IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAKITIMU DISTRICT

A20120007050
APPEAL 2012/4

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal by Hōhepa Mei Tatere and Te Aroha Edwards, against orders of the Māori Land Court issued on 4 April 2012 at 15 Tākitimu MB 204-221 in respect of Mangatainoka No 1BC No 2C, Tamaki 2A2A (Balance) also known as Ngawapurua and Rua Roa Trusts
BETWEEN	HOHEPA MEI TATERE AND TE AROHA EDWARDS Appellants
AND	TE AUTE TRUST BOARD AND THE EDWARDS WHĀNAU WAIAPU BOARD OF DIOCESAN TRUSTEES AND ANGLICAN PARISH OF DANNEVIRKE AND EMERY WHĀNAU Respondents

Hearing: 2012 Māori Appellate Court MB 376-430, 15 August 2012
(Heard at Hastings)

Court: Judge L R Harvey (presiding)
Judge G D Carter
Judge S Te A Milroy

Appearances: Mr L Watson and Ms E Dawson, for the Appellants
Mr J Appleby, for the Edwards Whānau and Te Aute Trust Board
Mr S Webster, for Waiapu Board of Diocesan Trustees and the Anglican Parish of St John's Dannevirke
Mr N Milner, for the Emery Whānau

Judgment: 8 March 2013

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] On 6 August 2009 Tau Anthony Hōhepa Edwards, Belinda Puanani Edwards, Donna Mahue Marsh, Michelle Awhina Edwards, Hester Vanessa Edwards and Josephine Mariana Henderson ("the Edwards whānau") filed an application to remove Hōhepa Mei Tatere and Te Aroha Matawai Annette Edwards ("the Trustees") as trustees of the Rua Roa and Ngawapurua Trusts ("the trusts"). The applicants are all children of one of the Trustees, Aroha Edwards, and were income beneficiaries under both trusts. They claimed that the Trustees had not been fulfilling their duties to the beneficiaries and had acted in breach of trust sufficient to warrant removal. The Trustees denied the claims. By judgment dated 4 April 2012 the application was granted by the Māori Land Court and the Appellants were removed as trustees.[1] They now appeal that decision.

[2] The removal proceedings followed an application by the trustees to vary the trust orders under s 244 of Te Ture Whenua Māori Act 1993 ("the Act") by bringing forward the date upon which distributions to the income beneficiaries were to cease. The application for variation was to facilitate an arrangement among the beneficiaries as to the distribution of the trust assets. Orders varying the terms of trust were then issued on 4 December 2007.[2] A rehearing was granted and took place on 6 August 2009.[3] On the same day the application for removal of the Trustees was filed. At the conclusion of the rehearing the Court reserved its decision and subsequently dismissed the application for variation in a judgment issued on 29 March 2012.[4] The Trustees also appealed that decision. Both appeals were heard before this Court on 15 August 2012.

[3] While the variation proceedings have no bearing on the outcome of this appeal some of the background facts are common to both applications. The question of agreement by the beneficiaries of the trust to an arrangement for distribution of the assets of the trusts was central to the application for variation. In the removal proceedings the actions of the Trustees with respect to that arrangement were material to the Court's decision. In this judgment it is therefore necessary to set out some of the background to the arrangement for distribution.

[4] In his decision Judge Coxhead considered six specific allegations against the Trustees. Of those he selected the inequitable treatment of beneficiaries as being the most

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1 15 Tākitimu MB 204 (15 TKT 204)
2 194 Napier MB 46 (194 NA 46)
3 204 Napier MB 185 (204 NA 185)
4 15 Tākitimu MB 4 (15 TKT 4)

significant ground for removal. Even though the grounds of appeal refer to all issues before the Māori Land Court in the removal proceedings, we intend to focus on the findings about inequitable treatment. Only if we find fault with this aspect of the judgment will we need to consider the other grounds supporting the decision. The issue for determination is whether or not the Judge exercised his discretion correctly to remove the Appellants as trustees.

[5] We note that the application was supported by the Te Aute Trust Board ("Te Aute") which is an income beneficiary and residual beneficiary in each of the trusts. In addressing the Māori Land Court Mr Appleby, who appeared as counsel for both the Edwards whānau and Te Aute, described Te Aute as a joint applicant. This is not the case since Te Aute was not named as a party to the application for removal, nor was it joined as a party during the proceedings.

[6] For convenience we refer to the Record on Appeal as "ROA, p123" being shorthand for Record on Appeal at page 123 since a number of important documents are mentioned in this judgment.

Background

The Trusts

[7] The trusts were constituted over land owned by Hōhepa Tatere or Hōhepa Mei Tatere I (the settlor) under s438 of the Māori Affairs Act 1953 on 9 July 1968.[5] The Rua Roa Trust was established over Tamaki 2A1C Block (40.4686(ha)) and Tamaki 2A2A block (39.8969(ha)). The Ngawapurua Trust, was established over Mangatainoka 1BC2C1 Block (84.3986(ha)). Variations to the trusts were made on 13 July 1970.[6]

[8] The original Trustees were Hōhepa Mei Tatere II ("Hepa Tatere") and Alan Raymund Fitchett. Mr Fitchett retired and was replaced by Te Aroha Matawai Annette Edwards ("Aroha Edwards") by order of the Court on 6 November 1998.[7] The Trustees are the Appellants.

[9] Initially the trusts provided for the payment of income to the settlor. Following his death on 20 August 1971 a further period of income distribution was then provided with the

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5 102 Napier MB 140 (102 NA 140)
6 104 Napier MB 135 (104 NA 135)
7 155 Napier MB 64 (155 NA 64)

period ceasing on the death of the survivor of certain named beneficiaries or the date upon which the last of a class of beneficiaries attains the age of 40 years, whichever is later.

[10] The date when distribution of income ceases was referred to by the parties as the date of distribution and we continue to refer it in those terms. At the date of the original hearing of the application for variation of the trust orders, 4 December 2007, the date of distribution for the Ngawapurua Trust was the date of death of Aroha Edwards or 22 March 2012 whichever is the later. For the Rua Roa Trust it was 22 March 2012.

[11] Once the date of distribution for a trust is reached the payment of annuities and income distributions for that trust ceases and the residual beneficiaries become entitled. The residual beneficiaries are the same for each trust, namely Te Aute and the Anglican Parish of Dannevirke ("the Parish") as to a 4/5th share and 1/5th share respectively. Both trusts provide for the net annual income to be applied in payment first of:[8]

> (i) All instalments of principal due under any Mortgage from time to time registered against the said land or any sums of money required to pay in whole or in part any indebtedness or obligation incurred or entered into by the said Trustees in connection with the trusts hereof or in the exercise of the powers or discretions conferred upon them.

[12] Then follow provisions for payment of several annuities. The only annuities remaining payable in December 2007 were $600 to Aroha Edwards under the Ngawapurua Trust and $200 to the Parish under the Rua Roa Trust. The requirement for the latter payment ceased on 22 March 2012.

[13] The balance of the income from each trust was to be paid to 6 children of Aroha Edwards (the Edwards whānau), 3 children of Hepa Tatere (the Tatere children) and Te Aute and the Parish "in such shares or proportions and to the exclusion of any one or more of them as the Trustees shall think fit". We refer to these beneficiaries collectively as the income beneficiaries and to the Edwards whānau and the Tatere children collectively as the family beneficiaries.

[14] The amount of income available for distribution is also affected by clause 7 in each trust order relating to the powers of the Trustees:

> To carry to a reserve fund so much of the income in each year of the said land and the other assets of the trust estate as they shall in their absolute discretion think fit with power from time to time as and when they think proper so to do to apply the reserve fund or any part or parts thereof:

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[8] 104 Napier MB 135 (104 NA 135)

> (i) As income arising in the then current year,
>
> (ii) In making good losses arising in any year or years in respect of any business carried on by them.
>
> (iii) In reducing or paying off any secured or unsecured debts owing by the Trustees in respect of the said land any business carried on by them on the said land.
>
> (iv) In effecting improvements to any lands for the time being subject to the trusts hereof.

Administration of the Trusts

[15] The trust property is farmland. The Trustees retained the original lands and farmed them until they were removed on 4 April 2012.[9] Over the years the Trustees have purchased a number of other blocks of land and considerably increased the total area of land farmed. It is common ground that the Trustees have not made any distributions to the income beneficiaries.

[16] In 1968 the total area of land held by the trusts totalled 164.7638(ha). (Ngawapurua 84.3983(ha) and Rua Roa 80.366(ha)). Ngawapurua purchased 78.888(ha) in 1975 and 5.340(ha) in 1986 bringing its total holding to 168.6263(ha). In 2001 the 78.888(ha) block was sold reducing that figure to its current holding of 89.7383(ha).

[17] Rua Roa purchased 32.757(ha) in 1982 increasing its total holding to 113.123(ha). In 2004 it purchased a further 111.952(ha) thus taking that total to 225.075(ha). The combined holding of the trusts has therefore increased from 164.7638(ha) in 1968 to their present holdings of 314.8133(ha).

[18] Over recent years the lands of both trusts have been farmed together under the Tatere Partnership. The Trustees have signed partnership agreements on behalf of each trust setting out terms including how partnership income is to be apportioned between each trust.

[19] The policy of developing the farming assets of the trusts has been to the benefit of the residual beneficiaries in that the capital assets of the trusts have been enhanced. Conversely it has been to the detriment of the income beneficiaries in that, as was noted earlier, no distributions from income have been made since inception of the trusts.

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9 15 Tākitimu MB 204 (15 TKT 204)

The Distribution Arrangement

[20] It is apparent that in 2003 Marcus Poole, the then solicitor for the Trustees, was concerned that no distribution of income had been made to the income beneficiaries. On 1 December 2003 he raised the possibility of settlement for the income beneficiaries in a letter to S D Morice. The letter contained the following passage:[10]

> 5. There is one outstanding issue on which I have been trying to get a decision from the Trustees. That concerns distributions to the family members of income. No income has been distributed to the family members since the inception of the trust. Like many similar maori (sic) trusts the Trustees started with the land and no working capital. All money for development was borrowed, and in the dairy industry the cost of effecting improvements is very substantial. I had put some propositions to the Trustees as to how they could distribute the Trustees reserve income account to the family members which would involve the sale of a portion of either the Rua Roa Estate land or part of the new property at Hopelands recently purchased by the trust. Both properties have a house surplus to requirements and I believe we could raise the sum of approximately $108,000.00 to be paid out of the reserve income account to the family members.

[21] In 2004 the Trustees raised the question of an arrangement for the lands of the trusts in a report to Te Aute. In that paper they concluded:[11]

> These our plans for the 'Tatere Partnership' does extend beyond our destiny as far as the will of Doc Tatere is involved. Your board needs to think about the whole scene and match our intent to be involved with this whole scene.
> The will dictates that the family receives nothing at the end of 40 years. I believe this is unfair and your board will need to come up with a compromise to cater for this anomaly.
> We can continue on, as we are with trustees controlling activities as shown at a ratio acceptable by all concerned.
> We can contest the will, which in my opinion is not tidy and there will be a feeling of us and them.
> We can sell and split the difference. Sell our heritage, not acceptable to us.
> We can gift one farm and keep the other. Who decides which farm is important to us as a family?
> We the Tatere Partnership buy the Te Aute Board out payable over 10 to 15 years.
> Take these thoughts away with you to consider and put forward your thoughts at our next meeting.

[22] It appears that discussions stalled for a time but were revived by the Trustees in 2007. In the minutes of a meeting of Te Aute with Hepa Tatere on 29 August 2007 an outline of the discussion was recorded in a series of bullet points which included:[12]

> There was agreement that the parties were moving in the right direction regarding the wishes of the Will of HW Tatere (Doc).

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10 ROA, Submissions for the Appellant, Bundle of Documents at p 79.
11 Ibid, at p 81
12 Ibid, at p 90

> It was noted that there is substantial debt due to the children as they should have been paid out years ago.
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> It was proposed that the Tatere family take the Ngawapurua block and that Te Aute Trust Board take the Roa Block. Hōhepa agreed to rationale but there are nine children that this needs to be discussed with.

[23] From that point the Trustees and Te Aute proceeded quickly to reaching consensus. Minutes of a meeting of Te Aute on 10 October 2007 record an agreement reached with the Trustees earlier that day as well as a resolution approving the arrangement:[13]

> Agreement had been reached at the meeting subject to confirmation by the board that:
> 1. An application should be made to the Māori Land Court forthwith to advance the date of distribution from the current date of March 2012. Such application could be made in the next two months and distribution could follow immediately thereafter.
>
> 2. The distribution is on the basis that the Tatere family retain the Rua Roa block.
>
> 3. All of the debt currently held by the trusts should go with the Rua Roa property.
>
> 4. The Ngawapurua property should go to the residual beneficiaries (the Te Aute Trust Board and the Dannevirke Anglican Parish of St Johns).
>
> 5. A payment of $50,000 per year for 5 years could be made by the residual beneficiaries to assist with debt financing.
>
> 6. The properties are to be divided on a "going concern" basis - that is the cattle and Fonterra shares would go with the respective properties such that each property operates as a separate going concern.
>
> **It was resolved that:**
>
> That the proposal to accept the Ngawapurua farm stock and assets debt free in settlement of the Te Aute Trust Board and Dannevirke Parish entitlement under the will in this matter be approved in principle subject to due diligence and legal sign off, noting that the interest of the Dannevirke Parish and thereby their approval must be taken into account.
>
> ***Stan Pardoe/Mark Williams***
>
> The Secretary indicated he would write to the Dannevirke Parish directly as their consent would be required for the application to go to the Māori Land Court likely to be early December**.**

[24] The negotiations were carried out solely between the Trustees and Te Aute. It was left to Te Aute to consult with and obtain the approval of the other residual beneficiary, the Parish.

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[13] Ibid, at p 90

[25] In a letter to the Parish dated 18 October 2007 Mr Palairet as secretary for Te Aute outlined the proposal and sought the approval of the Parish. In his letter he wrote:[14]

> The two trusts arose out of the will of the late Doc Tatere In(sic) the 1960s whereby various family members continued as beneficiaries of the trusts until distribution in March 2012 and the residual beneficiaries would be the Te Aute Trust Board as to four fifths and St John's Anglican Church (Dannevirke) as to one fifth.
>
> …
>
> The underlying background which needs to be bourne(sic) in mind is: that there is a very firm resolve from the family notwithstanding the provisions of the will, to endeavour to retain what is considered to be the family property (that is the Rua Roa block). Our view is that this would probably manifest itself into a challenge to the will and what would then amount to a long drawnout expensive and quite damaging process.
>
> …
>
> The Te Aute Trust Board has given its support to the settlement proposal in principle on the basis that:
>
> (a) It recognises that the enterprise has grown to such an extent that entitlements which the family may feel they have to the land given those changing circumstances can be met without rancour and long drawnout legal attrition; and
>
> (b) Both beneficiaries access an income stream at a time when dairy prices are at record highs.
>
> …
>
> We understand that the application has gone in on a preliminary basis seeking a hearing on 3 December 2007 at the Māori Land Court and it would be a necessary component of that hearing that consents from TATB and yourselves be available.
>
> In the meantime we will be seeking more financial information and having a budget undertaken by a farm consultant just to give us a full understanding of the income likely to accrue but suffice to say that this represents for both of us a substantial opportunity to access a solid income stream. So far as TATB is concerned it comes at [a] time of some financial strain for the Trust Board and would enable its finances to be put into a much stronger position where it can provide greater and much needed support to both Te Aute and Hukarere.

[26] In the course of negotiations the Trustees talk of challenging the will. Te Aute follows this terminology and also refers to a will in minutes and correspondence. The trusts were established, not by will, but by orders of the Court. Nevertheless the inference given by the trustees is that there would be a legal challenge to the right of the residual beneficiaries to the assets of the trusts. The comments on this point by Mr Palairet in the above extract from his letter of 18 October 2007 clearly show that Te Aute took this to be the case.

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[14] ROA, Submissions for the Appellant, Bundle of Documents at p 93.

[27] The agreement outlined in paragraph [23] formed the basis for the application for the variation of the orders relating to the trusts. The outcome of that application is mentioned in paragraph [2] of this decision.

Māori Land Court decision

[28] Judge Coxhead summarised the arguments in favour of removal as falling under 6 headings:[15]

(a) Selling off of Trust land
(b) Implications of the Waimarama lease
(c) Inequitable treatment of beneficiaries
(d) Failure to disclose all information to all beneficiaries
(e) Trustees' failure to maintain proper accounts, and
(f) Trustees' borrowing trust funds

[29] Leaving aside the inequitable treatment of beneficiaries, the Judge indicated that all the other matters listed above raised concerns and demonstrated that there had been slips and breaches of trustees' duties. He concluded that by the narrowest of margins the Trustees had not carried out their duties satisfactorily.

[30] He then went on to say in respect of inequitable treatment of beneficiaries:[16]

> [90] The letter is also significant. It clearly shows the trustees' intentions to seek to look after themselves and their families at the expense of the residual beneficiaries. They were motivated by interest of their families, not their duties as trustees. The trustees then, having sought to negotiate the beneficiaries out of half of their entitlement, have proceeded to look after the Rua Roa farm lands to the detriment of the Ngawapurua farm land.
>
> …
>
> [95] However, in terms of the equitable treatment of beneficiaries this is an entirely different matter. I am of the view that the trustees have and have had a clear intention to ensure that the residual beneficiaries do not receive their full entitlement. There has been inequitable treatment of beneficiaries in seeking to profit the income beneficiaries so that they receive part of the residual beneficiaries' entitlement, being one of the farms. With regards to this matter

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15 15 Tākitimu MB 204 (15 TKT 204) at [17]
16 Ibid at [90], [95]-[97]

> there is clearly a breach of Trustees duties and it is assessed that the Trustees have not been performing their duties satisfactorily.
>
> [96] What is also most concerning, is that there has been orchestrated (although at times it could be said negotiated) attempt to ensure the residual beneficiaries do not receive what they are entitled to.
>
> [97] I am of the view that the trustees have clearly breached their trustees' duties in this regard. It is a significant and ongoing matter. The Court is well within its discretion to remove the trustees. The trustees' intentions are undisputed, clearly articulated, and they do not hide from what they seek to do.

[31] The Court then proceeded to make orders under s 240 removing the Trustees.

Appellants' submissions

[32] The Appellants filed extensive submissions addressing all the issues raised by the Māori Land Court. As foreshadowed, at this point we concentrate on the finding as to the inequitable treatment of beneficiaries as our determination on this issue will shape our approach to the other issues on appeal.

[33] The submissions on inequitable treatment can be summarised as follows:

(a) the Court failed to consider the benefits of the proposed variation to all the beneficiaries who had full disclosure of relevant facts and access to independent advice;
(b) the Court failed to follow its own reasoning when it concluded that the Appellants had acted improperly in circumstances where the Court had already concluded that the evidence was unclear in regard to a number of areas;
(c) the Court failed to properly consider how the principles of the Act apply to the negotiations undertaken by the Trustees in respect to the Distribution Arrangement.

The Law

Removal of trustees

[34] Section 240 of the Act states:

> 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 trustees, 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 prolong absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[35] The word "satisfactorily" as it appears in s 240(a) has been subject of considerable judicial interpretation. In *Ellis v Faulkner*, *Poripori Farm A Block*, it was held that a simple failure or neglect of duties is not enough to warrant the removal of a trustee.[17] The requirement is a failure to perform them "satisfactorily". The Court must therefore undertake an assessment of the trustee's performance having regard to the standard duties of trustees as well as broader considerations relevant to the Māori Land Court. This approach has been approved in a number of decisions of this Court.[18]

Trustees' duties

[36] Trust law dictates that trustees must comply with a number of critical duties when performing their obligations under a trust. At this point our examination of the conduct of the trustees is confined to the finding of inequitable treatment of beneficiaries. The duties that are relevant to to the actions of the trustees in the context of this appeal and which we need to consider are those to adhere to the terms of trust, to maintain impartiality between beneficiaries and to avoid any conflict of interest.

[37] The authors G E Dal Pont and D R C Chalmers in *Equity and Trusts in Australia* confirm that a trustee's principal duty is to know and adhere to the terms of trust:[19]

> A trustee's plainest and overriding duty is to obey the terms of the trust. This is because a trustee is duty bound to give effect to the settlor's intention as expressed in the trust instrument, irrespective of how seemingly insignificant such terms may appear. The duty of obedience qualifies virtually all other duties of a trustee. The trust instrument is the trustee's "charter", by which he or she must constantly be guided. The failure to fulfil a duty prima facie renders the trustee liable for breach of trust.

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17 [1996] 57 Tauranga MB 7 (57 T 7)

18 *Perenara v Pryor – Matatā 930*, [2004] 10 Waiariki Appellate MB 233 (10 AP 233); *Marino – Repongaere 4G (Part)* [2004] 34 Tairāwhiti Appellate MB 98 (34 APGS 98); *Apatu v Puna – Owhaoko C1 and 2* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34).

19 (4th ed) The Law Book Company, Sydney, (2007) at [22.15]. See also *Hallows v Lloyd* (1888) 39 Ch D 686 and *Smith v Hugh Watt Society* [2004] 1 NZLR 537 at [62].

[38] It is also well settled that where doubts exist as to the particular course trustees may wish to take and whether a trustee's proposed conduct is compliant with the terms of trust then the correct approach is for the trustees to seek directions: *Wong v Burt*.[20]

[39] In *Equity and Trusts in New Zealand* the authors list the duties of trustees.[21] Duties relevant to the inequitable treatment of trustees are to adhere to the trust's terms and to maintain impartiality between beneficiaries. On the duty to demonstrate impartiality between beneficiaries the authors state:[22]

> It is the duty of trustees to act fairly by all the beneficiaries. The observance of this duty requires the proper disposition and employment of the trust property so as to avoid benefiting one beneficiary or one set of beneficiaries at the expense of another. This is not always an easy duty to fulfil. For example, a balancing exercise is required when investment issues arise between the life tenant and the residual beneficiaries. Impartiality also requires that trustees refrain from siding with one beneficiary (or group of beneficiaries) against another if there is a dispute between them as to the proper interpretation of the trust instrument.

Conflict of interest

[40] Section 227A of the Act states:

> (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.

[41] It is trite law that a trustee cannot profit from that office: *Robinson v Pett*.[23] A profit made directly or indirectly remains a breach of fiduciary duty: *Rochefoucauld v Boustead*.[24] More importantly for the purposes of the present case, it will also be a breach even where the profit is made by a third party, including children of the trustee: *Willis v Barron*.[25]

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20 [2005] 1 NZLR 91 at 99-100. See also *Re Mulligan* [1998] 1 NZLR 481 at 506.

21 Butler et al, *Equity and Trusts in New Zealand* (2nd ed),Thomson Reuters, Wellington, (2009) at page 124.

22 Ibid. See also *Re Schroder's Will Trusts* [2004] 1 NZLR 695

23 (1734) 3P Wms 249. See also Butler et al *Equity and Trusts in New Zealand* (2009) Thomson Reuters, Wellington, at 497-502

24 [1898] 1 Ch 550 (CA)

25 [1902] AC 271 (HL)

Moreover, as a fiduciary a trustee cannot permit any conflict between personal interests and the trustee's duties to the beneficiaries: *Boardman v Phipps*.[26]

Discussion

[42] Judge Coxhead found that the Trustees had broken the duty of impartiality on two counts. First, they had managed the Rua Roa farm to the detriment of the Ngawapurua farm so as to further the interests of their families. Secondly, they had acted with a clear intention to ensure that the residual beneficiaries did not receive their full entitlement.

[43] The submissions for the Appellants do not dispute that the Trustees procured the distribution arrangement and actively sought to bring the arrangement into effect. Counsel argued that the Court should have taken into account the benefit of the arrangement to all the beneficiaries, the principles of the Act and its own finding that some of the evidence was unclear.

[44] In this discussion we propose to first address whether the Appellants were in breach of their duties as trustees. We will consider the submissions for the Appellants as and when they become appropriate to the discussion.

Manipulation of trust assets

[45] There is no doubt that in 2007 the Trustees were working towards the implementation of the distribution arrangement. By the end of that year the proposal was that Te Aute and the Parish were to receive the tangible farming assets of the Ngawapurua Trust, namely the land, livestock and plant and Fonterra shares, free of any debt. The family was to receive Rua Roa subject to any debts of the trusts.

[46] To ensure that the arrangement was feasible the Trustees had to present the farms of both trusts as viable propositions. The improvement of the position of the Rua Roa farm was necessary so that the distribution arrangement could be put into effect.

[47] The need to concentrate on the position of Rua Roa was illustrated when late in 2007 Rabobank, which held security over Rua Roa farm, would not approve the arrangement unless the debt of Rua Roa Trust was reduced. This prompted a change in the arrangement

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[26] [1967] 2 AC 46

where Te Aute agreed to and paid a contribution of $1million towards the reduction of that debt.

[48] If the arrangement could not be put into effect Te Aute and the Parish remained entitled to the capital assets of both trusts. There was no detriment to them by the actions of the Trustees. The assets of both trusts still remained intact.

[49] It would appear that the question as to which party would take which farm was not settled until after 29 August 2007 as minutes of a meeting between Te Aute and Hepa Tatere on that date record that the family beneficiaries were to receive Ngawapurua and Te Aute the Rua Roa farm (see para [22]). At that stage there was no certainty as to which beneficiaries were to receive which farm.

[50] The actions of the Trustees are explainable in the light of the general agreement of all parties to the arrangement and the need to improve the position of Rua Roa for that purpose. We do not see them as an exercise to manipulate the assets of the trusts for the benefit of the family beneficiaries at the expense of the residual beneficiaries. The finding of the Māori Land Court in this context is not justified.

Inequitable treatment of beneficiaries

[51] Judge Coxhead emphasises the stance taken by the Trustees and their conduct in acting as advocates for the family beneficiaries. He concludes that such actions amount to the inequitable treatment of the beneficiaries. The evidence clearly demonstrates that there can be no doubt as to the active role of the Trustees in endeavouring to facilitate the distribution arrangement.

[52] Counsel for the Trustees virtually acknowledges this role when in his written submissions he cites from the affidavit of Tau Edwards, a member of the Edwards whānau:[27]

> I applaud the trustees' magnificent gesture in negotiating with the Anglican Church and the Te Aute Trust Board in order to secure the benefit for our families under the Distribution Agreement. The benefits to all of us are beyond anything we could ever have expected. [Hepa Tatere] deserves the utmost credit and our sincere thanks for what he has done.

[53] In summary, the facts appear quite clear. Nine of the 11 income beneficiaries are children of the Trustees and although both trusts provide for distribution of income to

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[27] ROA, Submissions for the Appellant dated 6 August 2012 at p 48

income beneficiaries the Trustees made no distributions of income, apart from the annuities specifically set out in the Trust deed. The Trustees then approached Te Aute to see if an arrangement for the distribution of the trust assets could be agreed. During those discussions the Trustees argued that the trusts were unfair in that after 40 years the family would receive nothing. The Trustees' proposition was that the capital beneficiaries take one farm and the family beneficiaries the other. The Trustees also indicated that if agreement could not be reached a legal challenge might be made. It was suggested that the date of distribution could be brought forward so that the capital beneficiaries could obtain early occupation of their settlement. In its appraisal of the proposed arrangement Te Aute took seriously the prospect that legal proceedings might be issued. Although any arrangement had to be agreed to by the capital beneficiaries and the income beneficiaries the negotiations were carried on by the Trustees on behalf of the family beneficiaries.

[54] In paras [36] to [41] we identified, in the context of this case, the duties of trustees which were relevant to the inequitable treatment of beneficiaries. These were the duties to adhere to the terms of the trust document and to act impartially or fairly by the beneficiaries. We now assess the actions of the Trustees against those duties.

[55] Before doing so it is appropriate that we deal with the submission on behalf of the Appellants[28] that the Court failed to follow its own reasoning when it concluded that the trustees had acted improperly in circumstances when the Court had already concluded in its decision that the evidence was unclear in a number of areas.[29] The evidence relevant to the finding of inequitable treatment of beneficiaries as outlined in paragraph [53] is both undisputed and unequivocal. We do not accept that the Judge's comment applied to the finding of inequitable treatment.

Conduct of the Trustees

[56] Negotiations over the distribution arrangement were initiated by the Trustees. The drive to come to an arrangement was prompted by the fact that no distributions from income had been made to the income beneficiaries. This situation arose from the decisions of the Trustees. They had managed the trusts apparently without regard to the interests of the income beneficiaries. Without assessing in any detailed manner the merits of such a claim by the beneficiaries we consider that there would have been a reasonable chance of success had any of the income beneficiaries commenced proceedings.

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[28] See paragraph [42] above
[29] 15 Tākitimu MB 214

[57] It was always open to the Trustees, if they felt that they had administered the trusts in a manner adverse to the interests of the income beneficiaries, to address this issue. An assessment could have been made as to the appropriate amount of any proposed reimbursement and put to the parties. It would then have been prudent, particularly given the Trustees' relationship to the family beneficiaries, for an application seeking directions to be made under section 66 of the Trustee Act 1956.

[58] As foreshadowed, Marcus Poole, as solicitor for the Trustees, had in late 2003 proposed a means of possible settlement for the family beneficiaries. The Trustees chose not to investigate the possibility of a distribution to the income beneficiaries. Instead they proceeded to negotiate the distribution arrangement which provided for the family beneficiaries to become residual beneficiaries to the Rua Roa Trust.

[59] In 2004 the Trustees raised the question of an arrangement in a report to Te Aute[30]. They expressed the view that the end result that the family would receive nothing after 40 years was unfair. They also raised the possibility of contesting "the will" if a compromise could not be reached. The inference is that they would either take or support legal action aimed at upsetting the rights of the residual beneficiaries under the trusts.

[60] Negotiations intensified in 2007. There is no doubt that the Trustees sought, through their negotiations, to remedy their perception that it was unfair for the family to receive nothing after 40 years. It is also evident from correspondence between Te Aute and the Parish that the risk of legal action was taken seriously by the residual beneficiaries. The outcome was that a distribution arrangement was agreed, where which the family beneficiaries were to become entitled to the Rua Roa lands, something that Tau Edwards acknowledged was beyond anything they ever could have expected.

Duty to abide by the trust instrument

[61] The Trustees held the opinion that the trusts were unfair to the family beneficiaries and took deliberate steps to circumvent the provisions of the trust orders. This was a fundamental breach of their duties as trustees. It was also contrary to the intention of Hōhepa Tatere I, the settlor. As the owner of the land he had decided that the capital beneficiaries would be the Parish and Te Aute. Under the applicable legislation of the time the Court had the jurisdiction to put the settlor's wishes into effect. Accordingly, the Trustees' actions in initiating negotiations and threatening legal proceedings were

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[30] See paragraph [26] above

incompatible with their duties as trustees. If they wished to pursue that course their first action should have been to obtain advice on whether or not they were in a conflict of interest and whether they should resign. In the circumstances, given their relationships with some of the beneficiaries, they should have sought directions from the Court at the very least.

Duty to act impartially or fairly by all beneficiaries

[62] Impartiality requires the trustees to refrain from siding with one beneficiary or group of beneficiaries against another. In *re Schroder's Will Trusts* the High Court found that where there are issues between beneficiaries the duty of a trustee to remain neutral is paramount.[31]

[63] An arrangement over the distribution of the assets of a trust is normally negotiated among the beneficiaries of the trust. It is their entitlements which are affected. The role of trustees is simply to carry out the terms of the arrangement once it has been given legal effect. In the present case the Trustees assumed the role of negotiator on behalf of the family beneficiaries. The family beneficiaries constituted children of the Trustees – six children of Aroha Edwards and three children of Hepa Tatere. The fact that they were children of the Trustees provides all the more reason for the Trustees to adopt a neutral stance since they had a conflict of interest.

Duty to avoid any conflict of interest

[64] As we have noted, another critical duty that a trustee must observe is to ensure that the duties of that office do not conflict with a trustee's interests. A set of circumstances may give rise to either the appearance of or an actual conflict. Moreover s227A of the Act makes it plain that a conflict of interest is not permitted. Where there is doubt trustees should always err on the side of caution and seek directions.

[65] The actions of the Trustees in negotiating the distribution arrangement with the residual beneficiaries and taking the side of the family beneficiaries is a breach of their duty to act fairly or impartially. Moreover, their pursuit of a settlement favourable to the family beneficiaries clearly involves a conflict of interest. The negotiations were marked by claims that the trusts were unfair and the threat of court proceedings. The Trustees should have maintained a neutral stance. Instead they allowed their personal interests to conflict with

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31 [2004] 1 NZLR 695

their duties. The breach is made worse because of the close relationship of the family beneficiaries to the Trustees.

Submissions for the Appellants

[66] Counsel submits that the Court erred in finding that the Trustees were not acting in the best interests of all beneficiaries by failing to consider the benefits of the proposed variation to all of the beneficiaries. They state that the Trustees did not act unconscionably; that the Court failed to consider the mutually beneficial nature of the distribution arrangement and the relevance of the fact that the parties had disclosure of information and access to independent advice.

[67] Judge Coxhead did not find that the Trustees acted unconscionably. It is correct that he did not consider the merits of the arrangement. His concern was with the actions of the Trustees in negotiating the arrangement; in taking the side of the family beneficiaries and trying to arrange for them to obtain a share of the assets of the trusts. The Judge found that such actions were a breach of the Trustees' duties to act fairly and impartially.

[68] Counsel for the Trustees in a further submission contended that the Court fundamentally misinterpreted the nature of the distribution arrangement. The submission went on to argue that:[32]

> 15.6.1 There is no consideration of the **contextual background** to the Distribution Arrangement, involved a redress of an imbalance in the way in which Trust funds had been directed towards capital growth and not income distribution.

[69] We agree with Judge Coxhead that the Trustees were in breach of their duties. Our next step is to determine whether those breaches amount to a failure by the Trustees to carry out their duties satisfactorily and whether the Māori Land Court was correct in exercising its discretion to remove them. The submissions as to consideration as to the merits of the arrangement and the redress of an imbalance between the beneficiaries are best considered at that stage.

Failure to carry out duties satisfactorily

[70] Under s 240(a) of the Act the requirement for the removal of a trustee is failure to carry out the duties of a trustee satisfactorily. This means that where breaches of duty are

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[32] ROA, Submissions Submissions for the Appellant dated 6 August 2012 at p 71.

established against a trustee the Court then has to measure whether those breaches are such as to constitute failure to carry out the duties of that trustee satisfactorily and, if so, whether to exercise its discretion to remove that trustee. Counsel for the Appellants submits that the Court should take into account the benefits of the arrangement to all the beneficiaries and the fact that it addresses an imbalance in the way in which trust funds had been directed towards capital growth and not income distribution. They also submit that the Court has not considered the distribution arrangement in the context of the trustees' duties under the Preamble and s 2 and s 17 of the Act.

[71] We address first the imbalance which has seen no distributions to the income beneficiaries. In paragraph [57] we pointed out that the Trustees have not addressed the issue of the imbalance between the income beneficiaries and the residual beneficiaries. No assessment was made. While it may be said that the distribution arrangement was in part to redress the imbalance between the two sets of beneficiaries, it went far beyond that. Negotiations were centred around the settlement of a share of the capital assets on the family beneficiaries. Tau Edwards, in the excerpt from his affidavit in paragraph [52], acknowledged that the arrangement exceeded considerably the expectations of the Edwards whānau.

[72] It is undisputed that the Trustees administered the trusts in a manner which provided no distributions of income. By their own admission they put the trusts at risk of a legal challenge by some or all of the income beneficiaries. They used that situation, which they had created, as a means of negotiating the distribution of part of the capital assets in favour of the family beneficiaries. In so doing, they disregarded their duties as trustees to adhere to the terms of the trusts and to act impartially as between the beneficiaries.

[73] If this had been a genuine attempt to settle the failure of the Trustees to provide income for the income beneficiaries we may have been persuaded to take that into account. It was not and we do not accept that this argument can be used to mitigate the breaches of duty as trustees.

[74] We turn now to the submission that the Court should have taken into account the merits of the arrangement and the benefit to the parties. Te Aute has, in no uncertain terms, expressed its approval of the arrangement. The benefits to the family beneficiaries are obvious. However, despite its approval of the arrangement, Te Aute strongly supports the removal of the Trustees. Te Aute weighed up and accepted the arrangement with due regard to the environment in which it was negotiated. The fact that Te Aute approved the

arrangement does not mean that it approves the actions of the Trustees and the manner in which they sided with the family beneficiaries in negotiating the arrangement.

[75] As we have said, the distribution arrangement was not simply a settlement over the failure of the Trustees to make distributions to the income beneficiaries. It incorporated the additional element of immediate settlement which needed the consent of Aroha Edwards who was entitled to an annuity. The evidence suggests that immediate settlement and the access to a steady income stream was a key factor acceptance of the arrangement by the residual beneficiaries.

[76] The residual beneficiaries had the capacity to enter into the arrangement. Before committing to the arrangement they carried out due diligence and took expert advice. These factors and the element of immediate settlement did not change the position for the Trustees. This was a settlement over trust assets and the Trustees were still bound to comply with their duties as trustees at all times.

[77] The focus of the Trustees was to negotiate for their children, who were income beneficiaries only, a share in the trust capital assets. Through committing serious breaches of their duties as trustees they were successful. We see no reason in the circumstances of this case why the fact that they were successful should be used to excuse those breaches.

Principles of Te Ture Whenua Māori Act 1993

[78] Counsel for the Appellants submits that the Court should have taken into account the principles of the Act. Under the preamble to the Act and s 2 emphasis is placed on the retention of land by owners, their whānau, their hapū and their descendants. Under s 2(2) the Court is directed as far as possible to exercise its powers duties and discretions to promote, amongst with other things, the retention of land.

[79] The land was effectively alienated out of Māori hands when the trusts were created in 1968. As we have noted, the settlor was entitled to make the arrangements that he did under the laws of the time. No formal challenge appears to have been made to his actions for almost forty years. Moreover, it is questionable whether the action by the Trustees in trying to restore some of the land to the family falls within the scope of retention of Māori land.

[80] The land is held under the trusts. We have found that the Trustees have committed serious breaches of their duties as trustees in their attempts to secure part of the trust estate for the family beneficiaries. Even so, the Court's power to remove trustees is discretionary. Even if the principles of the Act were to apply, given the circumstances of the Trustees'

conduct, it would not have been appropriate for the Court to exercise its discretion to decline to order their removal.

Conclusion

[81] The breaches of duties are serious, all the more so because the Trustees intended to improve the position of their children, the family beneficiaries. They failed to recognise that there was a conflict between their duties as trustees and their conduct in promoting the interests of their children. They set out to advance the interests of the family beneficiaries over those of the residual beneficiaries. In so doing they argued that the trusts were unfair and implied that legal action could follow if a compromise was not reached. They actively sought to arrange a change to the terms of the trusts to benefit their children in breach of their duty to act impartially.

[82] The Appellants should have considered resigning because of their conflict of interest. At the very least they should have sought directions. They did neither. As we noted earlier some of the actions of the Trustees comprised not just breaches of their duties but were incompatible with their position as trustees. The breaches were not caused by omission or neglect but as the result of calculated actions by the Trustees to benefit their own families directly. For the breach of their duties they were held to account and removed from office. Our conclusion is that the Judge acted correctly and accordingly we see no reason to disturb the judgment of the Māori Land Court. The appeal is dismissed.

Decision

[83] The decision of the Māori Land Court is affirmed. The appeal is dismissed per s 56 (1) (g) of Te Ture Whenua Māori Act 1993.

Costs

[84] This is the second of two appeals involving largely the same parties. In the circumstances it is appropriate that cost lie where they fall. There is no order as to costs.

Pronounced at 10.30 am in Hastings on Friday this 8th day of March 2013

L R Harvey	G D Carter	S T Milroy
JUDGE	**JUDGE**	**JUDGE**