IN THE COURT OF APPEAL OF NEW ZEALAND

CA542/2011
[2013] NZCA 353

BETWEEN	JILLIAN NAERA First Appellant
	KEREAMA PENE Second Appellant
	ANAHA MOREHU Third Appellant
	WARRICK MOREHU Fourth Appellant
	ERIC HODGE Fifth Appellant
AND	PIRIHIRA FENWICK, WIREMU KINGI AND HIWINUI HEKE First Respondents
	TAI ERU Second Respondent

Hearing:	26 March 2013
Court:	Arnold, Stevens and White JJ
Counsel:	F E Geiringer for Appellants D G Hurd and J C Jeffries for Respondents
Judgment:	8 August 2013 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The case is remitted to the Māori Land Court for further hearing on any matters arising from the conflict of interest issue.

C The appeal is otherwise dismissed.

D There is no order as to costs.

REASONS OF THE COURT

(Given by Stevens J)

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A joint venture is formed

[1] This appeal concerns the future use of a block of 32.0923 hectares of Māori freehold land known as Whakapoungakau 24 (the trust land). It is administered by the Whakapoungakau 24 Ahu Whenua Trust (the Trust), commonly known as the Tikitere Trust. The Trust was established by trust order in 1999 under the Te Ture

Whenua Māori Act 1993 (the Act) and as of 2009 had some 1,222 beneficial owners. The respondents are the trustees.

[2] In November 2008 the Trust, via a subsidiary, Tikitere Geothermal Power Ltd, entered into a joint venture agreement, known as the Tikitere Project Agreement (the Agreement), with the intention of establishing a geothermal power station. The other parties to that agreement were the Paehinahina Mourea Trust and the Manupirua Ahu Whenua Trust. To facilitate the entry into the Agreement, the trustees sought and obtained from the Māori Land Court variations to the trust order in 2004 and 2006. These variations allowed the trustees to enter into joint ventures and to develop the area as a geothermal tourism park.

[3] The appellants are some of the beneficial owners of the trust property. They object to the actions of the trustees and argue that the trustees had no power to enter into the Agreement. The second respondent, although a trustee himself, supports the position of the appellants. The conduct of the appeal has been carried by the fifth appellant, who is legally aided.

[4] The appellants were unsuccessful in the Māori Land Court[1] and Māori Appellate Court (Appellate Court).[2] At the hearing of the appeal, the appellants largely repeated the arguments made before the lower Courts.

[5] The appeal raises six discrete issues:

(1) Did cl 3(a) of the trust order empower the trustees to enter into the agreement without reference to the owners or the Court?

(2) Can the joint venture agreements be entered into under cl 3(b) of the trust order?

(3) Did the variations to the trust order comply with s 244 of the Act?

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1 *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiariki MB 279 (15 WAR 279) [MLC judgment].

2 *Naera v Fenwick – Whakapoungakau 24* (2011) Māori Appellate Court MB 316 (2011 APPEAL 316) [MAC judgment].

(4) Were the trustees required to consult with owners prior to entering into the Agreement?

(5) Did the trustees' conflicts of interest invalidate the Agreement?

(6) Should the trustees have been removed?

[6] With respect to the fifth issue, at the conclusion of the hearing we sought submissions from the parties on the following three questions:

(a) Was the issue of the effect of the trustees' conflicts of interest on the validity of the agreements relating to the proposed geothermal development raised before the Māori Land Court? If so, how and in what form was it raised?

(b) If the issue was live, what is the effect of the existence of conflicts of interest on the part of some trustees on the relevant agreements in terms of general trustee law? Is that analysis affected by the particular context (a trust established under Te Ture Whenua Maori Act 1993)?

(c) If the Court were to conclude that the validity of the agreements is or may be affected, what relief should the Court grant?

[7] These further questions were addressed in two joint memoranda of counsel and an exchange of submissions.[3] We are grateful to counsel for their assistance.

[8] Having considered the issues raised by the conflict of interest point (following submissions from both parties) we are satisfied that the case must be remitted to the Māori Land Court for further hearing on that aspect.

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3 The final submissions were received by the Court on 4 June 2013.

First issue – interpretation of cl 3(a) of the trust order

[9] The appellants submitted that cl 3(a) of the trust order did not allow the trustees to proceed with the Agreement without reference to the beneficial owners of the land.

[10] Clauses 3(a) and 3(b) are relevant to this issue:

> 3 Powers
>
> The trustees are empowered:
>
> a General
>
> In furtherance of the objects of the Trust and except as hereinafter may be limited to do all or any of the things which they would be entitled **to do if they were the absolute owners of the land PROVIDED HOWEVER that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale** other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.
>
> b Specific
>
> **Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the powers** of the Trustees it is declared that the Trustees are empowered:
>
> i To buy
>
> To acquire any land or interest in land whether by way of lease purchase exchange or otherwise PROVIDED HOWEVER that no purchase or exchange shall be effected except through the agency of the Māori Trustee or by such other means as shall ensure that the land so acquired can be vested in the appropriate beneficiaries as Māori freehold land and be made subject to the trusts hereof.
>
> ii To subdivide
>
> To subdivide the land in any manner permitted by law into such subdivisions or parts as may seem expedient to them, and to bring applications before the Court for partition orders to allocate such allotments amongst the owners in accordance with their entitlement ...
>
> ...
>
> xvi To operate as a Geothermal Tourism Park

> To enable the trustees to develop the area to support the Geothermal Tourism Park concept.
>
> xvii To represent owners
>
> To prosecute from time to time in the appropriate tribunal such objection to zoning or proposed zoning such application for re-zoning of the said land, such application for specified departure from such zoning and such application for conditional use in any current zoning or otherwise howsoever the Trustees in their absolute discretion may determine, AND to represent the beneficial owners on any negotiations or questions of compensation for lands taken under the Public Works Act or other statutory authority with the Government or any local authority.
>
> xviii To enter into joint ventures
>
> To join with others and to undertake and form companies and enter into joint ventures with other Māori Authorities sited over the same field to investigate the possibility of establishing a Geothermal Power Station and to take advantage of the findings. To process any other product resulting from the venture to be processed upon trust property. Those joint ventures and companies shall not provide that the trustees can receive income other than in their capacity as trustees pursuant to the existing Trust order and the accounts for the joint ventures and the companies are to be shown as part of the accounts of this Trust. The fees of any independent Director be set by the shareholders.

(Emphasis in bold added).

[11] The remainder of cl 3(b) outlines further specific powers to improve, employ, borrow, set aside cash reserves, lend, to pay own costs, to promote title improvement projects, to distribute, to permit occupation and enjoyment by the owners, to make other special provisions for beneficiaries, to consent to the erection of dwellings, to lease, and to take over existing leases. An original power to farm the land was removed in 2006.

[12] The Māori Land Court rejected the appellants' argument. As to the scope of the power granted by cl 3(a) the Court held that:

> [100] … For present purposes, the key point is that, … where a trust order provides trustees with the powers of absolute owners, with the exception of alienation of the land – and I understand alienation of the land in this context to mean the permanent alienation of the corpus by way of sale, gift or exchange – the trustees are able to enter into arrangements like the agreement in the present case.

> [101] It is irrelevant whether or not trustees believe or understand that they possess such a power. The point is that they did at the relevant time. It is equally irrelevant that they may have harboured doubt as to their authority and sought to amend the trust order to provide further comfort as to their ability to proceed with the project and the agreement. My conclusion is that, notwithstanding the applications for variation, the trustees did have the authority to enter into the agreement dated 5 November 2008. Moreover it is not unreasonable to suggest that the decisions of the Court to vary the trust order would have created a reasonable belief amongst the trustees that they could proceed.

[13] The Appellate Court held that cl 3(a) is not unique to this trust order – it is a common clause found in many trust orders. The Court noted that the relationship between cl 3(a) and 3(b) had been discussed in *Karena – Owhaoko C1,C2,C4,C5 & C7*, where the Appellate Court held:[4]

> Put simply, the Trustees have the powers of absolute owners. They can do anything an absolute owner is entitled to do except sell the land. Subclauses 3(b)(i) to (xviii) provide an inclusive rather than exclusive list of powers "for emphasis and clarification". In other words, the inclusion of the phrases "without limiting the generality" and "to extend the powers" underscores the need for a broad interpretation.

[14] In *Karena – Owhaoko*, the Appellate Court relied on the principle that the greater power includes the lesser. Regarding cl 3(a), the Court held:[5]

> … A plain and ordinary reading of the relevant clauses supports the view that if the Trustees could grant a lease to a non-owner it must follow that a licence, a much lesser form of use of land, could also be granted. …

[15] That is different from the current proceeding because here the project engages several distinct powers of the trustees. The appellants noted this distinction and contended that *Karena – Owhaoko* should be distinguished because in that case the trustees already had the power to lease the land for that purpose and there had been a meeting of the owners supportive of that action. The Court was therefore dealing with "a technical objection by a rival contender for the licence".

[16] However, the Māori Land Court and the Appellate Court did not consider the principle to be so limited. The Māori Land Court held:

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4 *Karena – Owhaoko C1,C2,C4,C5 and C7* (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4) at 14.

5 Ibid.

> [102] … [*Karena – Owhaoko*] confirms that clause 3 of the standard wide powers trust order gives trustees the powers of absolute owners to do anything except alienate the fee simple land by sale or gift. The balance of the trust order is provided, not to limit the generality of the order, but by way of emphasis and clarification, to extend the powers of the trustees.

[17] Responding to the appellants' argument that the geothermal project was a new venture requiring oversight pursuant to s 229 of Act, the Appellate Court stated that this provision contains no mandatory requirement, particularly when the trustees already possessed the necessary authority in cl 3(a). The Court noted:

> [104] ... If the trust order had limited or confined the trustees' powers in clause 3 then this argument would carry greater weight but on the contrary it is expressed in very broad terms.

[18] The Appellate Court applied its previous decision in *Karena – Owhaoko*, stating:

> [22] As stated by Counsel for the respondent, Clause 3(a) means exactly what it says. It gives the trustees the power to act as if they were absolute owners. Because clause 3(b) commences with the words "without limiting the generality of the foregoing" clause 3(a) is not limited by the specific provisions set out in clause 3(b).
>
> [23] This power existed at the time the trustees entered into the [Agreement] and the question is simply whether the trustees exercised this power in pursuance of the objects of the trust. These are the use and management of the land to the best advantage of the beneficial owners.
>
> ...
>
> [40] ... Clause 3(a) gave the trustees powers to enter into the agreement with no need to obtain variations to the trust order.

[19] Underscoring this reasoning is the notion that trustees have a decision-making role. As the Appellate Court concluded:

> [59] To require trustees to consult with owners and seek their opinion on every matter under consideration would make the position of trustee a pointless fiction. A trustee's role is to make the decisions around the management and improvement of the trust assets, relieving beneficiaries of that burden.

[20] Counsel for the appellants, Mr Geiringer, emphasised that the broad language of cl 3(a) must be interpreted in the context of the rest of the document, the relevant legislation and the purpose of the trust order. He contended that cl 3(a) should be

given an ejusdem generis interpretation. Thus cl 3(a) serves as a machinery provision to ensure that, if a particular power is left out of the specific powers under cl 3(b) (as in *Karena – Owhaoko*), the trustees still have the power to execute the necessary documents. Counsel therefore submitted that cl 3(a) exists primarily so that third parties dealing with the trust cannot challenge the validity of contracts.

[21] Before we set out our evaluation of the scope of cl 3(a), we will address two subsidiary points.

Subsidiary point – geothermal steam

[22] In order to deal fully with the appellants' challenge we also refer to a subsidiary argument: that geothermal steam is not "land" and therefore prima facie falls outside cl 3(a). The respondents submit that the correct view is that geothermal steam is a resource that is able to be accessed by the Trust by virtue of its ownership of the land within or under which the geothermal steam is found. The statutory background of the Geothermal Energy Act 1953 and the Resource Management Act 1991 (RMA) and the broad ambit of the trust order support this outcome.

[23] It was not disputed that the sole right to tap, take, use and apply geothermal steam under land was vested in the Crown by s 3 of the Geothermal Energy Act.[6] This form of energy is now included in the definition of geothermal energy contained in the RMA:[7]

> **geothermal energy** means energy derived or derivable from and produced within the earth by natural heat phenomena; and includes all geothermal water
>
> **geothermal water** means water heated within the earth by natural phenomena to a temperature of 30 degrees Celsius or more; and includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by natural phenomena
>
> **water–**
>
> (a) means water in all its physical forms whether flowing or not and whether over or under the ground:

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6 That Act was repealed by the Resource Management Act 1991, ss 362 and 354 and sch 8. However, the rights vested in the Crown by that Act are preserved by the Resource Management Act 1991, s 354(1)(a).

7 Section 2.

(b) includes fresh water, coastal water, and geothermal water:

(c) does not include water in any form while in any pipe, tank, or cistern

[24] A person who wishes to use geothermal energy can obtain the necessary resource consents from his or her responsible local authority. A person is not prohibited from taking, using, damming or diverting any water, heat or energy, if the requirements of s 14(3) are met, namely:

> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
>
> …
>
> (c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Māori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment ... .

[25] On this topic the Māori Land Court held that the power exercised by the trustees was effectively that of entering into a lease. The Judge stated that the proposal involved use of the trust's existing asset base for an activity that is directly connected with the land.[8]

[26] In the Appellate Court, the respondents submitted that using the land for the benefit of the owners means using the benefits derived from the land. Therefore, pursuing rights to the geothermal steam under the land furthers the objects of the trust.[9] The Appellate Court simply agreed that the land "sits on a geothermal resource and using the land for the benefit of the owners must include using the benefits derived from it".[10] When discussing whether the geothermal project is a "new venture" pursuant to s 229 of the Act the Court stated:[11]

> Further we do not see the geothermal project as being a "new venture". There is significant geothermal activity on and under the lands vested in this trust. *It is difficult to see how any reasonable person would not contemplate that this trust may in fact one day become involved in geothermal related ventures.*

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8 MLC judgment, above n 1 at [107].
9 MAC judgment, above n 2, at [25].
10 At [27].
11 At [47].

(Emphasis added).

[27] Against the statutory background, and consistent with the views of both Courts below, we are satisfied that there is no issue arising from the fact that the Agreement relates to the exploitation of a natural resource (geothermal steam) found under the land. So long as the necessary resource consents are obtained or the energy is used in accordance with tikanga Māori,[12] the geothermal steam can be used as an interest in land like any other resource.[13] Its development is a use of the land.

Scope of objects clause

[28] The next question is whether the objects clause limits the powers of the trustees under cl 3(a).

[29] The objects clause states:

> 2 Objects
>
> Except as hereinafter may be limited the objects of the Trust shall be to provide for the use management and alienation of the land to best advantage of the beneficial owners or the better habitation or use by beneficial owners, to ensure the retention of the land for the present Māori beneficial owners and their successors, to make provision for any special needs of the owners as a family group or groups, and to represent the beneficial owners on all matters relating to the land and to the use and enjoyment of the facilities associated therewith.

[30] The clause is broadly worded. It first states the objects of the trust order are "to provide for the use management and alienation of the land to best advantage of the beneficial owners or the better habitation or use by beneficial owners". This objective can be achieved in a range of ways depending on how one characterises "best advantage" or, in this instance, "better use by beneficial owners". The objects clause on its face permits the alienation of the land if it is to best advantage of the beneficial owners.

[31] Another relevant phrase in the objects clause is "to ensure the retention of the land for the present Māori beneficial owners and their successors". This of course

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12 See Bal Matheson and Simon Berry "Water" in Derek Nolan (ed) *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at [8.21].

13 See also Tom Bennion "Introduction" in Tom Bennion and others *New Zealand Land Law* (2nd ed, Thomson Reuters, Wellington, 2009) at [1.6(1)].

conflicts with the earlier object which specifically permits alienation. This was not an issue in the lower Courts. It was not necessary to discuss the issue of retention because the use of the land is through what the Māori Land Court characterised as a "lease" and the purported geothermal project does not entail a loss or alienation of land.

[32] The remaining aspects of the objects clause are sufficiently broad to encompass the proposed use of land. Of particular relevance is the reference to "on all matters relating to the land", which on the interpretation previously given includes the geothermal energy. We are satisfied that there is nothing in the objects clause that limits the use of the geothermal resources in the way contemplated by the Agreement.

Our evaluation on scope of cl 3(a)

[33] We are satisfied that the interpretation given by the Appellate Court is correct and for the reasons given. Such interpretation is consistent with the language of cl 3(b) which not only explicitly recognises the generality of cl 3(a) but also emphasises, clarifies, and extends the powers of the trustees. Any other interpretation would be strained. However, for completeness the appellants' arguments are addressed below.

[34] First, we note that although cl 3(b) explicitly states that it does not limit the generality of cl 3(a), some of the various powers do provide such a limit. For example, cl 3(b)(vii) "To lend" states:

> To lend all or any of the money coming into their hands upon any securities in which Trust funds may be invested by Trustees in accordance with the Trustee Act 1956 or in accordance with any other statutory authority upon first or second mortgage or contributory mortgage approved by a resolution of the beneficial owners at a properly constituted meeting.

Thus cl 3(b)(vii) operates as a limit in conflict with the part of the clause that explicitly states cl 3(a) is not limited. In our view, this limitation is properly characterised as procedural in nature. If the trustees decide to pursue the activity of lending money then they would have to comply with the limitation in that section. In that sense, the specific clause has clarified the extent of the power.

[35] Further, we have not overlooked the fact that some powers overlap with each other. An example is the powers in cl 3(b)(xiii), dealing with the erection of dwellings, and cl 3(b)(iii), providing a general power to improve the land. Other powers could be said to fall within more than one of the categories (such as the power in cl 3(b)(xvii) to represent owners). What cannot be disputed, however, is that there are a variety of powers and, as such, there must be an overall power of the trustees to decide which course to follow: that is the power given in cl 3(a). This is consistent with the notion that the powers in cl 3(b) emphasise and clarify the general power in cl 3(a).

[36] It is true that some powers require approval through a resolution of the beneficiaries or oversight by the Court. Others do not. A proper construction of the trust order is that the trustees are free to do that which absolute owners of the land can do, except where the specific provisions of the trust order impose a procedural limit on the power.

[37] We reject the appellants' contention that the object of the trust order before the variations were sought was primarily to farm the land and possibly to allow owners to live on the land. We do not accept that "all of the specific powers are directed to this [object] and to assisting the owners".

[38] There is nothing in the trust order that restricts the objects to farming the land. Rather, cl 2 (the objects clause) broadly provides for the "use, management and alienation of the land to the best advantage of the beneficial owners". The geothermal project falls within that object.

Second issue – could the joint venture agreements be entered into under cl 3(b)?

[39] Even if we were wrong in our conclusion that cl 3(a) provides the power of absolute ownership (subject to the alienation point), that is not the end of the analysis. The question is whether the geothermal project could nevertheless fall within the more specific powers in cl 3(b). Of particular relevance to this question are the following clauses in the original trust order:

(a) Clause 3(b)(iii) giving power "to develop and improve the Trust lands and to erect thereon such ... constructions or erections of whatsoever nature as may seem necessary or desirable".

(b) Clause 3(b)(iv) giving power "to engage employ and dismiss ... consultants surveyors engineers valuers and other professional advisers require to carry out the powers of the Trustees and to fix their remuneration".

(c) Clause 3(b)(xiv) granting power to lease the land.

[40] Furthermore, the following subclauses added in 2004 and 2006 pursuant to s 244 are apposite:

(a) Clause 3(b)(xvi) grants the power to "develop the area to support the Geothermal Tourism Park concept".

(b) Clause 3(b)(xviii) grants the power to "join with others and to undertake and form companies and enter into joint ventures with other Māori Authorities sited over the same field to investigate the possibility of establishing a Geothermal Power Station and to take advantage of the findings".

[41] We are satisfied that these specific powers provide more than ample powers to deal with the trust land for the purposes of the Tikitere Geothermal Power project.

Third issue – did the trust order variations comply with s 244 of the Act?

[42] The appellants submitted that the variations to the trust order approved by the Māori Land Court were unlawful as the trustees failed to comply with s 244 of the Act:

> **244 Variation of trust**
>
> (1) The trustees of a trust to which this Part applies may apply to the court to vary the trust.

> (2) The court may vary the trust by varying or replacing the order constituting the trust, or in any other manner the court considers appropriate.
>
> (3) The court may not exercise its powers under this section unless it is satisfied—
>
> (a) that the beneficiaries of the trust have had *sufficient notice of the application* by the trustees to vary the trust and *sufficient opportunity to discuss* and consider it; and
>
> (b) that there is a *sufficient degree of support* for the variation among the beneficiaries.
>
> (Emphasis added).

[43] In the Māori Land Court, Judge Harvey referred to *The Trustees of the Pukeroa Oruawhata Trust v Mitchell*,[14] in which this Court underscored the importance of strict adherence to s 244.[15] In that case it was considered that a three step process was required, including notice to the beneficiaries, an opportunity to discuss and consider the proposal, and evidence of a sufficient degree of support. Judge Harvey concluded that, having regard to *Pukeroa Oruawhata*, some of counsel's criticisms of the s 244 process in the present case were "not without foundation".[16] However, it was unnecessary to take this point further because the Judge was satisfied that the trustees had power on other grounds to enter into the agreement.

[44] The Appellate Court noted that the legal validity of the variations was never formally challenged by way of appeal or rehearing application. Accordingly, the variations were operative at the time the trustees entered into the Agreement. The Court held:

> [38] If the appellants had concerns about the legal validity of these variations, the appropriate action was to challenge those orders through an appeal within 2 months of the order. This cannot be raised now, more than four years later.
>
> [39] The lower Court, in its decision of 10 September 2010, had no jurisdiction to set these orders aside and has not done so.

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14 *The Trustees of the Pukeroa Oruawhata Trust v Mitchell* [2008] NZCA 518.
15 MLC judgment, above n 1, at [65].
16 At [69].

> [40] Even if the variations are set aside, in our judgement that would not alter the trustees' power to enter into [the Agreement]. Clause 3(a) gave the trustees power to enter into the agreement with no need to obtain variations to the trust order.

[45] On appeal, the appellants submitted in summary that:

(a) The variations were unlawful as they did not comply with the requirement of s 244(3) that the beneficiaries have sufficient notice of the application and time to discuss it, and there was not a sufficient degree of support for the proposals.

(b) There could not have been sufficient notice or support because the meeting preceding the 2004 variation was attended by only 17 people and no meetings were held before the 2006 and 2009 variations.

(c) Section 58 of the Act provides that the Appellate Court has jurisdiction to hear appeals against decisions of the Māori Land Court within two months of the date of the decision or "within such further period as the ... Appellate Court may allow". The Appellate Court erred in failing to consider whether an extension was justified in this case.

[46] Mr Hurd for the respondents argued that the appellants have adopted a simplistic approach to s 244. That section does not prescribe the means of notification, or the degree of support required. There is no requirement in the Act for meetings to be held, or for a majority of beneficiaries to approve the proposal. The Appellate Court was correct to conclude that it is now too late to pursue such a challenge. While the Court has power to extend the time to appeal, no extension is warranted in this case. In any event, none of the variations was necessary and a decision to declare any of them invalid would not invalidate the trustees' decision to enter into the Agreement.

[47] We are satisfied that the approach taken by the Appellate Court was correct. The Act has a time limit within which challenges of this nature must be brought. We agree with the respondents that it is now too late to raise issues of this nature. In any

event, it follows from our conclusion on issues one and two that the variations sought were not needed by the trustees in order to enter into the Agreement.

Fourth issue – consultation

[48] The appellants submit that the trustees had a legal obligation under s 229 or s 244 or the common law to refer the Agreement to the owners for consultation.

[49] Section s 229 provides:

> **229 Court may authorise new ventures**
>
> (1) Subject to subsection (2), the court may approve an extension of the activities of any trust constituted under this Part, whether by the trustees alone or in concert with any other person or body, and whether or not the proposed activities relate directly to the property of the trust.
>
> (2) The court shall not exercise its powers under subsection (1) unless it is satisfied that the beneficial owners have had sufficient opportunity to consider the proposal and that there is a sufficient degree of support among the owners.

[50] On appeal, the appellants submitted that the geothermal project was so radically different from the objects of the trust as set out in the trust order that the trustees needed to seek the permission of the Court or the owners in order to pursue it. The Agreement was either an extension of the activities of the trust under s 229 or would require a variation of the trust order under s 244.

[51] The respondents submitted that the position taken by the Appellate Court on this issue was correct. That Court held that s 229 is an optional section which allows trustees alone or with others to apply to the Court for directions or to sanction a new venture where no authority exists in the trust order. Because cl 3(a) gave the trustees power to enter into the agreement, there was no need to make a s 229 application.[17]

[52] Again, we are satisfied that the approach taken by the Appellate Court was correct. There is nothing in the trust order, the Act, or common law that necessitates

[17] MAC judgment, above n 2, at [44]–[45].

consultation with beneficial owners.[18] While best practice dictates that trustees should in the normal course keep beneficial owners informed of developments (subject to any issues of commercial sensitivity), this is not a requirement of the Act or an element of the trustees' duties.

Fifth issue – conflicts of interest

[53] The issue for determination is whether the Agreement was invalidated by the trustees' conflicts of interest. In order to deal with this question further factual background is required. The actions of three trustees are relevant.

Factual background

[54] Mrs Fenwick's alleged conflict arises from her interests in two of the three trusts party to the Agreement. In addition to owning 1.57991 shares in Whakapoungakau 24 out of a total shareholding of 83.63567, she owns 93,187.322 out of 1,977,351 shares in Paehinahina Mourea. Mrs Fenwick was also a trustee of Paehinahina Mourea, and her family owned at least 20 per cent of the shares in that trust.

[55] Mr Eru's alleged conflict arises from the fact that a whanau trust in which he is both a trustee and beneficiary holds 0.0964 shares in Whakapoungakau 24 and 894.90 shares in Paehinahina Mourea. Mr Eru is also a trustee of the Manupira Ahu Whenua Trust and a beneficiary of Paehinahina Mourea.

[56] The alleged conflict of the late Mrs Emery arose from the fact that her husband was a trustee of the Paehinahina Mourea Trust.

[57] All three trustees participated in the decision making process and voted in favour of the Agreement.

Relevant provisions of the Act and the trust order

[58] The first relevant provision is s 227:

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[18] No public law duty of consultation arises: cf Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 958.

227 Trustees may act by majority

(1) Subject to any express provision in the trust order and except as provided in subsections (2) and (3), in any case where there are 3 or more responsible trustees of a trust constituted under this Part, a majority of the trustees shall have sufficient authority to exercise any powers conferred on the trustees.

[59] The second is s 227A:

227A Interested trustees

(1) A person is not disqualified from being elected or from holding office as a trustee because of that person's employment as a servant or officer of the trust, or interest or concern in any contract made by the trust.

(2) A trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects that person's remuneration or the terms of that person's employment as a servant or officer of the trust, or that directly or indirectly affects any contract in which that person may be interested or concerned other than as a trustee of another trust.

[60] Section 227A is incorporated into the trust order via cl 4:

4 Personal Interest of Trustees

Notwithstanding any general rule of law to the contrary no person shall be disqualified from being appointed or from holding office as a Trustee or as a representative of the Trust by reason of his employment as a servant or officer of the Trust or by his being interested or concerned in any contract made by the Trustees PROVIDED THAT he shall not vote or take part in the discussion on any matter that directly or indirectly affects his remuneration or the terms of his employment as a servant or officer of the Trust or that directly or indirectly affects any contract in which he may be interested or concerned PROVIDED FURTHER THAT if a Trustee is employed by the Trust in any capacity whatsoever he shall not be paid any fees, costs, remunerations or other emolument whatsoever until same has been approved by the Court.

Was the issue of the effect of the trustees' conflicts of interest on the validity of the agreements raised before the Māori Land Court?

[61] This was the first of the three issues on which we sought further submissions following the conclusion of the hearing.[19] The parties agreed that at no stage before the Māori Land Court did the appellants seek a ruling that the agreements entered

[19] It was addressed in the joint memorandum filed on 6 May 2013.

into by the trustees were invalid due to any of the appellants' contentions about the manner in which those agreements came about. Rather, the appellants originally sought injunctive relief to prevent the trustees from taking any other steps related to the geothermal proposal. This relief was sought in the context of the appellants seeking to remove and replace the trustees and to have the trust order amended.

[62] At the hearing before the Māori Land Court, the appellants asked the Court to amend the order to require that owner consent was necessary before certain types of transactions could be entered into. The respondents argued that any amendment could only have prospective effect as the Agreement itself was valid. The appellants submitted that the question of the enforceability of the agreements against the trustees was a matter on which any new trustees would need to seek advice. Apparently this was the only time at which the validity of the Agreement was raised. Accordingly, the parties recorded their agreement:[20]

> Notwithstanding how the issues are presented in the judgment of the Māori Land Court, the question whether the existence of any conflicts of interest affected the validity of the agreements was not raised before that Court.

[63] In summary, the appellants originally sought to have the named trustees removed under s 240(a) on the basis that they had ignored conflicts of interest. The appellants did not, however, seek a ruling that those conflicts affected the Agreement in any way. As we will discuss, this is an important consideration in terms of the nature of the relief open to the Court at this stage.

Māori Land Court decision

[64] Judge Harvey referred to the proposition that a trustee cannot profit from his or her office, and that, as a fiduciary, a trustee cannot permit any conflict between personal interests and the trustee's duties to the beneficiaries.[21] He observed that under s 227A of the Act, as adopted in cl 4 of the trust order, a trustee interested in a contract is not disqualified from holding office provided the trustee ensures that he or she does not vote or participate in the decision making process. The Judge

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[20] This acknowledgement is consistent with the pleadings before the Māori Land Court.

[21] At [139], citing *Robinson v Pett* (1734) 3P Wms 249, 24 ER 1049 (Ch) and *Boardman v Phipps* [1967] 2 AC 46 (HL).

observed that best practice was that a trustee interested in a contract should be absent whenever the contract is being discussed or voted upon.

[65] Turning to the specific trustees, Judge Harvey first considered the position of Mrs Emery, finding:

> [142] The position of the late Mrs Emery can be dealt with in short order. The fact that Mrs Emery's husband is a trustee of Paehinahina Mourea on its face gives rise to the presumption of a potential conflict or at least the appearance of one. *However, that presumption can be rebutted*. On the evidence before the Court I am not persuaded that there was a real risk of an actual conflict arising, given the composition of the trustees for both trusts and taking into account the processes they followed leading up to the [Agreement]. *I am confident that the trustees of Tikitere and Paehinahina Mourea have acted by majority* to ensure that the interests of their respective owners have remained paramount.
>
> [143] Again, from a practical perspective it is not as if the votes of Mrs Emery or her husband were crucial to the decision for either trust. Moreover, even if both Mrs Fenwick and the late Mrs Emery both voted against the proposal as Tikitere trustees or absented themselves, the votes of the remaining trustees would have been sufficient. While there may have been a presumption of bias there is no evidence to confirm any actual bias or conflict.
>
> (Emphasis added).

[66] In respect of Mrs Fenwick, Judge Harvey found:

> [149] While I accept that Mrs Fenwick did not deliberately set out to benefit herself and her family, *it was inappropriate for her to participate in the decision making. ... The trust order is perfectly plain on this point.* It was unwise for her to be involved and ... she should have been absent from those parts of the meeting where the decision to enter into the [Agreement] was made.
>
> [150] But even then, does the conduct of Mrs Fenwick mean that she was fatally conflicted to such an extent that she can no longer act as a trustee or that her involvement in the process has resulted in the decision to enter into the [Agreement] being irredeemably tainted? *The trustees of both Paehinahina Mourea and Tikitere were aware of her large holding* in the former. It was not as if this was somehow a secret. With respect, *I struggle to accept the suggestion that experienced individuals like Mr Kingi and even Mr Eru would have made a decision that was dependant, wholly or in part, on whether or not Mrs Fenwick might stand to gain personally or that somehow they were unaware of her interests*. Moreover, while it is acknowledged that she took advice, both trusts had their own independent advice and in any event *her vote, like that of Mrs Emery, was immaterial to the final outcome and decision.*

[151] Having considered her evidence and assessed her demeanour, *I do not accept the suggestion that Mrs Fenwick's conduct was driven by personal financial considerations. It was clear that she unsurprisingly found the suggestion grotesque.* She is a well known kaumatua in this district with a long history of service and community involvement. That she should have been more upfront to the meeting of Tikitere owners in 2008 about the potential for personal gain and conflict is obvious. ...

[152] *In any case, there is also no guarantee that a dividend will be paid* from any monies received by Paehinahina Mourea which might opt instead for grants for Māori community purposes under s 218 of the Act. ...

...

[154] My conclusion is that Mrs Fenwick, like all her fellow trustees, did not follow proper process to ensure that she remained completely disconnected from the decision making at every relevant point and in that failure has created an appearance of conflict which has not been properly managed. The trust order prohibited her from taking part in the decision making. Her actions in creating the appearance of conflict have excited the suspicions of the owners. *I am not persuaded however that such appearance has rendered the decision to enter into the [Agreement] nugatory*. Nor do I accept that Mrs Fenwick's actions in this context are sufficient to warrant her removal. *Her fellow trustees made the decision and their consent without her involvement would have been sufficient to confirm the decision.* I also acknowledge for completeness Mr Hurd's submissions on the words of s 227A(2) and in particular "other than as a trustee of another trust" which arguably also provides Mrs Fenwick with some comfort in the present context.

(Emphasis added).

[67] In respect of Mr Eru, the Judge found:

[163] In summary, Mr Eru, like his colleagues, has connections to more than one trust involved in the [Agreement]. He also retains a leadership role with the [Ngati Rangiteaorere Claims Committee] and has advocated for that body and its supporters. While on the face of these relationships conflicts will be presumed, Mr Eru, like Mrs Fenwick is entitled to participate in the various entities because of their whakapapa. They are connected to the land and are entitled to nomination and appointment. *As Mr Hurd and also Mr Gray submitted, it would be impossible to appoint anyone to a trust if whakapapa gave rise to insurmountable conflicts*. *What matters more is how those actual and perceived conflicts are managed and whether or not the affected trustees have participated in any decisions that directly concern their interests.* If they have then the failure to seek directions will be a relevant consideration.

[164] Actual conflict of course will always be subject to the Act and in this case to the terms of the trust order. Both make it clear that involvement or interest in a contract is no bar to retaining the position of trustee. The affected individual must simply absent themselves from any hint of influencing an outcome in which they are interested. While like Mrs Fenwick, I find aspects of Mr Eru's conduct a cause for concern,

> including the issues surrounding the execution of the [Agreement], it falls short of surpassing the threshold required for removal. ...
>
> (Emphasis added).

[68] Judge Harvey ultimately concluded that any actions of the trustees were insufficient to warrant their removal under s 240 of the Act. He added that he accepted that "the trustees did not adhere strictly to the trust order and general trust law principles from time to time".[22]

Decision of the Appellate Court

[69] Before the Appellate Court, it appears that counsel for the appellants submitted that Judge Harvey should have gone further and found that the consequences of the conflicts of Mr Eru and Mrs Fenwick was to invalidate the agreement. This was despite there being no pleading of such a claim.

[70] The Appellate Court rejected this argument, holding:

> [70] The lower Court gave extensive consideration to the issue of conflicts of interest.
>
> [71] We agree with the lower Court that the conflicts of interest found did not invalidate the trust's decision to proceed with the project. We agree that, even without the involvement of the 'conflicted' trustees, the same decision would have been breached.
>
> [72] We do not agree with the proposition put forward by the appellants that the participation of the conflicted parties meant the decision as a whole was invalid. *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*[23] dealt with judicial decision-making and thus an entirely different set of duties and obligations. We do not see it as being applicable to conflicts of interest with regards to trustees of statutory trusts formed under Te Ture Whenua Māori Act 1993.

Submissions

[71] In this Court, counsel for the appellants originally submitted that the conflicts of interest on the part of Mr Eru and Mrs Fenwick provided sufficient reason to "invalidat[e] the decision to proceed with the geothermal project". Specifically, the appellant contended that the lower Courts had misunderstood the difference between

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22 MLC judgment, above n 1, at [230].

23 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

"potential conflicts" and "actual conflicts" and had been too quick to accept claims that the trustees were acting in good faith and in the best interests of the owners. During the course of the hearing, we sought clarification from counsel as to the manner in which this issue was raised before the Māori Land Court.[24] It seems that, although the appellants did not originally seek a ruling as to the effect of any conflicts of interest on the validity of the Agreement, that possibility was considered by Judge Harvey and was taken up by the appellants in the Appellate Court. This raises a question as to the options open to this Court at this stage.

[72] To assist us in resolving this issue, we also sought additional submissions from counsel on two further questions:

> (2) What is the effect of the existence of conflicts of interest on the part of some trustees on the relevant agreements in terms of general trustee law? Is that analysis affected by the particular context (a trust established under Te Ture Whenua Maori Act 1993?
>
> (3) If the Court were to conclude that the validity of the agreement is or may be affected, what relief should the Court grant?

[73] Counsel for the appellants submitted that the Agreement may be set aside on the application of the beneficiaries and the matter should be sent back to the Māori Land Court to determine the question of relief. Mr Geiringer submitted that when, in breach of trust, a trustee enters into a contract that disposes of trust property to an innocent third party, the contract cannot be undone after completion. Up until completion, however, equity will prevent the disposition of trust property "even although the other contracting party is bona fide and has no notice of the breach".[25] The innocent third party may still have a claim against the trustee with whom he contracted, but the trust property cannot be used to satisfy that claim. After completion, however, the innocent third party will have a better equity. If the third party had knowledge of the breach, the above will not apply and the contract may be set aside even after completion on the application of a beneficiary.

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[24] This question was the subject of further submissions referred to at [61]–[63] above.

[25] Citing H A J Ford and W A Lee *The Law of Trusts* (looseleaf ed, Thomson) at [17.8010].

[74] The appellants emphasised the Māori Land Court findings that Mrs Fenwick, Mrs Emery and Mr Eru "failed to manage the conflicts".[26] Accordingly, the agreement was entered into in breach of trust. Had the trustees used a mechanism in the Act to manage their conflict (for example, by removing themselves from decision-making), that may have meant that no breach occurred. However, this did not happen. Counsel further submitted that there were no innocent parties to the Agreement. That is because one or more of the conflicted trustees (or a party connected with those trustees) was also a trustee in each of the trusts that formed the parties to the Agreement.

[75] In this context the relevant parties were:

(a) **Pirihira Fenwick**, Wiremu King, **Winnie Emery**, Hiwinui Heke, and **Tai Eru**, jointly as trustees of the Tikitere Trust;

(b) Barnet Vercoe, Parehuia Aratema, **William Emery** (the husband of **Winnie Emery**), **Pirihira Fenwick** and Te Hurihanganui Whata, jointly as trustees of the Paehinahina Mourea Trust;

(c) George Epapara, Phillip Curtis, Richard Vercoe, Sam Emery, Stormy Hohepa, **Tai Eru** and Whakehau Waerea, jointly as trustees of the Manupirua Trust; and

(d) TGL (a company created and wholly owned by the **Tikitere trustees**).

[76] For this reason, the appellants submitted that each party has, or can be imputed to have, actual knowledge of the decision making process. Further, although Mr Bruce Carswell, Green Energy Ltd, and Ormat Industries Ltd (Ormat) had all had some dealings with the Trust since the conclusion of the Agreement, the appellants do not accept that these are innocent parties. That is because Mr Carswell, and by extension his companies, had knowledge of the trustees' decision making processes. Accordingly, there are no innocent third parties, and the Agreement can be set aside on the application of the beneficiaries.

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[26] Citing the MLC judgment at [154].

[77] On the question of relief, the appellants accepted they did not initially seek to put the question of the status of the Agreement before the Court. However, while Judge Harvey's finding that the conflicts did not render the decision to enter the Agreement nugatory stands, it prevents the beneficiaries from obtaining the relief of having the Agreement set aside.

[78] Counsel for the respondents contended that, even if the trustees acted in breach of trust, it is now too late for any beneficiary to seek to have the agreement set aside. If this Court concludes that there is merit in the appellants' submissions it should, at most, state the issue and refer the matter back to the Māori Land Court for a full review. We summarise the respondents' contentions.

[79] First, neither the Māori Land Court nor the Appellate Court found any actual conflicts of interest by any of the trustees. Rather, the Courts found that there were matters which might have given the appearance of conflict, and failures to manage the process to avoid that appearance. Accordingly, there is no basis on which to question the validity of the Agreement.

[80] Second, the effect of s 227 of the Act, which allows for decisions to be made by a majority of the trustees, is that conflicts affecting a minority do not invalidate the decision which the un-conflicted majority was entitled to make. Counsel submitted that s 227 is an example of the way in which the Act has a "substantive and moderating impact" on the principles to be applied to the conduct of trustees of ahu whenua trusts. This is intended to reflect the fact that beneficial ownership in more than one ahu whenua trust is likely to be common. Because Mr Eru and Mrs Fenwick constitute only a minority of the trustees, the remaining trustees had authority to exercise the power of the trustees as a whole.

[81] Third, the respondents reject the suggestion that there are no innocent third parties involved in the transaction. Counsel points to the Build Operate Transfer Agreement entered into between Tikitere Geothermal Power Ltd (a subsidiary of the Trust) and Tikitere Ltd Partnership (a partnership established by Ormat). Under this agreement significant rights have been obtained and consideration provided by third parties, including the two adjoining trusts and Ormat. There is no basis to impute to

these parties knowledge of the alleged breach of trust. Furthermore, it is submitted that the appellants were well aware of this agreement, as they unsuccessfully applied to the Māori Land Court for an injunction to prevent the agreement being entered into.

[82] Finally, counsel submitted that the present status of the appeal raises concerns of injustice and unfairness. It is submitted that if the Court considers that there is, or might be, some substance in the appellants' contentions, it would be appropriate for the matter to be referred to the Māori Land Court. However, this Court ought to go no further than to identify the issue as one needing further consideration.

Discussion on conflicts of interest

[83] As Mr Geiringer identified, while Judge Harvey's findings on this issue stand, the beneficiaries are unable to obtain the relief of having the Agreement set aside. For that reason it is necessary for us to consider this issue despite the fact that it was not raised by the appellants before the Māori Land Court.

[84] We consider that there are errors in the approach taken by both the Māori Land Court and the Appellate Court. In particular, we consider that the Courts erred in their consideration of the principles governing when an actionable breach of trust is made out in the context of ahu whenua trusts. In addition, we are satisfied that any application by the appellants to have the Agreement set aside would be arguable.[27] However, as the parties accepted, it is not appropriate for this Court to determine this issue without further evidence from all interested parties. For that reason, the case is to be remitted to the Māori Land Court for further consideration of this issue.

Applicable legal principles

[85] When considering a claim relating to breach of trust, the starting position is that trustees of Māori land are under the same obligations as other trustees. Equitable principles such as the duty of loyalty and good faith, the duty to act

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[27] We emphasise that we are not to be taken as commenting on the likely success or otherwise of such application.

personally, and the duty not to profit, apply equally to Māori trustees.[28] Those general principles may be modified, however, by the Act or by the trust order. In *Rameka v Hall* the position was described by this Court as follows:[29]

> [19] … The trustees have obligations to the beneficiaries to administer the trust property in accordance with general trust law, the requirements of the Trustee Act 1956 and the provisions of the Act. In other words, trustees are *subject to traditional trustee duties with the statutory overlay* of particular obligations arising from the context of ahu whenua trusts.

[86] It is necessary to first consider the position at common law where a trustee has a conflict of interest but nevertheless participates in decision making. The second stage is to examine whether there is anything in the Act or the trust order which alters this outcome.

[87] At common law, trustees have a clear obligation of single-minded loyalty to their principal.[30] To establish a breach of this duty it is sufficient to show that the trustee has placed him or herself in a position of *potential* conflict.[31] As expressed by Lord Brougham in *Hamilton v Wright*:[32]

> There cannot be a greater mistake than to suppose ... that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty.

[88] This is because fiduciary doctrine is prophylactic in nature: it holds that prevention is better than cure. As noted by Matthew Conaglen, "removing the fruits of temptation is designed to neutralise the temptation itself by rendering it pointless".[33]

[89] A position of potential conflict will arise where:[34]

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28 *Taueki – Horowhenua 11 (Lake) Maori Reservation* (2005) 163 Aotea MB 99 (163 AOT 99) at [20] and [27].

29 *Rameka v Hall* [2013] NZCA 203.

30 See *Bray v Ford* [1896] 1 AC 44 (HL) at 51.

31 Matthew Conaglen *Fiduciary Loyalty* (Hart Publishing, Oxford, 2010) at 65*; Eden v Ridsdales Railway Lamp & Lighting Co Ltd* (1889) 23 QBD 368 (CA) at 371; *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471, 149 RR 32 (HL) at 39.

32 *Hamilton v Wright* (1842) 9 Cl & Fin 111 at 123, 8 ER 357 (HL) at 362.

33 Matthew Conaglen "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452 at 463.

34 *Boardman v Phipps*, above n 21, at 124.

> A reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you would imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

[90] Where the trustee is conflicted in this manner, he or she cannot deal with the trust without the informed consent of all beneficiaries[35] or of the Court.[36] If neither of these steps is taken, and the conflicted trustee participates in decision making, any resulting transaction will be voidable regardless of the fairness or otherwise of that transaction. Indeed, "no inquiry on that subject is permitted".[37] Likewise, the honesty or otherwise of the fiduciary is also irrelevant.[38]

[91] Furthermore, the transaction will be voidable regardless of whether or not other trustees were similarly conflicted. In *Re Thompson's Settlement* Vinelott J held:[39]

> The principle is applied stringently in cases where a trustee concurs in a transaction which cannot be carried into effect without his concurrence and who also has an interest in or holds a fiduciary duty to another in relation to the same transaction. The transaction cannot stand if challenged by a beneficiary because in the absence of an express provision in the trust instrument the beneficiaries are entitled to require that the trustees act unanimously and that each brings to bear a mind unclouded by any contrary interest or duty in deciding whether it is in the interest of the beneficiaries that the trustees concur in it.

[92] The trustees will be jointly and severally liable for any breach of trust. This is because where there is more than one trustee, the trustees are expected to act jointly.[40] Barring an express provision in the trust deed, all of the trustees' decisions must be unanimous. Therefore, liability for breach of trust attaches to the trustees jointly and severally, regardless of which of them was directly responsible for the breach of trust.[41]

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35 See eg. *Tempest v Lord Camoys* (1888) 58 LT 221 at 223 and *Hordern v Hordern* [1910] AC 465 (PC) at 475, as cited in Matthew Conaglen "Fiduciaries" in John McGhee (ed) *Snell's Equity* (32nd ed, Sweet and Maxwell, London, 2010) at [7–016].

36 See *Campbell v Walker* (1800) 5 Ves 678 at 681, 31 ER 801 (Ch) at 802 (as cited in Conaglen, above n 35, at [7–017]), and *Re McNally (dec'd)* [1967] NZLR 521 (SC) at 522.

37 *Aberdeen Railway Co*, above n 31, at 472 and 39, as cited in Conaglen, above n 35, at [7–018].

38 See eg. *Ex parte Lacey* (1802) 6 Ves 625 at 630, as cited in Conaglen, above n 35, at [7–018].

39 *Re Thompson's Settlement* [1986] Ch 99 at 115.

40 Jill E Martin *Modern Equity* (19th ed, Sweet and Maxwell, London, 2012) at [17–007].

41 See Alastair Hudson *Equity and Trusts* (7th ed, Routledge, Oxford, 2013) at [18.2.4].

[93] On the basis of the common law, therefore, it is apparent that Mrs Fenwick and Mr Eru acted in breach of trust. Each placed themselves in a situation where there was a prima facie conflict between their interests as trustees and beneficiaries of the Trust and their interests (or the interests of their family members) in the other trusts that were party to the Agreement. The fact that this conflict may not have actually affected their decision-making is irrelevant; the appearance of conflict is sufficient.

[94] The next step is to consider whether any of the provisions of the Act alter this outcome. Two such provisions are relevant: ss 227 (trustees may act by majority) and 227A (interested trustees).[42]

[95] In our view, for the reasons that follow, neither of these provisions affects the common law position described at [93] above.

[96] The starting point for analysis is the fact that both s 227 and s 227A are specific alterations of the common law of fiduciary obligations. For that reason, if neither s 227 nor s 227A applies, the common law approach will prevail. This reasoning is supported by the fact that when Parliament passed the Act, it elected to use the mechanism of trusts as a means of governing Māori land. In doing so, it must have anticipated that any "gaps" in the Act would be filled by the common law, including the law of fiduciary obligations.

[97] Section 227A relaxes the application of the common law position on conflicts of interest. It provides that conflicted individuals may serve as trustees of Māori land trusts. However, s 227A is clear that such individuals are not permitted to participate in decision making that has a direct impact on their interests.[43] The Act is silent on the consequences that follow if the trustee breaches this requirement and nevertheless participates in decision making. We consider that in such circumstances

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[42] These sections are set out in full at [58] and [59] above.

[43] The only exception to this would be where the individual's conflict arose solely from his or her position as a trustee of another trust. In that scenario, the final section of s 227A(2) appears to indicate that the trustee may be permitted to participate in decision making. In the present case, the conflicts of Mr Eru and Mrs Fenwick extend beyond merely being trustees to other trusts. For that reason, this exception is not relevant.

the common law position will apply and the trustee's involvement will constitute a breach of trust.

[98] We note that this conclusion is strengthened by the fact that s 227A(2) (and cl 4 of the trust order) prohibit an interested trustee from voting *and* from "participating in the discussion" in specified circumstances. This indicates that Parliament recognised that by participating in the discussion, even if not voting, an interested trustee could (improperly) influence the decision of the non-interested trustees. Thus, by prohibiting participation outright, the Act and order emphasise that a fact-based inquiry into whether or not the non-interested trustees were improperly influenced is not appropriate.

[99] Similarly, s 227 alters the common law position by providing that trustees may make decisions by majority. This provision is a necessary corollary of s 227A, as it allows trust business to continue when one trustee has absented themselves from decision making. However, s 227 has no effect on the common law requirement that every trustee who participates in decision making must be free from conflict. In *Re Thompson's Settlement*, Vinelott J noted that "beneficiaries are entitled to require that the trustees act unanimously *and* that each brings to bear a mind unclouded by any contrary interest or duty."[44] Section 227 relaxes the first requirement by allowing the trustees to act by majority, but it has no effect on the second requirement. Trustees must still bring to bear a mind unclouded by any contrary interest. Hence if a conflicted trustee participates in decision making, the decision will be voidable regardless of whether there is a majority of non-conflicted trustees. This is consistent with the prophylactic nature of the no-conflict rule discussed earlier.

[100] Therefore, while the above provisions of the Act alter the common law position in certain circumstances, those alterations have no effect where the conflicted trustee participates in decision making. It follows that our conclusion on this point is different than that reached by the Māori Land Court and by the Appellate Court. In those Courts it was considered that the effect of s 227 and s 227A was that no breach of trust would occur provided a majority of the trustees

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[44] Above n 39, at 115 (emphasis added).

were not conflicted. In this context, however, we do not consider that the specialist nature of those Courts affects our conclusion.[45]

[101] Accordingly, we consider that it was not open to Judge Harvey to engage in an inquiry into the overall circumstances of the transaction. In reaching his ultimate finding in respect of Mrs Fenwick, the Judge gave weight to her personal assurances that she had not been driven by personal financial considerations, and his assessment that it was unlikely that the other trustees would have been influenced by her participation. Similar factors were taken into account in respect of Mr Eru. The Judge also considered it to be important that the votes of the conflicted trustees were "immaterial to the final outcome and decision", given the unanimous support of the other, non-conflicted trustees.

[102] This reasoning went beyond the application of fiduciary principles to the facts and strayed into a holistic assessment of whether the trustees' acts were fair in the circumstances. This is inconsistent with the principles described above and with the prophylactic nature of the no-conflict rule. Applying those principles, once Judge Harvey concluded that either Mrs Fenwick or Mr Eru was in a position of conflict but nevertheless continued to participate in decision making, he ought to have made a finding that the transaction was voidable, and considered whether any remedy was available.

[103] We acknowledge that it might be said that applying these principles could cause administrative inconvenience to trustees because of the fact that many trustees of Māori trusts are likely to be conflicted.[46] However, we are confident that the Act provides the appropriate tools for trustees to manage such conflicts. For example, trustees may remove themselves from decision making under s 227A, or apply for a variation to the trust deed under s 244. Alternatively an application for directions to the Māori Land Court might be appropriate. If those mechanisms are thought to be insufficient, it may be necessary to consider legislative change.[47]

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45 Compare *Kameta v Nicholas* [2012] NZCA 350, [2012] 3 NZLR 573 at [7]–[10].

46 See MLC judgment, above n 1, at [163].

47 We note the Act is currently under review: see *Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel* (March 2013), available at <www.tpk.govt.nz>.

[104] We consider that it is open to the appellants to make an application to have the Agreement set aside. At common law, if a breach of trust is found, the remedies available will include rescission (the setting aside of the transaction). However, rescission will not be available where the agreement in question is with an innocent third party.[48] The parties disagree as to whether any innocent third parties have become parties to the Agreement or any subsequent agreements. It is not appropriate for us to attempt to resolve this question. Further evidence from all interested parties would be required. The evidence as it presently stands does not conclusively rule out the possibility that it is open to the appellants to make such an application. The appropriate course is to remit this matter to the Māori Land Court for further consideration of any matters arising from the conflict of interest issue.

Sixth issue – removal of trustees

[105] The appellants also submit that the Appellate Court erred in failing to remove the trustees.

[106] Section 240 provides:

> **240 Removal of trustee**
>
> The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—
>
> (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
>
> (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[107] In the Māori Land Court, the application for removal was made on the basis that the trustees had failed to carry out the duties of trustees satisfactorily. In particular, it was alleged that they had:

> (a) failed to inform the owners of the Trust about the proposed development;

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[48] See Conaglen, above n 31, at 77, and *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 (Ch) at 1261.

(b) refused to allow the owners access to information about the development;

(c) failed to keep adequate records of Trust meetings;

(d) abrogated their decision-making role to the secretary of the Trust;

(e) ignored conflicts of interest;

(f) purported to act on the basis of an owners' meeting despite the meeting being attended by fewer than 10 per cent of the owners;

(g) attempted to cancel a properly requisitioned and advertised meeting of owners; and

(h) deliberately concealed attempts to commit the Tikitere geothermal resource, therefore disenfranchising the shareholders who regard Tikitere as a cultural icon.

Māori Land Court findings

[108] Judge Harvey considered each of these grounds. Many of his conclusions (for example, on conflicts of interest, variations of the trust order, and consultation with the beneficiaries) have been set out above. On the question of delegation, the Judge considered that there was no "wholesale abandonment" of the trustees' roles in favour of the Trust secretary.[49] On the remaining grounds, the Judge did acknowledge that there had been some shortcomings in the administration of the trust (such as a failure to file trust accounts).[50] However, his final conclusion was that taken together, the errors on the part of the trustees were not sufficient to warrant removal:

> [221] … in my assessment, [the shortcomings] fall some distance from the threshold required for the drastic step of intervention by the Court and removal. The trust has not suffered significant financial loss and its assets have not been put at risk. While a 52 year lease is certainly at the higher end

[49] MLC judgment at [179].
[50] At [220].

> of the scale, compare that with forestry leases and licenses in excess of 70 years, leases that are common place in this district. While these are not exact comparisons in the absence of independent evidence claims of risk to trust assets remain speculation. …

Appellate Court

[109] Before the Appellate Court, the appellants argued that Judge Harvey erred in his assessment of s 240. In particular, it was argued that the Judge erred in his assessment of cl 3(a) and ss 229 and 244 (dealing with consultation and variation). The Court held that as the Judge's decision under s 240 amounted to an exercise of judicial discretion, it could only interfere where there was an error of law or principle, where the Judge took into account an irrelevant consideration or failed to take account of a relevant consideration, or where the decision was plainly wrong.

[110] In summary, the Court held:

> [86] … we have found no error in law in either Judge Harvey's interpretation of clause 3(a) or his findings in regard to sections 229 and 244. We do not find that he took into account irrelevant considerations or failed to consider relevant considerations. Finally, we do not think his decision was plainly wrong.

[111] On appeal, the appellants submitted that the "numerous failures" on the part of the trustees amounted to a failure to carry out their duties satisfactorily and that they should have been removed. In particular, it is submitted that the evidence shows that most of the trustees had only a vague idea of their obligations and of the details of the trust and its finances. At least three of the trustees had major interests in other trusts, and the trustees also failed to keep proper accounts for over two years.

[112] The respondents submitted that the appellants had failed to recognise that this part of the appeal seeks to overturn the exercise of a discretion. As it was not contended that either the Judge failed to take into account relevant considerations or took into account irrelevant considerations, the appellants must show that Judge Harvey made an error of law or principle, or that the decision not to remove the trustees was plainly wrong.

[113] The respondents submitted that the suggestion that the trustees had only a vague idea of their obligations as trustees is a "substantial overstatement". Similarly, the appellants have overlooked the fact that Judge Harvey concluded that the trustees did not delegate their duties to the Trust secretary. While there were aspects of their knowledge of which the Māori Land Court was critical, having considered all those matters, it decided that removal was not required.

Our views

[114] The principles relating to removal of trustees are set out in *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc*,[51] recently approved by this Court in *Rameka v Hall*.[52] In *Bramley* the Appellate Court held:

> [9] Whether governance performance has been satisfactory or not must depend then on whether there is a clear and present apprehension of risk to the incorporation asset or to the wider interests of the incorporation shareholders as a result of action or inaction of the committee. *It is not every unsatisfactory act or omission which should lead to removal, but those that go to the principles of the Act.* To adopt any other approach, would lead to removal being the primary remedy available for any technical breach of the Act. We do not think that wholesale removal of Māori governance members is consistent with the principles of the Act or the intentions of the legislature.
>
> (Emphasis added).

[115] As the above makes clear, s 240 involves a wide discretion. Not every unsatisfactory act will be relevant. Rather, the Judge ought to focus on those breaches which go directly to the principles of the Act.

[116] We have disagreed with the decision of the Māori Land Court and the Appellate Court on one point only – the question of the consequences of the trustees' conflicts of interest. However, we have found no cause to differ from Judge Harvey's conclusions on the power of the trustees to enter into the Agreement, the validity of the variations to the agreement, and the trustees' obligations of consultation.

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[51] *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc* (2006) 11 Waiariki Appellate MB 144 (11 AP 144).

[52] *Rameka v Hall*, above n 29, at [32].

[117] Ultimately, to succeed in a removal of trustees the appellants must establish that Judge Harvey erred in principle or that his decision was plainly wrong. We are satisfied that the Judge made no error of principle in the manner in which he conducted the s 240 analysis. Judge Harvey's conclusion was that the behaviour of the trustees fell well short of the standard required for removal. Therefore, even if our different conclusions on conflicts of interest were to be taken into account, we do not consider that this is a proper case for removal. We are not satisfied that the Judge's conclusion was plainly wrong.

[118] Accordingly, this ground of appeal must fail.

Result and costs

[119] For the reasons given above, the appeal is allowed in part. The case is to be remitted to the Māori Land Court for further hearing on any matters arising from the conflict of interest issue. The appeal is otherwise dismissed.

[120] As the fifth appellant, who conducted the appeal on behalf of the other appellants, is legally aided, there is no order as to costs.

Solicitors:
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