IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA712/2021
CA435/2022
[2023] NZCA 473

BETWEEN	MARK JAMES MCLAUGHLIN AND ANDREW ASHLEY MCLAUGHLIN Appellants
AND	JOHN DAVID MANUEL MCLAUGHLIN First Respondent
AND	GLASGOW HARLEY TRUSTEE LIMITED Second Respondent
AND	BRETT GARDNER MCLAUGHLIN Interested Party

Hearing:	7 March 2023
Court:	French, Courtney and Clifford JJ
Counsel:	J W A Johnson, S T Dymond and A A H Low for Appellants N S Gedye KC, G G Dill-Russell and O D Peers for First Respondent No appearance for Second Respondent J M McGuigan for Interested Party
Judgment:	29 September 2023 at 3 pm

JUDGMENT OF THE COURT

A The appellants' application for leave to adduce the further evidence of Mark James McLaughlin is declined.

B The appeal in CA712/2021 is dismissed.

C The appeal in CA435/2022 is dismissed and the cross-appeal allowed. The High Court's imposition of a 20 per cent reduction on the costs and disbursements otherwise payable to the first respondent by the appellants

and the Trust is quashed, but in all other respects the High Court's decision on costs is affirmed.

D The appellants must pay the first respondent costs on the two appeals and cross-appeal calculated on the basis of a standard appeal, band A, together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] John McLaughlin (John) was a trustee of a family discretionary trust established by his parents.[1] The Trust undertook a residential subdivision which included the Trust's own land as well as land belonging to John and his wife. John's company was engaged by the Trust as the project manager for the subdivision and was paid a fixed fee.

[2] John's three brothers, who are discretionary beneficiaries, became unhappy with the way the Trust was being run. Two of them, the appellants Mark and Andrew McLaughlin, issued proceedings in the High Court making various claims of breach of trust against John and another trustee, the second respondent Glasgow Harley Trustee Ltd. Those claims included a cause of action against John for an account of profits.

[3] The case came before Gendall J. The Judge found on the evidence that Mark and Andrew's allegations were unfounded. He held that at all times the trustees, including John, had acted competently and in the best interests of the beneficiaries.[2] He further held that in so far as John had any conflicts of interest, those conflicts had been either impliedly authorised by the settlors or expressly authorised in the Trust Deed and had been appropriately managed.[3]

[4] Mark and Andrew now appeal the Judge's rejection of their claim for an account of profits against John.[4] Although a fourth brother, Brett, is not a party to the appeal, he was represented as an interested party and made submissions in support of Mark and Andrew's case.

[5] Both parties challenge aspects of the Judge's subsequent costs decision.[5] Mark and Andrew appeal the Judge's decision to award increased costs against them in

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1 To avoid confusion, we refer to all members of the McLaughlin family by their first names.
2 *McLaughlin v McLaughlin* [2021] NZHC 3015 [High Court judgment] at [372] and [384].
3 At [346]–[351] and [357]–[363].
4 The claim against the second respondent was withdrawn by agreement shortly before the hearing of the appeal.
5 *McLaughlin v McLaughlin* [2022] NZHC 1841 [Costs judgment].

John's favour. John cross-appeals the Judge's decision to discount the award of costs by 20 per cent.

[6] The substantive appeal regarding John's liability has been allocated the file number CA712/2021. The costs appeal and cross-appeal have been allocated the file number CA435/2022. Both appeals were heard at the same time.

[7] Although the substantive appeal is limited to the claim against John, it is necessary to traverse the general factual background in some detail because of the issues raised in the costs appeal.

Background

Events leading to the creation of the Trust

[8] In the early 1960s, the four brothers, then just children, shifted with their parents Jim and Edna McLaughlin to Nelson. Jim took up a position as general manager of a local company.

[9] The couple purchased land in the Marsden Valley. Their first purchase was of a block of land referred to in the proceeding as the Homestead Block. Relatively soon after purchasing the Homestead Block, Jim and Edna purchased another block of land across the road called Ching's Block. Taking both blocks into account, the total land area acquired was approximately 100 hectares.

[10] Jim and Edna ran stock on both properties.

[11] It was not an economic farm unit and Jim continued to work full time in his managerial role. Jim was an astute businessman and according to the evidence always had it in mind that the land being close to Nelson City would be ripe for residential subdivision in the future. He was very confident about that. When it became apparent, however, that no ready market existed for the land, his thinking changed from one of exploring potential sale opportunities with local developers to a firm belief that money could only be made if the family developed the land themselves.

[12] In the ensuing years, three of the sons left the Nelson area to pursue careers of their own. Mark became a doctor, Andrew a vet and John a registered valuer. With financial assistance from his parents, Brett acquired a small area of land near Ching's Block and farmed a portion of the Homestead Block.

[13] Jim retired from his managerial position at age 62. There is no evidence as to his date of birth and therefore no evidence as to exactly when he retired. However, drawing inferences from other evidence, it is likely to have been in the late 1970s or early 1980s.

[14] In 1979 John, who was employed by the Rural Bank at the time, returned to Nelson. His parents subdivided a block of five hectares at the back of Ching's Block which they sold to John and his then wife Wendy. For ease of reference, we will call this five hectares "John's Land".[6] This transaction was done at the parents' initiative for two reasons: partly to prevent the property being resold to someone who might oppose Jim's subdivision plans and also because Jim thought the sale would set a precedent for subdivision.

[15] During the 1990s, Jim persisted with his vision of a subdivision and made several resource consent applications. These were initially unsuccessful because the local authorities were opposed to subdivision in the Marsden Valley.

[16] In 1994, Ching's Block and John's Land were rezoned under a plan change to rural/residential, and in 1996 Jim and Edna were granted resource consent to subdivide 106 hectares. However, the minimum lot sizes stipulated under the consent were too large to make a subdivision profitable having regard to the costs involved and the likely yields from sale of the individual allotments. What Jim needed in order to realise his vision was residential zoning with small urban sections. He continued to press the local authorities and renewed his consent application.

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[6] In May 2017 following the breakdown of their marriage, John and Wendy transferred their land to a family trust, which was not a party to the proceedings. Although the High Court Judge considered this might of itself be an impediment to an accounting of profits, it has become unnecessary for us to express any view on the correctness of that proposition.

[17] Around 2000, Jim and Edna obtained a further resource consent which included both their land and John's Land. It allowed for subdivision and the creation of around 70 residential lots with a minimum size of 1500 square metres across parts of the Homestead Block and Ching's Block with the balance of the holding sub-divisible into rural/residential lots. In his evidence, John said this "broke the ice" but was still not sufficient because 70 lots would also have never been economic.

The creation of the Trust in 2004

[18] The Trust, called the Ashley Trust, was settled by Jim and Edna on 26 February 2004. They appointed themselves as the trustees along with John and a solicitor, Mr Brian Nelson, who had acted for Jim and Edna for many years. The discretionary beneficiaries of the Trust were Jim and Edna, their children, 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.

[19] The Trust Deed empowered the trustees to subdivide and develop property, and under the heading "Settlor's Wishes" provided as follows:

> 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.

[20] Mr Nelson, who drafted the Trust Deed, testified that Jim had wanted to make it mandatory for the trustees to undertake a subdivision development but was persuaded it was better to give them some flexibility in case of unforeseen events outside their control. Hence the word "wish".

[21] On 22 April 2004, Jim and Edna transferred Ching's Block and the Homestead Block to the Trust for the sum of $9.9 million. The land was the Trust's primary asset. The debt of $9.9 million owing by the Trust to Edna and Jim as a result of the transfer was to be forgiven in their respective wills. Meanwhile, they retained a leasehold interest for their lifetime.

[22] Also in April 2004, a fifth trustee was appointed, Mr Westrupp, a retired accountant.

[23] As at the date the Trust was established, both Jim and Edna were in their 80s. Jim's health was failing after a stroke. The subdivision development was in limbo with the necessary consents still to be obtained. Jim remained confident however that they would eventually be obtained. It was just a matter of time, possibly a long time, but it would happen. He was convinced there was no money in farming and that the greatest value in the land lay in subdividing it. He also wanted it to be his family who got the maximum benefit of that by doing the subdivision itself and not letting external developers take the golden egg.

[24] It is clear in our view from the overwhelming weight of evidence that the primary reason for the creation of the Trust was to provide a vehicle whereby the land would be preserved for subdivision and the subdivision work able to be continued after Jim's death. According to Mr Nelson, Jim made the comment that the Trust would keep going long after he was dead and would not be waylaid from its purpose by other family members. Under the Trust Deed, the Trust was to endure for a maximum of 80 years.

[25] As regards the selection of the initial trustees, Mr Nelson testified that he asked Jim why he wanted John to be a trustee and whether any of his other sons should also be appointed. Jim's response was that he trusted John to carry out his subdivision project and that none of his other sons had any interest in it. In contrast to his brothers, John was interested and being next door was already involved, plus unlike the others he had experience in business and land development.

[26] Under the Trust Deed, the number of trustees was not to be less than two persons, one of whom could not be a discretionary beneficiary. The deed also provided that the trustees' decisions were not required to be unanimous. A majority vote was sufficient, provided that the majority included at least one person who was not a discretionary beneficiary. As noted by the Judge, the combined effect of these provisions was that there would always be an independent trustee with no possible self-interest, and that they would always be part of any majority decision.[7]

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7 High Court judgment, above n 2, at [357]–[359].

Events after the creation of the Trust

[27] Between 2004 and 2007 John was actively involved in pursuing the development plans at Jim's request and with the agreement of the other trustees.

[28] In December 2006, the Trust together with John and Wendy made a joint application for a resource consent to subdivide Ching's Block. The application was for a staged subdivision with 117 residential lots over both the Trust land and John's Land. The inclusion of both pieces of land was seen as necessary to obtain a consent on the most favourable terms.

[29] The subdivision plan and consent application were prepared by surveyors. Jim and John were disappointed with the work that had been done and discussed ways to improve it. Jim asked John to take over sole management of the consent process.

[30] Jim died on 21 May 2007.

[31] By the time of Jim's death, John had taken over all aspects of the management of the project, including the application process, and had begun to assemble a project design team.

[32] A few months after Jim's death, Mr Westrupp, who it will be recalled was appointed a trustee in April 2004, expressed misgivings about the subdivision which he thought was too big for the Trust. He also thought John was moving too quickly. Those views were not shared by the other trustees and the Trust's accountant. Mr Westrupp later resigned in September 2007.

[33] Also in September 2007, Mr Nelson retired as a trustee in his personal capacity and was replaced by his firm's professional trustee company, the second respondent Glasgow Harley Trustee. Mr Nelson was a director of Glasgow Harley Trustee and acted on its behalf in relation to the Trust. He therefore continued to attend trustee meetings along with Edna and John.

[34] On 8 November 2007, the resource consent that would enable Stage One, the residential subdivision of 129 lots, of Ching's Block to proceed was finally obtained.[8] The Trust had 91 lots in the Ching's Block of which 15 were composite or shared lots comprising both Trust land and John's Land (the Composite Lots.)

[35] In order to obtain bank funding for Stage One, John personally guaranteed the Trust's borrowings up to $3.7 million. Had he not done so, the Trust would not have been able to proceed. In evidence John said he was prepared to provide the guarantee with the comfort that he could ensure the subdivision was properly managed.

[36] In around April 2008, Mr Hinton, the Trust's accountant, was employed as an adviser to the trustees and in particular to Edna.

[37] The following month, on John's initiative the Trust applied for a further plan change to rezone all the Trust land, including the Homestead Block, as residential. The Council adopted the proposed plan change as its own and applied the rezoning to all properties in the Marsden Valley. This was of significant benefit for the Trust's Homestead Block because it meant residential subdivision with a minimum lot size of 400 square metres could be undertaken as of right, accompanied by designated areas for comprehensive housing and commercial activity.

Appointment of John as project manager in 2008

[38] Up until early June 2008, John had been undertaking unpaid work on the development while still in full-time employment as the Chief Executive Officer of a building company. He gave uncontested evidence that during 2007 and 2008 he invested a significant amount of time — hundreds of hours — into managing the consent process, including taking a week's leave to attend a consent hearing. He was not paid to do any of this work by the Trust and nor did he seek payment for it.

[39] According to Mr Nelson's evidence, without John the consenting process begun by Jim would never have been completed nor would the development have been able to be undertaken by the Trust.

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[8] The application was initially for 117 lots but was redrawn to include 129 lots prior to consent being granted.

[40] Given the size of the proposed development, it had, however, always been anticipated that the Trust would at some stage need to employ a project manager.

[41] In the week his job with the building company was due to end, John emailed Mr Nelson on 3 June 2008 attaching a role description for a contract for him (John) to manage the development. The email with the subject line "Re Marsden Park management" read:

> Brian
>
> I have attached the principal expectations and tasks to manage Marsden Park development to best advantage.
>
> I finish the job I am doing this Friday and I need confirmation of a management contract as soon as reasonably possible. It is very difficult to size this position. The best indication I have, given the scale of the project, is in the ball park of around $180k. However, given this is a family situation and to get the project started I'm happy to accept a contract of $120k pa with a review after 12 months. A contract would mean I would meet all my own expenses including vehicle etc which gives a clean, simple and transparent arrangement which should leave no issue open to challenge. While I need to get into this full time from next week to meet our targeted start of Oct 2008, I don't expect to start the contract formally until 1st July 2008.
>
> I have had a brief discussion with Alan re this and I think it would be a good idea for you to get agreement with him so we can record this in the minutes etc. I would appreciate a call once you have had time to consider.

[42] A copy of the email was forwarded that same day to Mr Hinton. The reference to a targeted start date of October 2008 was a reference to the Ching's Block development.

[43] It is clear from the wording of the email and the reference to a prior discussion with Mr Hinton that the contents would not have come out of the blue for either Mr Nelson or Mr Hinton. That is confirmed by the oral evidence of Mr Nelson. It appears, presumably during discussion about future project management, that John had offered to undertake the role and that Mr Nelson had asked John to give him a list of the tasks that John thought needed to be done.

[44] The position was never advertised or put out for tender. However, in Mr Nelson's assessment, John was the right person for the role. He had the necessary background and had already demonstrated he had the necessary skills and commitment

to the project and the Trust. Mr Nelson was impressed with John. He described him as dedicated to realising his parents' vision and the Trust's goal of maximising the value of the land for the benefit of the Trust.

[45] As a general rule, a trustee is not entitled to remuneration for their time and trouble in order to avoid a conflict between their personal interests and their duty to the beneficiaries.[9] One of the exceptions to this rule is if remuneration is provided for expressly or impliedly in the trust deed.[10]

[46] Mr Nelson testified that he considered John was entitled to receive payment as project manager despite being also a trustee because this was permitted by an express charging clause in the Trust Deed, cl 13.

[47] Although John's proposal email does not specifically mention this, the proposal was that John would provide the management services through the corporate vehicle of a consulting company he owned called McQuarry Group Ltd (John's Company). The company had been incorporated in June 2005, which was after the Trust was established but some two years before Jim died.

[48] On receipt of the email from John, Mr Nelson asked Mr Hinton if his accounting firm had benchmarking facilities so that they could "ascertain the reasonableness of John's proposed contract". Mr Nelson noted that if John bore his own general expenses that would be worth $12,000 to $15,000 a year for the Trust.

[49] Mr Hinton then consulted with a specialist executive recruitment company, reviewed the list of duties and made some of his own inquiries into appropriate benchmarking. In evidence, he said he considered whether a contract based on a return as a percentage of sales was preferable to a fixed fee, but ultimately opted for the latter because the role encompassed so much more than just sales. A fixed fee allowed for overall management including times when sales would be low but workload every bit as high.

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9 See for example *Peach v Jagger* (1910) 30 NZLR 423 (SC) at 428; and *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190 at [90].

10 See for example *Peach v Jagger*, above n 9, at 428; and *Spencer v Spencer*, above n 9, at [91].

[50] Mr Hinton duly reported back to Mr Nelson advising he would be comfortable with the remuneration proposed by John.

[51] On 13 June 2008, Mr Nelson sought Edna's views. He forwarded her John's proposal which he described as a proposal the Trust enter into a contract with John's Company for John to manage the subdivision project on a full-time basis at a fixed fee of $120,000 plus GST per year. The email exchanges and the draft job description were also forwarded for her consideration. At some stage, according to Mr Nelson's testimony, he made some amendments to the job description.

[52] Edna subsequently confirmed to Mr Nelson and Mr Hinton that she agreed the fee was fair and reasonable and that John's Company should be appointed.

[53] It appears from the minutes of a meeting of the trustees the following month on 2 July 2008 that a draft management contract between the Trust and John's Company was discussed,[11] and a resolution passed that Mr Nelson was to consider the contract and have it approved by the trustees.

[54] In attendance at the meeting were Edna, Mr Nelson, John and Mr Hinton. The contract was one of 10 matters discussed at the meeting. John is not recorded as having abstained in respect of any matter. At the time, the trustees appear to have been operating under the mistaken belief that the Trust Deed did not allow for majority decisions. However, based on the evidence of Messrs Nelson, Hinton and Russell, that did not mean that John in fact participated in decisions relating to him personally, including the project management contract. According to their evidence, he invariably disqualified himself.

[55] While the management fee was approved, the reality was that the Trust did not have the funds to pay John. John agreed he would not get paid until the Trust could afford it. That did not happen for some eight years during which the vast majority of the work required to complete the Ching's Block subdivision was undertaken.

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[11] Strictly speaking, the parties to the contract were Marsden Park Ltd, the corporate vehicle for the Trust's subdivision, and John's Company.

[56] Due to the Trust's inability to pay John, a completed contract of services was never signed in order to avoid creating a liability in the Trust's accounts.

[57] What was signed in July 2008 was a Heads of Agreement between the Trust and John and Wendy regarding the subdivision. The key features of the agreement were:

(a) the Trust's land would be subdivided first;

(b) John and Wendy were to contribute $45,000 to the costs of obtaining the consent to subdivide;

(c) the lot size on John's Land was to be larger in order to satisfy a council requirement that the subdivision must include some larger lot sizes;

(d) the Trust was to meet its own costs in obtaining a rezoning of the remainder of its land; and

(e) the division of net profits on the sale of composite land was to be divided rateably in accordance with the area contributed by each party. The calculation of the net profit in respect of each section to be agreed or, failing agreement, by a third party.

[58] The agreement was signed by John both in his capacity as trustee (along with Edna and Mr Nelson) and in his personal capacity.

[59] In late 2008 an application for an amendment to the resource consent increasing the available lots on Ching's Block from 129 to 130 was granted. Very shortly thereafter, at the end of 2008, the physical subdivision work, being the initial bulk earthworks, began.

Events after the commencement of the Ching's Block development

[60] Work on the Ching's Block development continued for several years.

[61] In around 2011 Mark and Andrew's concerns about the development and John's conflicts of interest began to surface. They engaged their own professional advisers to look into the operation of the Trust. The advice they received encouraged them to persist with challenges to the way the Trust was being run.

[62] In 2012, the trustees themselves arranged for an independent review of the Trust, including the arrangements with John. The reviewer did not identify any significant concerns. The review did not however allay Mark and Andrew's concerns and in response they commissioned their own expert to conduct a report, which was produced in 2013.

[63] In 2014, the trustees made two distributions, totalling $550,000, to each of the four brothers.

[64] The following year in April, Mr Ian Kearney, a solicitor with experience and expertise in the Nelson development and building sector was appointed as an independent professional trustee in anticipation of Edna retiring as a trustee. He became the Chair of the trustees.

[65] On 5 August 2015 a second independent professional trustee, Mr Russell, also a solicitor, was appointed. Mr Russell had been nominated by Mark and Andrew's lawyer. Mr Russell was an experienced commercial lawyer with significant governance and trusteeship experience. It was hoped his appointment would help allay Mark and Andrew's concerns.

[66] In his evidence, Mr Russell said his initial observations were that the Marsden Valley subdivision was a project with considerable economic upside and that the trustees were conscientious. However, both he and Mr Kearney considered that greater formality was needed in terms of documentation and decision-making processes. In particular, both considered it important to formalise the unsigned management agreement with John's Company and to resolve the situation of the unpaid remuneration for past services. A substantial sum was now owing, and Mr Russell recommended that advice be sought from Deloitte as to how this payment should be made.

[67] Looking ahead to the future, Messrs Kearney and Russell also considered that John's salary needed to be agreed, formally recorded and remuneration set on the basis of independent and objective criteria. They were aware that market benchmark information had previously been used but were of the view that a formal evaluation should be obtained from a suitably qualified expert. Accordingly, a decision was made to instruct the accounting firm PricewaterhouseCoopers (PwC).

[68] Like Mr Nelson, neither Mr Kearney nor Mr Russell saw any legal impediment to John receiving remuneration from the Trust given the terms of the Trust Deed, and in particular the charging clause.

[69] By the time of Mr Russell's appointment in August 2015, the Ching's Block subdivision (including John's Land) had largely been completed, save for some hillside sections. The main focus of the trustees was now on the issue of whether to proceed with the subdivision of the Homestead Block.

[70] The PwC remuneration report was provided to the trustees on 28 August 2015. The report provided an average total remuneration benchmark of $163,500 per annum for the role of property development manager with a 75th percentile rate of $181,500. The trustees had what Mr Russell described in evidence as "some robust discussions" before agreeing on a package of $180,000. Mr Russell confirmed Mr Nelson's testimony that John was largely excluded from these discussions and was not privy to the correspondence. John had no involvement in the final decision which was made on 27 November 2015.

[71] In September 2015 Edna retired as trustee.[12]

[72] In March 2016, Mr Kearney retired following receipt of a letter from Mark that Mr Kearney was said by others to have considered offensive. Mr Russell replaced him as Chair. That same month, there was discussion at a trustee meeting initiated by Mr Russell as to whether John should resign as trustee. Mr Russell's evidence was that although he did not consider John's conflicts were unlawful under the Trust Deed, he thought John's resignation might appease Mark and Andrew and take the heat out

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[12] Edna retained her power as settlor to appoint trustees, but resigned as the appointer in 2016.

of their complaints. Mr Nelson and John however felt this would be to defeat one of the founding elements of the Trust.

[73] It was agreed on Mr Russell's advice that the Trust Deed should be amended to ensure the independent trustees could always outvote John. In fact, an amendment was not required because as previously mentioned at [26] the Trust Deed already had that effect.

[74] On 31 March 2016, on the advice of Deloitte the Trust paid John's Company the arrears owing to it which amounted to approximately $800,000. No interest was paid. The payment was later documented in a signed agreement. An agreement between the Trust and John's Company providing for the annual management fee of $180,000 was also signed. John did not sign that agreement as trustee.

[75] In response to threats of legal action from Mark and Andrew, Edna now in her 90s swore an affidavit on 7 November 2016. In the affidavit she detailed the background to the creation of the Trust and the selection of the trustees. Her affidavit was consistent with the evidence given at trial by John and Mr Nelson.

[76] The following month, the trustees obtained a report from an independent consultant Mr Tony Sewell. They had engaged him on the recommendation of Mr Russell to review the quality of the development and to advise on future plans. Mr Sewell had recently retired as the CEO of Ngāi Tahu, a position which he had held for 21 years and was, Mr Russell said in evidence, well known within the professional community for being one of the foremost experts in residential development in the South Island.

[77] Mr Sewell's report to the trustees identified some issues around financial reporting and budgeting but was generally positive. It confirmed that the first stages of the development had been managed to an acceptable standard, that to date it had been a success in the market, that its design and construction was sound, and that it was profitable. It also confirmed that the remuneration being paid to John was in line with the market. Under the heading "The Proceed with Development or Sell

Question", Mr Sewell identified significant benefits for the beneficiaries in continuing with the development of the Homestead Block.

[78] On 15 August 2017, the Trust obtained resource consent for the subdivision of the Homestead Block into 220 lots in 21 stages.

[79] During 2017 and 2018, the first sales of the lots in John's Land took place as did the sales of the last Ching's Block sections, except for the nine hillside sections, which remained unsold.

The court proceedings

[80] On 24 August 2017, Mark and Andrew issued the current proceedings in the High Court against John, Mr Russell and Glasgow Harley Trustee as the then current trustees, and against Mr Nelson as a former trustee.

[81] The essence of the claim was that the subdivision project undertaken by the trustees had been a disaster due to mismanagement and that the beneficiaries would have been better off had the Trust land been sold in 2008 and the proceeds invested. Coupled with this was what Mark and Andrew described in evidence as "a main and enduring concern" that the only person who had really benefited from the decision to subdivide the Trust land was John. He had earned significant fees as the project manager and obtained significant benefits as the owner of the adjoining land. It was also alleged that the decisions to undertake the Ching's Block development and then not to sell it uncompleted when economic conditions changed in 2008 were decisions made in John's self-interest because he was desperate for work and wanted to be appointed project manager.

[82] Mark and Andrew said they wanted an explanation as to how a clearly conflicted trustee had effectively been able to run the development, profiting himself along the way, with his co-trustees taking no steps to protect the Trust and its beneficiaries. They also accused the trustees of a lack of consultation, secrecy and hostility.

[83] Due to the risk of personal exposure, Mr Russell was forced to resign as trustee on 12 December 2017, and was subsequently removed as a defendant.[13] Mr Nelson was also removed as a defendant at the same time.[14] That left John and Glasgow Harley Trustee as the sole defendants.

[84] In evidence, Mr Russell said he very much regretted having to resign. He considered Mark and Andrew's claims were unreasonable and said he had reached a firm view that the development work was soundly run and would continue to provide solid commercial benefits for the beneficiaries. Despite resigning, he remained involved with the Trust in an advisory capacity.

[85] Then followed two contested interlocutory applications. First, in 2018, Mark and Andrew applied to the High Court for a restraining order, seeking to restrain John and Glasgow Harley Trustee from using Trust funds to defend their claims. In response the trustees sought and obtained a court order allowing them to do that in relation to claims regarding the subdivision.[15] Then, in 2019, Mark and Andrew unsuccessfully sought an interim injunction to stop the trustees from proceeding any further with the Homestead Block development, the trustees having resolved to progress development of Stage One and sell several lots.[16]

[86] The statement of claim pleaded three causes of action:

(a) First cause of action — removal of John as trustee and replacement with a professional trustee, on the grounds that John had misconducted himself in the administration of the trust.

(b) Second cause of action — John and Glasgow Harley Trustee had breached several of the duties they owed the beneficiaries including

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13 *McLaughlin v McLaughlin* HC Nelson CIV-2017-442-52, 18 December 2019 (Minute of Associate Judge Lester) at [3(i)].
14 At [3(i)].
15 *McLaughlin v McLaughlin* [2018] NZHC 3198, [2019] NZAR 286 [Beddoe judgment].
16 *McLaughlin v McLaughlin* [2019] NZHC 2597, [2019] NZFLR 299 [Injunction judgment].

their duty of prudent investment with regards to the decision to embark upon and carry out the Ching's Block subdivision.[17]

(c) Third cause of action — breach of fiduciary duty by John in obtaining personal benefits while acting in a position of conflict of interest, and by Glasgow Harley Trustee as co-trustee allowing and assisting John to act in a position of conflict and to profit.

[87] Under the third cause of action, Mark and Andrew sought an account of profits from John and Glasgow Harley Trustee in relation to:

(a) all profits received from the subdivision of John's Land;

(b) the increase in value of John's Land due to the initial consent obtained by the Trust and the developments on the Trust's land;

(c) disgorgement of the project management fees paid to John or his company; and

(d) the difference between the contribution John had paid to shared resource consent costs and the amount he should have contributed.[18]

The hearing in the High Court

[88] The hearing in the High Court took place over several weeks in May and June of 2021. Sadly, during that time Edna died. Despite opposition from Mark and Andrew, the Judge held that her 2016 affidavit should be admitted into evidence.[19]

[89] As at the date of the High Court hearing, the Trust was partway through the completion of Stage One of the Homestead Block subdivision, sections having been pre-sold with completion scheduled for October 2021. The gross revenue from the

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17 The Ching's Block being the first block developed by the trustees was the main focus of the criticisms of the performance of the development.

18 An account of profits was also sought in relation to John's use of trust machinery and other equipment for the development of his own land but this was not pursued at the hearing in the High Court.

19 High Court judgment, above n 2, at [13]–[15].

sales was expected to be in the vicinity of $6 to $7 million. The process to obtain consents for another area of land within the Homestead Block, called Edna's Block, was also underway. As regards the remainder of the Homestead Block, a decision had been made to sell it, with the consents that had been obtained, to a developer. The nine hill sections in the Ching's Block were still unsold. There had not been any distribution to beneficiaries other than the $550,000 paid to each of the brothers in 2014.

[90] At trial, evidence was given by Mark, Andrew, Brett and John along with Messrs Russell, Nelson and Hinton. There was also extensive expert evidence regarding the financial viability of the subdivision project, as well as the quality of the work done by John and the remuneration paid to him.

[91] After the evidence had concluded but before closing submissions, John advised the Judge that he had decided to resign as a trustee.

The High Court judgment

[92] John's resignation meant it was unnecessary for the Judge to consider the first cause of action save only that he needed to decide who should replace John as trustee, the parties being unable to agree. Mr Dorrance, a trust lawyer, was appointed as replacement trustee.[20]

[93] In dismissing the second cause of action — breach of the trustees' duties as regards the decision to embark on and undertake the Ching's Block subdivision — the Judge placed considerable weight on Jim and Edna's intentions for the Trust as expressed in cl 9.2 of the Trust Deed quoted above at [19].[21]

[94] As to the commercial wisdom of honouring those intentions and the management of the subdivision, the Judge preferred the expert evidence called by the trustees to that called by Mark and Andrew. In particular, the Judge found the evidence of Mr Sewell as to the profitability and quality of the subdivision particularly

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20 At [151].
21 At [172]–[198].

compelling.[22] As well as Mr Sewell's evidence, the Judge also relied on evidence the Ching's Block subdivision had won a prize as a standout development, together with evidence of Westpac's continued willingness to support the project.[23]

[95] In contrast the Judge considered that an expert called by Mark and Andrew had strayed into areas outside his expertise, and that a report Mark and Andrew had obtained in 2013 critical of the Trust was hearsay, the report writer not being called to give evidence.[24]

[96] In so far as the second cause of action included an allegation that the trustees had failed to appoint a suitable and qualified project manager, the Judge found that there was "nothing in [that] suggestion".[25] In his assessment, Mark and Andrew's "scathing comments" about John's abilities were not supported by the evidence and were more indicative of their hostility towards their brother than any other objective assessment.[26] The Judge was satisfied John had performed his role competently, diligently and with considerable hard work over a long period, with good results.[27]

[97] The Judge concluded that the Ching's Block subdivision was performing well and that once the hill sections were sold its fair overall profitability was likely to be in the $7 million to $8 million range, which was what had been forecast in 2014.[28]

[98] In relation to the third cause of action, the Judge identified a key issue as being whether John had:[29]

> … obtained a benefit whilst acting in a position of conflict of interest and in circumstances where that conflict was neither authorised nor excused nor waived under the express terms of the Trust Deed.

[99] The Judge found that Edna and Jim had authorised that conflict by appointing John as trustee knowing of his interest in the adjoining land and that any further

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22 See for example at [165], [246(a)], [251], [372] and [384].
23 At [166], [249], [268], [372] and [384].
24 At [163]–[164].
25 At [286].
26 At [285].
27 At [283]–[286].
28 At [246] and [248].
29 At [321].

conflict he had in acting as project manager was also effectively authorised by Jim and Edna through their actions.[30] The conflict having been authorised by the settlors, it followed that the trustees were not required to manage it.[31]

[100] In case he was wrong on that, the Judge went on to consider what steps the trustees had taken to manage the conflict.[32] After reviewing the evidence of the use of independent trustees, an independent adviser to the Trust, the obtaining of external advice, the commissioning of the 2012/2013 review, and the exclusion of John from decision making involving the setting of his remuneration; the Judge concluded that the trustees had appropriately managed the conflict.[33] The Judge also found on the evidence that John did not receive from his project management role more than what the trustees would otherwise have been required to pay an outside person.[34] He also added that he took from Mr Sewell's favourable comments that if anything John had outperformed any outside project manager who might have been contracted.[35]

[101] The Judge concluded that all decisions regarding the Ching's Block were made for the benefit of the Trust and dismissed the application for an account of profits.[36]

[102] Although it was not necessary for the Judge to do so, he also went on to state there was a possible argument that even if John had breached his duties as trustee, it would not be in the interests of justice to make any order for disgorgement having regard to s 73 of the Trustee Act 1956[37] and the principle of acquiescence.[38] Mark and Andrew had not put John on notice they were seeking a disgorgement of profits until 2017 and in the intervening period they had stood by and allowed the trustees to proceed with the development of Ching's Block.

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30 At [346].
31 At [346].
32 At [347].
33 At [350], [359]–[362] and [415].
34 At [351].
35 At [371].
36 At [396]–[397], [399], [408] and [426].
37 Section 73 empowers the Court to relieve a trustee partly or wholly from personal liability for breach of trust if the trustee has acted honestly and reasonably and ought fairly to be excused for the breach.
38 High Court judgment, above n 2, at [421]–[425].

[103] Dissatisfied with that outcome, Mark and Andrew filed an appeal in this Court. As mentioned, the grounds of appeal only relate to the third cause of action, that is the claim against John for an account of profits.

Preliminary matters prior to the appeal hearing

[104] Initially Glasgow Harley Trustee was named as a respondent in the appeal. However, prior to the appeal hearing, counsel advised the Court that Mark and Andrew had reached an agreement with Glasgow Harley Trustee and would no longer pursue the appeal against it. Mark and Andrew also confirmed they would not oppose any application by Glasgow Harley Trustee seeking an indemnity from the Trust in relation to costs incurred on the appeal.

[105] Also prior to the appeal hearing, Mark and Andrew filed an application for leave to adduce further evidence. The proposed further evidence consisted of an affidavit from Mark annexing the Trust's financial statements for the year ended 31 March 2022, which had only recently become available.

[106] The evidence was provisionally admitted for the purposes of the appeal hearing on the basis that a final decision would be made as to its admissibility in our judgment.

[107] While we accept the proposed further evidence is fresh and credible, we have decided it should not be admitted for the simple reason that it is not relevant to the issues on appeal. The financial performance of the Trust was only relevant to the second cause of action seeking equitable compensation in respect of the Ching's Block subdivision. But that cause of action has not been appealed. The substantive appeal is limited to the claim for a disgorgement of profits from an allegedly errant fiduciary.

[108] The application to adduce the further evidence is accordingly declined.

[109] We turn now to consider the merits of the appeal regarding John's liability to account.

Arguments on appeal

[110] On behalf of Mark and Andrew, Mr Johnson told us we need only read three English cases, *Da Silva v Heselton*, *Sargeant v National Westminster Bank Plc* and *Breakspear v Ackland*,[39] to be satisfied that the Judge's decision in this case represents a significant departure from established English authority and should not be allowed to stand. In particular, he contended that the Judge had made two fundamental errors of law.

[111] First, in reaching his conclusion that the charging clause (cl 13 of the Trust Deed) expressly authorised John acting in a position of conflict, the Judge adopted far too expansive an interpretation of the Trust Deed and wrongly relied on contextual factors that largely arose after settlement of the Trust. In Mr Johnson's submission, if the Judge's finding is allowed to stand, trustees will be able to use a standard clause like cl 13 to effectively create a job for themselves and charge the trust.

[112] The second and related error was to support a finding of implied authorisation by reference largely to events that took place after settlement.

[113] In Mr Johnson's submission, the Judge was led into these errors because he was imbued with the misconceived idea that the usual strict rules relating to trustee obligations do not apply, or at least not with the same force, to the trustees of closely held family discretionary trusts. While Mr Johnson accepted that some latitude may be afforded to trustees of family trusts, in this case it went too far and, in the process, fundamental trust rules that go to the very concept of a trust were undermined.

Analysis

The rule against self-dealing and the exceptions to it

[114] Mark and Andrew's claim of breach of fiduciary duty is based on two well established and fundamental rules that apply to all trustees, including trustees of

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[39] *Da Silva v Heselton* [2022] EWCA Civ 880, 25 ITELR 130; *Sargeant v National Westminster Bank Plc* (1990) 61 P & CR 518 (CA); and *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] CH 32.

family trusts. Both rules are in effect sub-sets of the trustee's core duty of loyalty and fidelity which is the hall mark of a fiduciary relationship.[40]

[115] The first is the rule that a trustee must not profit from their trusteeship. If they do, equity will invariably require the profit be disgorged. The second rule (aimed to prevent the trustee from being able to profit from their trust in the first place) is that a trustee must not put themselves into a position where their interest and duty conflict.[41]

[116] Although the rules are sometimes described as absolute rules or prohibitions,[42] there are some established exceptions, those exceptions being where the self-dealing transaction or conduct at issue is:

(a) either expressly authorised by the trust deed;[43] or

(b) impliedly authorised by the settlor;[44] or

(c) sanctioned by the court.[45]

[117] In holding that John had not breached his fiduciary obligations despite his conflicts of interest, the Judge relied principally on the second exception and in particular the decision of the English Court of Appeal in *Sargeant v National Westminster Bank plc*.[46] In submissions, John's counsel, Mr Gedye KC, described this decision as being at the heart of the present case.

[118] *Sargeant* concerned a retired farmer Henry Sargeant who owned three freehold farms which he leased to his children on yearly tenancies. The children farmed the

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40 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18.

41 *Re Thompson's Settlement* [1986] Ch 99, [1985] 2 All ER 720 at 730. See also *Spencer v Spencer*, above n 9, at [90]; and *Enright v Enright* [2019] NZHC 1124 at [154]–[160].

42 *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721 (HL) at 115 per Lord Guest and 123 per Lord Upjohn.

43 *Bray v Ford* [1896] AC 44 (HL) at 51; *Breakspear*, above n 39, at [114(a)]; and *Enright,* above n 41, at [159]–[160].

44 *Sargeant,* above n 39*,* at 522–524. See also *Dever v Knobloch* HC Napier CIV-2008-441-537, 29 October 2009 at [46]–[47]; and *Enright,* above n 41, at [159]–[160].

45 *New Zealand Māori Council v Foulkes* [2014] NZHC 1225 at [22].

46 High Court judgment, above n 2, at [334]–[336] and [346], citing *Sargeant*, above n 39, at 519.

three properties in partnership, each being entitled to a one third share of the profits. The leasehold interests were assets of the partnership.[47]

[119] The father died in 1969. Under his will, he appointed his widow and the three children as trustees and executors. He gave his residuary estate, including the three farms, to his trustees on trust for sale and conversion, a life interest to his widow and directed that on her death, the capital was to be held on trust for such of his children as should survive him, and if more than one in equal shares absolutely. The will also conferred a power on his trustees to purchase any portion of his estate for themselves, notwithstanding that they were a trustee.[48]

[120] Thus, each child as well as having the duties of a trustee also had the rights of a tenant and a beneficiary.

[121] The widow died in 1973 and shortly thereafter one of the children, Charles, also died. On Charles' death, he ceased to be a trustee of his father's will but his estate retained his beneficial interest in the farms subject to the tenancies. Charles' estate did not however retain his interest in the tenancies because following his death, his two siblings exercised the option conferred on them by the partnership deed to acquire that interest. The two surviving trustees continued to farm the three properties and paid rent into their father's estate.[49]

[122] The dispute before the Court of Appeal centred on whether the trustees were entitled to exercise their powers under the will to sell the farms either to third parties or to themselves without first terminating the tenancies. The value of the farms was significantly greater with vacant possession than without. The administrators of Charles' estate[50] argued the trustees had a duty to obtain the best price possible for the freeholds of the farms, and therefore if they went ahead without ending the tenancies, they would be putting themselves in a position where there was a conflict between their duty to the beneficiaries and their own personal interests.[51]

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47 *Sargeant,* above n 39, at 519–520.
48 At 520.
49 At 520 and 523.
50 Charles died without a will requiring the appointment of administrators.
51 *Sargeant,* above n 39, at 520–522 and 524.

[123] The Court accepted there was no doubt that ever since Charles' death the trustees had been in a position where their interests as tenants might conflict with their duties as trustees. However, it went on to say there was "a conclusive objection" to the application of the self-dealing rule, namely that it was not the trustees who had put themselves into that position. Rather, they had been put there by the testator, by his grant of the tenancies and the provisions of his will, and also by the contractual arrangements to which Charles himself was a party.[52]

[124] The rule having no application, the trustees were not required to appoint a new trustee before making any sale subject to the tenancies. Nor was there any absolute bar to their selling to themselves while the tenancies subsisted. On the other hand, it was also said, they must continue to discharge their fiduciary obligations to Charles' estate in regard to the freeholds by obtaining the best price for them subject to the tenancies.[53]

[125] *Sargeant* has been cited with approval in New Zealand[54] and in Australia[55] and regarded as authoritative in the leading English text, *Lewin on Trusts*.[56] The principle it enunciates has been described as an exclusion of the self-dealing rule by necessary implication, arising not from the wording of the trust instrument, but from the circumstances in which the appointment was made by the settlor.[57] In the present case, the Judge used the notion of implied authority to capture the same concept.

[126] While acknowledging the existence of the "implicit authorisation" exception, Mr Johnson emphasised that it was a narrow exception. He submitted there was a distinction to be drawn between the administrative powers of trustees and their dispositive powers, and that, in the past, the cases dealing with implicit authorisation have primarily been confined to cases of dispositive powers rather than administrative

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52 At 523.
53 At 523.
54 See for example *McNulty v McNulty* (2011) 3 NZTR 21-025 (HC) at [45].
55 See for example *Brine v Carter* [2015] SASC 205 at [144].
56 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Thomson Reuters, London, 2020) vol 2 at [46-005] and [46-041].
57 *Brine*, above n 55, at [143]–[144]; and Tucker, Le Poidevin and Brightwell, above n 56, at [46-041]. We note it was common ground in this case that the mere fact a settlor of a family trust appoints a beneficiary/family member as a trustee does not of itself necessarily trigger the application of the *Sargeant* exception. All depends on the particular circumstances.

powers.[58] According to Mr Johnson, in cases, such as *Sargeant,* which involve purely administrative powers, there can only be implicit authorisation if the self-dealing was an axiomatic and necessary consequence of the trustee being appointed as trustee from settlement.

[127] In so far as there was a suggestion in the submissions that the exception only applies to dispositive powers, we do not accept that submission. No such distinction is drawn in the caselaw, and we know of no reason of policy or principle why that should be so and nor did Mr Johnson identify one. We would also question the characterisation of the powers at issue in *Sargeant* as purely administrative.

[128] We do however agree that for the purposes of determining whether the exception applies in this case, the primary focus must be on the circumstances that existed at the time of the settlement. Findings relating to those circumstances, including settlor intentions, may of course be informed by evidence of subsequent conduct.

John's conflict of interest as adjoining landowner

[129] As regards the conflict of interest that existed between John's duties as a trustee and his interests as an adjoining landowner, we consider that the Judge's finding of an implicit authorisation was well founded on the evidence.[59]

[130] We say that for the following reasons.

[131] First, there was very strong evidence that Jim and Edna's whole rationale for forming the Trust was to provide a vehicle to take their subdivision plans well into the future after their deaths.

[132] Secondly, there was also strong evidence that the settlors' subdivision plans had always included John's Land as part of the subdivision. He had owned his land for some 25 years before the Trust was formed. The reason the settlors had sold it to him in the first place was because they saw his ownership of adjoining land and the

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58 Citing *Breakspear*, above n 39.
59 High Court judgment, above n 2, at [346].

prospect of it being subdivided as beneficial to their subdivision plans for what was to become the Trust land. Further, the uncontested evidence was that the work Jim had been doing on consents and plan changes prior to 2004 in relation to Ching's Block had always included John's Land.

[133] Thirdly, a key reason the settlors appointed John as trustee was precisely because he had "skin in the game".

[134] In our assessment, these key facts amply support the Judge's finding that John's conflict as an adjoining landowner was hard wired into the Trust.[60] It was always intended that the applications to the local authorities would be in joint names and that the subdivision would encompass both blocks of land, to their mutual benefit.

[135] Accordingly, it follows in our view that any profits and benefits John obtained in his personal capacity as a result of his land being included in the subdivision are not caught by the self-dealing rule.

[136] Further, contrary to Mr Johnson's submission, we consider that conclusion is consistent with *Sargeant* and an entirely orthodox application of the principle of implicit authorisation. We also disagree with his submission that the conclusion is contrary to *Breakspear*, the outcome of which turned on an express provision in the trust deed permitting self-dealing.[61] It is correct that in the absence of that express clause the Court in *Breakspear* considered the trustee would have been liable for exercising a power to add herself as a beneficiary, even although the settlor had always intended her to be a beneficiary, albeit at a later date on his death.[62] However, the distinguishing feature is that it was crucial in that case that the appointment as a trustee was a first step, whereas here John had been a neighbouring owner for two and a half decades before being appointed as trustee.[63]

[137] Finally, for completeness, we do not consider there is any cause for complaint over the amount of the respective contributions towards the costs of the subdivision

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60 High Court judgment, above n 2, at [343(g)].
61 *Breakspear*, above n 39, at [131].
62 At [102], [107], [123]–[125] and [131].
63 At [102].

that were agreed between the other trustees and John in July 2008. On the evidence, the figure of $40,000 (plus GST) was able to be independently justified. Mark and Andrew's argument to the contrary is based on what we consider to be an incorrect assumption that the true joint resource consent costs for Ching's Block were much more than the figure used by the trustees of $130,000 plus GST. Mark and Andrew did not adduce any accounting or other forensic evidence to support this other than a reference to a figure of $220,000 in a funding application made by the trustees to the bank. John and Mr Nelson testified that this higher figure included additional costs specific to the Trust land but not benefiting John's Land. As for costs that were incurred in the later years, these related to the Homestead Block and were exclusively for the benefit of the Trust land.

[138] Although we have come to a very clear view about authorisation of John's conflict as adjoining landowner, the conflict of interest that arose as a result of his appointment as a remunerated project manager is not quite so straightforward, as we now explain.

John's conflict as a paid project manager

Implicit authorisation?

[139] Mr Johnson submitted that while John was already an adjoining landowner at the time the Trust was settled, the conflict as project manager came about because of an active decision by the trustees, including John, to appoint him to the role. It was not a state of affairs that existed by implication.

[140] Mr Gedye however argued that at the time the Trust was settled, the settlors knew the subdivision was always going to take years to complete and that it would need a project manager. Mr Gedye acknowledged there was no formal appointment back then but argued that was entirely understandable because at that time the development was still in a state of limbo. There was therefore no need to formalise what was John's nominated position.

[141] We accept the settlors must have been known and intended from the outset that eventually the trustees would need to employ people to work on the subdivision

project, and that given the size and complexity of the project there would be a need for a project manager. And, of course, the Trust did engage paid contractors between 2004 and 2007 while Jim was still a trustee.

[142] In accepting it was always contemplated that a project manager would be needed, we have not overlooked the existence of a handwritten note in the minutes of a trustee meeting held in January 2009. The note reads "Dad didn't want [a] project manager". However, surprisingly given that the appellants seek to rely on it, this notation was never put to any of the trustees in cross-examination, including John and the note taker, Mr Nelson. We think it more likely the note was a reference to Jim's hostility towards outsiders becoming involved. Seen in that light, the note actually tends to support the existence of a long-standing intention that John should lead the development, rather than the other way around.

[143] We also acknowledge that at the time the Trust was settled, the evidence established that Jim's health was failing, that he and Edna wanted a family member to lead the project, that John was becoming increasingly involved in the project and was the obvious choice to assume that leadership role. That was the second of the two key reasons why they appointed him as one of the trustees. John was to step into his father's shoes and lead the project to completion. Jim trusted John to carry out his plan

[144] To that extent, we therefore agree with the Judge that the settlors can be viewed as pre-selecting John as the person in charge of the subdivision, and so implicitly authorising that appointment.[64]

[145] However, while John had been pre-selected, it would have been possible for him to oversee and lead the project in his capacity as trustee without necessarily being the remunerated full-time project manager himself. There is no evidence of any specific discussions with Edna and Jim about John taking a paid full-time management role himself prior to or at the date the Trust was settled. And, of course, as at the settlement date John was in full-time employment elsewhere.

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64 High Court judgment, above n 2, at [281].

[146] John himself does not say that his taking on a paid full-time position was ever discussed with his parents. The best evidence for John is the fact of Edna's agreement to his appointment in 2008 and the following statement in her affidavit:

> I completely disagree with any suggestion by Mark and Andrew that John shouldn't be getting paid fairly for his work or that there is something wrong about him doing so while also being a trustee. This is what Jim wanted …

[147] Having regard to all the evidence, we consider it highly likely that had Jim been alive in 2008, he too would have strongly supported John's appointment as a paid full-time project manager. However, as a matter of law, we are not persuaded that is a sufficient foundation of itself to say that payment — as distinct from John's appointment to drive the project — was implicitly authorised or hard wired into the Trust. On that issue, we therefore take a different view to Gendall J.

[148] In our view, express authorisation for payment was required and accordingly it is necessary to turn to the Trust Deed.

Express authorisation — clause 13

[149] Mr Gedye submitted that even if we were not persuaded that remuneration for John for project management was implicitly authorised, then it was in any event expressly authorised by cl 13 of the Trust Deed. It will be recalled that the three lawyers involved in the Trust — Messrs Nelson, Kearney and Russell — were all of the view that cl 13 sanctioned the payments to John. Mr Gedye emphasised that cl 13 was expressed in wide and permissive terms, and that even if it was a standard clause, it should be read in a way as to give effect to the intentions of Jim and Edna. In his submission the settlors' intentions must be all important when it comes to construing trust deeds and it could not be right that cl 13 should have no application when the settlors intended John be paid.

[150] Clause 13 was in the following terms:

> 13 DELEGATION AND PROFESSIONAL TRUSTEES
>
> 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 shall not be responsible for the default of any such solicitor or agent or any loss occasioned by hi[s] employment 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.

[151] In his submissions regarding cl 13, Mr Johnson placed considerable weight on the English Court of Appeal decision *Da Silva v Heselton.*[65] The Court in that case held, regarding a clause with similar wording to cl 13, that a trustee was only entitled to charge for work that fell within the scope of their profession.[66] The clause, it was said, did not mean that any trustee who happened to be engaged in a profession or business could charge for all work done or time spent on the administration of the estate irrespective of whether that work had any connection with their profession or business.[67] What the trustee needed to show was that she was conducting a business and that the work done for which she was seeking payment had been done in the course of that business.[68] In Mr Johnson's submission, the Judge's finding in this case that cl 13 authorised remuneration to John was clearly contrary to *Da Silva*.

[152] We accept, as Mr Johnson submitted, that charging clauses are to be construed strictly. However, as has also been said (including in *Da Silva*), authorities on the construction of charging clauses in other trust documents need to be handled with care because every case turns on the wording of the particular clause at issue, such that slight differences in wording can make a difference.[69] And there are some aspects of cl 13 that are different from other charging clauses, including the clause in *Da Silva* itself. For example, in *Da Silva* what was authorised was payment of "all usual professional and other fees", whereas in this case, the wording is "all usual or professional or other charges" indicating three distinct categories of charges.[70]

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65 *Da Silva,* above n 39.
66 At [6], [58] and [62].
67 At [39]–[40].
68 At [40], [57]–[59] and [61]–[62].
69 At [50].
70 *Da Silva,* above n 39, at [2].

Likewise, the *Da Silva* clause did not include the phrase "and although not of a nature requiring the employment of a professional person".

[153] Turning then to a closer analysis of the text of cl 13.

[154] As will be apparent, cl 13 addresses two different situations.

[155] The first part of the clause concerns delegation and is not relevant for present purposes. It empowers the trustees to use trust monies to engage and pay external parties, that is to say non-trustees, to undertake work for the benefit of the Trust.

[156] It is the second part of the clause that is at issue. It permits payment to a trustee for work the trustee has done for the Trust. The crucial words are:

> … 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.

[157] We draw the following key points from that wording.

[158] First, although the heading of the clause refers to "professional trustees", the wording in the text makes it clear that the entitlement to charge is not limited to professional trustees, nor is it limited to the provision of professional services. It can also apply to a trustee who is not a solicitor or chartered accountant so long as that trustee is engaged in a business, *"any"* business. The word "any" must apply to both "profession" and "business" in the phrase "engaged in any profession or business".

[159] Secondly, the work in question that has been done for the Trust need not be work that the trustee does in the ordinary course of their business. The use of the disjunctive "or" in the phrase "all usual or professional or other charges" reinforces this because it means that the charges at issue need not be the trustee's usual charges. However, there must nevertheless in our view be some connection or link between the business of the trustee and the work being charged for. The underlying purpose of the clause is to ensure that payments are made to a trustee with some knowledge and

experience in the work sought to be charged or to a trustee who is engaged in work that has some association with the work to be charged. That approach is broadly consistent with the approach taken in *Da Silva*.

[160] Thus, to take an extreme example the clause would not allow payment to a trustee for carrying out building work when he or she had only ever worked as a dentist.

[161] Thirdly, to be a person in business for the purposes of the clause does not require the person to be self-employed — "business done by him or his firm". Legal work done by a trustee who was a staff solicitor would be work done by his or her firm and be covered by the clause.

[162] Fourthly, contrary to a submission made by Mr Gedye, we consider that the word "business", in its ordinary and natural meaning, connotes an activity that has a commercial element and involves the exchange of money. It would not be an ordinary use of language to refer to someone who was doing unpaid work as being engaged in a business. We therefore do not accept his contention that for the purposes of cl 13 John was engaged in the business of managing the development prior to his appointment as project manager in 2008.

[163] Finally, as to when the trustee must be engaged in the business, our view is that the clause cannot be sensibly interpreted to always require the trustee to be in the relevant profession or business at the time of their appointment as trustee. It would be absurd to suggest that a trustee for example who commenced legal practice some years after their appointment would for that reason alone be precluded from ever charging for legal services.

[164] Conversely, if a trustee was engaged in a relevant business before their appointment or at the time of their appointment, but undertook some other endeavour before returning to their previous line of work for the benefit of the trust, we do not consider it a sensible or reasonable interpretation to conclude that such a trustee would automatically be outside the scope of the clause. In short, a trustee need not have been continuously engaged in a relevant business to come within the clause.

[165] Applying this interpretation to the facts of this case, the provision of project management services, whether undertaken by a professional or nonprofessional, is clearly capable of being work within the scope of the clause. The critical question is whether John was or had been engaged in that business or in a business involving relevant skills and knowledge.

[166] As mentioned, because we interpret "business" as requiring a commercial element we are not persuaded that John was engaged in an operative business when doing unpaid work on the subdivision prior to 2008. However, we do consider that the paid work he had undertaken prior to 2008 was sufficiently connected to project management of a residential property development that he can properly be said to have been engaged in a qualifying business for the purposes of the clause.

[167] John's paid work history prior to 2008 was that after obtaining a diploma in valuation and farm management from Lincoln University, he had worked in a number of industries and management roles. Significantly, for present purposes, these included working as an appraiser for the Rural Bank, Chief Executive for the Nelson/Marlborough Combined Rural Traders, and Chief Executive for the Ngāti Rārua Ātiawa Iwi Trust. In the latter role, he was responsible for managing aspects of the Iwi's investment portfolio, including the management of a 95 lot subdivision in Motueka. Finally, the building company (for whom he was still working in 2008) had interests in residential development.

[168] This paid employment history meant John had significant work experience in business and land development, experience that was a key reason for his selection as an initial trustee and experience which we are satisfied brought him within the scope of the charging clause.

[169] That however is not the end of the story. The fact that the trust instrument authorises the payment of the cost of services rendered by the trustee, does not mean

the trustee has an unfettered discretion as to the amount. The fees must still be reasonable and just.[71]

[170] At trial, Mark and Andrew claimed that the role was not full time and that the fees were excessive. In particular, they contended that the remuneration was based on an over scoped job description, being scoped on the basis of 600 lots with $126 million gross yield, which never eventuated. They also argued that when it became apparent, the subdivision was slowing down the fees should have been reviewed.

[171] The Judge rejected those assertions, principally in reliance on the evidence of Mr Sewell.[72] There was also evidence from Mr Nelson that the role assumed by John was far wider and more involved than a project manager would undertake on a standard development. For his part, John gave evidence that the job description was not based on getting to 600 lots but based on a process of development capable of delivering 600 lots.

[172] On appeal, Mr Johnson challenged the Judge's finding which he suggested was not in fact supported by Mr Sewell's evidence.

[173] First, according to Mr Johnson, Mr Sewell acknowledged that at times John was effectively not working at all and certainly not on a full-time basis. We have read Mr Sewell's evidence in its entirety and do not consider that to be an accurate account of his evidence. Mr Sewell was very definite it was a full-time role, pointing out that it was not limited to project managing the construction phase of the 91-lot Ching's Block but was much wider, including planning and preparation for the Homestead Block development. He regarded John's role as encompassing the work of both a project director and a project manager, which was consistent with the evidence of Mr Nelson.

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71 *Re Wells* [1962] 1 WLR 874, [162] 2 All ER 826 (CA) at 879 per Lord Russell; and Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Thomson Reuters, London, 2020) vol 1 at [20-013]. See also *Ngai Tai Ki Tamaki Tribal Trust v Karaka* [2012] NZCA 268, [2015] NZAR 266 at [58].

72 High Court judgment, above n 2, at [383].

[174] In cross-examination Mr Sewell confirmed his view that the role was full time, and further stated that in his opinion it would have only ended being full time once the Homestead Block Stage One development was completed. Significantly, he also specifically rejected the suggestion that because there may at one point have been a hiatus in sales or physical activity on site that meant there was nothing for John to do. Mr Sewell pointed out there was no hiatus in planning for the project, working on consents and working with the engineers.

[175] As regards the reasonableness of John's fee, Mr Johnson contends that Mr Sewell acknowledged that John's fees were above market rate.

[176] However, again, we do not accept that was the thrust of Mr Sewell's evidence taken as whole. It rests on a selective comment taken out of context.

[177] The context was as follows. In his 2016 report, Mr Sewell had suggested that John's fee be based on 4.5 per cent of project income, the fee being paid monthly on a pro-rata basis. That would mean approximately $172,000 per annum, which he considered was consistent with the advice obtained from PwC.

[178] It was put to him in cross-examination that total gross revenue of the whole project was likely to be $27 million, which would mean the project management fees would in fact represent 8 per cent of revenue. He was then asked whether in his view 8 per cent was a market rate. He responded by saying "No, that is high" but then went on to say that it was "high because of the nature of the work". He further stated that the question still came down to whether it was possible to find someone who would be willing to work for 4 per cent, that it was not just a percentage game and that he doubted very much whether it would be possible to find anyone for that amount. He had looked and PwC had looked. In his evidence, Mr Sewell also rejected the suggestion that trustees were required to test the market as well as take external advice.

[179] In re-examination, he reiterated that the theory of applying a mathematical calculation to determine payment may be good for analysis, but it was necessary to face the reality that if you went to the market and tried to hire somebody in the residential development sphere for the amount being suggested by the appellants, his

firm view was you would not find anyone. At one point, Mr Sewell stated that for him to have employed a project manager to undertake the bulk of the roles that had fallen to John in the Nelson market would have required a salary to be paid in the order of $250,000 per annum.

[180] In our view, the Judge was entitled to rely on Mr Sewell's evidence to support his finding about the reasonableness of the fees. We agree with that finding. We agree too that the conflicts were appropriately managed as detailed in the evidence of Messrs Nelson, Hinton and Russell.

[181] It follows from all of the above, that in our view the appeal against the High Court decision is not sustainable and it is accordingly dismissed. This was a case where on orthodox trust principles, John was not liable to account for personal benefits obtained in his capacity as the owner of land adjoining the Trust's subdivision and as project manager.

[182] We add that having decided there was no breach of fiduciary duty, it is unnecessary for us to address three further arguments raised by Mr Gedye as fall-back positions. Those arguments centred on the application of an exclusion clause in the Trust Deed exempting the trustees from liability for breach of trust, and ss 72 and 73 of the Trustee Act 1956. Section 72 empowers the court to order payment in an amount that is fair and reasonable to a trustee for services rendered to the trust.

[183] Section 72 is being raised for the first time on appeal, and in the absence of a formal application to support the judgment on other grounds. Mark and Andrew also question the sufficiency of the trial evidence to be able to determine it. As for the exemption clause, the Judge never considered the exemption clause in relation to the third cause of action, only in relation to the second cause of action and even then, did not reach any concluded view, only that it was reasonably arguable it applied.[73]

[184] In those circumstances and given that it would not in any event be dispositive of the substantive appeal, our preference is not to address those two arguments. Nor

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[73] At [311]. The Judge appears to have wrongly assumed the exemption clause was pleaded as an affirmative defence.

do we consider it appropriate to consider s 73, which it will be recalled was discussed by the High Court Judge as a possible argument.[74]

[185] We therefore now turn to the costs appeal.

The costs appeal and cross-appeal

The High Court costs decision

[186] There were two costs issues for determination in the High Court.[75]

[187] The first was costs as between the parties consequential on the outcome of the proceeding. The second was a claim made by John for indemnification from the Trust fund for any shortfall between his actual solicitor-client costs (said to total $1,104,778.38) and the amount of any costs award in his favour against Mark and Andrew. In making a claim for indemnification from the Trust, John relied on an indemnity clause in the Trust Deed.

[188] For their part, Mark and Andrew argued that costs should lie where they fell, in light of John's resignation at the end of the hearing.

[189] The Judge disagreed. He held that was an unrealistic stance for Mark and Andrew to take and that John as the successful party was entitled to costs against them.[76] He further held the costs should be increased by 30 per cent on the grounds it was Mark and Andrew who had initiated "this unfortunate, heated, and hostile dispute" which had occupied considerable court time and involved senior counsel.[77] However, the Judge also held the costs award to John should be reduced by 20 per cent on account of the outcome of the first cause of action.[78] The 20 percent reduction was applied to both the scale costs as well as the indemnity costs, which the Judge accepted were otherwise payable to John under the Trust Deed.[79]

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74 At [421]–[425]; and see above at [102].
75 Costs judgment, above n 5.
76 At [14(a)].
77 At [14(d)].
78 At [14(a)].
79 At [14(a)] and [17].

Arguments on appeal

[190] On appeal, Mark and Andrew contend their conduct did not meet the test for an increase. Developing this central contention, Mr Johnson submitted that increased costs respond to conduct which is unreasonable, whereas the factors relied on by the Judge reflect ordinary realities of litigation. He also argued that the conceptual confusion of the Judge's approach was illustrated by the fact that he simultaneously uplifted and reduced costs when the reasons relied on were essentially two sides of the same coin. The Judge did not for example consider whether John's persistent refusal to resign contributed to the contentious nature of the dispute.

[191] The second ground of Mark and Andrew's appeal is that a discount of 20 per cent was insufficient recognition of the time occupied by the first cause of action and the success they achieved when John resigned. According to Mr Johnson, John's removal as trustee was the appellants' principal objective from the outset of this proceeding and in his submission a one third reduction was justified.

[192] There was no challenge on appeal to John's entitlement to indemnity costs under the Trust Deed.

[193] In a cross-appeal on the costs decision, John sought an order setting aside the 20 per cent reduction altogether.

Analysis

[194] In imposing a 20 per cent reduction of the costs otherwise available to John, the Judge stated that a discount was required to reflect the increased time and work involved for all in addressing the retirement issue and to provide some finality.[80]

[195] The power to reduce costs that would otherwise be payable to a successful party is contained in r 14.7 of the High Court Rules 2016. Rule 14.7(d) states that the court may impose a reduction if the party claiming costs has failed in relation to a cause of action or issue which has significantly increased the costs of the party

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80 At [14(a)].

opposing costs. Rule 14.7(g) preserves a residual discretion to reduce costs for some other reason.

[196] We acknowledge that as a result of his decision to retire as a trustee, John can be said to have failed in the first cause of action. However, we do not accept that the second condition precedent for a reduction was satisfied. That is to say, we do not accept that the first cause of action significantly increased Mark and Andrew's costs.

[197] Their grounds for seeking John's removal were based on the same misconduct allegations made against him in the second and third causes of action. There were no misconduct allegations unique to the first cause of action. It follows that even in the absence of the first cause of action, those allegations would still have been traversed in the detail that they were, and the same evidence called. Further, they were allegations which, ultimately, the Judge emphatically rejected, thereby vindicating John's defence of them.

[198] The only additional costs associated exclusively with the first cause of action related to the appointment of a trustee to replace John. And, ironically, it was John's suggested candidate that the Judge appointed, being in the latter's view a more suitable choice than the person proposed by Mark and Andrew.[81]

[199] We are unsure what the Judge meant by the interests of finality but note that the claim that John's removal was the appellants' primary objective sits uneasily with their pursuit of the substantive appeal.

[200] We are satisfied the Judge erred in imposing any discount on the costs payable to John both under the High Court Rules and the Trust Deed, and accordingly set aside that aspect of the costs decision.

[201] Contrary to Mr Johnson's submission, we are not however persuaded that the Judge erred in uplifting the costs by 30 percent. In our assessment, there was unreasonable conduct which unnecessarily prolonged the litigation rendering it more costly than it should otherwise have been.

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[81] High Court judgment, above n 2, at [148] and [150].

[202] The High Court judgment is littered with damning comments about the lack of any evidence, or any relevant and reliable evidence, to support Mark and Andrew's core allegations, as well as references to arguments being advanced by them that were "without substance" or "not credible".[82] There was also what can fairly be described as an unnecessarily wide-ranging audit of the minutiae of the trustees' commercial decisions. It is a striking feature of the evidence that outsiders including knowledgeable experts generally tended to be very positive about John and the subdivision, including of course Mr Russell who had been made a trustee on Mark and Andrew's own initiative. When Mr Russell did not share their views, Mark and Andrew became hostile towards him as well.

[203] Also relevant to the issue of increased costs is Mark and Andrew's rejection of a "without prejudice save as to costs" offer made by John in January 2021. The offer would have resulted in a better outcome for them than the judgment. Although the offer was made only a few months before the commencement of the hearing, there must have been significant costs incurred in the period commencing 1 February 2021 and ending at the conclusion of the hearing in late June 2021. We note too that a revised settlement offer made in April 2021 included an offer from John to resign as trustee.

[204] It follows from all of the above that we have decided Mark and Andrew's appeal on costs should be dismissed and John's cross-appeal allowed. The effect of this is that Mark and Andrew must pay John scale costs with a 30 per cent uplift, with the difference between whatever amount that formula yields and John's actual solicitor-client costs being funded from the trust.

Outcome

[205] The appellants' application for leave to adduce the further evidence of Mark James McLaughlin is declined.

[206] The appeal in CA712/2021 is dismissed.

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[82] For example at [195], [244], [247] and [257].

[207] The appeal in CA435/2022 is dismissed and the cross-appeal allowed. The High Court's imposition of a 20 per cent discount on the costs and disbursements otherwise payable to the first respondent by the appellants and the Trust is quashed, but in all other respects the High Court's decision on costs is affirmed.

[208] As regards costs on the appeal, it was common ground that these should follow the event. The appellants must pay the first respondent costs on the two appeals and the cross-appeal calculated on the basis of a standard appeal, band A, together with usual disbursements. We certify for second counsel.

[209] Finally for completeness we note that counsel who represented Brett at the hearing was doing so on pro bono basis, and we therefore make no award of costs in relation to him.

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