him … in relation to the execution of the trusts …

[364] I will now turn to consider in more detail each of the particular conflict claims against John here.

(i) John's appointment and remuneration as project manager

[365] Mark and Andrew contend here the first type of profit John has made from his conflict of interest (which must be held on constructive trust for all the beneficiaries of the Trust) is represented by the remuneration he received as project management fees. They say he is liable to account for this in total as a constructive trustee of these payments or, alternatively, he is personally liable to account for the profit element. The amount to be accounted for is said to be around $1.1 million approximately. This, Mark and Andrew contend, is the amount accrued to John as project manager up to May 2021 ($1,980,500) less an amount identified by their accountant, Mr Smithies, as appropriate for the work undertaken on a percentage basis to represent an allowance for appropriate skill and labour undertaken here.

[366] In relation to these project management fees, Mark and Andrew state that, without John's appointment by the Trust as project manager, these fees would not have been earned by him. They say too that the total possible allowance they suggest here for John, being about $880,500, is at best a concession on their part. The burden for establishing the need to make any allowance for time, skill and effort John may have applied to the subdivision must lie on him here. And they question whether, in any event, he may have established the appropriateness of any such allowance.

[367] Overall, on these matters Mark and Andrew suggest it is appropriate to order an account as to these profits John and his interests have received. They say this will ensure there is a fair accounting for the management fees and profit he has inappropriately obtained here.

[368] In response, John's initial contention, as I have noted, is that the appointment of him as project manager was permitted under cl 13 of the Trust Deed.

[369] I have addressed above the context and circumstances of this appointment.

[370] Mark and Andrew in response suggest that John's initial appointment and continuation as project manager was entirely promoted by him simply because of his self-interest in being fully employed as such and being paid for this role. I reject this claim, however. It is not supported in any way by reliable evidence before me. What is uncontested is that John and his wife lived in the Marsden Valley area on the land adjacent to the Ching's Block for many years before this role began. It seems that Jim and Edna acknowledged too that John had shown a particular interest along with them in the overall property, its rezoning potential and its subsequent development for residential purposes. The evidence before me is clear that they wanted John, as an interested family member and local, involved in this project management role. This was a closely held family trust and John's conflicts were seen as being properly manageable throughout.

[371] On competence issues, Mr Sewell in his evidence commends John's performance over the years with the entire development. He makes clear too that John has worked admirably to achieve an excellent development result for the Trust. The implication I take from all his favourable comments is that John, if anything, has actually out-performed any outside project manager who might have been contracted to undertake the work.

[372] Lastly, on this aspect, I note that Mark and Andrew have repeatedly asserted that John was simply incapable of properly filling the role of project manager for this development. On the expert evidence that was before me, I must reject this contention. It was simply not borne out by other witnesses (including, in particular, Mr Sewell) who were qualified and in a position to judge this. Mark and Andrew's credibility in their constant attacks on John's competence here is seriously undermined by this other evidence before me. This includes evidence relating to the two awards which the surveyor, Mr Newton, and the Ching's subdivision won for what has been described as a standout subdivision. The significant weight of evidence at trial was that John

performed his project management/project director role here competently, effectively and with diligent hard work over a long period, achieving excellent results for what was not an easy ground-breaking subdivision in the Marsden Valley.

[373] I return now to the objections Mark and Andrew raise as to the level of remuneration paid to John as project manager over the various periods from 2008.

[374] Annual project management fees paid to John for the period 2008 – 2015 were initially set at $120,000 per annum including expenses. The evidence is that this amount was adjusted at some point to $130,000 per annum.

[375] While it is correct that the 2008 to 2015 period covered the bulk of the time for physical development of the Ching's Block, the services to be provided by John under the 2008 project management arrangement were much broader than simply the physical development of the 12.72 hectare Ching's Block Stage 1 land. Other roles undertaken by John included securing appropriate Plan Changes and resource consents for the entire Trust property, developing marketing and sales strategies, arranging appropriate bank and other funding, carrying out the subdivision work, and arranging other activities necessary to achieve the key outcomes of the development.

[376] Any criticisms from Mark and Andrew that John was writing his own contract terms as project manager for this or any later period are simply not justified on the evidence before me. Discussions between trustees other than John as to the terms of his employment and the rates to be paid occurred independently of him. These included, in particular, discussions with Edna as a trustee. Mr Hinton, too, provided input, in doing so no doubt relying on his commercial experience.

[377] In 2013 a relevant benchmarking assessment of John's employment payment terms was undertaken by Mr Ewing, an expert in this area from EQI Global. This occurred partly in response to issues arising out of enquiries from the accountants, Kendons, and the involvement of Mr Mahony in 2012/2013.

[378] Mr Ewing's estimated range for payment to a project manager for a development of this type was $180,000 to $220,000 with amounts being paid of up to

$260,000 per annum outside the Nelson area. These amounts were well above the $120,000 to $130,000 per annum paid to John, an amount which also included expenses at the time. Despite this, no suggestion is made that John even attempted then to use the opportunity to request any pay increase.

[379] From 2016 onwards, Mr Russell assisted in preparing a management agreement involving John and his company. That 2016 agreement specified an annual management fee of $180,000 per annum plus GST. This included $10,000 for expenses.

[380] The $180,000 fee was based on another benchmarking report, this one from accountants PWC carried out in August 2015. The impetus for this PWC report it seems came from Mr Kearney, who was then for a time chairman of the board of trustees for the Trust. Mr Kearney too, it seems clear, was the strongest proponent for John's remuneration at this $180,000 plus GST mark. And, interestingly, *all* parties to this proceeding, first, unequivocally accepted Mr Kearney's credentials as a well-known Nelson businessman with significant construction and development experience and expertise, and secondly, acknowledged the high regard he was accorded by all who knew him. Significant weight, as I see it, can be given to his views on this remuneration rate.

[381] Mr Russell, a trustee at that time, accepted this. He said in his evidence he regarded Mr Kearney's views as quite rightly a factor which he and the other trustees should give significant weight to.

[382] John said in his evidence (and others have confirmed) that the wide-ranging consenting, development and related work he had undertaken under his management contract throughout had been demanding and his role was a full time one. Despite this, John had not received management fees he had accrued since 2016 and at the date of the hearing in this matter these had accrued and I understand he was owed $520,950 in outstanding management fees (GST inclusive). This may have been in addition to a loan I understand he had made earlier to the Trust of $261,976.55 (GST inclusive) with respect to other management fees previously earned and declared but which also had never been paid to him.

[383] Suggestions are made too particularly by Mr Smithies, but also by Mark and Andrew that, in any event here, John's role was not a full time one. In my view, this contention is quickly dismissed, as evidence to this effect is limited and questionable. This evidence includes comments from Mr Smithies, the valuer, who it is acknowledged, unlike Mr Sewell, has no hands-on residential subdivision experience. Mr Smithies makes what I see as an unsupported statement that John's remuneration should have been based over an eight year period of the development "based upon a fulltime equivalent of 0.5 per cent (of the development cost) or thereabouts". Mr Smithies, although a registered valuer, I am satisfied was unable to establish before me that he was a truly qualified expert in the day-to-day details of subdivision or development matters. And, as to this evidence, I am satisfied he based his comments in any event on what was an incorrect assessment of John's role. As I see the position, it needs to be given little weight. By way of contrast, Mr Sewell, who clearly was a very experienced subdivision and development expert, illustrated in his evidence that John's role here was a full-time one, it was extensive, and it was a role he successfully undertook throughout. Indeed, Mr Sewell's oral evidence went so far as to confirm that, for him to employ a project manager to undertake even the bulk of the roles which have fallen to John here (particularly in Nelson which itself is a small market creating its own difficulties), would have required a salary to be paid in the order of $250,000 per annum plus.

[384] Lastly, Mark and Andrew repeatedly asserted throughout their evidence that John was simply not competent to fill the role of project manager for this development. I reject this contention. It is simply not borne out by reliable and expert evidence here from witnesses including, in particular, Mr Sewell, who were qualified and in a position to judge this. Mark and Andrew's credibility in attacking John's competence here must also be undermined, as I see it, by other evidence relating to the two awards which Newtons Survey and the Ching's subdivision won for the Trust's Marsden Valley subdivision as a standout subdivision. The significant weight of evidence before me was that John performed his project management and project direction role here competently, diligently, and with considerable hard work over a long period with good results.

[385] For all these reasons, I conclude that this aspect of Mark and Andrew's third cause of action must fail. The request for an account to be undertaken for John's project management fees, said by Mark and Andrew to involve an excessive amount of at least $1.1 million, is dismissed.

(ii) John's contribution as a neighbour to the initial resource consent cost

[386] Under this head, Mark and Andrew seek that a further account of profits exercise is undertaken. This exercise would be in relation to the difference between the contribution John paid to the cost of the initial resource consent application (being $40,000 (plus GST)) and what should have been a much higher figure to represent a true pro rata contribution required of him to the actual cost of the consent application and related development works.

[387] This raises a question also as to whether John improperly participated in the decision of the trustees at the time to require only a $40,000 (plus GST) contribution from him towards the initial resource consent, such that this was a breach of his duty as a trustee and represented an unacceptable conflict. The breach alleged by Mark and Andrew does not assert there was anything inherently wrong with a cost-sharing transaction being entered into at the time. Rather, the objection appears to be that John, under this arrangement, did not pay his fair share at this figure of $40,000 (plus GST).

[388] John in his evidence explains that the total $45,000 contribution (including GST) was based on the costs outlined for the initial 2007 resource consent from the Council. Evidence from the accountant, Mr Smith, links a $130,000 plus GST figure as the total approximate costs in relation to the consent application based on a total subdivision of 129 lots. Thus, the Trust was to meet $90,000 plus GST and John to meet $40,000 plus GST on a rough estimate basis. The arithmetic for this suggested that the $130,000 plus GST total, based on 129 lots, produced consent costs of $1,007 per lot. From the initial Council consent, the Trust was to benefit with 91 lots and John's adjoining land with 38 lots. The Trust's pro-rata share of this $130,000 plus GST for its 91 lots was therefore $91,637 and John's adjoining land share for 38 lots was $38,363. This general formula was accepted by the trustees at the time with

agreement recorded in contemporaneous documents. John's share for the 38 lots was rounded up to this $40,000 plus GST figure.

[389] As to the process adopted to reach this position, Mr Nelson in his evidence said that at the time (which was some 13 years ago) he discussed this issue with his co-trustee, Edna, and the accountant, Mr Hinton, separately from John. They were all satisfied it was fair.

[390] Mark and Andrew initially contended before me that the actual resource consent cost was not $130,000 but approximately $300,000 and that John, therefore, should have contributed a much higher figure than the $45,000 he paid. This was their initial assertion, later modified to an actual resource consent cost of $220,000. The $220,000 contention was based it seems on a 2009 funding application document prepared by John. The $300,000 figure it appears came from a 2016 report from Mr Sewell. The $300,000 figure was erroneous as Mr Sewell was referring in the report to the Homestead Block when that cost amount was provided.

[391] Issues also arise over whether the $220,000 represented a fair figure in identifying the precise costs legitimately related to joint or common processes between the Trust and John's entities. It is obvious there is no basis for requesting John to contribute to matters which benefit the Trust exclusively.

[392] I am satisfied Mark and Andrew have not adduced any unequivocal evidence before me to establish that the total actual shared resource consent cost was higher than the $130,000 (plus GST figure). It is true the $220,000 figure appears to have come from John himself in his later funding application material for the Trust. All this is historical however, relating back as it does to over a decade ago. The trustees at the time, Mr Nelson and Edna, and also Mr Hinton, were satisfied the $40,000 (plus GST) contribution was a fair one then. This Court should be reluctant to disturb commercial decisions made by independent trustees at the time with contemporaneous knowledge of the relevant circumstances. The amounts too, in any event, would not be particularly significant. Any difference is relatively minor in the context of the overall

claims made here.[78] John says, too, that if there was any benefit to him, which he denies, it is more than offset by a significant amount of unpaid work he did to obtain the consent, which the Trust benefitted from at no additional cost.

[393] I agree with John and GHTL that, from a legal perspective, there is little in this claim to a further contribution towards resource consent costs advanced before the Court. In advancing this particular claim here, Mark and Andrew have not met the evidential standard required, being on the balance of probabilities. That claim is dismissed. But having said that, I consider it appropriate in the entire context of this case to advance an invitation to John (which I now do), without constituting any legal obligation on his part to do so, to make an additional ex gratia payment to the Trust towards his or the Keystone Trust's contribution to the overall consenting costs he has himself noted at a total of $220,000.[79]

(iii) Were John's decisions as trustee to undertake the Ching's Block and Homestead Block developments made in his self-interest rather than in the interests of the Trust?

[394] It is appropriate at this point to briefly address the claim that John has been solely motivated by self-interest in his decisions as a trustee. This issue is raised at para 78(a) of Mark and Andrew's statement of claim outlined at [323] above.

[395] The answer to this question follows from the matters I have outlined above. This must include my conclusion as to the reasonableness of the decision taken by the trustees to undertake the Ching's Block development at the outset, in light of the purposes of the Trust, the meaning of cl 9.2 of the Trust Deed and the original intentions of Jim and Edna as settlors.

[396] I am satisfied here that Mark and Andrew have failed to establish that the original decisions to undertake the Ching's Block development, and then not to sell it uncompleted when economic conditions changed in about 2008, were decisions made

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78 Of the original consent figure at $130,000 (plus GST) used, the $40,000 (plus GST) paid by John amounted to about 30.8 per cent. If that original consent figure was calculated at $220,000 (plus GST), John's 30.8 per cent share would have been $67,760 (plus GST). A further payment of $27,760 would have been required from John.

79 This ex gratia payment would obviously be made without any admission of liability.

solely in John's self-interest. These decisions were made unanimously by all participating trustees. This included Edna as original settlor and trustee. They were the continuation of the processes Jim and Edna had already set in train and were in accordance with the express purpose outlined in the Trust Deed. The expert evidence is clear that these decisions were made for commercially justified reasons. Decisions made to continue the development ultimately were demonstrably better options for the beneficiaries than any alternatives of dumping land on a depressed market, assuming that any buyer could have been found.

[397] I reject the proposition that decisions to which John contributed to pursue development of the Ching's Block and later the Homestead Block were made solely in order to secure his ongoing employment as project manager. As I see it, that suggestion is simply not supported by the evidence. Efforts to cast John as desperate for a job and unable to obtain employment elsewhere are not supported by any evidence provided to me.

[398] And, so far as the Homestead Block is concerned, because it does not connect in any way to John and Wendy's adjoining land, I am satisfied its development does not involve a direct conflict with John's interest in that adjoining land. The only potential conflict relates to John's role as project manager generally and decisions to obtain funding for the Homestead Block. On these aspects I am satisfied, however, that the general merit of the Trust undertaking development of the Homestead Block is clear, given the substantial amount of evidence before me that subjected this question to significant scrutiny. Mr Sewell confirms the real merit in proceeding with the Homestead Block. Previously Mark and Andrew had sought a direction and injunction to prevent the development of the Homestead Block but, as I understand it, this was withdrawn after the merits of the application were questioned in this Court by Thomas J. Later, those merits were again considered by this Court when Mark and Andrew unsuccessfully applied for an injunction to prevent Stage 1 of the Homestead Block development from proceeding. Dunningham J, in her decision in this Court refusing the injunction, described the evidence advanced on behalf of John and GHTL

as "compelling as to the merits of the current course of action in terms of maintaining the value of the Trust property".[80]

[399] I conclude that Mark and Andrew's pleading that the Trust's decision to undertake the Homestead Block was also one made in John's self-interest does not bear further scrutiny. I dismiss it. I note in passing too that the current trustees of the Trust have sold most of the Homestead Block land for $6.7 million in response to what I understand was an unsolicited offer. This sale action is entirely inconsistent with Mark and Andrew's theory that John is trying to drag out the subdivision simply to continue his receipt of remuneration as project manager.

(iv) Has John derived benefits and/or profited from the Trust's subdivision of the Ching's Block as an adjoining landowner?

[400] Lastly, I turn to this aspect of Mark and Andrew's third cause of action. For this claim to succeed, I must first establish that there was a fiduciary breach and, secondly, if so, that any profits concerned were derived and arose as a consequence of that breach. Here, causation is an essential element of an account of profits succeeding. If I am to reach a point of ordering disgorgement of profits by John from his adjoining land, a subsequent process will be required for the taking of accounts.

[401] On all this, however, John contends any claim to profits obtained by him or the Keystone Trust, his Trust which owned and developed the adjoining land, is fundamentally misconceived.

[402] At the outset, it is clear the Keystone Trust is not a party to this proceeding. The evidence indicates this was a family trust settled on 4 May 2016 following John's separation from his wife, Wendy. John maintains it was a family trust settled for legitimate and normal reasons following a major change in his family circumstances.

[403] As a starting point, John contends the trustees of the Keystone Trust owed no fiduciary duties to Mark and Andrew and that, in any event, it has derived all proceeds of sale of the adjoining land sections simply from its own development of its land at

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80 *McLaughlin v McLaughlin,* above n 2, at [65].

its own cost. He maintains too, no basis has been established here for treating the Keystone Trust as his alter ego in respect of subdivision activity carried out by John and for his benefit.

[404] Any question of profits obtained by John prior to the transfer to the Keystone Trust which occurred on 18 May 2017 does not arise here. There were no sales of sections from this adjoining land made until August 2017, with the majority of sales not settling until 1 April 2020.

[405] Both John and Mr Hinton, who was a trustee of the Keystone Trust, state that its development on the adjoining land was an entirely separate exercise from that undertaken by the Trust on its land. The Keystone Trust and John used separate contractors with separate planning processes and entirely separate funding sources.

[406] Further, Mark and Andrew have not sought to join John's former wife, Wendy, as a party to this proceeding. She and John, as original owners of the adjoining land, sold it to the Keystone Trust and any pre-transfer profits would have been jointly owned by her and John. Clearly this Court has jurisdiction only in respect of alleged profits obtained by John alone.

[407] I am satisfied, too, that no account of profits can lie in this case simply because of an increase in the value of the adjoining land whether prior to, or subsequent to, the May 2017 transfer to the Keystone Trust. Causation becomes a real issue and is problematic here for Mark and Andrew. Any such increase in value of the Keystone Trust land naturally follows from its location in the Marsden Valley next to land with a developing change to residential use. It is a property right which belongs to the landowner and, as I see it, causation simply cannot be established here.

[408] Although it is accepted that the development of the Ching's Block created efficiencies and benefits for John's adjoining land in terms of connecting to boundary services, and "opening up" the Valley, much of that has also occurred for other neighbouring land owned by the McCashin family and others. All this was simply a consequence of the Trust carrying out the Ching's Block subdivision, a subdivision expressly pursued by Jim before he died and completed by the Trust. Benefits to

John's adjoining land were not caused by any breach by John of his fiduciary duty to the Trust.

[409] As to suggestions from Mark and Andrew that, although not pleaded, John should also have contributed to the cost of roads, bridges and other services installed on the Trust's land which benefitted his adjoining land, no convincing evidence of any type was provided to the Court to support these assertions.

[410] And, in any event, no legal principle has been advanced to support the proposition that an account of profits should be ordered on the basis that a neighbouring landowner did not subsidise development work on the Trust's land, land which it did not own, when it had no legal obligation to do so. This cannot constitute attackable profit the adjoining land has obtained. Before me, in cross-examination Mark and Andrew endeavoured to advance a theory the trustees erred in that they should have waited for another unconnected neighbour in the Marsden Valley (for example, Solitaire) to develop first. Although this claim was unpleaded, it is of no substance when the facts before the Court clearly establish two critical points. First, that Solitaire's Quail Rise resource consent was not granted until 18 December 2014, some seven years after the Ching's Block consent and its subdivision. Second, another small 17 lot development, Tussock Place, although mentioned only in passing, was consented to only on 26 March 2008, it had significantly lower quality design features, and it was located at the start of Marsden Valley. That Tussock Place development, therefore, would also have provided little benefit to the trustees had they waited for it to be completed.

[411] It necessarily follows that Mark and Andrew, in requesting an account of profits resulting from the adjoining land development, must be signalling for the Court ultimately to grant a remedy against the Keystone Trust. The trustees of that trust, as I note above, have not been joined as parties to this proceeding. As I see it, this creates an immediate difficulty for Mark and Andrew.

[412] Notwithstanding this, and in any event, Mark and Andrew have simply been unable to establish on the balance of probabilities that, even had there been an actionable breach of fiduciary duty on the part of John (and I have found otherwise),

in terms of causation John has profited by virtue of those actions by obtaining benefits from the sale of adjoining land sections directly from that breach of duty. I also, therefore, reject this aspect of Mark and Andrew's third cause of action against John here.

(d) Third cause of action against GHTL

[413] The substance of Mark and Andrew's allegations against GHTL in this proceeding relate largely to this third cause of action. At [80] of their pleading noted at [323] above, they contend that GHTL allowed/assisted John to act in positions of conflict and to profit thereby.

[414] This raises two issues so far as the claim against GHTL is concerned:

(a) If John was conflicted in any of the ways alleged by Mark and Andrew, did GHTL as a matter of law have to address those alleged conflicts of interest and, if so, how did it do that?

(b) Even if GHTL did not adequately address the alleged conflicts (which has been denied) and assuming that allowed John to profit thereby (again which has been denied) can GHTL be liable as a matter of law to account for profits that it did not make?

[415] Here, I have concluded for the reasons outlined above that, even if it is accepted there was a potential for unauthorised conflicts of interest on the part of John to occur, these were appropriately managed by the trustees and there was no recoverable benefit derived by John.

[416] At [80](b) of Mark and Andrew's statement of claim they contend that GHTL ought to have required John to retire as a trustee in light of what they say were these alleged conflicts of interest. On this, clearly there was no ability for GHTL, however, as only one of the trustees, to require John to resign under the Trust Deed. It would have required Edna, prior to 4 April 2016 when she purported to resign as appointor, to remove John. The only other possible route would have been to make application to the Court which I accept was simply not warranted here.

[417] I turn now to the issue as to whether GHTL, in any event, can be liable as a matter of law for the alleged profits made by John. On this Mark and Andrew, it seems, qualified their claim that GHTL is jointly and severally liable for any order to disgorge profits made against John by saying this is only to the extent that John is unable to meet any award himself. This represented an oral submission made before me by Mr Johnson. I consider, however, that this claim against GHTL is fundamentally misconceived. Unlike compensatory damages which are measured by what a plaintiff may have lost, an account of profits is measured by what a defendant has gained.[81] Here, GHTL maintains it has gained nothing. I accept this is the case.

[418] An errant fiduciary will only be liable to account for profit it has made. The leading case relating to this is the Supreme Court decision in *Stevens v Premium Real Estate Ltd*.[82] In that case, Mr and Mrs Stevens retained Premium to sell their home. Premium induced the Stevens to sell the home to a Mr Larsen knowing, but not telling the Stevens, that Mr Larsen was in the business of re-selling homes quickly for a profit. The Stevens sued Premium for the profit made by Mr Larsen in re-selling the home. On that claim the Supreme Court found Premium to be in breach of its fiduciary duty but, however, refused to make an order that it account for the profits made by Mr Larsen.

[419] The Supreme Court held that the errant fiduciary could not be liable to account because it had not shared in the profit made. This decision in *Premium* is binding on me. Although I accept it was not a case involving a trustee as fiduciary, the activity or occupation in which Premium as defendant was engaged and gave rise to the fiduciary obligation, was not important and did not affect the principle reached. It is the existence of the fiduciary duty (which can be one owed by real estate agents, directors, trustees and others) that is important when determining the remedy.

[420] Even if I had found that GHTL had breached its fiduciary duties and John had profited here (and I have found otherwise) GHTL, as I see it, cannot be liable for a profit it did not make. To hold otherwise would be inequitable and not serve the purpose behind the remedy of an account of profits.

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81 *Chirnside v Fay*, above n 64, at [17].
82 *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 884.

(e) Section 73 Trustee Act 1956

[421] Had I found otherwise regarding the third cause of action there is a possible argument that s 73 of the Trustee Act is available to John and GHTL in the context of this account of profits claim, it being a defence available in the event of breaches of trust being established.

[422] On this, John relies upon the principles and comments which I have addressed with respect to the second cause of action claim noted above.

[423] By way of additional comment, I note that a principle of acquiescence is of some relevance relating to this aspect. In particular, plaintiffs who seek a remedy of account in equity cannot stand by and permit defendants to make profits over a period and then claim those profits for themselves.[83]

[424] John says this is precisely what Mark and Andrew have done in this case. He says they have simply stood by and allowed the trustees to proceed with development of the Ching's Block and now complain. This occurred, first, in the period 2007 to 2011 when, despite reports being provided to them to make it clear the Ching's Block development was happening, they raised no objection and showed little interest. Secondly, in the period 2012 to 2017, John says that despite some five years of intensive communications by the trustees to Mark and Andrew, they did not at any stage place him or the trustees on notice that they would seek disgorgement of alleged profits or that it was a belief or expectation that development works to be undertaken on John's adjoining land (albeit by third parties) would be for the benefit of the Trust. No demands were made that the development of the Ching's Block stop. It is fair to say that would have been at odds with what appeared to be Mark and Andrew's main concern, underlying their appointment of Mr Davidson QC, which was their stated desire for faster distributions to be made from the Trust.

[425] Given the reasons outlined earlier and the delays I note above, including general acquiescence on the part of Mark and Andrew, I find here it would be

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[83] See Tucker, Le Poidevin and Brightwell, above n 43, at [41-123] and Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [31.6.1].

inappropriate in the interests of justice to make any order for disgorgement or account of profits.

[426] For all the reasons I have outlined above, this third breach of fiduciary duty cause of action against John and also against GHTL seeking an account of profits fails. It is dismissed.

Result

[427] For the reasons I have indicated above:

(a) As to Mark and Andrew's first cause of action relating to removal of John as a trustee of the Trust, this effectively succeeds, given that John has now agreed to retire as a trustee. An order is now made, as referred to in [116] above, confirming that, pursuant to John's expressed wish to retire as a trustee of the Trust, which the Court accepts, John does so retire and he is hereby removed as a trustee of the Trust, effective from the 16th day of November 2021.

(b) Pursuant to [151] above, an order is now made that Paul Dorrance is appointed as the new trustee of the Trust to replace John effective from the 16th day of November 2021 subject to Paul Dorrance completing an appropriate consent to act prior to that date.

(c) As to Mark and Andrew's second cause of action against John and GHTL seeking compensation for alleged breach of their duties to the beneficiaries relating to the Ching's Block subdivision, that claim fails and it is dismissed.

(d) As to Mark and Andrew's third cause of action seeking an account of profits from John and GHTL with respect to alleged breaches of fiduciary duty, this claim also fails and is dismissed.

Costs

[428] Certain issues as to a possible claim for costs have arisen from Mark and Andrew's pleadings in this case. In addition, costs with respect to the proceeding and the hearing before me need to be determined.

[429] Counsel at the hearing requested that costs should be reserved. If necessary, they suggested these could be the subject of further submissions.

[430] That said, costs are reserved.

[431] Counsel for the parties are urged to liaise with a view to endeavouring to resolve between themselves all issues as to costs. Failing this being achieved, then the parties may file (sequentially) memoranda of submissions as to costs and, in the absence of either party indicating they wish to be heard on that question, I will decide the issue of costs based upon the memoranda filed and all the other material which has been provided relating to this proceeding.

Final words

[432] At [11] above, I indicated that the first words in this unfortunate family dispute should fall to Edna. Areas of concern which the parties have exhibited reflect the wider and combative family dispute between these siblings. A primary task between the McLaughlin brothers and affected members of their individual families ought now to be building bridges between the two sides. The inter-family problems which developed are not of a kind that any Court can fully resolve. That resolution will require restraint, common sense and generosity of spirit from all.

[433] Bearing all this in mind, it seems only appropriate that the final words in this whole sad and unfortunate saga should again fall to Edna:[84]

> I am glad that the Trust dispute has not interfered with my relationship with my children or grandchildren too much but very much hope that these issues can be resolved without court action.

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84 At para [42] of Edna's 7 November 2016 affidavit.

[434] Regrettably, Edna's hopes and aspirations came to nothing. This bruising dispute over the Trust went the distance in this Court. With this judgment, that aspect, in the High Court at least, is now over. Hopefully, despite the brothers having been pitted against each other for many years (for which no doubt everyone feels aggrieved), a time might come when Edna's expressed concerns about the relationships in her family will result in real efforts being made to heal the rifts so all can move forward with their lives.

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Gendall J

Solicitors:
Wynn Williams, Auckland
N Lawrence, Barrister, Christchurch
Jeremy Johnson Barrister, Auckland
Nathan Gedye QC, Barrister, Auckland
Buddle Findlay, Christchurch
Janna McGuigan Barrister Limited, Christchurch