

I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE TAIRĀWHITI
In the Māori Land Court of New Zealand
Tairāwhiti District

A20190011094

WĀHANGA <i>Under</i>	Section 240, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Wharekahika A47
I WAENGA I A <i>Between</i>	ASHLEY BROOKING Te kaitono <i>Applicant</i>
ME <i>And</i>	APIRANA MAPUROA HENDERSON Te kaiurupare <i>Respondent</i>

Nohoanga: 31 January 2020, 94 Tairawhiti MB 141-152
Hearing 6 August 2021, 105 Tairawhiti MB 104-178
(Heard at Gisborne)

Kanohi kitea: L Hemi for Applicant
Appearances J Kahukiwa for Respondent

Whakataunga: 20 April 2022
Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ MATUA TUARUA C L FOX
Judgment of Deputy Chief Judge C L Fox

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Hei tīmatanga kōrero*Introduction*

[1] Wharekahika A47 is a block of Māori freehold land situated near the township of Hicks Bay on the East Coast of New Zealand. Wharekahika is the traditional name of the area. The block is 1,174.4148 hectares in size. The Wharekahika A47 Trust (the trust) runs a farming operation known as Oweka Station. The trust has six trustees, but it appears the Māori Trustee has acted as agent for the trustees when entering leases of the land over the period 2000-2019.

[2] The details of the trust constituted on 16 February 2000 at 56 Ruatoria MB 267-268 are as follows:

Block:	Wharekahika A47 Block
Name of Trust:	Wharekahika A47 Trust
Type of Trust:	Ahu whenua trust
Area:	1,174.4148 hectares
Total Shares:	9,667.307
Number of Owners:	364
LINZ Reference:	479379
District Council:	Gisborne District Council
Valuation of Block: (as at 1/09/2020)	Land Value: \$1,400,000.00 Improvements: \$215,000.00 Capital Value: \$1,615,000.00
Current Trustees:	Apirana Mapuroa Henderson Ashley Brooking Ned Henderson Rawiri Ruru Steuart Corry McClutchie Victor Henderson
Trust Review Date:	16 February 2020
Current Trust Order:	56 Ruatoria MB 267-268 dated 16 February 2000

Kōrero whānui*Background*

[3] On 9 December 2019, one of the trustees Ashley Brooking filed an application pursuant to s 240 seeking the removal of another trustee, the respondent Apirana Mapuroa Henderson. The application was supported by trustee Rāwiri Tuhiwai-Ruru, and Te Aira Henderson, a beneficial owner. There are two further applications relating to the trust before the Court.

[4] Upon receipt of the applications the Court directed that the chairperson of the Wharekahika A47 Trust file a s 238 report. On 24 January 2020, the Court received that s 238 report from the chairperson, Mr A Henderson. He addressed the operation of the trust and its financial statements for the period 2015-2020. His report is reproduced as follows:

Wharekahika A47 Trust - Report to the Court Section 238, Te Ture Whenua Māori Act 1993

He ora te whakapiri, He mate te whakatakariri.

There is strength in unity, Defeat in anger.

The Wharekahika A47 Trust (“the trust”) was established in February 2000. Since its establishment, the trust has been managed by both the Māori Trustee and other elected trustees. The Māori Trustee’s administration over the trust ended in December 2018 and a separate group of trustees took over management of the trust.

I was nominated and appointed as a trustee in February 2015 and formally appointed by the Māori Land Court in October of 2015. I was voted in as Chair in May 2016.

Since my appointment as Chair, we have held numerous trustee hui and have held AGM’s in all years except 2017 as we were awaiting a report on the whenua from Valuation Eastland/John Bowen.

Hui dates, processes and procedures for both trustee and AGM hui are outlined below.

Trustee Hui

In the last 5 years the trust has held the following trustee hui (minutes attached):

2015 – 7 November

2016 – 27 February, 28 May and 27 August

2017 – 29 April, 24 June and 30 September

2018 – 14 July and 2 December

2019 – 27 February, 25 May, 2 August, 31 August and 5 October

AGM Hui

In the last 5 years the trust has held the following AGM’s (minutes are attached):

2015 - held 7 November at Potaka Marae

2016 – held 26 November at Potaka Marae

2017 – No AGM held as we were awaiting a report on the whenua from John Bowen

2018 – held 14 July at Potaka Marae

2019 – held 8 June at The Cosmopolitan Club

Process for setting Trustee hui and AGM’s

The process for setting dates and kaupapa for trustee hui and AGM’s are as follows:

1. Trustees discuss kaupapa for the hui;

2. Trustees are emailed with dates to choose from by the Chairman and/or secretary;
3. The date chosen is the date that the majority of trustees are available;
4. An email goes out to all trustees with this date;
5. From the discussions, the secretary and/or Chairman produce a draft agenda which is sent to all trustees for approval;
6. Once approved, a final agenda is sent to trustees;
7. For AGMs, the AGM is then advertised. All AGM's are advertised in the Gisborne Herald at least twice, on Radio Ngāti Porou, in the shop windows in Hicks Bay/Te Araroa at least three weeks before the hui;
8. For trustee hui, any important decisions that have been made are written into a form and signed off by the majority of the trustees (see signed forms attached).

The last 5 years

In the last 5 years, things have run along smoothly. We have made several important decisions but the most important has been taking rangatiratanga back over our whenua. This has resulted in us having discussions and making decisions such as:

- purchasing equipment e.g. Tractor and fencing materials, new steel yards, ATV bike and gorse sprayer;
- deciding on what we want to happen with the whenua;
- deciding on litigation (which we are currently in for compensation from the past Lessee for spraying our valuable Manuka resource);
- employing a Chartered Accountants to minimize costs;
- improving our income and relationships with local businesses;
- discussing kaumatua grants; and
- grazing 200 cattle on the block to create income.

Almost every year we have successfully reported back to our owners at AGM hui.

As can be expected with trusts, issues started arising when the trust had to decide on:

1. removing Shaun Brosnahan;
2. perusing legal action against John Helmbright for taking Manuka brush; and
3. deciding on who to give a contract to between Golden Grove and NZ Manuka (this resulted in a split vote decision in 2019).

At the 2019 AGM, I struggled to maintain order due to not knowing what the right procedure was and some trustees and owners not respecting me in my role as Chair. There were several times where I tried to call order and was not listened to. Despite all of this, I am keen to do Trustee training with all trustees to improve not only my skillset as the Chairman but also the skillsets of all of our trustees.

Financials

The last five years of financial reports are attached.

As you will see from the reports, “Oweka” derives an income from rental income, honey proceeds and proceeds from our Manuka. We have maintained a steady income over the last 5 years, with several outgoings being paid during this time and we have made enquiries into having the accounts audited in accordance with the trust order. We now have a chartered accountant (Cookson Forbes in Opotiki).

The Appointment of 3 new trustees

Our trust used to have 7 trustees however 1 trustee resigned. In relation to the application to add 3 new trustees, this was never discussed nor advertised with the 2019 AGM Agenda. At our hui in June 2019, three new trustees were just nominated (the first by Rawiri Ruru) and appointed on the spot and before anyone else had the chance to have a say Rawiri closed nominations, despite my calls for order and comments at subsequent hui that there was a process to follow to add trustees and it had not been followed.

I agree that a 7th trustee needs to be elected to replace the resignation however, I have tried to explain to the trustees and shareholders that there is a process for this – i.e that it has to be advertised as part of the AGM agenda and shareholders need to be given the opportunity to nominate and vote on who they wish to be elected. I have suggested that another properly advertised hui be held for the appointment of a 7th trustee.

Conclusion

Oweka has potential to continue to be a successful block for our shareholders both now and in the future provided we as a trust can come back together and make decisions accordingly. Further trustee training needs to be undertaken by current trustees (including myself) and any nominated trustees will be required to undertake this training also. I look forward to carrying the trust into a prosperous future and will gladly accept the Court’s assistance (when needed) to do so.

Nā, Apirana Henderson (Current Chairman)

Ngā Whakaritenga

Procedural History

[5] The applications were initially heard at 94 Tairawhiti MB 141-152 on 31 January 2020 and adjourned to allow for the parties to seek legal representation.

[6] Several judicial conferences were conducted by her Honour Judge Wainwright who outlined and worked through various *take* for all three applications. None of the conferences resolved any of the outstanding issues. On 24 September 2020, Judge Wainwright appointed counsel to assist the Wharekahika A47 Trust to arrange for the resignation of all current trustees. Resignations were to take effect as at the date when the Court ordered a new trust order and when it appointed new trustees elected at an AGM.¹ A number of the trustees refused

¹ 98 Tairāwhiti MB 29-30 (98 TRW 29-30).

to resign, including the respondent. Counsel appointed to assist the trust subsequently sought leave to withdraw.

[7] At a judicial conference on 10 November 2020, the respondent along with all trustees and their respective counsel confirmed they agreed with the directions of Judge Wainwright for all trustees to resign, a new trust order to be worked through, and an election of new trustees at a properly convened hui.²

[8] The respondent along with trustees Ned Henderson, Victor Henderson and Stuart McClutchie chose not to comply with the directions of the Court.

[9] A teleconference was set down for 26 February 2021. On 25 February 2021, the respondent informed the Court that he would not attend the teleconference and that he wanted to go to a formal hearing. The respondent also advised that Woodward Chrisp was no longer acting for himself, Ned Henderson, Victor Henderson or Stuart McClutchie.

[10] On 15 March 2021, I directed the Deputy Registrar to produce a s 40 report setting out the chronology of all applications before the Court. That report produced sets out the background to those applications and notes that the case manager had:

- (a) Received an e-mail from Mr Ashley Brooking on 2 December 2020 informing the Court that Mr V Henderson was asking the trustees to vote on paying Mr A Henderson \$10,000 for the work he has done for the trust and wanting directions to have this stopped.
- (b) Received a memorandum from counsel for the applicant, Mr Hemi, dated 17 February 2021 seeking a formal hearing and asking how the Court would like to proceed.
- (c) Set this application down for a teleconference to be held on 26 February 2021.
- (d) On 25 February 2021, Mr Apirana Henderson advised the Court that he would not attend the teleconference and that he would rather go to a formal court hearing. He also confirmed that Woodward Chrisp no longer acted for him and the trustees.

² 101 Tairāwhiti MB 49-50 (101 TRW 49-50).

[11] A further adjournment of this matter was granted on 5 July 2021 at the request of newly instructed counsel for the respondent, Mr Kahukiwa.

Te Tono ki te Kooti

The Application

[12] The applicant sought the removal of Apirana Henderson upon several grounds. These were refined once counsel, Mr Hemi, was appointed. In a memorandum to the Court dated 8 July 2020, Mr Hemi listed those grounds as failing to adhere to the trust order, acting in conflict of interest, acting outside the authority of the trust, and acting in a bullying and intimidatory fashion towards other trustees and beneficial owners.

[13] Notice of the applications and the hearing were advertised in the Gisborne Herald on 17 July 2021, and the Registrar was directed to give notice to all owners and parties for whom the Māori Land Court had addresses.

Te Nohonga o Te Kooti Whenua Māori

The Māori Land Court Hearing

[14] The three applications were called before the Court on 6 August 2021.³ It was noted that on 12 July 2021, Mr Hemi had filed a notice of discontinuance with respect to application number A2021190008723 for the appointment of additional trustees. The Court was also advised that the application A20200002942 for review of trust was not ready to proceed. I adjourned the applications for review of trust and replacement of trustees.

[15] At the hearing, evidence was presented by witnesses and this is recorded below. Counsel for both parties also presented submissions on the application for the removal of Mr Henderson.

[16] I heard argument on the application for the removal of Mr Henderson and reserved my judgment. Final closing submissions were filed in November 2021. Due to the state of the application file, and to ensure that counsel know what was before the Court, I set out summary versions of the documents relevant to the application.

³ 105 Tairawhiti MB 104-178 (105 TRW 104-178).

Ngā Kaitautoko i te Tono*Those in Support of the Application****Ashley Brooking – Brief of Evidence Undated***

[17] Ashley Brooking is a trustee for Wharekahika A47 Ahu Whenua Trust and the applicant in these proceedings. He advised that the main reason for bringing the application was because of A Henderson's failure to recognise, understand and properly manage several significant conflicts of interest. The witness noted that A Henderson was the chairman of the trust, a trustee on the trust, and is living in a house owned by the trust on Wharekahika A47. He is also managing the farm. In the applicant's view, the respondent's life is too tied to the trust and there is no separation between his personal life and the trust management. It was the applicant's view that while it might be possible to manage these conflicts, the respondent did not recognise there was an issue. He pointed out that the situation has not been helped by the fact that the respondent's brothers are also trustees. These trustees are Victor Henderson ("Victor") and Ned Henderson ("Ned"). In the applicant's view both Victor and Ned often failed to recognise their own conflict of interest in supporting many of A Henderson's actions which he believed were not in the best interest of the trust.

[18] Mr Brooking then discussed the payment of \$10,000. He recorded that in 2019, the trust paid \$10,000 to A Henderson for work that he had done for the Trust. The witness acknowledged that he had supported this payment, and signed the consent form. However, the applicant contended that his signature was conditional on the payment being put to a meeting of owners before it was made. The applicant signed the form because he often worked in very remote places around the East Coast for months at a time and this could mean that sometimes he was hard to contact. The matter was never put to a meeting of owners. The payment was made directly to the respondent by Golden Grove Apiaries. This should not have happened, according to the applicant. The applicant alleged that it was A Henderson who drove the idea of the trust paying him the \$10,000 and that he drafted the consent for everyone to sign.

[19] He acknowledged that A Henderson is a hard worker and that he has done a lot of good work on the farm. The issue for him was the conflict of interest that this causes. This was particularly the case when there are no agreements in place between the trust and A Henderson such as an employment agreement or a tenancy agreement. Mr Brooking suggested on several occasions over the years that the respondent needs to choose what he wants to do - be a trustee

or an employee. He did not think A Henderson should be both and raised this again with the trust in an email to the other trustees dated 6 April 2021.

[20] One of the other problems with working on the farm is that the respondent has made this his main focus. This would be good if he was just the manager of the farm, but he is also the chairman of the trust. In the applicant's view this means that many of the things the trust should focus on have not been done, such as developing the future plans for the trust, updating the database for the owners, and updating the trust deed.

[21] Mr Brooking then referred to the payment of \$5,000. A Henderson was offered this money while these proceedings were in train and prior to the August 2021 hearing. According to the applicant, Victor and Ned have been initiating these discussions. However, he believed that the respondent was behind it. Like the payment of the \$10,000 made to the respondent, he considered that this needs to be put to the owners at a meeting for them to decide.

[22] In terms of the Wharekahika A47 insurance, there was an issue concerning the coverage of the respondent's personal property - two of his vehicles, two trailers and his boat. Despite protests and opposition from Rāwiri Tuhiwai-Ruru about the inclusion of these personal assets within the policy, a majority of trustees approved the policy and the trust paid for it. The respondent was the person that organised the insurance policy and he was the person that asked for these personal items to be included in the policy. This is a very good example, the applicant opined, of the respondent having no clue about the obvious conflict of interest for him in doing all of this.

[23] He concluded by stating that because of the respondent's behaviour over the last four to five years and his failure to recognise and properly manage a large number of conflicts of interest, the relationship between the trustees has become strained. They are no longer working together, and the trust has become dysfunctional. They have not managed to have a face-to-face meeting for nearly two years and the last AGM of the trust was in 2019.

[24] For the benefit of the trust and in an attempt to help the trust move forward, the applicant, Rawiri Tuhiwai-Ruru and Steuart McClutchie were willing to resign as trustees and hold an AGM for new trustees to be elected. However, Apirana Henderson, Victor Henderson and Ned Henderson all refused to resign. The applicant believes that this is a further sign that the respondent is too tied to the trust personally. The applicant noted the trustees need to

urgently update the trust deed to ensure that all trustees are required to retire every three years. He also believed the trust deed should clearly set out issues around conflicts of interest to help avoid what is now occurring. He alleged that A Henderson has never been interested in this because:

...it would risk the position he is in now which he is happy to maintain. The trust provides him a place to live, pays for all his expenses and pays him money. He is in control of everything, or at least in a position to influence everything and these are also things he gets a personal benefit from.

Therefore, the applicant believes that the only way forward for the trust is for the respondent to be removed. Exhibits were attached to the evidence.⁴

Rāwiri Karaitiana Tuhiwai-Ruru – Brief of Evidence dated 21 July 2021

[25] Rāwiri Karaitiana Tuhiwai-Ruru gave evidence for the applicant. He is a trustee on the Wharekahika A47 Trust and has been in that role since about 2000. He supports the application to have A Henderson removed as a trustee of the trust. He claims the trust is dysfunctional. In his view, the sole reason for this is because of the behaviour of A Henderson and his failure to effectively manage conflicts of interest that have constantly arisen. Along with working for the trust, living in and on the trust property and being a trustee of the trust, the respondent has household expenses paid by the trust. At regular intervals he has asked for payments to be made by the trust to him for work done for the trust. It is not helped that two of the respondent's brothers, Victor Henderson and Ned Henderson are also trustees. The witness alleged that these two trustees back the respondent and ignore their own conflict of interest as his brothers. Mr Tuhiwai-Ruru confirmed that Ashley Brooking and himself were both willing to resign as trustees and for there to be fresh elections to try and move the trust forward. However, the other trustees all refused.

[26] In terms of the payment of \$10,000 to the respondent by Golden Grove, it was his evidence that he was not contacted by the respondent regarding this payment. By the time he knew about the transaction, the money had already been paid to the respondent. The respondent has his email address and could easily have given him notice about the request. Mr Tuhiwai-Ruru believes that the respondent did not contact him about the payment because the

⁴ (a) Exhibit A – Consent for payment to A Henderson 2018.
 (b) Exhibit B – Email correspondence raising whether A Henderson should forgo his trustee role.

respondent knew that he would oppose it. The respondent prepared the consents and listed all the trustees except himself. Most of the work that the respondent undertook was work as a trustee and much of the work he did was never authorised by the trust. Rather “he just went off and did it himself.” An example was the 'investigation' he did into alleged payments made by Tairāwhiti Pharmaceuticals to a former lessee of the block. There was no justification for the payment as the work was either unnecessary or was work done as a trustee for which he should not have been paid. He considers that the \$10,000 should be repaid to the trust. This was an illegal payment, was never justified and A Henderson should therefore be asked to repay the funds.

[27] In terms of the further payment for \$5,000 to the respondent Mr Tuhiwai-Ruru opposed it. The witness believed that the respondent was driving the idea, but his two brothers pushed the issue.

[28] The witness considers that this was a further conflict of interest. In terms of the respondent's 2019 proposal to manage the farm, that proposal sought authorisation to live in the house on the trust farm and in exchange for this he would also work on the farm. The witness considered this represented a significant potential for conflict of interest given the respondent's obvious personal interest in this matter. Mr Tuhiwai-Ruru believed that A Henderson had avoided addressing the issue of the conflict of interest and avoided taking all the necessary steps to ensure that this issue was effectively managed. The witness noted that the respondent also voted in favour of his own proposal. He also refused to follow the advice of Leo Watson, the lawyer appointed by Her Honour Judge Wainwright, in relation to how he should manage his proposal given the conflict of interest. That advice was:

- (a) It is always best to err on the side of caution whenever a trustee is placed in a position of personally benefitting from trust property. If not, then the trustee runs the risk of being held personally liable for benefits.
- (b) The arrangement appears to be a five-year situation where you will reside on the trust land, rent free, in exchange for providing much needed security for the block, and undertaking remedial work on the block. Any grazing income will go to the trust bank account. Therefore, while in the short term it seems to me to be a sensible and very constructive solution to the current situation, it still has the potential to be

criticised (by the court or owners) if you are in a position of taking a working role up on the farm in exchange for rental at the home. This is especially so as it stretches into a five-year proposal.

[29] The respondent was directed at a trustee meeting held on 2 August 2019 to send out the proposal to shareholders.

[30] In terms of the insurance, the trust has recently taken out insurance cover for the farm and other trust property, and the respondent organised this for the trust. The respondent arranged for the insurance to also include two of his private vehicles, two of his trailers and his boat. Despite protests from the witness and Ashley Brooking, the insurance was paid for by the trust. The respondent participated in the debate around this, and he also voted in favour of the trust paying to insure his own private property. There is no need for the respondent to use his private vehicles for work on the farm as the trust has vehicles available. Even if he did occasionally use his vehicle or trailer it did not justify the trust paying to insure these vehicles for 12 months. For almost 100% of the time these vehicles, the witness claimed, will be used for the respondent's private use. As for insuring his boat, the witness stated "this just shows how out of control the respondent has become." This is another recent example, he claimed, of a clear conflict of interest. This has happened despite his knowing that there was an upcoming Court hearing, which shows how completely unaware the respondent is about conflicts of interest and how important it is to manage the conflict properly.

[31] The respondent's brothers Victor and Ned Henderson, he opined, also have no idea of potential conflicts or if they do, they are happy to ignore it.

[32] Then there is an issue as to the payment of \$200 for petrol vouchers. This may seem a minor thing, he deposed, but it is just a further example of the respondent advocating and then voting for something that he has a personal interest in. Again, this is proof of the respondent voting on matters in which he has a personal interest.

[33] The trust has become dysfunctional, in Mr Tuhiwai-Ruru's view. The witness noted there had been no face-to-face meetings for over two years and no AGM in 2020 and none planned for 2021. Things are being done by email and this is not good when things need to be planned and properly discussed. In Mr Tuhiwai-Ruru's view, the only way forward for the trust is for the respondent to be removed as trustee. The witness considers that the respondent has

shown by his actions a complete disregard for his responsibilities as a trustee and a complete failure to properly manage the many conflicts of interest that exist with him being so personally involved with the trust.⁵

Ngā Kaitautoko o te Kaiurupare

Evidence for the Respondent

Victor Henderson – Brief of Evidence dated August 2021

[34] Victor Henderson is a trustee of the Wharekahika A47 Trust. He did not support the application and he considered that it was hurting the administration of the trust. He claimed the condition of the farm was terrible before A Henderson took over the farm. The witness was one of the trustees who approved the respondent going onto the farm due to breaches of covenant by the previous lessee. He considered the respondent was an obvious choice given his commitment and passion for the land.

[35] He claimed there was a huge amount of work done by A Henderson. The work completed included fencing, roads, gorse clearing, and digging drains to allow paddocks to drain thereby minimising storm damage. Most storm damage done to the fences has been repaired without any insurance claim assistance. This further enhanced the witness's admiration for the respondent. The witness acknowledged that he insisted that A Henderson should claim. It was his estimate that that the cost of hiring contractors to do the same work was "conservatively around \$250,000.00". Thus, the respondent saved the trust money.

[36] Victor Henderson acknowledged that he initiated the payment of \$10,000 to the respondent in 2018. He was comfortable for the respondent to get this payment as, in his view, it was not an easy thing to get the previous lessee off the land. The respondent dealt with Te Tumu Paeroa on behalf of the trust as well.

⁵ (a) Exhibit A - Consent for Payment to A Henderson 2018;
 (b) Exhibit B – Email dated 20 November 2018 re payment to A Henderson;
 (c) Exhibit C - Report of A Henderson dated 13 August 2018;
 (d) Exhibit D – Email correspondence regarding payments to A Henderson;
 (e) Exhibit E – Farm Proposal;
 (f) Exhibit F – Letter from L Watson to A Henderson dated 5 June 2019;
 (g) Exhibit G – Extracts of Minutes of Trustee Meeting dated 2 August 2019;
 (h) Exhibit H – Agreement to Purchase ATV Quad Bike & Sprayer at \$6,900 and \$200 worth of petrol and email correspondence re Insurance
 (i) Exhibit I – Insurance Policy
 (j) Exhibit J – Confirmation of payment for Insurance.

[37] The witness supported the payment of \$5,000 to A Henderson in April 2021. Trustee Steuart McClutchie proposed it.

[38] He claimed that A Henderson was a good trustee and chairman and that the trust was working well. In addition the land and farm were in “far better shape than before he came on.” He concluded that the “call to remove him is foolish.”

Steuart McClutchie – Brief of Evidence dated August 2021

[39] Steuart McClutchie, a retired policeman, also gave evidence. He is a trustee of the Wharekahika A47 Trust. He did not support the application for the removal of the respondent. His view was that Oweka has been in decline for decades. As a result, there was a profusion of invasive weeds such as gorse, blackberry, and thistle on the land, and fencing and drainage had been neglected. A succession of lessees over the years, he believed, compounded the problems as very little remedial action was taken during their tenures. The trust was in no financial state initially to progress any work on the farm. There was no infrastructure and therefore, it was in a perpetual cycle of neglect and associated lessee breaches.

[40] He considered that it was important that a trustee had a physical presence on the whenua due to the activities of rustlers, poachers, or other individuals with “nefarious intent.” He approved the respondent taking up residence there.

[41] Oweka has a valuable manuka resource and, he opined, the “Hail Mary moment” for Oweka came when trustees agreed to take over the honey and oil operations. As a result, the trust was in a much-improved financial position to carry out remedial work and to pay long-awaited dividends to shareholders.

[42] Despite some opposition, the trust has purchased a tractor and post driver. It has since purchased a digger. This machinery is essential to address the problems that beset this whenua. The witness noted the respondent has completed approximately 2 kilometres of new fencing and effected essential repairs to boundary fences. He has also hung new gates on the farm for ease of access. He has used his own tractor-driven rotary slasher on weeds to increase acreage for grazing stock. He continues to recover more land.

[43] In Mr McClutchie's view, the respondent has a close affinity to the land and has a genuine love for Oweka and a regard for all shareholders.

[44] He then discussed the access track that traverses the farm, noting that it was often compromised by slips and areas prone to subsidence and the digger has proved its worth as a means of clearing the access. At the time of purchase a quorum of trustees stipulated that this machine must have manuka brush cutting capability. The respondent secured a "lucrative" deal with a local manuka processor to supply brush for \$1,000 a trailer load. However due to weather conditions, and this not being the optimal time to harvest, the processor has ceased activity.

[45] He agrees with the respondent that the shareholders must be self-reliant and not depend on expensive outside contractors to carry out the work.

[46] The respondent has done a lot of work on the whenua and has received little thanks for it. Under some duress, the respondent continues to save the trust money by doing these jobs himself. He considers that there has been improvement in the right direction. While no dividend has been paid, the witness considers that the question should be whether money is more important than the whenua gifted by the tīpuna. He supports the respondent's work on the whenua, and he considers that the respondent's aspirations for Oweka align with his.

Apirana Henderson – Affidavit Undated & Unsworn

[47] On 31 January 2020, an affidavit was filed responding to some of the allegations levelled at the respondent. Some of those allegations have since been dropped. His evidence also addressed the issues concerning other applications. That component of the evidence is not relevant to this matter before me.

[48] The respondent did address allegations such as his failure to consult other trustees, which he denied. He claimed that the trustees had met regularly, that hui were held or that trustees were directly consulted on issues pertaining to the trust. In terms of allegations that he was aggressive, it was his evidence that there was aggression demonstrated by other trustees and their supporters. He considered the trust was in a constant state of deadlock over issues such as the proposal by Golden Globe and NZ Manuka involving the placement of beehives on the land. The issue of grazing leases was resolved by a majority vote in favour of Potikirua

Incorporation. Before he was on the block there had been issues concerning the growing of marijuana on the block, the theft and spraying of manuka, and breaches of the previous lease by the lessee. There were annexures attached to the affidavit.⁶

Apirana Henderson – Brief of Evidence dated August 2021

[49] This was the brief the respondent presented during the Court hearing held on 6 August 2021. He began by noting that he is an owner of Wharekahika A47, that he is a trustee of the land and the chairman of the trust. He claimed to be familiar with the terms of the trust order. He opposed the application as he believed that he was “doing things right as a trustee.” He claimed to work hard for this trust and this land. As he is not a wealthy person, he is unable to pay out of his pocket for the trust. He keeps a diary and he used this to accurately provide dates of the work he has completed. He then addressed the allegations concerning:

- (a) The \$10,000 paid to the respondent in 2018;
- (b) The \$5,000 paid to the respondent in April 2021;
- (c) His proposal of April 2019;
- (d) The petrol vouchers in the sum of \$200; and
- (e) The insurance policy.

[50] With regard to the \$10,000 paid to him in 2018, he claims that the money was paid to him due to the state of the farm and the many jobs he had to do. The farm was not in good shape. It was overgrown, he claimed, and run down. He considered that his first job was to get the former lessee, Mr Brosnahan off the land due to various breaches of the lease. He used a lawyer to assist him remove the lessee.⁷

⁶ (a) Annex A – Minutes of Meeting of Owners dated 1 November 2014
 (b) Annex B – Minutes of Meeting of Trustees for Wharekahika A47 Trust dated 28 May 2016
 (c) Annex C - Gisborne Herald Advertisements of AGM of Wharekahika A 47 Trust dated 18 and 21 May 2019.
 (d) Annex D – AGM, Minutes of the Meeting of Owner Minutes dated 8 June 2019.
 (e) Annex E - Minutes of Trustee Meeting dated 2 December 2018.

⁷ The background to his evidence is that a new lease had been executed on 15 July 2015, for an initial term of 5 years, with two rights of renewal of five years each, for a total of 15 years in favour of Mr Brosnahan. This same lessee had been farming Oweka Station under a sublease from 2013-2015. The trust engaged Valuation

[51] The respondent then discussed Te Tumu Paeroa's management of the farm claiming that too much money was spent for that service. To fill the void that Te Tumu Paeroa left, the trust needed a bank account and services of an accountant. He organised this. He also helped ensure that the "bee-hive people" had proper arrangements in place to carry on using parts of the land, and to pay the trust for that use. To do all of this took a lot of running around. He cannot afford to do this and not get any remuneration back.

[52] In mid-2018, trustee Victor Henderson proposed that the respondent should be paid for all that he had done. Victor proposed \$10,000. Victor also proposed that the respondent could take the payment direct from one of the beehive users, because at that time the trust's bank account was not operational since we were still transitioning Te Tumu Paeroa out of their management role. He assumed that Victor raised this matter with the other trustees, likely by email. He did not attend any trustee meeting about it.

[53] He argued he could prove his efforts by virtue of his diary. It is headed up "Hour log time spent on Oweka Trust as Trustee and Chairman". It is the document marked "C" and attached to Rāwiri Tuhiwai-Ruru's brief of 21 July 2021. He states that he did not initiate the payment, but he did however help to formalise Victor's proposal and to obtain the majority of the other trustees' signatures, including Ashley Brooking's signature. This was done on or about 19 November 2018. He confirmed it is the document attached to Rāwiri Tuhiwai-Ruru's brief of 21 July 2021. The payment was made later in November 2018 and is recorded in the 2019 financials. He did not seek the payment, or that amount. He recorded his appreciation to those trustees who recognised his efforts.

[54] In terms of the \$5,000 paid in April 2021, he claimed that from November 2018 - 2021, he has worked on Oweka Station. He claims to have secured the land from any trespassers (including rustlers of stock). He recorded he fenced the land (including repairs caused by the recent floods earlier this year), he has cleared the land of gorse and scrub, and he has cleared the waterways and culverts, repaired access ways, and harvested the manuka brush for purchasers of brush. In terms of income, this has helped the "beehive users", it has increased the area for stock to graze the land, and it has increased grazing fees to the trust. His work has

Eastland to undertake an Inspection Report late in 2017, who reported significant breaches of the lease including wide-spread spraying impacting the manuka resource on the land. Negotiations with the lessee failed and the respondent instructed a lawyer who issued a Notice of Intention to Cancel the Lease.

also increased the income the trust receives for the brush that he cuts and sells. He has also moved back on to the whenua and has been there since June 2019.

[55] He claimed in April of this year Steuart McClutchie proposed by email that the respondent be paid \$5,000 for his work efforts. Victor and Ned Henderson supported that by email. The respondent did not attend a trustee meeting about this proposed payment. He claims to be able to prove his efforts. Taking again from his diary, he claims to have provided a report of his services in the form of a chairman's report on 3 April 2021.

[56] With respect to the farm proposal of April 2019, and the allegation that he voted in favour of it, the respondent disagreed that there was anything wrong with his actions. He recorded that in the wake of removing the previous lessee and to get the land and farm back up to condition a plan was needed. He prepared one that he shared with the other trustees. It set out the works to be done and proposed how the respondent might be paid. Regarding payment, he proposed just over \$15,000 per annum. The trustees seemed to agree with it. It is the document marked "E" in the annexure of exhibits to the brief of evidence of Rāwiri Tuhiwai-Ruru dated 21 July 2021.

[57] It was recommended that he share his proposal with the owners. He did so by email to the owners on 8 August 2019. There has been no reply to him from any of the owners. He claims he took it as indicating that they had no problem with what we were doing. He has attempted to do the works as set out in the proposal as best as he has been able to. It is an ongoing project. He has not, however, received payment for that work. It cannot therefore be said that he voted for something that is in place and on the terms that he asked for.

[58] In relation to the petrol vouchers in the sum of \$200 paid on 18 May 2019, the respondent disagrees that this was wrong. The farm uses fuel. The fuel is needed to run the vehicles and the machines that he operates in doing the work on the land. He acknowledges that he did receive this money, but it was to reimburse him for money he had spent on fuel running the quad bike over the land at that time to spray the weeds. He did not think that he should have to pay out of his pocket for things that are used for the farm.

[59] As for the insurance policy, he arranged for the insurance broker Bruce Talbot to visit the farm and give a quote for farm insurance over the farm equipment. On 11 December 2020, the broker provided the draft policy by email and the respondent circulated it to the other

trustees. He contends it was a reasonable coverage, so the respondent recommended the trust approve it. He claims the broker included the respondent's trailer and Ford Falcon, which the respondent claims are sometimes used for farm business. Also included was the respondent's private Mitsubishi GTO car, his boat and his trailer (which he does not use for farm business). These were included because it was cheaper to do so. He claims that it was his intention to repay the trust for that cover. In April 2021, he removed the Mitsubishi GTO car, the boat and its trailer from the insurance cover. He can now see that it is better not to have his personal things on the trust's insurance policy if these are not being used for trust business. On 26 July 2021, he asked the broker to give him a dollar figure for his non-farm items as a portion of the annual premium. Later that day he advised that it is \$238.00. A copy of his email dated 26 July 2021 with this advice to the respondent was produced. He claims he will pay \$238.00 to the trust by way of reimbursement.

[60] Since he has been on the land and worked to clean it up, he has received positive feedback from some of the owners. This appreciation has come from the Wirepas', the Reedys' and the McClutchies'. None of these people have asked him to resign. He opined that since he has been a trustee and moved on to the land, he believes that the condition of the land has improved, and that the financial position of the trust is stable.

[61] In concluding, he stated that he believes that he is carrying out his responsibilities as a trustee should. The land, or the farm is not at risk. The beneficiaries, he claims, seem generally content. The allegations that Ashley Brooking makes against him are unfounded. He has found it stressful to deal with as well.⁸

Ngā Take

Issues

[62] The issues for me to decide are:

⁸ (a) Exhibit AH-01 – Affidavit (Unsworn) filed 31 January 2020 and annexures A-E;
 (b) Exhibit AH-02 – Letter dated 18 September 2018 re removal of lessee and associated email correspondence;
 (c) Exhibit AH-03 – Report of Improvements to Oweka Station Farm dated 3 April 2021;
 (d) Exhibit AH-04 – Email to less than 20 people attaching Farm Proposal and three other attachments.
 (e) Exhibit AH-05 – Email acknowledging that the respondent will pay \$238 to the Wharekahika A47 Trust for insurance of personal items.

- (a) Whether the respondent has breached his duties as a trustee;
- (b) If so, whether it is desirable for the proper execution of the trust that the respondent be removed as a trustee on the grounds that he is no longer suitable to hold office as trustee because of his conduct or circumstances.

Ngā Ture

The Law

[63] I start with the general functions of trustees as set out in s 223. This provision states that:

Every person who is appointed as a responsible trustee of a trust constituted under this Part shall be responsible for—

- (a) carrying out the terms of the trust;
- (b) the proper administration and management of the business of the trust;
- (c) the preservation of the assets of the trust;
- (d) the collection and distribution of the income of the trust.

[64] In constituting or reviewing a trust, the Court may confer on the trustees such powers, whether absolute or conditional as the Court thinks appropriate, having regard to the nature and purposes of the trust. This is done in the trust order. The Court may also impose express limitations or restrictions in such a trust order and subject to those, the trustees shall have all such powers and authorities as may be necessary for the effective management of the trust and the achievement of its purposes.⁹ In any case where there are three or more responsible trustees of a trust, a majority of the trustees have sufficient authority to exercise any powers conferred on the trustees.¹⁰ Under s 227A trustees are required to manage potential conflicts of interest:

(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.

⁹ Te Ture Whenua Māori Act 1993, s 226.

¹⁰ Te Ture Whenua Māori Act 1993, s 227.

[65] In carrying out their functions and exercising their powers, trustees must exercise certain duties. Failure to adhere to those duties may be cause for removal. Removal will only be considered after analysing s 240, the Preamble, ss 2 and 17 of Te Ture Whenua Māori Act 1993 (the Act), and relevant case law. The previous case law on s 240 was dense and prolific. As His Honour Judge Stone has noted in relation to the previous s 240:¹¹

[8] There are several superior court authorities regarding the principles applicable to the serious step of removal of trustees. They include the Court of Appeal judgments *Rameka v Hall* and *Naera v Fenwick*, and the Māori Appellate Court decision of *Perenara v Pryor*.

[9] These authorities support the following general propositions:

- (a) removal is a serious step and is not undertaken lightly;
- (b) before removal can be contemplated it is necessary that the trustees at risk of removal are properly notified of that possibility;
- (c) in accordance with *Ellis v Faulkner*, the Court must assess whether a trustee has performed his or her duties “satisfactorily” which will inevitably involve a careful review of that trustee’s conduct;
- (d) technical breaches of terms of trust and related governance instruments may not necessarily lead to removal unless it is apparent that the assets of the trust have been put at risk or whether there has been serious loss or malfeasance;
- (e) the appropriate procedure is for the Court to be satisfied that there is evidence of real abuse, failure or malfeasance and the absence of any tenable defence; and
- (f) only where the Court is satisfied that these conditions have been met will removal be appropriate and, in extreme cases, inevitable.

[10] Applying s 240 involves two stages. First, I must assess whether the trustees have failed to carry out their duties satisfactorily. Second, I must assess whether the Court should exercise its discretion to remove trustees, in accordance with the principles and kaupapa of the Act.

[66] His Honour Judge Harvey (now Justice of the High Court) outlined those same principles as follows:¹²

[16] The leading authorities on removal include *Rameka v Hall*, *Perenara v Pryor – Matata 930*, *Ellis v Faulkner* and *Pook v Matchitt*. These decisions underscore that:

¹¹ *Boon v McQueen - Waiwhakaata 3E6 Section 4B2 Trust* (2021) 214 Waikato-Maniapoto MB 1 (214 WMN 1) at [8]-[10] citing: *Rameka v Hall* [2013] NZCA 203; *Naera v Fenwick* [2013] NZCA 353; *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354; *Perenara v Pryor – Matata 930* (2004) 10 Waiāriki Appellate MB 233 (10 AP 233); *Ellis v Faulkner - Poripori Farm A* (1996) 57 Tauranga MB 7 (57 T 7); *Bramley v Hiruharama Ponui Inc – Committee of Management* (2006) 11 Waiāriki Appellate MB144 (11 AP 144).

¹² *Huata-Kupa v Puna - Puninga 4A1B* (2021) 89 Tākitimu Minute Book 82 - (89 TKT 82) citing with approval *Rameka v Hall* [2013] NZCA 203; *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233); *Ellis v Faulkner - Poripori Farm A* (1996) 57 Tauranga MB 7 (57 TMB 7); *Pook v Matchitt - Matangareka 3B* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167).

- (a) removal is a serious step that is not undertaken lightly. The Court must act with caution on any application for removal unless the evidence is so compelling as to a trustees' abuse of their position, malfeasance or failure to attend to the duties of a trustee that renders removal the only viable outcome;
- (b) any application for removal must include notice to the affected trustee of the possibility of removal and any order made in the absence of notice will be made without jurisdiction;
- (c) the Court must also consider whether there are any positive defences or factors in mitigation in the context of an application for relief from liability under the Trustee Act 1956.

[67] I concur with these summaries of the applicable principles, and I adopt the reasoning of all the decisions cited regarding the previous s 240. However, by the time of the hearing of this application the amended s 240 applied and it is under this provision that the application must be determined. The relevant parts of this provision now read:

- (1) 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 that—
 - (a) the trustee has lost the capacity to perform the functions of a trustee; or
 - (b) the removal is desirable for the proper execution of the trust, and 1 or more of the following grounds for removal are met:
 - (i) the trustee repeatedly refuses or fails to act as trustee:
 - (ii) the trustee becomes an undischarged bankrupt:
 - (iii) the trustee is a corporate trustee that is subject to an insolvency event:
 - (iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances.
- (2) A trustee has lost the capacity to perform the functions of a trustee, for example, if the trustee—
 - (i) is subject to an order appointing a manager under section 31 of the Protection of Personal and Property Rights Act 1988; or
 - (ii) has a trustee corporation managing the trustee's property under section 32 or 33 of that Act.
- (3) A person may no longer be suitable to hold office as trustee, for example, because of the following conduct or circumstances:
 - (a) the trustee is convicted of an offence involving dishonesty:

- (b) it is not known where the trustee is and the trustee cannot be contacted:
- (c) the trustee is prohibited from being a director or promoter of, or being concerned or taking part in the management of,—
 - (i) a company under the Companies Act 1993; or
 - (ii) an incorporated or unincorporated body under the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.

[68] There is no issue as to the respondent's capacity, nor is he an undischarged bankrupt and he is not a corporate trustee. Furthermore, the respondent did not refuse or fail to act as a trustee. Thus, the only relevant provision is s 240(1)(b)(iv).

Te Take Tuatahi –
The First Issue

Te Kēhi Mō te Kaitono
Case for the Applicant

[69] The case for the applicant is that the respondent has breached several duties as a trustee and is therefore unsuitable to hold office.

[70] In particular, the applicant has focused on various payments made to the respondent and on several transactions that the respondent was involved with.

[71] The applicant contends that on 19 November 2018, Mr Henderson actively participated in the proposal to pay himself the sum of \$10,000 and then voted in favour of the payment being made to himself. Mr A Henderson was personally paid that \$10,000 directly from Golden Grove Apiaries. At the time of the payment, Golden Grove Apiaries had an agreement in place with the trust which allowed them to have beehives on trust property. The payment was for alleged services that the respondent had provided to the trust during the preceding 12-month period. Yet these services related to the ordinary fulfilment of Mr Henderson's role as a trustee on the trust. The payment should have been made to Cookson Forbes Accounting Services who provide administrative and financial support to the trust. This was income of the trust so it should have been tendered to the accountants so that it could be properly accounted for in the trust's financial statements. It was argued that the trust order does not allow for any payments to be made to trustees for acting in their capacity as trustees. It was further alleged

that at the time of the payment Mr Henderson was aware that the trust order did not authorise any payments to be made to trustees.

[72] The applicant further alleges that at some time after 1 December 2020, Mr Henderson attempted to procure a further payment of \$5,000. Again, this payment was for alleged services to the trust.

[73] Mr Hemi submitted that the trust order for the Wharekahika A47 Trust does not provide for any payments to be made for the exercise of duties as trustees. The starting point is that trustees are “not entitled to be paid as a matter of right and they serve in an honorary position.”¹³ There is no precedent case, he submitted, where the Courts have supported such payments.¹⁴ Mr Hemi submitted that there is no legal justification for the payment of \$10,000 or the additional payment of \$5,000 for the extra work undertaken by the respondent. As there is no legal justification for the payments the respondent is in the position of a debtor to the trust.¹⁵

[74] In the alternative, Mr Hemi submits that the circumstances surrounding the payments disclose an abuse of process, failure or malfeasance for which there is an absence of any tenable defence.

[75] With respect to the farm proposal authorising the respondent to work on the trust farm and to live in the house on the trust farm, it was noted that the proposal included a 'work and payment plan' which detailed a number of personal expenses that the trust would cover in exchange for Mr Henderson working on the trust's farm. On 8 April 2019, the respondent voted in favour of the trust adopting of the proposal and he signed his consent to it.

[76] On 18 May 2019, Mr Henderson actively participated in the proposal to pay himself \$200 worth of petrol vouchers, and then voted in favour of himself receiving the vouchers.

[77] On 11 December 2020, Mr Henderson submitted a draft insurance policy for the insurance of several assets owned by the trust. The draft insurance policy included insurance cover for several personal assets of Mr Henderson. These included a 1990 Mitsubishi GTO

¹³ See *Mika - Te Manawa o Tuhoē* [2012] 54 Waiariki MB 16 (54 WAR 16) at [20].

¹⁴ See *Trustees-Tauhara North No 2A, 2B & 2C Blocks* [2011] 40 Waiariki MB 240 (40 WAR 240).

¹⁵ See *Marino v Horsfall – Repongaere 4G (Part)* [2004] 34 Gisborne Appellate MB 98 (34 APGS), at [102].

3.0 2DR Coupe, a Ford Falcon, a Prescott trailer and a boat and trailer. On 15 February 2020, Mr Henderson voted in favour of approving the draft insurance policy which includes insurance cover for his privately owned personal assets as detailed at clause 14.

[78] It was also submitted that the respondent failed to properly manage conflicts of interest.¹⁶ Mr Hemi referred to authorities that analysed the rule in s 227A(2) requiring a conflicted trustee to withdraw from participating or voting in:¹⁷

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.

This rule exists because owners are entitled to the benefit of trustee decision making “untainted by any conflict between the trustees' duty to them on the one hand and any personal considerations and interests on the other.”¹⁸

Te Kēhi a te Kaiurupare

The Case for the Respondent

[79] The respondent in reply states that these allegations are misconceived and cannot amount to a breach of trust and thus they are denied, because (inter alia) the trust order allows for such payment. It contains an implied direction entitling a trustee to reasonable remuneration for personal trouble and loss of time incurred, including arising from clauses 2, 3, and 4.

[80] The respondent acknowledges that he is living and working on the land. He argues he has undertaken work for which he is qualified to undertake, and which was reasonably required to advance the objects of the trust. Counsel for the respondent, Mr Kahukiwa, acknowledged that there is no express provision in the trust order that authorises the remuneration of trustees.¹⁹ He also acknowledged that the law indicates that trustee remuneration is not permitted unless it can be inferred from a trust order that such remuneration entitlement is available.²⁰

¹⁶ See *Fenwick v Naera* [2015] NZSC 68 at [61]-[65].

¹⁷ Te Ture Whenua Māori Act 1993, s 227A(2).

¹⁸ See *Pook v Matchitt – Matangareka 3B Block* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167) at [60].

¹⁹ 105 Tairāwhiti MB 139 (105 TRW 139).

²⁰ 105 Tairāwhiti MB 139 (105 TRW 139)

While there is no express provision in the trust order, Mr Kahukiwa submitted it can be inferred on the construction of clauses 2, 3 and 4 of the trust order. Further, more detailed submissions were presented in closing on the meaning and effect of these clauses and how the objects of the trust are scoped by s 2 and the Preamble of Te Ture Whenua Māori Act 1993. Essentially, he continued, these clauses and the legislation result in an interpretation that would permit the payment of remuneration, administration costs, and the distribution of revenue to one owner (namely the respondent) for living on the land. Mr Kahukiwa submitted that if the Court is not persuaded to infer the power to pay remuneration from clauses 1-4, the Court has the power to retrospectively order remuneration in line with the sums already transferred to the respondent.

[81] The respondent contends that the November 2018 payment of \$10,000 was initiated by the other trustees. It was then formally approved by trustees Ned Henderson, Victor Henderson, Stuart McClutchie, and Ashley Brooking on 19 November 2019, and it included providing a direction to a debtor of the trust to pay him. The payment was reasonable remuneration for the work completed for the trust including the removal of the previous recalcitrant lessee (Brosnahan) from the land over the time 2016 to about October 2018 and the replacement of Te Tumu Paeroa as the administrator of the trust in 2018.

[82] In terms of the April 2021 payment of \$5,000, the respondent contends that this was initiated by Stuart McClutchie. It was then formally approved by trustees Victor Henderson and Ned Henderson on 19 April 2021. The payment is from revenue and is reasonable remuneration for the respondent's work for the trust. He contends that it is reasonable remuneration recognising the elapse of over two years since the November 2018 \$10,000 payment. This second payment was not excessive considering the work completed.

[83] He also opposes this application and the allegations that he acted in breach of his duties as a trustee on 8 April 2019, when he voted in favour of his farm proposal which at the date of hearing had not been implemented.

[84] He further refutes the allegation that on 18 May 2019, he actively participated in the proposal to pay himself \$200 worth of petrol vouchers. This was for fuel that he expended to run the quad bike over the farm, and to spray weeds. This is an expense that he considers he was entitled to be reimbursed for under the trust order and at law generally.

[85] The same opposition is recorded concerning the allegation that on 11 December 2020 he voted in favour of approving a draft insurance policy that included his own chattels. Since then, he has removed his personal chattels from the policy. He will make good to the trust the portion of the annual premium that applied to his personal chattels not used for the farm.

[86] Very detailed submissions were then made by Mr Kahukiwa on the application of s 240 to the facts of this case, counsel's analysis of the trust order for Wharekahika A47, and the effect of s 227A of Te Ture Whenua Māori Act 1993. In summary the respondent considers that the trusts (and authorities) in relation to the land are fundamentally operating within the scope of the purpose of the trust as intended, including improving the condition of the land and stabilising the financial position of the trust.

Te Whakautu o te Kaitono

Reply Submissions for the Applicant

[87] In reply, Mr Hemi denied that the appointment of the three brothers to the trust that this is an implied authority that they could act vis a vis with and between each other. He submitted that the case law does not support such a proposition.

[88] While it is accepted to a degree that the trust order authorises the use, occupation, and management of the land by the trustees, this right must be exercised in accordance with other expectations around the behaviour of trustees and the trust such as managing conflicts of interest. Legal expectations and safeguards were ignored in this situation. Also, relevant legal advice was ignored.

[89] The trust is now dysfunctional as a direct result of the behaviour of A Henderson, Mr Hemi submitted, and the Court should act to resolve this issue.

Kōrerorero

Discussion

[90] As counsel both agree, the starting point is that trustees are not paid for their role as trustees as a matter of right. Rather there must be some provision made for such a right in the trust order or by direction of the Court. There is nothing in the Wharekahika A47 Trust Order

that expressly provides for the remuneration of trustees. Nor has there been a direction of the Court authorising any remuneration.

[91] In terms of the Trust Order, by clause 2 of the trust order, the trustees have the power to use, occupy and manage the land vested in them “and to that end to do all or any of the things that they would be entitled to do if they were the beneficial owners of the land...” Then at clause 3 the trustees shall have:

such powers and authorities as are necessary for the effective performance of the trustee herein contained including power to use, occupy and manage the land or any part thereof for agricultural pastoral forestry or horticultural purposes, including the use of the land or any part thereof for the growing of permanent horticultural crops by the Trustees themselves or in conjunction with any person or persons upon such terms for the growing utilisation or sale of the crop as the trustees consider appropriate.

Then finally in clause 4, the trustees “shall apply the revenues arising from the operations of the trust in paying the costs of administration of the affairs of the trust and in the furtherance of the objects of the trust...”

[92] There is nothing in these clauses that would permit the inference that there is authority to pay remuneration. The powers and authorities in clauses 2 and 3 relate to actual use, occupancy and management of the land. The power in clause 4 to pay for the costs of administration necessarily relates to the furtherance of the objects of the trust. The objects of the trust are not listed in the trust order but are to be discerned from the Preamble and s 2 of Te Ture Whenua Māori Act 1993. Both these provisions reference the principles of retention and utilisation. The furtherance of these twin principles does not require the payment of remuneration to trustees and therefore it cannot be said that to do so would further the objects of the trust. Thus, there can be no inference taken or any implied authority granted in the trust order authorising the trustees to remunerate themselves.

[93] Furthermore, while s 227A(1) of the Act makes it clear that a trustee may be a servant or officer of the trust, or they may have an interest or concern in any contract made by the trust that is different to stating that they can pay themselves from the trust whenever they or their fellow trustees deem it appropriate and without some other form of contract for work. Thus, it is perfectly acceptable for A Henderson to be a resident trustee on the land and to work the farm, but it is not acceptable for the trustees to then pay him unless subject to a work contract properly granted through due process or by direction of the Court.

[94] In addition, no trustee, including the respondent can:

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...

None of the clauses of the trust order, even where coloured by the Preamble and s 2 of Te Ture Whenua Māori Act 1993, authorise trustees to act in any manner contrary to s 227A(2) of the Act. To suggest otherwise is to miss the point that s 227A is superior in legislative terms to the trust order and cannot be avoided, even if I did consider there was force to the submissions made on behalf of the respondent, which I do not.

[95] I also do not accept Mr Kahukiwa's submission that although appointed at different times, it must have been known to the Court that Victor, Ned and Apirana Henderson were brothers. Therefore, there is a "necessarily implied authority for conflicts of interest prima facie arising from their close blood relationship." There can be no implied authority to breach the limits of the law set out in s 227A(2). The three siblings should have been excluded from all discussion concerning the payments, the farm proposal, and the insurance.²¹

[96] In looking at the allegations regarding the payments of \$10,000 and \$5,000 made against the respondent, I have had regard to mitigating factors such as the payments being suggested by other trustees, the fact that most of the trustees consented to the payments and that there is demonstrable evidence of the work completed. Conversely, I have considered factors that indicate Mr A Henderson participated in the decision-making contrary to s 227A of the Act.

[97] In terms of the \$10,000:

- (a) The respondent helped formalise Victor Henderson's proposal to pay him \$10,000;
- (b) No meeting of trustees was convened;

²¹ See *Pook v Matchitt – Matangareka 3B Block* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167) at [61].

- (c) No direction of the Court was sought authorising the payment;
- (d) The respondent obtained the majority of the other trustees' signatures; and
- (e) The respondent signed the proposal himself.

[98] In terms of the \$5,000;

- (a) No meeting of the trustees was convened;
- (b) The payment was made and received at a time when this application was before the Court;
- (c) No direction was sought from the Court authorising the payment;
- (d) The respondent produced a report justifying the payment; and
- (e) The majority of those who authorised the payment were brothers and thereby conflicted.

[99] Similar problems are associated with the farm proposal produced by the respondent and approved by the majority of trustees. While I take into account it has not been implemented, the respondent has been involved at all relevant times during decision making over a proposal where he will be remunerated for work on the farm. His participation and voting was contrary to s 227A of the Act.

[100] I consider the payment of \$200 for the petrol to be further evidence of the inability of the majority of trustees to properly manage potential conflicts of interest and a failure to implement proper trust procedures to ensure such conflicts do not occur. While I accept that the respondent was entitled to reimbursement, he and his brothers should not have participated in the decision to refund. That is a matter for the remaining trustees to determine.

[101] I note the active participation of the applicant in the obtaining of insurance coverage for the trust under which he knowingly added personal items not used for trust operations. I take into account that the respondent has agreed to repay the trust for those personal items that

were wrongly included in the insurance cover, but this comes after the fact and so again his participation and voting were contrary to s 227A of the Act.

[102] I therefore consider that these findings mean that the respondent has been in breach of his duties as a trustee. These include:

- (i) The duty to adhere rigidly to the terms of the trust.
- (ii) The duty not to make any profit from being a trustee, and to act without being paid.
- (iii) The duty not to exercise a power of a trustee directly or indirectly for the trustee's own benefit.

[103] I turn now to consider whether he should be removed.

Te Take Tuarua
The Second Issue

Te Kēhi Mō te Kaitono
Case for the Applicant

[104] Mr Hemi submitted that the respondent breached his duties as a trustee and that these breaches have been significant, occurring over a protracted period. They cannot, he argued, be described as technical in nature. Rather they go to the heart of a trustee's duties. Mr Hemi then described several factors demonstrating why the respondent should be removed including that the trust is dysfunctional. The circumstances, he submitted, warrant removal of the respondent as a trustee.

Te Kēhi Mō te Kaiurupare
Case for the Respondent

[105] The respondent denies that his removal is in any way necessary and thus desirable for the proper execution of the trust. He asserts that this matter has been before this Court since about 2019, and that there has been no apprehension on the part of the Court that the welfare of the beneficiaries or the trust property are at risk. He also contends that the applicant has failed to meet the burden of proving that there is any conduct on his part, or any circumstances present which justify his removal.

[106] In terms of the law, Mr Kahukiwa submitted that there are limits to the jurisdiction to remove a trustee pursuant to s 240 and these arise from the general law.²² The jurisdiction to remove a trustee is exercised with a view to taking into account:

- (a) the interests of the beneficiaries
- (b) the security of the trust property, and
- (c) the efficient and satisfactory execution of the trusts, inclusive of the faithful and sound exercise of trustee powers.

[107] Mr Kahukiwa made the following lengthy submissions on the new s 240:

1. ... the relevant parts of s240(1)(b) of the Act that the Court must be satisfied with are as follows-
 - 1.1 240(1)(b) the removal is desirable for the proper execution of the trust **and** 1 or more of the following grounds for removal are met:
 - 1.2 (iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances.
2. s240(1)(b) is further informed by s240(1)(3). It provides-
 - (3) A person may no longer be suitable to hold office as trustee, for example, because of the following conduct or circumstances:
 - (a) the trustee is convicted of an offence involving dishonesty;
 - (b) it is not known where the trustee is and the trustee cannot be contacted;
 - (c) the trustee is prohibited from being a director or promoter of, or being concerned or taking part in the management of,—
 - (i) a company under the Companies Act 1993; or
 - (ii) an incorporated or unincorporated body under the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.
3. s240(1)(b) is conjunctive. Submitted that *both* of its two parts must therefore be satisfied for the discretion to arise. In relation to the first part, the Court must be satisfied that removal is desirable for the proper execution of the trust. The use of the word “desirable” means that an inquiry about the past, as well consideration about the future, are equally contemplated, and thus required. In that regard, it is desirable to remedy past breaches of trust. It is desirable to dis-enable any risk of misconduct (or of breach of trust) going forward. The Court must therefore look at whether the trustee *has* caused and *will* cause the trusts not to be done (or not to be done properly) and which results in, or will result in, the interests of the beneficial owners being prejudiced.
4. The second part is whether the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances. As mentioned, the scope of this second part is informed by s240(3) of the Act. It sets out examples (it uses the words “for example”) of what *might* amount to unsuitability (it uses the word “may”). In

²² *Rameka v Hall* [2013] NZCA 203 at [82].

terms of the illustrations provided, either conduct, or circumstances, of a trustee can provide a reason for unsuitability. In informing the scope of unsuitability, this provision is not exhaustive, but neither is it prescriptive either. It is illustrative. It is submitted further that this means that there are therefore limits or bounds to unsuitability, the extent of which are explained by the examples given. It follows then that conduct, or circumstances that are not synonymous with the nature of the examples given will not be sufficient to satisfy the Court in relation to unsuitability. There are three illustrations. Two go to dishonesty. One of those is for criminal dishonesty in the form of a person being convicted of an offense (i.e., s240(3)(a) of the Act). The other is for “director” dishonesty, which whilst broader than criminal dishonesty, is nonetheless restricted to dishonesty done in the context of operating a company or dealing financial securities (i.e. s240(3)(c) of the Act)¹²⁷. The third example is of a person who has basically left their post unexplained (s240(3)(b) of the Act). It is material that a trustee who becomes an undischarged bankrupt is not listed as an example of a person who might be unsuitable to continue as a trustee, but instead that circumstance is put higher as a ground for removal under s240(b)(ii) of the Act. This is an elevation that the common law previously did not treat as being a circumstance of automatic removal¹²⁸. By s240(3) setting out such examples, Parliament has indicated the kind of person who will be unsuitable to continue as a trustee. It is a person who is *found* to be dishonest, either in the criminal or companies/securities context. But this is not surprising. This is because the kind of person who does misappropriate money (or assets) or a company’s undertaking, is likely as a trustee to be tempted to do the same in respect of trust property. It is thought that there will be risk posed to trust property and to beneficiary welfare because of the person’s “propensity” to do it again. Similarly, a trustee who *has* abandoned his or her post will be unsuitable to continue. A trust with no trustee axiomatically means that the trust is not being carried out. Likely the trust property is not being maintained and its value is being depleted, and which is anathema to a trustee’s basic duty to act with reasonable care and diligence. In the result the beneficiary is self-evidently being deprived. The risk again lies in the trust property being depleted and the beneficiary being neglected by the trustee’s disappearance. The risks (as contemplated by the illustrations set out under s240(3) of the Act), if apprehended, must then be averted by the Court in its role as supervisor of all trusts. Importantly however, not every risk gives the Court the power to “avert”. This rule is only concerned with the kinds of risk that are at the serious end of the spectrum and that are the result of things that have occurred. Once again, these are the risks posed by dishonest/unlawful propensity conduct (based on other misconduct that has been proved), and by the circumstance of abandonment having occurred. This amounts to Parliament having set the bar for removal at a certain height, and which is consistent with the guidance provided by the old equity cases like *Letterstedt v Broers*. Submitted that the bar for removal under the old s240 of the Act, and which was set at “unsatisfactory conduct”, was therefore by definition, lower. The authorities confirm that “unsatisfactory conduct” could extend to a trustee’s performance. Furthermore, this could mean taking into account the views of owners. This lowering is as a result of the Court being able to take into account a broader range of such factors. Submitted that the new s240 is markedly not as broad ranging as its predecessor. In illustrating what kind of conduct is being targeted for removal, as the new s240 invariably does, the focus is much narrower, in the way described above. A trustee’s performance in general terms, and any feedback from beneficiaries is no longer part of the legislative yardstick for removal. The result is that the bar for removal has changed. More so, it has not only been changed it has been raised since a specific and more serious kind of action is required than was previously the case.

[108] The respondent contends that all matters raised by this application are explicable. Therefore, the applicant, as a trustee of this trust, brings this application in the absence of the requisite care and skill that is reasonable in the circumstances and hinders the proper administration of the trust. The respondent seeks orders dismissing this application and awarding costs against the applicant.

Kōrerorero

Discussion

[109] The new enactment of s 240, had not been the subject of any major analysis by the Māori Land Court prior to the filing of the respondent's submissions in October 2021.

[110] I consider that the correct approach to the interpretation of the section requires that I be satisfied that one or more of the grounds for removal listed in s 240(1)(b) have been met. That list is prescriptive. One of those grounds includes where the trustee is no longer suitable to hold office because of his or her conduct or circumstances. I consider this provision to be wide in scope and ambit. Such a wide-ranging approach is necessary to allow the Court to consider the range of conduct or circumstances that may result in a trustee being unsuitable to hold office.

[111] I also consider that the examples of when a person may no longer be suitable to hold office as trustee outlined in s 240(3) are exactly that. I therefore reject the interpretation of counsel for the respondent that s 240(3) is prescriptive in any way. Rather that provision acts as a guide and does not form an exhaustive list.

[112] Once I am satisfied one of the grounds in s 240(1)(b) has been met, I then have to consider whether removal is desirable for the proper execution of the trust. That involves an exercise of discretion. In exercising that discretion in this Court, I have to take into account the kaupapa of the Act as set out in the Preamble, ss 2 and 17.

[113] I also consider that, despite the amendment, earlier principles concerning removal still apply and those have been outlined above.

[114] Taking all those matters into account, I find that removal is desirable for the proper execution of the trust having regard to the repetitive nature of the breaches of trustee duties that

the respondent has engaged in, supported by his siblings. I further find that it is desirable due to his actions and his circumstances. He is now effectively the manager of the farm operations, a trustee, and the chairperson of the trust who, with his siblings, control the trust's assets. While that is a situation that can normally be managed without conflicts occurring, the nature of decision making by these trustees indicate they are unlikely to change should the respondent remain a trustee and chairperson of the trust. Effectively, to leave the situation as it is, places the assets of the trust at risk.

Kupu whakataunga

Decision

[115] Therefore, I have found that:

- (a) The respondent has breached his duties as a trustee;
- (b) That it is desirable for the proper execution of the trust that the respondent be removed as a trustee on the grounds that he is no longer suitable to hold office as a trustee because of his conduct and circumstances.
- (c) That the trustees are directed to adopt the farm proposal of the respondent by employing the respondent as farm manager for the trust for five years. I issue this direction because all except Mr Tuhiwai-Ruru agree that his work on the land has improved farm operations.

Nga Ōta

Orders

[116] There is an order pursuant to s 240 removing the Mr A Henderson as a trustee of this trust.

[117] There is a direction to the trustees to adopt the farm proposal of the respondent and to employ Mr A Henderson as farm manager for the trust for the next five years.

[118] The Registrar is to work with the remaining trustees to conduct the next AGM of the trust by no later than 30 June 2022 whereat the following agenda items are to be dealt with:

- (a) A financial report on the trust is to be given by the trust accountants;

- (b) The Registrar is to summarise and explain this judgment to the owners;
- (c) The Registrar is to facilitate a new election to replace trustees, and those who are on the trust now should consider retiring and standing for re-election, with the exception of Mr A Henderson;
- (d) The Registrar is to facilitate discussions on the draft trust order used in this district for proper resolution and adoption by the owners; and
- (e) The Registrar is to spend a one-hour session with the newly elected or remaining trustees on the roles and responsibilities of trustees.

[119] The Registrar is to set the applications for the trust review (A20200002942); and for the appointment of trustees (A20190008723) down for Gisborne Court in the month of August 2022 when I expect any newly elected trustees to be appointed.

[120] Costs to lie where they fall.

I whakapuaki i te 11.30 am i Turanganui-a-Kiwa, te 20 o ngā rā o Paenga-whāwhā te tau 2022.
Pronounced at 11.30 am in Turanganui-a-kiwa on this 20th day of April 2022.

C L Fox
DEPUTY CHIEF JUDGE