**IN THE MĀORI LAND COURT OF NEW ZEALAND**
**WAIARIKI DISTRICT**

**A20100012352**

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| | UNDER | Sections 19, 37, 237, 238 and 240 Te Ture Whenua Māori Act 1993 |
| | IN THE MATTER OF | Kawerau A8 D Block |
| | BETWEEN | KANI HUNIA<br>Applicant |
| | AND | COLLEEN SKERRETT-WHITE AND TOMAIRANGI FOX<br>Respondents |

Hearings: 22 Waiariki MB 56-91 dated 20 December 2010
46 Waiariki MB 239-276 dated 29 November 2011
93 Waiariki MB 259-269 dated 17 March 2014
110 Waiariki MB 220-287 dated 10 December 2014
110 Waiariki MB 288-368 dated 11 December 2014
114 Waiariki MB 110-153 dated 13 February 2015

Appearances: J Kahukiwa for the Applicant
C Bidois for Colleen Skerrett-White
J Gear for Tomairangi Fox
J Chadwick for the Trust

Judgment: 31 August 2016

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**JUDGMENT OF JUDGE L R HARVEY**

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## Introduction

[1] In 2003 the Crown and Tūwharetoa ki Kawerau initialled a deed of settlement in respect of that group's historical claims which eventually became enshrined in legislation.[1] As part of that agreement, ownership of the geothermal well ("KA22") located on Kawerau A8D was returned to its beneficial owners. Following the return of the well the trustees of Kawerau A8D began investigating geothermal development options. In doing so the trust has incurred a substantial amount of debt in pursuing the venture and has also received a significant amount of income as part of the project, the use of which is now the subject of these proceedings.

[2] In 2010, Kani Hunia, a trustee, concerned with how trust monies were being spent says he made a request to his fellow trustee, Colleen Skerrett-White, for the accounts of the trust. That information was not forthcoming and Mr Hunia subsequently filed proceedings seeking to restrain the trustees from any further dealings with trust property until the information requested had been supplied.

[3] To date I have issued three decisions dealing with various matters that have come to light as part of these proceedings. The first was issued on 24 December 2010 where orders were made restraining the trustees from taking any steps in the administration and management of the trust without the approval of the Court. Further orders were issued directing that the trust's accounts should be subject to audit.[2] The second decision was issued on 13 April 2011 where Andrew Kusabs was appointed as independent trustee and chairperson of the trust until further order of the Court.[3] Following that on 12 December 2011 a third decision was issued where the removal of Ms Skerrett-White as a trustee was affirmed on the grounds that she had been declared bankrupt.[4]

[4] This application was last heard on 13 February 2015. After closing arguments from counsel, the proceedings were adjourned for a reserved decision to issue on the outstanding matters requiring determination in due course.[5] For several reasons that need not encumber

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1 Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005
2 *Hunia v Skerrett-White – Kawerau A8D* (2010) 22 Waiariki MB 92 (22 WAR 92)
3 *Hunia v Fox – Kawerau A8D* (2011) 28 Waiariki MB 226 (28 WAR 226)
4 *Hunia v Fox – Kawerau A8D* (2011) 45 Waiariki MB 32 (45 WAR 32)
5 114 Waiariki MB 110-153 (114 WAR 110-153)

this judgment further, the file was mislaid for a time between registries. In any event, I regret the lengthy delay in finalising this decision.

## Issues

[5] The proceedings give rise to multiple and overlapping issues for determination:

(a) Did the trustees fail to provide information?

(b) Did the trustees pay themselves in breach of their duties?

(c) Did the trustees fail to account for trust monies?

(d) Did the trustees misappropriate trust funds?

(e) Did the trustees collude in breach of their duties?

(f) Was the trustees' management of legal advisers prudent?

(g) Did the trustees manage the affairs of the trust prudently?

(h) Did the trustees act prudently regarding the geothermal development?

(i) Should any of the trustees be removed?

(j) Are any of the trustees entitled to relief?

[6] The issue of any post removal eligibility for re-election and re-appointment is also considered in this judgment by way of request for further submissions on the point before any final decision is taken.

## Background

*The land and the trust*

[7] Kawerau A8D is Māori freehold land approximately 171.47 ha in area created by partition order on 7 October 1981.[6] There are currently 109 beneficial owners. In 1988 part of the block was set aside as a Māori reservation for the purpose of "an urupā for the common use and benefit of the present owners of Kawerau A8D and their successors in accordance with Māori custom."[7]

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6 72 Whakatāne MB 328 (72 WHK 32)

7 "Setting Apart Māori Freehold Land as Māori Reservation" (27 October 1988) 180 *New Zealand Gazette Notice* 4225 at 4240

[8] The balance of the land is administered by an ahu whenua trust constituted on 19 October 1981.[8] At the time this application was filed, the responsible trustees were Ms Skerrett-White, Mr Fox and Mr Hunia.[9] The trustees at the date of this decision are Mr Fox, Mr Hunia and Mr Kusabs.[10]

[9] Prior to 2009, the trust operated in accordance with a trust order issued in 1993.[11] That order made no provision for trustee remuneration or the power to invest. In 2009 the trust order was varied to enable the trustees to investigate options to develop a geothermal power project on the land.[12] The variations also included extending the powers of the trustees to empower them to employ persons, pay their own costs and investigate the possibility of entering into geothermal development projects.

[10] According to the affidavit of Ms Skerrett-White, since 2005 the day to day administration of the trust had been undertaken by Taumanu Associates ("Taumanu"), a consultancy business where the partners were Stan Knuth and herself.[13] Later in 2005 the trust entered into an agreement with Norske Skog Tasman which provided that the company would pay an annual fee of $21,935.00 for access to the block. That same year, following the settlement of the Ngāti Tūwharetoa (Bay of Plenty) and the return of KA22, the trustees began investigating options for a geothermal development.[14]

*Geothermal development proposals*

[11] In 2007 the trustees entered into a Memorandum of Understanding (MOU) with Ormat, a geothermal development company, and as a result established Otuwhetu Power Ltd. That MOU ended in 2007, following which the trust sought expressions of interest for geothermal development from a range of other companies.[15]

[12] Following the receipt of expressions of interest, the trustees engaged Russell McVeagh, solicitors of Auckland, to assist in advising them on the proposals that had been received. According to Ms Skerrett-White, the trustees and Russell McVeagh entered into an agreement whereby the legal fees incurred would be paid from the proceeds of the

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8 72 Whakatāne MB 380 (72 WHK 380)
9 104 Whakatāne MB 105 (104 WHK 105)
10 41 Waiariki MB 187 (41 WAR 187)
11 68 Opotiki MB 65 (68 OPO 65)
12 124 Whakatāne MB 16 (124 WHK 16)
13 Affidavit of Ms Skerrett-White dated 23 November 2010 at [7]
14 Ibid at [7]
15 Ibid at [15] – [19]

geothermal development project. She would later claim that the solicitors' fees had been capped. A similar arrangement is said to have been agreed between the trustees and Taumanu.[16]

[13] In January 2008 the trustees entered into a MOU with Innovations Development Group ("IDG"), a Hawaiian based company, for the development of KA22. The agreement provided that the trust and IDG would commit to work together for a period of 12 months, during which IDG would identify possible strategic partners for a joint venture project to develop the geothermal resource.[17]

[14] As part of the MOU it was agreed that IDG would pay to the trust an exclusivity fee of $360,000.00 and upon signing the Development Agreement, the joint venture partnership would pay the trust a $300,000.00 commitment fee, a $100,000.00 administration fee and a $20,000.00 scholarship fee. There was also provision for negotiating the reimbursement of costs incurred by the trust for scientific studies and the like. Additionally, it was envisaged that the joint venture partnership would reimburse the trust for consenting costs incurred.[18]

*Special meeting of owners – 7 December 2008*

[15] On 7 December 2008 the trustees convened a special meeting of owners. According to Ms Skerrett-White, those in attendance were advised that costs for the project were being met by the trustees and Taumanu as well as from contracts with Te Puni Kōkiri and Mighty River Power.[19] Two resolutions were then put to the beneficiaries.

[16] The first provided:[20]

(a) That the shareholders/beneficiaries authorise Mr Fox to act as the cultural curator of the project and cultural monitor and Ms Skerrett-White as Taumanu to undertake a comprehensive cultural affiliation report;

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16 Affidavit of Ms Skerrett-White dated 24 October 2014 at [9] – [10]
17 Ibid, Exhibit A
18 Ibid
19 In or around 2008, the trustees entered into a Well Interference Agreement with Mighty River Power. See Affidavit of Ms Skerrett-White dated 24 October 2014, Exhibit G
20 Affidavit of Ms Skerrett-White dated 24 October 2014, Exhibit G

(b) That the shareholders/beneficiaries direct that Mr Fox, Mr Hunia and Ms Skerrett-White as trustees are entitled to and should receive appropriate remuneration for their services to the joint venture partnership; and

(c) That the shareholders/beneficiaries approve all payment for costs incurred by the Trust for expenses relating to pre-development activities; and undertakings prior to the creation of the joint venture project may be reimbursed to the trustees from funds available to the Trust which have been specifically sought and obtained from Government and/or private sources.

[17] The second resolution stated:[21]

(a) That a new trust order be approved; and

(b) Trustee meeting fees are set at $300.00 per meeting or attendance to Trust business and acknowledging that trustees are representing the trust in geothermal development matters there shall be no restriction on the number of meetings or attendances.

[18] Following that on 17 December 2008 the MOU with IDG was varied, whereby it was agreed that IDG would pay the exclusivity fee of $360,000.00 and the commitment fee of $300,000.00. All other references to fees were deleted.[22] According to Ms Skerrett-White, since 2008 the trustees and IDG have entered into negotiations with Iceland America Energy Ltd, Ormat, Mighty River Power, Contact Energy, Horizon Energy and others.[23]

[19] On 14 August 2010 the trustees and IDG entered into a joint venture partnership ("JV") with Eastland Group Limited ("EGL"), under which EGL agreed to provide funds to the JV including rental in advance for the lease of the land to develop KA22. The JV partnership is known as Te Ahi Maui Power Limited.

**Procedural history**

[20] This application was first heard on 20 December 2010.[24] The principal allegation was that Ms Skerrett-White had misappropriated trust monies. The applicant sought interim

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21 Affidavit of Ms Skerrett-White dated 24 October 2014, Exhibit G
22 Ibid, Exhibit B
23 Ibid at [51] – [56]
24 22 Waiariki MB 56 (22 WAR 56)

orders restraining the trustees from dealing with trust property until an audit had been undertaken. Ms Skerrett-White denied having paid herself without authority. She argued that she was simply reimbursed for costs incurred in negotiating an agreement for the use of the block for a geothermal project.

[21] Following that hearing, I issued an interim decision outlining concerns as to the activities of the trustees.[25] They were restrained from taking further steps to progress their joint venture geothermal power project without express approval from the Court. This included the operation of the trust's bank accounts and receipt of trust funds.

[22] A further hearing was held on 13 April 2011 at the conclusion of which I issued an oral decision appointing Mr Kusabs as an independent trustee and chairperson of the trust in the absence of agreement[26]. I directed the trustees to convene a meeting as soon as possible and agree to a work plan to deal with outstanding issues.

[23] On 18 October 2011 I issued a short minute noting that the Court had received information that Ms Skerrett-White had been adjudged bankrupt as of 29 August 2011.[27] On that basis orders were issued removing Ms Skerrett-White as a trustee.

[24] A further hearing was held on 29 November 2011 to hear from the parties on the subject of Ms Skerrett-White's removal.[28] Following that I issued a reserved decision affirming the previous order for removal.[29] I also noted that the auditors had expressed concern as to the considerable gaps in the records of the trust. To that end, I directed the trustees to file any outstanding material in their control or possession in relation to the trust.

[25] There matters lay for some time as the preparation and audit of the accounts remained problematic, due largely to the absence of critical trust documents relevant to the accounts. On 10 March 2014 I issued a direction expressing concern as to the ongoing difficulties in both providing the Court with a report on the activities of the trust and completion of audited accounts.[30] Discussion over contingent liabilities in respect of unpaid legal fees and the accounts claimed by Ms Skerrett-White remained unresolved. The trustees were then directed to provide an update on the outstanding matters.

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25 *Hunia v Skerrit-White – Kawerau A8D* (2010) 22 Waiariki MB 92 (22 WAR 92)
26 *Hunia v Fox – Kawerau A8D* (2011) 28 Waiariki MB 226 (28 WAR 226)
27 41 Waiariki MB 187 (41 WAR 187)
28 46 Waiariki MB 239 (46 WAR 239)
29 *Hunia v Fox – Kawerau A8D* (2011) 45 Waiariki MB 32 (45 WAR 32)
30 *Hunia v Fox – Kawerau A8D* (2014) 91 Waiariki MB 213 (91 WAR 213)

[26] A conference was subsequently held on 17 March 2014.[31] Mr Kusabs had filed a progress report and I also heard from Murray Patchell concerning the debt owed by the trust to Hulton Patchell Ltd for the completion of accounts. Orders were then issued for payment of the sum outstanding. Ms Corbett advised that the 2008 accounts had been prepared, as far as they could, given the lack of detailed information, and that the 2009 and 2010 accounts still required updating. Further timetabling directions were issued on 7 November 2014.[32]

[27] The substantive hearings were finally held on 10 and 11 December 2014 followed by a final hearing on 13 February 2015. At the conclusion of the hearing I reserved my decision.[33] For completeness, I record that submissions were also received from a number of persons throughout these proceedings, including the siblings and close whānau of the trustees and the owners.

**The Law**

[28] Section 238 of the Act states:

> **238 Enforcement of obligations of trust**
>
> (1) The Court may at any time require any trustee of a trust to file in the Court a written report, and to appear before the Court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.
>
> (2) The Court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligation of his or her trust (whether by way of injunction or otherwise.)

[29] It is trite law that trustees must adhere to their duties and any suggestion as to a lack of knowledge of such responsibilities is no defence against a claim of breach of duty. The Court of Appeal judgment in *Rameka v Hall* underscored the relevant duties including the principal obligation of being familiar with the terms of the trust:[34]

> [28] The general responsibilities of responsible trustees are set out in s 223 of the Act. That section refers to the following:
>
> a) Carrying out the terms of the trust:
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> b) The proper administration and management of the business of the trust:
>
> c) The preservation of the assets of the trust:

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31 93 Waiariki MB 259 (93 WAR 259)
32 107 Waiariki MB 96 (107 WAR 96)
33 110 Waiariki MB 220, 288 (110 WAR 220, 288) and 114 Waiariki MB 110 (114 WAR 110)
34 [2013] NZCA 203

> d) The collection and distribution of the income of the trust.
>
> [29] As we have noted, these statutory duties are not exhaustive and general trustee law principles are also relevant. Further, the trust order applicable to the trust may add other responsibilities. The relevant obligations of trustees have been described by the Maori Appellate Court in these terms:
>
> a) A duty to acquaint themselves with the terms of trust;
>
> b) A duty to adhere rigidly to the terms of trust;
>
> c) A duty to transfer property only to beneficiaries or to the objects of a power of appointment or to persons authorised under a trust instrument or the general law to receive property such as a custodian trustee;
>
> d) A duty to act fairly by all beneficiaries;
>
> e) A duty of trustees to invest the trust funds in accordance with the trust instrument or as the law provides;
>
> f) A duty to keep and render accounts and provide information;
>
> g) A duty of diligence and prudence as an ordinary prudent person of business would exercise and conduct in that business if it were his or her own;
>
> h) A duty not to delegate his or her powers not even to co-trustees;
>
> i) A duty not to make a profit for themselves out of the trust property or out of the office of trust: Garrow and Kelly *Law of Trusts and Trustees* (sixth edition, pp 523–582 inclusive)

[30] In *Clarke v Karaitiana* the Court of Appeal commented on the extent of the Court's jurisdiction under s 238 of the Act:[35]

> Apart from the inherent jurisdiction enjoyed by the High Court and conferred on the Māori Land Court by s 237, the Māori Land Court has wide supervisory and enforcement powers under s 238. These include the power to require any trustee to provide a written report to the Court and to appear before the Court in any matter relating to the administration of the trust or the performance of his or her duties as a trustee. In addition, the Court may, at any time, in respect of any trustee, enforce the obligations of the trust whether by injunction or otherwise. As well, the Court has the power, at any time, to add, reduce, replace or remove trustees under ss 239 and 240.

[31] Then in *Fenwick v Naera* the Supreme Court underscored the role of this Court in relation to trusts, drawing a distinction with the jurisdiction of the High Court. The Supreme Court made it plain that this Court currently possesses a particular and unique jurisdiction:[36]

> [121] Ahu whenua trusts are also unusual in the way in which they are established and closely supervised by the Maori Land Court. The Beneficiaries argue that, while the Maori Land Court has broad powers, the High Court has similar broad powers of review, but these do not supplant the specific rules of the common

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35 [2011] NZCA 154 at [36].
36 [2015] NZSC 68

> law and equity setting out what forms of relief ought to be available and in what circumstances. While that may be true, the Maori Land Court's role is very different from that of the High Court. The Maori Land Court is actively involved in the setting up of trusts under the Act, sets the contents of the trust order, appoints the trustees, and has a major role in the governance and review of Maori trusts. While the High Court has jurisdiction over trusts, its role in trusts is not comparable to the Maori Land Court's special involvement in trusts created under the Act.

[32] I adopt the reasoning set out in these decisions.

**Did the trustees fail to provide information?**

*Applicant's submissions*

[33] Mr Kahukiwa submitted that Ms Skerrett-White breached her duty to account to both the beneficiaries of the trust and her fellow trustees by refusing and failing to provide the financial information requested of her by Mr Hunia. He argued that it was telling that the refusal to provide that information has now been admitted by Ms Skerrett-White.

[34] Counsel contended that a trustee's duty to account to both beneficiaries and fellow trustees is fundamental to the office, arising as it does from a trustee holding fiduciary duties. He argued that this principle applies here notwithstanding the distinction in the Act between a responsible trustee and a custodial trustee.

[35] Mr Kahukiwa submitted that Mr Hunia asked Ms Skerrett-White for the accounts of the trust in 2010 after becoming concerned about trust monies following a comment made by Mr Fox to him earlier in 2010 that funds were going missing. Counsel contended that Mr Hunia was entitled to make such a request and Ms Skerrett-White was obliged to provide that accounting to Mr Hunia, whether in his capacity as a fellow trustee or in his capacity as a beneficiary of the trust.

[36] Counsel argued that it was not enough for Ms Skerrett-White to blame her refusal to provide the information on an Inland Revenue Department audit, as the accounting was required in respect of trust monies, not Taumanu property. Whether she was prevented from doing so due to the fact that the information was supposed to be in the control of the trustees but was in fact in the control of Taumanu (her alter ego) is no justification. Rather it underscores the breach and her apparent inability to distinguish one role from the other – trustee or contractor.

[37] Mr Kahukiwa submitted that Ms Skerrett-White could not account, did not account and eventually, deliberately refused to account, all in breach of her duties. As a result Mr Hunia was forced to take action and commence proceedings.

*Respondents' submissions*

[38] Mr Bidois confirmed that Ms Skerrett-White concedes that there was a failure to provide the information requested by Mr Hunia. However, counsel submitted that the information was not readily available to Ms Skerrett-White and says that the availability of the information was also affected by the Inland Revenue Department audit being undertaken at the time.

[39] Counsel argued that it is telling in terms of the trusteeship or the conduct of Mr Hunia in his trustee role that he was demanding information from Ms Skerrett-White, as Mr Hunia should have had this information himself as a trustee.

[40] Mr Bidois submitted that it is almost as if Mr Hunia had woken up from a long sleep. He further submitted that it is beyond dispute that there is a duty on trustees not to delegate to another, including to another trustee. There is also a duty to not let the trust monies come into the hands of any one of them solely. Mr Bidois argued that these factors must militate against Mr Hunia.

**Discussion**

[41] In *Apatu v Trustees of Owhaoko C Trust*, the Māori Appellate Court set out the principles relating to the disclosure of information to beneficiaries.[37] I adopt those principles. I also note that cl 7(c)(i) of the trust order provides that the trustees have an obligation to cause annual reports and audited accounts to be prepared each year and to be filed with the registrar.

[42] It is well settled that beneficiaries of trusts have a fundamental entitlement to receive information.[38] This includes the right to receive information relating to the financial statements of the trust. Ms Skerrett-White now acknowledges that she failed to provide the information requested by Mr Hunia. She points out that the responsibility to ensure that the

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37 [2010] Māori Appellate Court MB 34 (2010 APPEAL 34)
38 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26

trusts' accounts were dealt with appropriately was the duty of *all* trustees rather than hers alone.

[43] I accept that it is the responsibility of all trustees to ensure that the trusts' accounts were prepared, audited and filed – as the trust order spells out in unequivocal terms. However, it is obvious that Ms Skerrett-White was in control of the trust's financial affairs and therefore its accounts. It is for this reason that I do not consider Mr Hunia's request unreasonable. As a trustee, he should have at least sighted the financial statements over the three year period or discussed them with his colleagues. Once Mr Hunia became concerned that something was amiss he took action by requesting the information, and sought recourse to the Court when that material was not provided. He acted properly in so doing, although it can also be argued that he ought to have taken steps far sooner than he eventually did. A gap of three years during which no accounts were prepared and filed seems inexplicable. This issue will be relevant to Mr Hunia's own exposure and ultimately, his liabilities as a trustee in the context of relief.

[44] In any event, the fact Ms Skerrett-White could not produce such essential information as the trust's accounts is evidence itself of a lack of internal controls by the trustees as a whole and by Ms Skerrett-White in particular. She has, after all, been paid to administer the affairs of the trust and did not dispute that she had a central role in the oversight of the trust's business. Significant sums, as set out in the reconstructed accounts, were paid to Taumanu for that very purpose. It seems a rather dubious defence, having accepted paid responsibility to manage the administration affairs of the trust through Taumanu for payment, to now point the finger at Mr Hunia for failing to have the accounts prepared, audited and filed. Moreover, the trustees have both a statutory duty and a responsibility under the trust order to prepare the financial statements and on both counts they failed.[39] In any case, the excuse or explanation of a loss of records could only reasonably apply to one financial year.

[45] That various excuses were eventually proffered by way of explanation as to the loss and destruction of trust records, inadvertent or otherwise, is acknowledged. But these explanations cannot relieve the trustees' of their responsibility of ensuring that the trust's financial records were intact, especially given the sums involved and the reality that one of their number was getting paid to administer and manage – to the extent that those descriptions were accurate – the business of the trust. Doubtless, like many trusts in this

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[39] Te Ture Whenua Māori Act 1993, ss 223, 226 and 230

district, if they had adopted the orthodox approach of having professional accountants deal with their accounts, then difficulties like the loss of the actual records might have been minimised, if not eliminated.

[46] As foreshadowed, I find that Ms Skerrett-White failed to provide the financial information requested by Mr Hunia and in doing so breached her duty as a trustee. I also find that the trustees as a whole breached cl 7(c)(i) of the trust order by failing to produce the financial statements and audited accounts as and when necessary. The trustees' accountability to their beneficiaries and to the Court is premised in the fundamental and core duty of being able to account for the property of others. By not retaining control over the trust's financial records at the relevant time, and taking into account the time consuming and costly exercise of attempting to reconstruct those accounts, the trustees generally and Ms Skerrett-White in particular have failed in their principal duty of preparing the trust's accounts, sufficient to warrant their removal.

**Did the trustees pay themselves in breach of their duties?**

*Applicant's submissions*

[47] Mr Kahukiwa argued that Ms Skerrett-White breached the trust order by failing to properly administer the trust, including by gaining control of all trust monies via a trust bank account, holding such monies, and ultimately paying the surplus of such monies to the beneficiaries.

[48] Counsel also contended that Ms Skerrett-White breached her duty to adhere to the terms of trust by ignoring or circumventing the express terms of the trust order. Prior to 2009 the trust order did not expressly provide for trustees to be remunerated for services rendered. In 2009 the trust order was varied per cl 4 to allow for remuneration, but subject to the particular trustee seeking remuneration being excluded from those discussions, and subject to the approval of the Court.

[49] Mr Kahukiwa submitted that while cl 4 relaxes the general proposition that a trustee is unable to profit from their office as trustee, it clearly allows for trustees to charge only where a high degree of independence and objectivity is maintained. He argued this ensures that the distinction between the fiduciary duty of not profiting and that of pursuing self interest is strictly observed.

[50] Counsel further submitted that Ms Skerrett-White paid or authorised the payment of Taumanu invoices using trust monies for significant amounts, which he says is not denied and is clear from the record. Ms Skerrett-White claimed that such payments are of the kind contemplated by cl 4, however; Mr Kahukiwa argued that while cl 4 applies, Ms Skerrett-White's actions fall outside of the requirements of cl 4, as she did not absent herself from discussions regarding the claimed payments to Taumanu. Rather, Ms Skerrett-White unilaterally made or authorised such payments with Mr Fox's complicit support, and in doing so violated cl 4.

[51] Mr Kahukiwa also argued that Ms Skerrett-White cannot justifiably respond by saying that Mr Hunia knew of these circumstances and did not protest. The evidence is the opposite, and confirms that the applicant had no idea how much Ms Skerrett-White was paying herself. According to counsel, Mr Hunia did not know the true picture as, despite his requests, he did not have the financial records or the invoices in front of him.

[52] Counsel added that it may be inferred that the issuing of invoices from Taumanu was an exercise done well after the fact, once the Court became involved and as a "backfilling" exercise. In support of that submission he pointed to the fact that the invoices appeared altogether once the Court began to intervene, that they are consecutively numbered (yet Taumanu was clearly undertaking work for other trusts), that there is a statement on the spreadsheet which says "Girls we have to reduce the above figure to reduce the total payments made to Taumanu Associates", and that the invoices often add up to round numbers, being the balance paid to a third party creditor.

[53] Mr Kahukiwa then submitted that, in addition, cl 4 was breached by the absence of any Court order approving these payments. The quantum of such payments heightens the need for complying with that requirement he argued. Both iterations of the trust order expressly require the trustees to properly account for income and expenditure of the trust on an annual basis.

[54] Further, the duty to account, according to counsel, imports the administrative obligations to get in trust monies, secure them, keep and render accounts, meet any liabilities, and ultimately distribute any surplus to the beneficiaries. Ms Skerrett-White did not do that. Rather, she directed trust monies be paid to her, via Taumanu, and she clearly arranged for any monies coming into the trust's bank account to be transferred to a bank account that she controlled.

[55] Counsel contended that there is no lawful justification for such conduct. Mr Kahukiwa argued that Ms Skerrett-White claimed that she was paying creditors directly, including herself, which she solely determined, but cannot now explain precisely how that occurred. Mr Kahukiwa submitted that in doing so Ms Skerrett-White has breached the responsibilities that are normally part of a trustee's administrative duty in respect of trust funds and, given the scale of monies involved, those breaches are gross breaches.

[56] Finally, Mr Kahukiwa referred to the fact that Ms Skerrett-White has stated throughout that she, through Taumanu, was providing administrative support for the trust in respect of the geothermal project. She also accepted that she was paying Taumanu out of trust monies that came to Taumanu because of her actions. In some cases the costs for administration are explained in terms of hours, or just simply the balance of an invoice after payment to a third party. Mr Kahukiwa submitted that he is unable to put an exact figure on the costs charged by Taumanu for administration but it is clearly substantial. However, overall he argued that the administration of the trust is a "mess".

*Respondent's submissions*

[57] Mr Bidois submitted that it is well settled that a trustee may be entitled to remuneration in certain circumstances, including where provided in the trust order, by agreement between the trustees and beneficiaries, and by approval of the Court. Mr Bidois argued that trustees are entitled to their out of pocket expenses per s 38(2) of the Trustee Act 1956 and that a Court order is not needed for this. Clause 3(b)(viii) of the trust order also provides the trustees with the ability to pay costs.

[58] Counsel contended that Ms Skerrett-White conceded that payments received by her from Taumanu during the relevant period were funded in part by monies paid by the trust. She accepted that those payments were in breach of cl 4 of the trust order. She also accepted that in drawing a salary from Taumanu without the approval of the Court she breached cl 4. However, she says that she did not take trustee meeting and attendance fees which she was entitled to under cl 3(b)(viii)(b) of the trust order, even though she incurred significantly more attendances than her fellow trustees.

[59] Mr Bidois argued that Ms Skerrett-White was lawfully entitled to receive payments made to Taumanu in order to meet the costs that had been incurred on the trust's behalf, in reliance of s 38(2) of the Trustee Act 1956 and cl 3(b)(viii) of the trust order. Mr Bidois also

submitted that the Court appointed auditor appeared to accept that costs had been incurred through Taumanu on behalf of the trust.

[60] Counsel argued that it is not unreasonable for Ms Skerrett-White to have believed she was entitled to continue drawing a salary from Taumanu, given cl 2(b)(viii) in respect of paying all costs, expenses and disbursements incurred by the trustees and based on the approval given by the beneficiaries at the 2008 AGM.

**Discussion**

[61] It is settled law that trustees are not entitled to remuneration for their exertions.[40] To do so would place a trustee in a position where their personal interests may conflict with their duties.[41] An exception is where Court approval has been obtained or there is provision in the trust instrument for the payment of trustees. In this case it appears at cl 3(b)(viii) of the trust order:

> viii To pay own costs
>
> From the revenues derived from the Trust to pay:
>
> (a) All costs expenses and disbursements incurred by them including the costs of any person employed by them in the administration of the Trust or in the furtherance of any of the objects of the Trust.
>
> (b) A meeting fee of $300.00 gross per trustee per meeting of the Trust or other attendance on any Trust business, without any limitation on the number of meetings or attendances.
>
> (c) All reasonable costs and travelling expenses incurred by them in attending the meetings of the Trust or other attendances on any Trust business.

[62] Thus, trustees and any person employed by them can seek payment for costs incurred in administering the trust. Trustees are also entitled to a trustee meeting fee of $300.00. Additionally, they can also seek payment of their reasonable costs and travelling expenses to attend to trust business.

[63] More importantly, in this case Ms Skerrett-White sought to rely on cl 4 of the trust order, which applies to situations where trustees are employed:

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[40] *Peach v Jagger* [1910] 30 NZLR 423 (SC); *Waipapa 9* (1995) 67 Taupō MB 10 (67 TPO 10)
[41] *Naera v Fenwick* [2013] NZCA 353

> 4 Personal Interest of Trustees
>
> Notwithstanding any general rule of law to the contrary no person shall be disqualified from being appointed or from holding office as a Trustee or as a representative of the Trust by reason of his employment as a servant or officer of the Trust or by his being interested or concerned in any contract made by the Trustees **PROVIDED THAT he shall not vote or take part in the discussion on any matter that directly or indirectly affects his remuneration or the terms of his employment as a servant or officer of the Trust or that directly or indirectly affects any contract in which he may be interest or concerned PROVIDED FURTHER THAT if a Trustee is employed by the Trust in any capacity whatsoever he shall not be paid any fees, costs, remuneration or other emolument whatsoever until same has been approved by the Court**.
>
> (Emphasis added)

[64] Ms Skerrett-White, in response to questions from the Bench, made it plain that the trustees did not seek approval to pay themselves and consequently acted contrary to the trust order. Her evidence disclosed a troubling casualness about adhering to its terms on such an important issue of the trustees' no conflict duty:[42]

> **Court:** …In fact there are two amounts for $2,500, made out to Mr Hunia and above that an amount of $2,000 I assume to Mr Fox and another amount of $1,000 to Mr Fox. What are those amounts for?
>
> **…**
>
> **Court:** …by this time the trust order has been changed at the request of the owners…and the trust order makes it plain that any reimbursement of time must be approved by the Court. So where is the approval from the Court?
>
> **C Skerrett:** No we didn't seek approval.
>
> **Court:** So you understood the trust order. It was a change that the trustees [had] put forward themselves. You understood what it meant? So you and your fellow trustees understood, the trust order said you must get the Court's approval? That is correct? So you simply ignored it? That is the only inference to draw isn't it? If you knew what it meant, you understood what it meant and you acted contrary to it?
>
> **C Skerrett:** Yes we have. Not deliberately.
>
> **Court:** Well what would it be, if you understood it?
>
> **C Skerrett:** I don't know. We were too busy.

[65] Mr Bidois contended that Taumanu is not an entity with a separate personality and accordingly Ms Skerrett White is personally liable for Taumanu. Ms Skerrett-White confirmed her connection to Taumanu during the hearing as well as admitting the more serious point of mixing trust funds. She stated that she was an owner of Taumanu with Mr Knuth:[43]

> **Court:** Let me understand you; you are saying that the Taumanu partnership, you have no ownership interest in that?

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42 22 Waiariki MB 78 (22 WAR 78)
43 22 Waiariki MB 75-76 (22 WAR 75-76)

> **C Skerrett:** Yes I didn't even realise it was a partnership. Yes I do. I have an interest – it is an administrative body. It was never a registered company.
>
> **Court:** Yes
>
> **C Skerrett:** It was just so that we could, it was easier for me to do everything by internet access to the banking and all of that stuff.
>
> **…**
>
> **Court:** Yes. But the owners of Taumanu were yourself and Mr Knuth, is that right?
>
> **C Skerrett:** Yes.
>
> **Court:** So did Taumanu ever make a profit?
>
> **C Skerrett:** No.
>
> **Court:** So the accounts for Taumanu would show that it makes a loss?
>
> **C Skerrett:** Yes, it will when it is audited…
>
> **…**
>
> **Court:** …Now you accept that looking at the document, this is a list of payments made out of Taumanu?
>
> **C Skerrett:** Yes
>
> **Court:** Ok
>
> **C Skerrett:** They are not all for A8 though.
>
> **Court:** Yes, so let me understand this, you as a trustee are mixing trust funds with other funds that you have in a business that you own, is that right?
>
> **C Skerrett:** I suppose yes. I guess that would be yes.

[66] It is difficult to see then how Ms Skerrett-White could not have been in a position of conflict. Not only is it unclear in what capacity Ms Skerrett-White undertook work for the trust (as a trustee or as an employee of Taumanu) it is also unclear whether she stood down from discussions concerning Taumanu. It appears that Ms Skerrett-White had essentially assumed personal control for the entire geothermal development project with the actual or tacit consent of her colleagues and in doing so for various reasons eventually exposed both the trust and Taumanu to considerable debt.

[67] In addition, it is inexplicable and unacceptable that no written agreement for services was entered into between the trust and Taumanu. This step was essential to protect the interests of all concerned, the trustees, Taumanu, and more importantly, the beneficiaries. Had such an agreement been completed then much of the confusion around Ms Skerrett-White's role, the costs for services rendered and the process for the approval of payments, might have been avoided. Here all of the trustees must be held responsible. It was their collective duty to ensure that any potential or actual conflicts were properly managed along with the performance of the contract between Taumanu and the trust. They also needed to satisfy themselves that the costs being rendered were fair and reasonable in all of the relevant circumstances. It would appear that based on the available evidence, scant regard

was paid to these critical requirements. If the trustees had even the slightest doubt they should have sought directions from the Court.

[68] More so given the scale of the project and the significant sums involved. This was not simply a lease of land for maize or grazing. It is a million dollar project of some complexity and risk. All of the trustees should have realised that a written agreement – if only to protect themselves – was critical. Again, they should have sought advice or directions. Considering the significant legal costs that they had incurred during the project, it was not as if they did not have access to lawyers for the purpose of obtaining advice, inter alia, on how best to manage potential conflicts. The impression that the evidence creates is that perhaps it simply never occurred to the trustees that any of them were in even a potential conflict until it was too late

[69] Additionally, Ms Skerrett-White sought to rely on the resolutions passed at the 2008 AGM as support for payments made to Taumanu. Those resolutions provide for remuneration for trustee's services to the joint venture project and reimbursement for costs incurred in the development of the project (prior to the joint venture being entered into). Even so, any such payments must be reasonable and as foreshadowed, they can only be made once there had been compliance with the conflicts of interest clause in the trust order. The trustees do not appear to have positively turned their minds to these issues or acted to ensure that they had appropriate benchmarks against which to measure the reasonableness of such costs. It is not yet clear whether the payments were reasonable since no independent assessment appears to have been undertaken.

[70] In any event, the key point concerning the necessity of complying with the trust order was discussed with Ms Skerrett-White at the earliest stages of this proceeding. In summary:[44]

> **Court…**you are a trustee, you are entitled to $300 for a meeting fee. The trust is entitled to pay for people who do work for the trust. If that involves a trustee in any way, the Court must approve those payments.

[71] In addition, it is not known whether those present at the AGM where aware of the extent of the debt *already* incurred by the trustees through Taumanu, a fact which became apparent during the hearing:[45]

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[44] 22 Waiariki MB 75 (22 WAR 75)
[45] 110 Waiariki MB 310 (110 WAR 310)

> **The Court:** And the trust order is explicit is it not? "Trustees shall not receive any payments personally unless they are approved". And at that stage, in 2006, it had not gone to the owners had it because that was in 2008?
>
> **C Skerrett-White:** Yes. That's why we were advised to vary our trust order.
>
> **The Court:** Yes but you have already rendered these $50,000.00 worth of bills before hand though. Were the owners at the 2008 aware of that, that there was this huge liability facing the trust when you asked for their approval?
>
> **C Skerrett-White:** Not specifically for this.
>
> **The Court:** I do not see it in the minutes of the meeting and I just wonder if the owners, if they had have been aware at the meeting, that this is a major project that will involve hundreds of thousands if not millions of dollars, and give us your confidence and trust to secure the funding and it is going to be expensive. In the meantime, just so you are aware, we have incurred tens of thousands of dollars of costs paying ourselves as trustees and here is the amount that you are already liable for. To me that would have been a transparent way of dealing with it. At least the owners would know so they cannot complain later saying they did not know.
>
> **C Skerrett-White:** Yes, no I discussed that with them in the 2008 meeting. That's why we discussed this project would have to generate its own funding because we had already incurred a lot of debt.
>
> **The Court:** Yes and were the owners…told the dollar amount?
>
> **C Skerrett-White**: I don't know.
>
> …
>
> **C Skerrett-White:** It specifically wasn't discussed.

[72] Then there were other payments made to both Mr Fox and Mr Hunia, payments, Ms Skerrett-White claimed were, in fact, reimbursement for lost time:[46]

> **Court**: Thank you. Now half way down the page is another amount made out in the name of Mr Hunia for $2,500, what is that for? In fact there are two amounts for $2,500, and above that is an amount of $2,000 I assume to Mr Fox and another amount of $1,000 to Mr Fox. What are those amounts for?
>
> **C Skerrett**: For Kani that is for lost time, he is self employed.

[73] There is no dispute that as a fiduciary a trustee cannot permit any conflict between personal interests and the trustee's duties to the beneficiaries.[47] Even a potential conflict of interest is sufficient to render a transaction improper. The Court of Appeal in *Naera v Fenwick* recently considered conflicts of interest: [48]

> [87] At common law, trustees have a clear obligation of single-minded loyalty to their principal. To establish a breach of this duty it is sufficient to show that the trustee has placed him or herself in a position of *potential* conflict…
>
> …

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46 22 Waiariki MB 78 (22 WAR 78)

47 *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721

48 [2013] NZCA 353. See also *Fenwick v Naera* [2015] NZSC 68 where the appeal was allowed in part and remitted to the Māori Land Court to make final decisions on the existence of particular conflicts and on the consequences of breach of s 227A of the Act in light of the judgment.

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

[74] Under s 227A of the Act, 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. However, 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, the terms of that person's employment as a servant or officer of the trust, or any contract in which that person may be interested or concerned other than as a trustee of another trust. As foreshadowed, this prohibition against participating in the decision making is also set out in the trust order which Ms Skerrett-White accepted had been read by the trustees.

[75] There is no evidence that the correct processes for managing conflicts of interest were followed. There are apparently no minutes filed that record Ms Skerrett-White leaving the meeting of trustees so that her two colleagues could then decide on whether or not she would be engaged or Taumanu contracted. Then there is the added complication of the relationship between Ms Skerrett-White and Mr Fox. While I acknowledge that the issue was raised at a meeting of owners, unless all of the owners were present (which was not the case) it is difficult to see how an argument that the owners themselves had waived any conflict could be sustained.

[76] It is also difficult to discern in what capacity Ms Skerrett-White was acting in regard to the geothermal project. It is clear that the line between being a trustee and an employee or contractor of Taumanu has been blurred. The fact that Ms Skerrett-White was paid a salary through Taumanu is further evidence of this. I find that Ms Skerrett-White not only failed to adhere to the terms of the trust order but also placed herself in a position of conflict thereby breaching her trustee duties. The two other trustees are also responsible for failing to manage the conflicts of interest until, in the case of Mr Hunia, the situation had deteriorated irretrievably. Indeed, the evidence suggests that both Messrs Fox and Hunia appeared content to allow Ms Skerrett-White to oversee the project until just before the commencement of these proceedings. And, given the circumstances, as well as her experience, that was not entirely surprising.

[77] My conclusion is that the trustees acted in breach of their trust order by paying themselves without the express consent and approval of the Court. In doing so, they allowed their duties to conflict with their personal interests. Given the magnitude of the sums involved, this omission is as inexplicable as it is unreasonable. Moreover, the trustees – or Ms Skerrett-White at least – have admitted doing so, albeit "not deliberately". With respect, this too is a breach of trust – a breach of the duty to adhere to the terms of the trust. For these breaches the trustees must now be held to account for their conduct.

**Did the trustees fail to account for trust monies?**

*Applicant's submissions*

[78] Mr Kahukiwa argued that Ms Skerrett-White breached her duty to account and the provisions of the trust order by failing to properly account for trust funds that went through her hands to the tune of $878,445.00.

[79] Counsel submitted that this breach arises out of the fundamental duty to account and is also borne out in the trust order. He contended that Ms Skerrett-White clearly arranged for trust monies to come into her hands. This was by way of direction or request to third parties who were obliged to pay the trust, and by way of deliberately transferring money from the trust's bank account to her own – which he says Ms Skerrett-White does not deny.

[80] Mr Kahukiwa argued that a significant amount of trust monies were under the control and custody of Ms Skerrett-White and as such the prima facie obligation to account falls upon her to discharge. However, Ms Skerrett-White's accounting of trust monies was at best incomplete and what she provided likely does not accurately reflect the true position. This uncertainty is confirmed by the auditor, Mr Lane, who had some anxieties about the reliability of the information his firm audited. Counsel referred to the Court hearing where Mr Lane said he did not know whether there is still missing information, and that is after a period of three years spent trying to reconstruct the financial accounts of the trust. Mr Lane also said the financial statements were "a mess."[49]

[81] Counsel submitted that Ms Skerrett-White was also uncertain about particular aspects of the trust's financial records, which reinforces the proof of the allegation. He pointed to two examples. First, in Ms Skerrett-White's affidavit of 24 October 2014 where she conceded that she was unable to produce evidence of costs that Taumanu incurred on the

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[49] 110 Waiariki MB 228-229 (110 WAR 228-229)

trust's behalf – in other words she was unable to account for trust monies that were paid out to Taumanu. Second, under cross examination Ms Skerrett-White was vague about Taumanu's outstanding claim to the trust for $376,407.00 together with information about how charge out rates were struck and apparently changed over time.

[82] Mr Kahukiwa submitted that Ms Skerrett-White is simply unable to account for every cent of the trust money that came into her hands, which puts her in breach of her duty. Further, as already noted, the amounts involved are not insignificant, totalling $878,445.00, thereby making it a gross breach of duty, enforceable against Ms Skerrett-White personally.

*Respondents' submissions*

[83] Mr Bidois submitted that his client concedes that the trustees failed to ensure the trust's annual financial statement were compiled each year. However, this was not her sole responsibility and the financial statements for 2008, 2009 and 2010 have now been prepared by accountants Hulton Patchell (now Deloitte).

[84] Mr Bidois acknowledged that Ms Skerrett-White has not come to Court with invoices or a financial narrative of where that money has gone. She has instead provided copies of correspondence, negotiations and research that was completed for the benefit of the trust and paid for from the monies that Taumanu received.

[85] Counsel further contended that by operating in a manner whereby monies were paid by third parties to Taumanu and applied to trust expenses, it has benefited Mr Hunia as a trustee, given that Taumanu incurred the development costs on behalf of the trust, which had no money to meet such costs. He asserts that it is ironic that Mr Hunia is denying that is what happened, when it was as much for his benefit as for the benefit of the owners.

**Discussion**

[86] It is trite law that trustees have a fundamental duty to account. The Act also requires that the trustees keep proper accounts.[50] The audit report discloses that monies due to the trust from third parties were paid directly to Taumanu at the direction of Ms Skerrett-White. According to the report, the trust has paid Taumanu a total of $878,446.02 between 2008 and 2010. Approximately $213,046.04 of that amount was paid directly to Taumanu from third

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[50] Sections 223 and 226, Te Ture Whenua Māori Act 1993

parties. The remaining funds were paid to Taumanu via the trust's bank account. A significant part of these funds were then paid to third party suppliers of goods and services.

[87] It is evident that prior to these proceedings the trust's financial accounts were in an unacceptable state. This is obvious given the fact that the audit report took over two years to finalise. The delay in completion it is said was due to the fact that pertinent information was simply not available to accurately recreate the trust's financial activities. Ms Skerrett-White has given evidence that her business partner, Mr Knuth, was responsible for the financial records of Taumanu. She acknowledged during cross examination that he could have acted more responsibly but claimed that the invoices from Taumanu were for work properly completed by the partnership on behalf of the trust:[51]

> **J Kahukiwa:** At what point did you, through Taumanu, start providing services to Kawerau A8D…
>
> **C Skerrett-White:** 2006 I guess
>
> **J Kahukiwa:** With your hat on as Taumanu partner, so from 2006 you're providing -
>
> **C Skerrett-White:** Yes when we negotiated the access agreement
>
> **J Kahukiwa:** So after 2006 there seems to have been quite a lot of administrative services that were provided by Taumanu to Kawerau A8D. That's right isn't it?
>
> **C Skerrett-White:** Project management and yes, I guess if you call that administrative.
>
> **J Kahukiwa:** I'm just picking up the words in a lot of the invoices, which I'm going to come to, often says, 'Administrative Services', or words to that effect. So it must be that.
>
> **C Skerrett-White:** I'm not sure. Stan Knuth handled that part of it. He provided those.
>
> **J Kahukiwa:** So Stan was handling all that was he?
>
> **C Skerrett- White:** Yes that was his position. He was the book-keeper.

[88] As foreshadowed, I find that Ms Skerrett-White did in fact control trust monies and that she did at times direct third parties to pay money owed to the trust directly to Taumanu. I acknowledge that her fellow trustees must have, to some extent, been aware of how the trust was operating yet simply never turned their minds to the details of the administration of the trust. Rather it appears that they were content to leave such responsibilities to Ms Skerrett-White. Mr Hunia made this clear during the hearing, in response to questioning from Mr Bidois:[52]

> **C Bidois:** …Because my question is with these meetings that were taking place, and professionals being engaged how was it intended to pay for those professionals?

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[51] 110 Waiariki MB 302-303 (110 WAR 302-303)
[52] 110 Waiariki MB 254 (110 WAR 254)

> **K Hunia:** Well the administration part was that we were to have money coming in but never had it at the time. So we more or less relied on Colleen on Taumanu.
>
> …
>
> **K Hunia:** We relied on Colleen, Taumanu & Associates who were doing our administration.
>
> …
>
> **K Hunia**: So it was left actually up to Colleen.
>
> **C Bidois**: It was left up to Colleen?
>
> **K Hunia:** Yes it was.
>
> **C Bidois:** You were of course an active trustee at this time and you were involved in the engagement of these professional advisors…where did you think the money was going to come from…
>
> **K Hunia:** Well, there was money coming in from IDG there was money coming from other sources.
>
> **C Bidois:** Is your answer that you don't really know?
>
> **K Hunia:** Well I don't really know, if you say so.

[89] Later, Mr Hunia acknowledged his role in the decision making:[53]

> **C Bidois:** So coming back to these costs that were incurred through Taumanu that would've been a decision that you participated in?
>
> **K Hunia:** I never ever saw the actual costs of what it was costing Colleen up to then.
>
> **C Bidois:** You'd agree though whatever costs were it would've been apparent that the costs would be substantial?
>
> **K Hunia:** Yes I agree.
>
> **C Bidois**: So if the Court was to find that the decision to allow the trust to incur costs through Taumanu was wrong you'd accept that you were part of that decision?
>
> **K Hunia:** Well I was a trustee so I was part of all the decision.
>
> **C Bidois**: …is that a yes?
>
> **K Hunia**: That's a yes.

[90] In addition, it was at least a questionable practice that third parties appeared to have been instructed by Ms Skerrett-White to pay monies due to the trust directly to the entity in which she had a personal interest, Taumanu. It would have been preferable that the other trustees issued those instructions to such third parties, provided they had satisfied themselves as to the appropriateness and prudency of such conduct. These were trust funds being supposedly properly managed by trustees with fiduciary obligations to their beneficiaries. It was, in common parlance, a bad look for the trustees and the trust that this conduct was permitted without adherence to correct processes to manage even the perception of conflict. This is not the behaviour that might be expected from such experienced trustees.

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[53] 110 Waiariki MB 263 (110 WAR 263)

[91] Then, as mentioned previously, there is the arguably more fundamental issue of failing to provide the necessary records to justify the significant payments that were being made from monies belonging to the trust, directly or indirectly, then being channelled into an entity controlled by one of the trustees. This, I infer, is at the heart of the applicant's claim – that not only were the procedures for control and payment of funds –such as they were- less than best practice, but that the amounts claimed were not justified. Worse, I understand from counsel's submissions and cross examination, it was suggested that some of the documentation that had been supplied may be unreliable and in some instances, I apprehend, manufactured.[54]

[92] My conclusion is that all the trustees have breached their duty to account, given the failures over providing accurate accounts as and when required in accordance with the trust order, to say nothing of the trustees' legislative duty to do so, per ss 223, 226 and 230 of the Act. Then there is the matter of whether or not the payments claimed were reasonable, given the conflict of interest point. Moreover, Ms Skerrett-White must take the lion's share of responsibility for these failures given the more active and paid role she had in the administration of the trust.

**Did the trustees misappropriate trust funds?**

*Applicant's submissions*

[93] Mr Kahukiwa contended that Ms Skerrett-White had misappropriated or converted for her own use monies of the trust, and has claimed for unpaid services in the sum of $336,407.00. He argued that misappropriation, in this case, is indistinguishable from the tort or crime of conversion. He submitted that Ms Skerrett-White misappropriated trust money and acted in breach of trust in paying herself or Taumanu from trust monies, the evidence of which is undeniable.

[94] Mr Kahukiwa further contended that such payments were transacted for Ms Skerrett-White's benefit. First, the payments were to her business for what she claims are services rendered to the trust. She was benefiting from such payments as she was receiving a salary, which tends to support the existence of a breach of trust being for a trustee's own gain and own profit. Second, such payments were being made in preference to other potential creditors and, it was contended, for the sole purpose of benefiting Ms Skerrett-White. Counsel submitted that there are currently potential creditors, including a line up of law

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[54] 22 Waiariki MB 64-67 (22 WAR 64-67)

firms, amounting to significant liability which the trust is now exposed to. Mr Kahukiwa referred to the case of *Hackett v Hackett* in support of this contention.[55]

[95] Mr Kahukiwa submitted that both iterations of the trust order expressly require the trustees to properly account for income and expenditure of the trust on an annual basis. The duty to account imports the administrative obligations to get in trust monies, secure them, keep and render accounts**,** meet any liabilities, and ultimately, to distribute any surplus to the beneficiaries. Counsel argued that Ms Skerrett-White failed to do so. Instead, she directed trust monies be paid to her, via Taumanu, and she clearly arranged for any monies coming into the trusts bank account to be transferred to her bank account.

[96] Similarly, counsel argued that Ms Skerrett-White also breached her duty not to mix monies of the trust with her own, by directing third party "debtors" of the trust to pay monies due to the trust directly into her bank account and/or the bank account of Taumanu. Mr Kahukiwa pointed out that trustees have a duty not to mix funds with their own, and where this occurs there is a prima facie presumption that the trustee has misappropriated such monies for his or her own use. This arises because the trustee gains an immediate advantage to his own bank account, whether in terms of interest or in terms of credibility.

[97] Counsel argued that the fact Ms Skerrett-White did mix trust monies with her own is undeniable and she has committed a breach of trust in doing so. He submitted that Ms Skerrett-White may seek to justify her actions and claim that she was authorised to do so by the applicant. However, he noted that she has been unable to point to any real evidence of that authority, such as a minute or resolution made for that purpose. Counsel also added that a trustee is chargeable only for money actually received by him or her.

[98] Mr Kahukiwa submitted that Ms Skerrett-White was in receipt of all monies of the trust. At the point of receipt and control, the fiduciary duty to account arises. Ms Skerrett-White failed to meet the standard of the fiduciary when she paid such monies to her account and mixed it with her own funds. She therefore acted in gross breach of trust.

*Respondents' submissions*

[99] Mr Bidois argued that there is insufficient evidence from which the Court can infer that Ms Skerrett-White misappropriated $650,000.00 for her own benefit. He further

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[55] [1922] NZLR 242

contended that the accounts support the proposition that money paid to Taumanu was applied to costs Taumanu had incurred on behalf of the trust, and did not include costs incurred by Ms Skerrett-White as a partner in Taumanu regarding invoices from Russell McVeagh and Aurere Law.

[100] Mr Bidois pointed to the trust's income figures for 2007 to 2010. He asks that the Court have regard to the fact that the figures record the trust as having very high accounts payable as compared with low income totals. Mr Bidois submitted that the figures show a reduction in costs, in terms of what the accounts payable were taking into account, in relation to the total expenses and total income. He contended that the 2009 results could not have been recorded by the trust unless there was money coming in from off the balance sheet. Mr Bidois asked the Court to infer that what is shown in the accounts supports Ms Skerrett-White's assertion that money was transferred to Taumanu for payment to the trust's creditors.

[101] Mr Bidois further submitted that the case of *Hackett v Hackett* can be distinguished from the present case, as the present trust has no money and the trustee has advanced money. He also submitted that Taumanu was incurring costs for a long period before the trust started receiving money and in that respect Taumanu is a creditor to the trust.

*Mr Fox's submissions*

[102] Regarding payments to Taumanu, counsel for Mr Fox submitted that Mr Hunia was aware of the costs being incurred and was part of the decision to allow the trust to incur costs through Taumanu.

[103] In addition, Mr Gear submitted that the 2008 AGM expressly passed a resolution providing for trustees to be reimbursed for costs incurred, and as a result the trust order was varied to include cl 3(b)(viii) of the trust order.

**Discussion**

[104] Mr Kahukiwa contended that, in the absence of evidence of proper process, the payment of funds from third parties to Taumanu, and therefore to Ms Skerrett-White, equates to misappropriation. Mr Bidois however, argued that there is simply no evidence of funds being mixed and reiterated the fact that payments were not for the personal benefit of Ms Skerrett-White.

[105] In *Eaton v LDC Finance Ltd*, Fogarty J recorded the position where a trustee mixed funds held on trust with his own personal money:[56]

> [75] So far as other contributions to the fund are concerned, the position is clear. *Re Hallett's Estate* provides that where money held on trust is mixed with the trustee's personal money, the whole of the resulting fund is treated as trust property and can, following a successful tracing exercise, be claimed by the trust beneficiaries. The trustees are presumed to act honestly where personal funds and trust funds are mixed, and when there is a shortfall, the trustee is presumed to intend to deplete their own funds first.

[106] Therefore, whilst there may be prima facie evidence of the mixing of funds, it must also be borne in mind that Ms Skerrett-White maintains that her actions were honest and aimed only to see the successful development of the geothermal project.

[107] Misappropriation is defined in the *Butterworth's New Zealand Law Dictionary* as "The wrongful application or stealing, by an agent, of a principal's money or property."[57]

[108] Then in *Armitage v Nurse* the Court of Appeal considered that:[58]

> A breach of trust may be deliberate or inadvertent; it may consist of an actual **misappropriation** or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers; it may consist of a failure to carry out a positive obligation of the trustees or merely of a want of skill and care on their part in the management of the trust property; it may be injurious to the interests of the beneficiaries or be actually to their benefit. By consciously acting beyond their powers (as, for example, by making an investment which they know to be unauthorised) the trustees may deliberately commit a breach of trust; but if they do so in good faith and in the honest belief that they are acting in the interest of the beneficiaries their conduct is not fraudulent.
>
> (Emphasis added)

[109] Mr Bidois submitted that there is insufficient evidence to prove misappropriation or unauthorised payments. He says that despite Ms Skerrett-White's concession to receiving a salary without authority and in breach of cl 4 of the trust order, she was nonetheless entitled to remuneration and reimbursement per s 38 of the Trustee Act 1956 and the resolutions passed at the 2008 AGM.

[110] Counsel added that the Court should take into account that the trust was in huge debt pre 2007 and was effectively "bank rolled" by Taumanu or Ms Skerrett-White personally. Thus when money eventually came in it went to Taumanu directly to repay the costs they had already incurred.

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56 [2012] NZHC 1105
57 *Butterworth's New Zealand Law Dictionary* (7th ed Lexis Nexis Online 2011)
58 [1997] 2 All ER 705 at 710

[111] The use of Taumanu for the transfer and payment of funds was acknowledged by Ms Skerrett-White during the hearing:[59]

> **J Kahukiwa:** Now you've acknowledged haven't you that trust money was paid direct to Taumanu? Money that was being paid by another party.
>
> **…**
>
> **J Kahukiwa:** …Did any money belonging to the trust, did that ever hit the bank account of Taumanu?
>
> **C Skerrett-White:** What funding are you talking about? Most of the funding went into the trust and then invoiced in and then transferred to Taumanu except for one amount that came directly from Mighty River Power….
>
> **J Kahukiwa:** So those payments were done by invoice weren't they, in Taumanu's name?
>
> **C Skerrett-White:** Yes.
>
> **J Kahukiwa:** But you can't point to any resolutions of trustees which authorised that to occur can you?
>
> **C Skerrett-White:** No because we didn't have the usual type trustee meetings. We had, like we didn't meet monthly and have a formal type trustees meeting. We were conversing with each other every day either by telephone of it there were negotiations, in person, email all of that. We didn't actually have any sit down trustees meetings unless they were without legal advisors in that whole process…
>
> **J Kahukiwa:** In terms of the amounts that came to Taumanu, I think Mr Kusabs pointed out at the last meeting of the owners that over three years that sum was $878.445.00.
>
> **C Skerrett-White:** Probably.
>
> **…**
>
> **J Kahukiwa:** …Some of the $878,445.00 went to you personally didn't it?
>
> **C Skerrett-White:** Only in terms of that it would've helped to pay my salary I guess, yes.

[112] At the hearing it was also clear that Taumanu was providing services to the trust, for which it was charging:[60]

> **J Kahukiwa:** You are familiar with these invoices?
>
> **C Skerrett-White:** I didn't produce these but they were produced for Taumanu, yes. I guess by Stan, yes.
>
> **J Kahukiwa:** Right. And so Stan would've been working on the assumption that there were some services done or work done…We can take it that Stan was invoicing the trust for work, can we?
>
> **C Skerrett-White:** Yes
>
> **J Kahukiwa:** Now can we take it that this invoice was to do with the attendances that you had made on the trust?
>
> **C Skerrett-White:** Not just me, all of the trustees. These meetings were held in the offices obviously.

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[59] 110 Waiariki MB 306-307 (110 WAR 306-307)
[60] 110 Waiariki MB 308-309 (110 WAR 308-309)

**J Kahukiwa:** Right, so it includes trustee attendances as well?

**C Skerrett-White:** Yes.

**…**

**J Kahukiwa:** Right. Just on that 200 hours thing, that can't be for trustee attendances because they'd just be paying themselves wouldn't they? Why would they invoice themselves?

**C Skerrett-White:** No it's for the research that was done. The girls were collecting up information as well. That's overheads.

**J Kahukiwa:** That's overheads?

**C Skerrett-White:** The $75.00, that's overheads.

**J Kahukiwa:** So is it overheads per hour?

…

**C Skerrett-White:** I would say so.

**J Kahukiwa:** Right. So [was] it a service office that Taumanu was providing?

**C Skerrett-White:** We had full office services. So we'd have our rental, our phones, printing and all of those things that a normal office would have.

**…**

**J Kahukiwa:** Was there timesheets or what?

**C Skerrett-White:** I didn't submit a timesheet, no.

**…**

**J Kahukiwa:** Can you point me to anywhere, again where trustees have verified these attendances and approved payment?

**C Skerrett-White:** Well they wouldn't have approved payment because they didn't have any money.

[113] It might be argued that this last sentence is an illustrative example *par excellence* of the approach of the trustees to the management -if it could reasonably be described that way- of the trust. Ms Skerrett-White's last response appears to miss the point that the funds involved were monies that belonged to the trust. It was therefore *necessary* that any payments had to be approved by the trustees, not by anyone else. This appears to be a fundamental misunderstanding of trustee duties.

[114] It is evident that due to the lack of proper financial procedures the trust is now in a position where it is unable to account for the services provided by Taumanu. Ms Skerrett-White says that evidence of emails and the project's success confirmed that she has not misappropriated money. Nonetheless, the situation could have been avoided had the proper procedures been followed. It is not a defence for Ms Skerrett-White to now say that monies paid to her in breach of trust should be mitigated by the fact she did not get receive any trustee fees and the like. It was open to the trustees to seek remuneration and reimbursement in the proper manner. The question is whether the actions taken by Ms Skerrett-White or

any of the trustees were deliberate or done in good faith and in the honest belief that the trustees were acting in the interest of the beneficiaries.

[115] I consider that, on balance, there is insufficient evidence available at this time to conclude that the trustees have misappropriated trust funds. As foreshadowed, the issue has become not one of misappropriation and all that that description includes, but rather a seemingly misguided belief that the costs for services being rendered by or with the complicity of individuals holding a number of conflicting positions were being properly incurred, charged and paid. Put another way, I consider that there is insufficient evidence of a premeditated intent to improperly and unlawfully convert trust funds for personal use. What appears to have occurred here is that substantial costs were being rendered as a charge against trust funds or trust interests without apparent regard to correct processes for the management of conflicts, or the setting of a proper market rate supported by independent evidence and, in the circumstances, given the personal relationships, the absence of directions from the Court as to how such processes should have been undertaken to ensure that the interests of the beneficiaries and the trustees themselves were properly protected.

[116] In short, some of the trust members appear to have been conducting the affairs of the trust without regard to correct procedures and with, it might be suggested, a somewhat misplaced sense of entitlement and over confidence, with the result that significant costs have been incurred that may or may not have been justified. Based on the available evidence, and in the absence of a considerable amount of the trust's records and those of Taumanu, I do not think however that this conduct could properly be described as fraud in the strict sense. Even so, the impression this behaviour has created, as I have underscored, is not particularly flattering of those involved, either from a legal or an ethical perspective. The confusion over the invoices for example is one instance where the witnesses' credibility became strained. I found the answers provided were at times confused to the point of being implausible at best. It certainly amounts to a breach of trust sufficient to warrant removal, in the absence of any tenable defence.

[117] At the risk of belabouring the point, the simple remedy would have been to seek directions. That this was not pursued is as inexplicable as it was unreasonable, taking into account the circumstances of this case. With hindsight, it may have been appropriate for Ms Skerrett-White to have been engaged as an independent contractor and for her to have resigned her position as a trustee. It might have been appropriate for Mr Fox to resign as well and to move into the role of an advisory trustee instead, so that his traditional and

customary knowledge could still have been brought to bear in fulfilment of the project objectives. Ironically, that is what has happened in practice.

[118] On the claim of the mixing of trust funds, contrary to Mr Bidois' submissions, Ms Skerrett-White's own evidence confirms that this did occur and that she was responsible.[61] This too therefore is another and serious, breach of trust. All of the trustees should have understood that such practices were improper and unacceptable in the absence of the necessary and appropriate safeguards. Those safeguards included the need to ensure that all relevant conflicts were properly managed and that the records of the trust made this plain.

[119] In any event, my conclusion is that, even though an audit had been conducted, taking all of the relevant circumstances into account, what is required in this instance is for a forensic audit or review to be undertaken. There are precedents for such action in this Court. In *Moeahu v Winiata* a forensic review was ordered once I was satisfied that there was sufficient evidence to require a more detailed examination of trust records where allegations had been made of trustees abusing their positions for personal profit in conflict with their duties to the beneficiaries:[62]

> [10] …Stephen Bell of KPMG, Auckland was commissioned to complete the forensic review by letter of engagement dated 8 June 2012. The report was completed by KPMG in draft form on 6 September 2012 and circulated to the trustees for their information and comment.
>
> …
>
> **Report of KPMG**
>
> [12] Mr Bell summarised the process he followed in preparing his report and noted that the current chairperson, Mr Moeahu, and another trustee, Mr Puketapu, were interviewed to obtain an understanding of the roles and responsibilities of the trustees and the processes of the trust especially in relation to organising payments. Mr Bell also reviewed financial information of the trust that was in the possession of the Court or the trustees for the period from 2009 to 6 September 2012. This involved analysing all bank accounts of the trust for the period in review to identify payments made to Mr Winitana or any entity associated with him; and tracing the destination bank account of payments made to Mr Winitana or any entity associated with him.
>
> [13] As part of the review Mr Bell also took steps to determine what authorisation was obtained for the making of payments to Mr Winitana or any entity associated with him. Mr Bell obtained documentation where available supporting the payments made to Mr Winitana or any entity associated with him.

[120] Given the seriousness of the allegations that have been made, and taking into account my own review of the evidence currently before the Court, the demeanour of the witnesses and the veracity or otherwise of their testimony, I consider, in fairness to all

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61 22 Waiariki MB 76 (22 WAR 76)
62 (2013) 310 Aotea MB 172 (310 AOT 172)

parties, that a forensic review of the payments between the trust, any third party debtors or funders associated with the trust, and Taumanu is necessary, if only to give the owners and future trustees confidence that the allegations are unproven. Orders in that regard will issue at the conclusion of this judgment.

**Did the trustees collude in breach of their duties to the beneficiaries?**

*Applicant's submissions*

[121] Counsel alleged that Ms Skerrett-White breached her duty to be independent and act objectively as a trustee by colluding with Mr Fox to perpetuate the wrongdoings already mentioned. He also argued that Mr Fox did the same by colluding with Ms Skerrett-White in order to permit her misconduct with trust monies, ultimately to his own benefit, whether directly or indirectly

[122] Mr Kahukiwa submitted that the independence and objectivity of a trustee is another fundamental aspect of the office. If trustees are in a personal relationship it is natural to assume that their independence is compromised. Counsel argued that the applicant's evidence is that at least prior to returning from Hawaii in early 2010 Ms Skerrett-White and Mr Fox were in a relationship. Mr Kahukiwa referred to the hearing in 2010 where the Court queried the nature of the relationship and both parties were vague about when it ended. He then referred to the last hearing where the exchange on the same matter with counsel was more vague. Counsel submitted that the exchange bordered on being inconsistent with such prior statements as both parties said the relationship was not spousal in nature.

[123] Mr Kahukiwa argued that, notwithstanding the equivocal nature of the evidence in the last hearing, it is open to the Court to find that the parties were in a relationship. It is also open to the Court to infer that such recent equivocation is rather conveniently consistent with a denial of any wrong doing, which both respondents have steadfastly maintained. The Court is able to assume that in being in that relationship their independence was compromised.

[124] Counsel contended that evidence of the compromise is that Mr Fox was complicit in the transfer of funds from the trust's bank account to the account of Ms Skerrett-White. Mr Kahukiwa argued that two trustees were required to authorise such a transfer and the applicant gave no such authority. Trust funds were able to be transferred because Ms Skerrett-White and Mr Fox were no longer independent of each other, or their own interests.

Mr Kahukiwa argued further that one can infer that financial pressures were being brought to bear on Ms Skerrett-White and that Mr Fox was sympathetic to alleviating those pressures. Counsel referred to comments by Ms Skerrett-White in her evidence that there was never enough money. He submitted that the trust was exposed and Ms Skerrett-White, with Mr Fox in tow, took full advantage of it.

[125] Mr Kahukiwa further submitted that Mr Fox may argue that his warning to the applicant in 2010 that money was going missing is conduct not consistent with someone who is colluding. However, such a counter point can be explained away, he submitted, because it is clear that they were in a relationship in 2009 going into 2010. This is when significant transactions and transfers occurred. According to counsel, in any case Mr Fox's warning came after the relationship had ended.

*Respondent's submissions*

[126] Mr Bidois submitted that there is no evidentiary basis for allegations of collusion and with respect to the failure to file tax returns. He contended Mr Hunia could not identify any particular occasion where he believed Ms Skerrett-White and Mr Fox has colluded. Mr Bidois also pointed out that regarding the tax returns, the auditor's evidence was that the trust would not incur tax on the first $600,000 of its taxable income. The trust would not have the benefit of tax loss if the trust's tax returns had not been filed.

[127] Mr Gear argued that the allegation of collusion has not been substantiated. Collusion, he says, is defined as a secret agreement or understanding for the purposes of trickery or fraud; underhand scheming or working with another; deceit, fraud and trickery. Further, counsel argued that the fact that Mr Fox and Ms Skerrett-White were involved in a relationship is not in and of itself a breach of trust. There is nothing which prohibits this in the trust order. Mr Gear also pointed out that the applicant has been unable to refer the Court to any examples of collusion.

[128] The fact that Mr Fox raised with Mr Hunia concerns regarding trust monies does not support the fact that he was colluding with Ms Skerrett-White. Accordingly, counsel argued that the allegation should be dismissed.

**Discussion**

[129] Ms Skerrett-White and Mr Fox were asked a number of times about the nature of their relationship. The evidence confirms that for a time Ms Skerrett-White and Mr Fox were intimate. They said so themselves.[63] This is also set out in the earlier hearing and is acknowledged in my earlier interim judgment of 24 December 2010.[64] That decision has never been subject to appeal. I find that although they may have been coy about their relationship, there is insufficient evidence to confirm that they acted together, thereby creating at least the appearance of a conflict. That said, there is little doubt that at the very least, the appearance of impropriety is unavoidable, given the lack of rigor around payment of trust funds, directly or indirectly, between the two trustees. It is evident that the two were heavily involved in the project at every stage, contrasted with Mr Hunia, given that he resided in Auckland.

[130] Moreover, it is evident that Mr Fox unhesitatingly supported Ms Skerrett-White at critical junctures. He even loaned, on a seemingly unilateral basis without security – the very antithesis of trusteeship – money held in trust over which he had control, to ensure that the project and therefore Ms Skerrett-White remained in funds.

[131] Then there were the approvals of accounts, so it is said, by the trustees including Mr Fox while he and Ms Skerrett-White were personally involved. This was inappropriate and improper conduct that reflects poorly on both trustees. Both are experienced governors and should have known better. Likewise, if Mr Hunia had concerns about his two colleagues approving payments one for the other without his consent while they were involved together, then he had a duty to raise this with the Court at the earliest opportunity.

[132] So, while I find that there is no incontrovertible evidence of "collusion" in the strict definition of that word, on the balance of probabilities, what I do find is evidence of a lack of judgement being exercised by trustees who were in an obvious conflict of interest and who should have known better. Once again, to use a colloquialism, it was simply a bad look for trustees who are personally involved to be approving payments one to the other without the application of s 227A of the Act. The short point is that, for the duration of the personal situation that had developed between them, both Mr Fox and Ms Skerrett-White should not had been involved in any of the decision making that affected them directly, let alone

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63 22 Waiariki MB89-90 (22 WAR 89-90)
64 *Hunia v Skerritt-White – Kawerau A8D* (2010) 22 Waiariki MB 92 (22 WAR 92) at para [15]

decisions involving payment of significant funds from or belonging to the trust. It was simply inappropriate and a breach of the conflict duty.

[133] As foreshadowed, the proper process would have been for the trustees, any one of them, to have sought directions with an onus on the affected trustees, Ms Skerrett-White and Mr Fox, and more so the latter given his role as chairperson. In any case, it may be that a forensic review of the relevant transactions and evidence might conclusively dispose of the allegations one way or the other.

**Was the trustees' management of legal advisers prudent?**

*Applicant's submissions*

[134] Mr Kahukiwa pointed to the line of law firms that now comprise part of the trust's creditors and the fact that Ms Skerrett-White prioritised payments to Taumanu essentially before those of the legal advisors. Counsel submitted that the money owed to those firms is substantial and represents a liability risk for the trust and Ms Skerrett-White personally.

[135] As foreshadowed, the audit report sets out the outstanding legal costs incurred by the trust. Those costs being $364,227.68 to Russell McVeagh and $203,517.95 to Aurere Law. Te Nahu Lovell has also submitted invoices to the trust.

[136] In response to questioning from the Bench, Mr Kahukiwa confirmed that the applicant accepted there is a liability of the trust to those law firms which is likely to be substantial, however Mr Kahukiwa also noted that Mr Hunia was not privy to the details of the engagement terms of the lawyers and had not reviewed the reasonableness of the fees charged with his fellow trustees.

*Respondents' submissions*

[137] Ms Skerrett-White says that the costs incurred to Russell McVeagh and Aurere Law were understandable as legal advice was required for the negotiation process and was unavoidable. The need to instruct a succession of lawyers however could not have been reasonably predicted by the trustees. She argued that the trustees acted prudently by engaging experienced solicitors on the basis that payment would not be demanded until the trustees were receiving payments from the geothermal development.

[138] In terms of the amount of the fees incurred, Ms Skerrett-White submitted that the amount of the Russell McVeagh account is in dispute as there was an agreement that the fees

would be capped at $100,000.00. Despite this, she says, the expense escalated to over $300,000.00 as Russell McVeagh took on a project management role during the period where the trust sought expressions of interest from joint venture partners, a role which the trust had not asked Russell McVeagh to fulfil. Ms Skerrett-White advised that the trustees were considering raising the fee dispute with the Law Society but at that time had not taken action in that regard.

*Trust submissions*

[139] Mr Kusabs for the trust provided a report to the Court in March 2014. He confirmed that the geothermal development is slowly making progress. Indeed, recent local media reports would suggest that it is now starting to gain momentum. On the issue of legal costs, Mr Kusabs stated that he had met with Ms Annette Sykes of Aurere Law and is satisfied that her account is fair and reasonable. Mr Kusabs also confirmed that he was involved in ongoing discussions with the other legal advisers engaged by the trust and was optimistic that a pragmatic solution could be found.

**Discussion**

[140] Ms Skerrett-White acknowledged that the trust's management of legal advice and therefore legal costs was less than might be expected. Even so, she appeared to persist with the claim that the costs to be incurred by Russell McVeagh were, in her understanding, to be capped at $100,000. Yet she failed to provided any conclusive proof that such an agreement was ever reached. More importantly, I note that the invoice dated 28 February 2008 was for a total cost of $356,877.87 inclusive of GST and disbursements and was for the period 16 February 2007 until 22 January 2008, or less than 12 months.

[141] The trustees, then apparently dissatisfied with their representation, sought alternative counsel in Ms Sykes of Aurere Law. But even there, the solicitor client relationship appeared to break down to the point where significant costs had been unpaid at the commencement of these proceedings some six years ago. The trust then it would appear decided to engage the services of yet another firm of solicitors all the while incurring significant costs for which they had no guarantee of ever paying. Moreover, given that the trust's then income was approximately $20,000.00 it seems imprudent that such conduct continued, technically placing the trust into insolvency at that time, a description Ms Skerrett-White accepted was correct.

[142] The following lengthy exchange with the Bench on this point is apposite:[65]

> **Court:** When you say the trust had gotten to so much debt, what do you mean by that?
>
> **C Skerrett-White:** It was mostly in terms of our legal counsel, because we had problems with all of them, with Russell McVeagh in the beginning, because they had overcommitted. They had asked us when we were in Wellington, how much did we want to spend. We said $100,000 max. Because we did not have any funding, we had $21,000 year income. But they had already spent $300,000.
>
> **Court:** Can we back up there then, the trust's income is $21,000 and the trustees have said spend five years worth of our income on legal costs. Why would you say that?
>
> **C Skerrett-White:** Because we had a bore sitting there that wasn't used.
>
> **Court:** But you are pledging credit, based on hypothetical income, you are a trustee, you are not a company director.
>
> **C Skerrett-White:** That was the legal advice we had that we could do that, and that we would find a partner, a developer.
>
> **Court:** And when Russell McVeagh's bill started coming in, and they started adding up to $300,000 when did the trustees decide, this is a bit much?
>
> **C Skerrett-White:** Russell McVeagh actually brought us IDG Hawaii.
>
> **…**
>
> **Court:** No, no what I cannot follow as I say, if as you have said, you told them $100,000 only, once you got a bill over $100,000, $100,001 even, isn't that the point where you ring them up and say, look we told you that it's it...
>
> **C Skerrett-White:** We did.
>
> **Court:** Stop sending us bills, don't do any work, here's our letter, do it again and we will go and make a complaint?
>
> **C Skerrett-White:** We did that.
>
> **Court:** What I cannot follow is, why would Russell McVeagh then carry on working and billing you. They cannot instruct themselves.
>
> **C Skerrett-White:** The lawyer was working with us, one of the lawyers that was working with us wanted to be the broker for the developer.
>
> **Court:** Yes but you are still the client, at the controls, the trustees. The lawyers cannot instruct themselves.
>
> **C Skerrett-White:** No, we instructed them that was enough.
>
> **Court:** Right, and what happened then after they sent you another bill adding up to $200,000?
>
> **C Skerrett-White:** We queried that, and that is where it was left and they agreed to leave it there, because they knew that we did not have the funding to pay it. That is still in negotiation.
>
> **Court:** I might be missing something, what I cannot understand it, if you have told them it is $100,000 that is all we have got the ability to book up, and they have gone double over that, any reasonable person surely would have said to them long before, hey that is it.
>
> **C Skerrett-White:** Yes we did, then we took on board, we got Rangitauira and Co.
>
> **…**

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[65] 46 Waiariki MB 254-257 (46 WAR 254-257)

> **Court:** Alright, so let me understand this, the trust has income of $21,000. It incurs debts of $300,000 with one law firm, goes to another law firm, gets more debts of $200,000 and those are the debts that are sitting on the trust now, making it insolvent technically?
>
> **C Skerrett-White:** Technically, yes. Which is why we instructed IDG to go and find us a million dollars to support the other costs.
>
> **Court:** Yes.
>
> **C Skerrett-White:** Because they were well aware that we had those costs.
>
> **Court:** So there is that pile of money, then there are the invoices that Taumanu provided for about $330,000 so we are up to $800,000 plus. In the meantime the Hawaiians your indigenous partners, walk away with over $2 million, and the owners are getting about $200,000 a year, the bulk of which is going to be swallowed up in all these debts the trustees have incurred.
>
> **C Skerrett-White:** *(acknowledges Court)* Because that is what we asked them to get, get us costs.

[143] While I acknowledge that the engagement of legal advisers was necessary in undertaking a project of this magnitude, I consider that the evidence demonstrates that the *management* of those advisers and their associated costs was less than reasonable. In short, either the trustees did not know such significant sums were being incurred, or they did know yet failed to take proper steps to ensure that the costs charged were appropriate and that the trust was going to be in a position to pay. In either case the impression created is not one of prudent conduct.

[144] In addition, the change of solicitors along with the fact that there is no evidence of, as Ms Skerrett-White contends, the agreement with Russell McVeagh that their legal costs would be capped at $100,000.00 is concerning. Moreover, having such an agreement – if in fact it ever existed – would require more regular oversight of the work being undertaken and of the costs being incurred by the trust's solicitors. If the scope of instructions or agreement as to costs was exceeded then it would not be unreasonable to expect a prudent trustee to make themselves aware of the costs and the risks to the trust and themselves personally should the proposal fail and the promised and anticipated funding not materialise – which, to an extent, is what eventually occurred.

[145] My conclusion is that, on the available evidence, the trustees appear to have failed to properly instruct, engage, monitor and manage their legal advisers and the costs being incurred to such an extent as to warrant their removal. This is because their failure has resulted in the incurring of a significant debt that the trust must now attempt to repay – a debt that may technically have rendered the trust insolvent for a time – not the conduct of prudent trustees on any objective assessment. But for the actions of Mr Kusabs since his

appointment and his efforts to bring order and stability to the trust, it may have been left in an even more dire position.

[146] There is also a related issue that needs to be considered in reviewing the accounts provided by the solicitors. The accounts dated 28 February and 25 November 2008 list a series of disbursements. Those charges appear to include, amongst other costs, accommodation bills incurred at the Intercontinental Hotel in Wellington. It is important to underscore that it is not for the Court to micro manage trusts. Trustees are free to administer the trust assets in accordance with their duties and consistent with the terms of their trust order. However, when faced with a trust as dysfunctional as Kawerau A8D, and the serial and continuing breaches of fundamental trustee duties, to receive evidence that also appears to demonstrate an apparent lack of care regarding what might be considered prudent conduct, is all the more surprising. How the trustees appear to have considered, in light of the all the relevant circumstances, that they were entitled to stay in one of the most expensive hotels in Wellington and charge this to the trust at a time when the trust's own finances were precarious is inexplicable.

[147] One final point on this issue. The trustees have made a number of claims regarding the conduct of their former advisers. They have not been given the opportunity to consider and reply to those claims and to have their responses included in the record. I direct the case manager to provide all former legal advisers of the trust with a copy of this judgment. Should any of them wish to file a response or seek directions they have three months from the date of this judgment to do so.

**Did the trustees manage the affairs of the trust prudently?**

*Applicant's submissions*

[148] Mr Kahukiwa submitted that both Ms Skerrett-White and Mr Fox failed to properly administer the trust. He says they exercised control over trust property and in relation to third parties in an autocratic and unaccountable manner and ultimately with little regard for the beneficial owners.

[149] As foreshadowed, Mr Kahukiwa pointed to the failures of Ms Skerrett-White to adhere to the terms of trust, by properly accounting for trust funds, receiving payments in breach, and in failing to adequately provide financial information when required. In addition, he submitted that Ms Skerrett-White claimed substantial payments, through

Taumanu, for providing administrative support to the trust when in fact the administration was in disarray.

[150] Regarding Mr Fox, Mr Kahukiwa argued that Mr Fox entered into unsecured loan transactions on behalf of the trust without authority, and was complicit with Ms Skerrett-White in the breaches of trust in relation to trust monies. He argued that such conduct is not the action of a prudent and diligent person.

*Respondent's submissions*

[151] Mr Bidois submitted that there is no direct evidence that the trustees have failed to act in the best interests of the beneficial owners. He submitted that although substantial costs have been incurred, this was necessary to secure the benefit of the geothermal development of the trust's land, and the costs were genuinely incurred in furtherance of the objects of the trust. He argued that such level of costs are simply in the nature of geothermal developments and, with the exception of the legal fees, the costs incurred have largely been met out of funds specifically obtained for the purpose of meeting such costs.

[152] Mr Bidois further submitted that the use of Taumanu as an entity to incur and pay costs, and the corresponding repayments to Taumanu, were also in the best interests of the beneficial owners. Significant costs were incurred before the trust received funding and as they were incurred by Taumanu this allowed the trustees to continue negotiating the geothermal arrangements, which would have otherwise faltered. The owners would not then have had the benefit of the development and would have been left burdened with the whole of the costs incurred up to that time.

[153] Counsel argued that there is no evidence that money paid to Taumanu was diverted for Ms Skerrett-White's personal benefit and it is clear that Ms Skerrett-White was not motivated by self interest. He noted that she has continued to play a leading role in bringing the project to a conclusion, despite being removed as a trustee in 2010.

**Discussion**

[154] In undertaking a project of this magnitude the trustees have sought to develop the land and grow an asset which will be of significant financial benefit to the owners in the future. I acknowledge the amount of time and the hard work, in particular that of Ms Skerrett-White, which has gone into the development of the geothermal resource, and I

further acknowledge the difficulties that such a project can present, particularly where substantial funds need to be expended to develop the resource.

[155] However, in saying that, it must be remembered that at all times the trustees maintain a duty to act reasonably and prudently. I have already concluded in relation to several matters that the trustees have failed to act prudently. Such failures include being unable to provide accurate financial records sufficient to properly account for trust monies, in large part due to the unusual and confusing way in which payments have been funnelled through the administration entity Taumanu, without adequate care and proper process. If, as I understand it, Taumanu was effectively underwriting the initial costs of the project given the trust had no funds, then it would have been prudent for such an arrangement to be documented in writing, to avoid any hint or suspicion of impropriety. Added to this is the fact that, despite money from third parties going through Taumanu to pay creditors, there is still a substantial debt due to creditors, including money it is said that is owed to Taumanu.

[156] I have also found that the trustees acted in breach of their trust order by paying themselves without the express authority of the Court, and in allowing their personal interests to conflict with their duties. In addition, there is the failure of the trustees to adequately manage their legal advisers, resulting in a substantial amount of legal costs being incurred and arguably well over what may have been agreed.

[157] In addition, during the early hearings of this proceeding I also became concerned at particular items of trustee expenditure and the way in which such payments were made, which at first blush did not appear reasonable:[66]

> **Court:** Alright. There is another cheque, $15,000 to Kani Hunia. What is that for?
>
> **C Skerrett:** You had better ask Kani that. That is what he requested.
>
> **Court:** So did Mr Hunia himself sign the cheque?
>
> **C Skerrett:** No they weren't cheques, they were made by internet banking.
>
> **Court:** And who would have made those payments?
>
> **C Skerrett:** Taumanu. I would have instructed Stan to.
>
> **Court:** Yes, so Mr Hunia asked for $15,000 from trust funds and you simply paid it?
>
> **C Skerrett:** No I paid that.
>
> **Court:** When you say "I" what do you mean?
>
> **C Skerrett:** Taumanu did.
>
> **Court:** But you accept that the $100,000 belongs to the trust?

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[66] 22 Waiariki MB 76-77 (22 WAR 76-77)

> **C Skerrett:** Yes
>
> ...
>
> **Court:** So are you telling me that you authorised the payment of $15,000 to Mr Hunia without enquiring as to what it was for?
>
> **C Skerrett:** He requested it by e-mail.
>
> **Court:** What if he requested a million dollars? I can't understand…

[158] While the above actions alone justify a finding that the trustees have failed to manage the affairs of the trust prudently, there is the further allegation that Mr Fox entered into unsecured loans on behalf of the trust, which I examine below.

*Unsecured loan transactions*

[159] The applicant alleged that Mr Fox, without authority, unilaterally committed the trust to loans and directed that the loan monies be paid directly to Ms Skerrett-White. Mr Kahukiwa submitted that in 2006 and 2008, $80,000.00 was borrowed from the Fox whānau and Tohia-o-te-rangi Marae. Counsel claimed that the loans were entered into unilaterally by Mr Fox who signed on behalf of the trust and in absence of any resolution or authority from the other trustees.

[160] Counsel further contended that prior to 2009 the trust order contained no express provision for borrowing and no power to mortgage. He argued that if the loan was defaulted on, the lender would have recourse against the trustees who may seek indemnity from the trust. Counsel submitted that Mr Fox has put the land at risk and in doing so breached his trustee duties. Mr Fox sought to bind the trust to an arrangement he made on his own and although he asserted the applicant knew about it, counsel refutes that claim. Mr Hunia knew of the loans only after they were created and accordingly cannot be said to have consented.

[161] Mr Kahukiwa submitted that such actions are not those of a prudent trustee. Mr Fox's actions were in gross breach of trust and placed the trust property at risk, as well as the interests of the beneficiaries.

[162] Mr Fox gave evidence that while he was not clear whether authorisation to enter the loans was recorded by trust minute or resolution, he maintained that the other trustees knew the rationale behind the loans and that they were advanced on honest grounds.[67] Counsel for Mr Fox submitted that the trust order is silent as to whether or not unanimous consent of the

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[67] 110 Waiariki MB 347 (110 WAR 347)

trustees or majority consent is needed.[68] Section 227(1) of the Act refers to a majority of trustees having the authority to exercise the powers conferred on trustees. He also pointed out that the applicant knew of the loan advances and why they were required and did not object to the terms. He argued the applicant took no steps to record his dissent in accordance with cl 6 of the trust order relating to the protection of minority trustees.

[163] The audit report reveals that the trust entered into various loans. The first was entered into on 17 September 2007 with Tohia O Te Rangi Marae Building Fund for the sum of $40,000.00. There are also a number of loans (between 2006 and 2008) with the Fox Whānau Group totalling $80,000.00. The audit report notes that loans dated 15 December 2006 for $20,000.00 and 18 February 2008 for $10,000.00 were paid directly to Taumanu. The audit report supports the contention that Mr Fox was the sole signatory for the trustees regarding these loans.

[164] The audit report also confirmed that the repayment obligations for the loans were ambiguous. The loan agreements provided that once the loan had been repaid, arrangements would be made as to any financial recompense for the use of the loan funds.

[165] At the time the loans were entered into the trust was operating under the previous trust order.[69] That version did not contain an express provision empowering trustees to borrow, however, it did contain the following general clause:

> 3 Powers
>
> The Trustees are empowered:
>
> a General
>
> In furtherance of the objects of the Trust and except as hereinafter may be limited to do all or any of the things which they would be entitled to do if they were the absolute owners of the land PROVIDED HOWEVER that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

[166] At the hearing held on 23 December 2014, Mr Fox gave evidence that he recalled discussing the loans with the trustees and considered that there may have been minutes

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68 114 Waiariki MB 146 (114 WAR 146)
69 68 Opotiki MB 65 (68 OPO 65)

documenting the discussion but could not be certain.[70] However, that material has not been produced. Similarly, Mr Fox could not recall whether these loans were discussed at the 2008 AGM and the minutes of that hui do not disclose any such discussion taking place. It is argued that Mr Hunia was however aware of the trust's cash flow problems through to 2008 and the fact that the likelihood of the geothermal project being continued was doubtful.[71] It is on this basis that counsel for Mr Fox argued that the loan was not entered into unilaterally, as all the trustees were aware of the situation.

[167] Yet when questioned, Mr Fox accepted that the guiding mind in the loan transactions was his, regardless of whether or not this was the proper conduct for trustees, let alone those with potential conflicts of interest:[72]

> **J Kahukiwa:** And the intention was to borrow money from these two lenders for the Trust wasn't it?
>
> **T Fox:** Yeah
>
> **J Kahukiwa:** And the intention was to bind the Trust to these loan advances is that correct?
>
> **T Fox:** Yeah.
>
> **…**
>
> **J Kahukiwa:** None of the other trustees have signed on behalf of the Kawerau A8D Trust though have they?
>
> **T Fox:** This one here, this was done by the older brother and I….we had a meeting with Colleen and I remember telling Kani about it.
>
> **J Kahukiwa:** You are a trustee on the lender as well are you?
>
> **T Fox:** …trustee as well yes.

[168] Regarding s 227(1) of the Act and trustees acting by majority, I raised with counsel whether a majority of trustees had consented. Mr Gear considered that a majority would have been Ms Skerrett-White and Mr Fox. I queried with counsel whether Ms Skerrett-White would have been in a position of conflict given that she was consenting to a loan as a trustee of funds to go to herself.[73] He responded by restating that Mr Hunia was aware of the loan, although he could not produce evidence to that effect. Bearing in mind the evidence presented to the Court, I consider that the applicant was at least aware of the loans but did not enquire into their details and nor did he object to the loans being executed. It was open to the applicant to seek direction from the Court if he was concerned with the actions of Mr Fox.

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70 110 Waiariki MB 347 (110 WAR 347)
71 114 Waiariki MB 146 (114 WAR 146)
72 110 Waiariki MB 347 (110 WAR 347)
73 114 Waiariki MB 147 (114 WAR 147)

[169] The evidence confirms that Mr Fox unilaterally signed the loan documents in question. It is unclear whether these loans were discussed amongst the trustees but it must be taken that all three of the trustees were aware of the requirement to obtain funding for the project. Given that Ms Skerrett-White received funds through Taumanu she should not have been part of any discussion as to whether to enter into the loans. She stood to directly benefit. Moreover, Mr Fox and Ms Skerrett-White may have been in a conflict of interest at that time due to their personal relationship. The short point is that they should have sought directions on the loans. Their relationship, according to Ms Skerrett-White's evidence, began in 2007, well before the loans were granted:[74]

> **J Kahukiwa:** …Now much is being made of your personal relationship with Mr Fox.
>
> **C Skerrett-White:** Yes.
>
> **J Kahukiwa:** So just to be clear…[wh]en did it start?
>
> **C Skerrett-White:** …2009
>
> **J Kahukiwa:** 2009?
>
> **C Skerrett-White:** Oh no sorry, sorry, hang on, no, the end of 2007….
>
> …
>
> **J Kahukiwa:** So to be clear you're not categorising it as a relationship of say, in the colloquial, boyfriend girlfriend?
>
> **C Skerrett-White:** No.
>
> …
>
> **J Kahukiwa:** But you're not denying that you co-habitated from time to time?
>
> **C Skerrett-White:** No.

[170] Then there is the issue of whether or not security had been provided for the loan. Ms Skerrett-White confirmed that there was no security:[75]

> **Court:** So that trust loaned $80,000 to this trust, is that right? What was the security provided by this trust?
>
> **C Skerrett-White:** Security?
>
> **Court:** For the loan.
>
> **C Skerrett:** We didn't think we needed security. That trust is a part of the whenua, part of the marae. Tikanga Māori ne?
>
> **Court:** Yes, but these are trustees of trusts and it is a duty of a trustee to make sure that they invest according to the Trustee Act. The Trustee Act requires security. I was wondering what security this trust had offered up.
>
> …
>
> **Court:** You are saying nothing?
>
> **C Skerrett:** No we didn't have any security.

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74 110 Waiariki MB 299-300 (110 WAR 299-300)
75 22 Waiariki MB 79 (22 WAR 79)

[171] As can be seen, the combination of facts in this case presents an unflattering picture. The loans were unilaterally signed by one trustee, with another trustee in a conflict of interest position in terms of the trust lending funds, and an additional conflict of interest existing due to a personal relationship between trustees. This, combined with the fact that no security was provided for the loan and no directions were sought regarding the conflicts, raises serious questions as to the decision making ability and judgement of the trustees concerned. Indeed, a loan upon an unsecured promise to repay has been held not to be an investment at all: *Khoo Tek Keong v Ch'ng Joo Tuan Neoh*.[76]

[172] It is an understatement therefore that I do not consider the trustees' actions in relation to the loan agreements with third party trusts to have been prudent, even though the loan was granted by another trust altogether that is not presently, in strict terms, a party to this proceeding. The marae and Fox whānau loans were procured it would seem from entities created under the Act or its predecessor. They therefore fall within the jurisdiction of the Court and it may be necessary for further inquiries to be made in that context.

[173] Once again, the option was always open for the trustees to seek directions of the Court regarding the loans, given the conflicts of interest existing in this case. The trustees failed to do so and their actions cannot be considered prudent. On careful reflection, my overall conclusion on all of these matters is inescapable: the trustees have failed to act prudently in managing the affairs of the trust. For this they must now be held to account.

**Did the trustees act prudently regarding the geothermal development?**

*Applicant's submissions*

[174] Mr Kahukiwa did not make specific submissions regarding the prudency or otherwise of the respondents' actions in relation to the geothermal development, separate from the administration of the trust.

[175] However, in response to my questions concerning the actions of all trustees in negotiating the geothermal development agreements, Mr Kahukiwa conceded that there was some merit in the argument that, given the substantial amount of funds spent on legal fees, the deal ultimately secured in relation to the project development agreement appeared to favour IDG more than the owners. Mr Kahukiwa submitted that, even so, a "bad deal" does not necessarily mean that a trustee is in breach of their duty of prudence, particularly where

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[76] [1934] AC 529

they relied on the advice of their experts. He contended that he could not see that Mr Hunia had breached such duty.

*Respondents' submissions*

[176] Mr Bidois submitted that the trustees did not act imprudently regarding the geothermal development. He submitted that Ms Skerrett-White obtained advice from a reputable firm of geothermal engineers that the existing geothermal bore situated on the land had sufficient pressure and sufficient heat to run a geothermal power station. Accordingly, the trustees believed that the geothermal asset could be profitably developed for the owners' benefit, despite the substantial negotiation costs that would be incurred. Mr Bidois argued that this belief was reasonably held and was confirmed by advice they received from Mighty River Power.

[177] Ms Skerrett-White gave evidence that the trustees also received advice from a number of geothermal experts, following which they took expressions of interest for development, eventually signing a MOU with IDG. A joint venture partner for the development of the geothermal bore was then sought by IDG who subsequently engaged with EGL. It was agreed that IDG could complete negotiations of the project development agreement in Hawaii, given they had no funding to return to New Zealand. However, she says that IDG was to bring the matter back to New Zealand for the last round of negotiations. Ms Skerrett-White noted that the trustees had some reservations regarding the agreement but relied on the advice of their lawyer and signed the agreement "in principle" based on an assurance that IDG would come to New Zealand and they would sit down with EGL to make sure the agreement was workable. This however did not occur.

[178] Ms Skerrett-White argued that what was agreed with IDG was not reflected in the project development agreement, in terms of IDG obtaining an exclusive right to develop the geothermal bore as opposed to a joint right. Ms Skerrett-White also noted that in terms of the "native to native" protocol, the equity that IDG received in the trust's development was to be reciprocated by the trust receiving a corresponding interest in IDG's Hawaiian development. However, they subsequently learned that IDG had taken on another partner for their proposed development.

[179] Ms Skerrett-White further asserted that the relationship between the trustees and IDG broke down during final negotiations, when Mr Hunia sent to IDG confidential minutes of the trust's discussions with their lawyer regarding their concerns over the project

development agreement. IDG subsequently cut communication with the respondents and they were unable to further negotiate the agreement.

[180] In response to questions from the Bench regarding the amount of legal costs and the corresponding expectation that the best possible deal should have been secured for the owners, Mr Bidois suggested that a consequence of paying "top dollar" for legal advice is you get "top- drawer" counsel and a sense that one need not question such advice. In addition, Mr Bidois noted that the trustees made a comparative analysis of the IDG offer with an offer from Mighty River Power which he considered were the actions of reasonable trustees. He argued that the fact the trustees may later regret the decision does not, of itself, make the decision, based on the information available at the time, imprudent.

**Discussion**

[181] It is uncontroversial that a substantial amount of research and negotiation has been undertaken by the trustees and Ms Skerrett-White in particular, in seeking to progress the geothermal development. The financial elements of the project will eventually be welcome and of benefit to the owners. However, what remains of considerable concern is the reality that the trustees, by their conduct, have inexplicably enabled, unwittingly or otherwise, their JV partner IDG to receive potentially *more* of a benefit from the development than the owners – again hardly the conduct of prudent trustees.

[182] Equally inexplicable is how the benefit to IDG bears, on the available evidence, little relationship to their actual "contribution" to the project. Indeed, a cynical eye might even suggest that the trustees had been taken advantage of by their "partners". Questions must then surely arise as to the extent of the due diligence and the ethics of how IDG appear to have conducted themselves throughout this negotiation, based on the evidence of the trustees.

[183] Disturbingly, given the cost and quality of advice that the trustees say they were receiving, Ms Skerrett-White eventually acknowledged that the trustees had been taken advantage of by their Hawaiian partners, even though they had ample legal advice:[77]

> **C Skerrett:** … One of the problems that has come out of this process is that we have been cut off by IDG and have been unable to discuss these things with them.
>
> **Court:** When you say cut off, what do you mean?
>
> **C Skerrett:** They cut us off.

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[77] 22 Waiariki MB 73 (22 WAR 73)

> **Court:** IDG?
>
> **C Skerrett:** Yes, our Hawaiian partners.
>
> **Court:** I see.
>
> **C Skerrett:** …they were advised by legal counsel that she was not to discuss anything with us, which made it very difficult for us to finish off what needed to be done with the PDA.
>
> One of the things that has happened is that we totally believed in the kaupapa that was developed with IDG Hawaii, in terms of the native to native protocols. Unfortunately in the PDA they have gone a little bit further than just being protocols. Their mapping in the PDA actually states that they have cultural control. That is something that we never ever agreed to. The cultural control is ours. We are the tangata whenua, it is our land and it is our resource. So those things have to be addressed. There is some issue with costs. Our costs were not addressed in that PDA but the costs of our partners were. They got $1.25 million for that.

[184] And further:[78]

> **Court:** Yes, now the Hawaiian people what do they get?
>
> **C Skerrett-White:** They walked away with US$1.25 [million] costs.
>
> **Court:** For what purpose, what did they get that for?
>
> **C Skerrett-White:** For costs, and plus they got 10 per cent equity and co-developers as well.
>
> **Court:** So they got in a lump sum more money than the owners are getting?
>
> **C Skerrett-White:** Yes
>
> **Court:** 10 per cent of the equity and they are the co-developer?
>
> **C Skerrett-White:** Yes

[185] Curiously, Mr Hunia also confirmed that the trustees were happy with the arrangements prior to signing the agreement. Subsequently however, it appeared that the agreement did not align with what they understood the arrangements were to be:[79]

> **The Court:** …The arrangement with the IDG, were the trustees happy with it in the end?
>
> **K Hunia:** Yes. I mean was [sic] the trustees were all happy.
>
> **The Court:** Yes. So the input with the Hawaiian partners, all the trustees were happy with that outcome?
>
> **K Hunia:** Yes, that is why we signed, all happy.
>
> **The Court:** After the agreement had been signed and the trustees discovered that it wasn't exactly what you thought it was going to be, were the trustees still happy?
>
> **K Hunia:** No.
>
> **The Court:** They weren't?
>
> **K Hunia:** No.

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78 46 Waiariki MB 251 (46 WAR 251)
79 110 Waiariki MB 274-275 (110 WAR 274-275)

> **The Court:** And did the trustees subsequently discover that in fact, the deal that they did sign up to was not really what they understand [sic] it to be in the first place? In that the Hawaiian partners were walking away with a big share for very little input?
>
> **K Hunia:** That is right.
>
> **The Court:** And this has soured the relationship wit the Hawaiian partners since?
>
> **K Hunia:** Oh I think that relationship is really sour at the moment.
>
> **The Court:** And the part I struggle with is that how can it be that the trustees signed up to a deal that they subsequently discover is not really what it should have been when they spent $500,000 on lawyers.
>
> **K Hunia:** Well I can't understand.

[186] As foreshadowed, it is unfathomable on any reasonable basis why the "deal" that was eventually secured by the trustees was one that appeared to favour the interests of IDG over those of the trust's beneficiaries, particularly when such large amounts were spent on legal advice. To then discover that, having the benefit of such advice, IDG were still able to secure substantial benefits which do not appear at first blush to fairly reflect what they contributed to the development, is startling. Additionally, it appears that the trustees were either not fully apprised or simply failed to properly comprehend the true effect of the agreement, with the result that arrangements in terms of the cultural matters and the reciprocal interest in the IDG development were not properly secured for the owners.

[187] Ms Skerrett-White conceded that the actions of the trustees contributed to the situation with the Hawaiian partners:[80]

> **Court:** So the IDG people, if the project is to proceed, they are still involved?
>
> **C Skerrett-White:** Yes.
>
> **Court:** They are the co-developers, is that right?
>
> **C Skerrett-White:** They are the Co-developers. What it did was disempowering us in terms of how all cultural matters were dealt with, within the project, because we are not the co-developers. It is disempowering and it is heartbreaking.
>
> **Court:** But isn't it the case and I say this with no disrespect, the disempowerment is as a consequence of the trustees' actions?
>
> **C Skerrett-White:** Yes. We dropped the ball!

[188] Mr Fox, at an earlier hearing was even more candid in his assessment of the deal. From his perspective the entire project was in disarray due to the conduct of IDG:[81]

> **T Fox:** I cannot see how IDG can be a partner. As far as I am concerned I do not want to be part of them.

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80 46 Waiariki MB 253 (46 WAR 253)
81 22 Waiariki MB 87 (22 WAR 87)

> **Court:** Okay. Now Mr Fox does that mean, if I understand you correctly the entire project is now at risk?
>
> **To Fox:** Yes, as far as I am concerned. It is just the way they have written it down on PDA. It is more for them, to me, this is myself and I will say it quite clearly, it is a scam.

[189] During cross examination, Ms Skerrett-White was questioned on her experience in geothermal development prior to undertaking the present project. She conceded that she did not have prior experience but that she had sought the expertise and advice of trustees of other geothermal operations, who also had no prior experience before their own successful ventures. I raised the point as to whether it would have been more prudent to engage those successful trustees to undertake the present development, given their proven ability. Ms Skerrett-White stated that Kawerau A8D was in a position unique from other developments as it only has one bore and is considered "the Crown jewel of the Kawerau geothermal field".

[190] She also stated that the trustees wanted to retain equity in the project without the need to buy it from royalties, which is the usual process, and the trustees accordingly secured that equity. Ironically, what eventuated was something less that such a laudable intention. For the owners however it is cold comfort since it appears that because of the trustees they are to receive less of the benefit of the project in favour of IDG who it seems contributed less than might be expected for the eventual equity stake that they received.

[191] In my assessment the trustees have failed to act prudently and their misconduct may have resulted in a serious loss to the trust of equity in the project - a loss that was likely to have been preventable and therefore quite unnecessary. For this serious breach of trust the trustees must be held to account.

**Should any of the trustees be removed?**

*Applicant's submissions*

[192] Counsel submits that Ms Skerrett-White and Mr Fox have breached their duties as trustees and asks the Court to make a determination that the trustees be removed. He says that despite the removal of Ms Skerrett-White by the Court due to her bankruptcy, the application for removal of trustees remains extant.

*Respondents' submissions*

[193] Mr Bidois submitted that his client did not wish to be restored to the position of trustee, responsible or advisory, but wished to remain a trustee of her whānau trust.

[194] Mr Fox considered that Ms Skerrett-White should remain an advisory or responsible trustee as she has considerable knowledge of the trust and its activities.

**Discussion**

[195] The principles relating to removal of trustees are set out in *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc*, recently approved by the Court of Appeal in *Rameka v Hall*.[82] In *Bramley* the Māori Appellate Court held: [83]

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

[196] In my decision of 12 December 2011 I confirmed the removal of Ms Skerrett-White as trustee.[84] The issue of her removal from other trusts for which she remained a trustee was also raised. I allowed an opportunity for those trusts to express their views to the Court within 60 days regarding Ms Skerrett-White's removal. The Official Assignee was also invited to make submissions.

[197] Responses were received from some of trustees of those trusts, however, the Official Assignee did not express a view. Three of the five trusts submitted that Ms Skerrett-White should not retain her position as trustee, while the Proprietors of Ruahine and Kuharua Incorporated considered her resignation, which was tendered following her bankruptcy in 2011, to be sufficient. In relation to her own whānau trust, submissions were made in earlier proceedings from members of the whānau supporting her retention as a trustee and no opposition was expressed.[85]

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82 [2013] NZCA 203 at [32]
83 (2006) 11 Waiariki Appellate MB 144 (11 AP 144)
84 *Hunia v Fox – Kawerau A8D* (2011) 45 Waiariki MB 32 (45 WAR 32)
85 46 Waiariki MB 259-260 (46 WAR 259-260)

[198] David Wickliffe, trustee of Haumingi 16 Māori reservation, submitted that Ms Skerrett-White should not retain her position as trustee on the basis of the Court's decision to remove her and his view that one of the fundamental obligations of a trustee is to ensure decisions are in the best interests of the beneficiaries to the exclusion of personal gain. The trustees of the Haumingi 15 (Uenuku Marae) Māori reservation were also of the opinion that Ms Skerrett-White should not retain her position as trustee. They advised that a hui had been held and the replacement of Ms Skerrett-White proposed.

[199] Georgina Whata, a trustee of Paengaroa South 5 Trust, also responded and expressed her view that trustee obligations demand a higher standard of conduct from trustees than non-trustees. Trustees must act in the best interests of beneficiaries and in a way that does not reflect negatively on the trust. Ms Whata noted that the existence of close whānau relationships cannot be sufficient for Ms Skerrett-White to retain her position. In addition, the trust order for Paengaroa South 5 Trust expressly provides that bankruptcy is sufficient cause for removal. Earlier, Mrs Emery, the chairperson of Paengaroa South 5 Trust, had submitted that Ms Skerrett-White should remain on the trust due to the lack of other local trustees available to assist in the administration of the land.[86] Ms Whata noted however that an AGM was soon to be held at which new trustees could be elected.

[200] The fact of Ms Skerrett-White's bankruptcy weighs heavily in favour of her removal, as do the submissions received from the trusts she currently remains a trustee on, which in the majority sought the termination of her trusteeship. In the circumstances I see no reason why earlier orders concerning her removal should be disturbed.

[201] While much of the focus of these proceedings has been on the financial issues of the trust and the role of Ms Skerrett-White, the performance of the other trustees in carrying out their duties is also relevant. In relation to Mr Fox, as I found earlier, he unilaterally signed loan agreements on behalf of the trust and put himself in a clear conflict of interest position in terms of his personal relationship with Ms Skerrett-White. In addition, I consider that both he and Mr Hunia were complicit in the overall failures of the trust's administration, particularly in their duty to account by ensuring that proper financial statements and audited accounts were maintained at all times. This is despite their apparent willingness to sit back and let Ms Skerrett-White manage the trust. The principle obligations of trustees include the proper administration and management of the business of the trust and strict adherence to the terms of the trust. These obligations apply equally to all trustees.

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[86] 46 Waiariki MB 260 (46 WAR 260)

[202] The evidence is beyond doubt that that there have been fundamental failures in the administration of this trust by the trustees. I have already found that they breached several of their duties, including failing to adhere to the terms of trust, failing to produce financial information when requested, failing to properly manage conflicts of interest, and failing in their duty to account for trust monies, not to mention the poor judgement exercised in relation to the loan agreements and the overall approach to the management of trust funds. While I acknowledge the efforts of the trustees in seeking development of the land for the benefit of the owners, nevertheless, their actions presented a real risk to the assets of the trust. Accordingly, I consider the trustees have failed to carry out their duties satisfactorily and conclude there is sufficient cause to warrant their removal. To avoid doubt, this does not include Mr Kusabs, who was appointed as an independent trustee following the filing of proceedings.

[203] One final point in terms of removal and its effect. Given the adverse findings that have been made, it may be appropriate for those trustees who have been removed to serve a period of ineligibility for any future appointment, should they seek to stand for election at some future date. That said, I acknowledge the argument that some may find permanent ineligibility too onerous an outcome. It may be necessary that those persons directly affected are deemed ineligible for appointment for a finite period of time. The parties should file submissions on this issue within one month from the date of this judgment. It is likely to be appropriate that the matter is also discussed at the next general meeting of owners.

**Are any of the trustees entitled to relief?**

*Applicant's submissions*

[204] Mr Kahukiwa submitted that Ms Skerrett-White should be held to account for trust monies which he argued have not been properly accounted for by the trustees.

*Respondents' submissions*

[205] As traversed earlier, Mr Bidois argued that there is no direct evidence that the trustees have failed to act in the best interests of the beneficial owners. The costs incurred in the geothermal development have been significant, however, that is simply in the nature of geothermal developments. With the exception of legal fees, the costs incurred have been largely met out of the funds obtained by trustees specifically for the purpose of meeting those costs. The costs incurred were genuinely incurred in furtherance of the objects of the trust and for the direct benefit of the beneficial owners. The payments ensured that the

trustees had the ability to continue negotiating the geothermal arrangements which would have otherwise failed with the result that the beneficial owners would have been left burdened with the whole of the costs incurred up until that date.

**The Law**

[206] Section 73 of the Trustee Act 1956 provides:

> **73 Power to relieve trustee from personal liability**
>
> If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for the same.

[207] The essential requirements for relief from liability are that the trustees acted honestly and reasonably; and ought fairly to be excused for both breaching the trust and omitting to obtain directions from the Court.

[208] In *Wong v Burt*, the Court of Appeal found:[87]

> [57] In our view, this is not a case in which the trustees can claim the protection of s 73 of the Trustee Act 1956. The expression "honestly and reasonably" is conjunctive. It was not merely unreasonable – it was downright foolish – to proceed to implement a scheme of this kind knowing that it could come under critical legal scrutiny, as being an allegedly unlawful device. There may well be cases in which trustees are entitled to put to one side a quite untenable proposition. But with all due respect, in this case, patently, the appropriate course to have followed would have been to obtain directions under s 66 of the Trustee Act 1956. This case would never have come about had that course been followed.

[209] In *Moeahu v Winitana – Waiwhetu Pā No 4* the Court considered whether a trustee was entitled to relief from liability per s 73 of the Trustee Act 1956 in circumstances where he employed the services of his own company to carry out work for the trust, authorising payments of trust money to his company.[88] It was noted that the payments were made without the authority of the trustees and amounted to unauthorised retention of the trust's funds in the hands of a trustee. The Court held that while Mr Winitana acted honestly, his conduct was not reasonable. He put himself in a position of conflict and made a profit from

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87 [2005] 1 NZLR 91

88 (2014) 319 Aotea MB 166 (319 AOT 166)

his office, therefore preferring himself to the other beneficiaries. Accordingly, he was not entitled to relief per s 73 of the Trustee Act 1956.

**Discussion**

[210] The circumstances of this case are somewhat comparable to those of *Moeahu*. Ms Skerrett-White and her colleagues employed the services of a partnership where she had personal involvement, thereby putting herself into a position of conflict. In addition, the system of transferring and paying trust funds to and from the account of Taumanu created confusion and the trustees have been unable to properly account for all trust funds. This lack of transparency also meant that there was it would appear no clear authorisation for such payments of funds. The fact that the trust's financial records for relevant periods were no longer available simply compounded matters.

[211] In addition, it is apparent that while the other trustees, Messrs Fox and Hunia, may not have been privy to all the details of the trust's administration, they were at least aware of how the trust was operating, yet they did not attempt to investigate matters earlier and thereby seek to mitigate the extent and effect of the breaches. As I have iterated throughout this judgment, it was always open to the trustees to seek directions of the Court, which would have been a simple and prudent course of action.

[212] In conclusion, in my assessment, although the trustees acted honestly, and in what they believed was in the best interests of the beneficiaries, in all of the circumstances I find that their conduct was not reasonable. Accordingly, I consider that they are not entitled to claim relief per s 73 of the Trustee Act 1956. Moreover, as a forensic review of payments to trustees, directly and indirectly, has been ordered, it may be that further submissions on this issue will be required. In the meantime, however, I am satisfied that there can be no relief from removal, given the adverse findings that have been made to date.

**Conclusion**

[213] This case is another example of where individuals have been appointed by the Court, following endorsement from the owners, to roles where the evidence has demonstrated, they were unsuitable, particularly in the context of relevant experience. It will be remembered that prior to the commencement of the geothermal project, the trusts' income was less than $25,000 per annum and it was derived largely from a single and uncontroversial source. Yet within a relatively short time frame that soon changed in a most significant way as the

project commenced in earnest. Management of the trust's interests in an undertaking of the scale of this project required trustees possessed of a particular set of skills and knowledge. Yet the evidence confirms that none of them had any direct and firsthand experience of managing a project of this size and complexity.

[214] While the trustees seem to have approached their responsibilities with diligence and dedication initially, the situation later deteriorated to the point where they had failed to adhere to their most elementary duties and had unsurprisingly, given subsequent events, fallen out amongst themselves. Foremost amongst their responsibilities was the duty to adhere to the terms of trust to which they had all agreed to be bound when they were first appointed. They also failed to keep proper accounts, to have them audited then filed with the registrar; they failed to properly manage professional and personal conflicts and in doing so let their interests conflict with their duties. They may also have failed to properly account for all trust funds in a manner expected of fiduciaries holding property belonging to others. That issue remains live, as foreshadowed, and will now be the subject of a forensic review.

[215] Then there is the equally serious issue of failing to protect the interests of the owners. Much was made in the evidence of a 'native to native' approach to the project. Yet as events unfolded it would later transpire that the trust's "partners" were in fact receiving a benefit in excess of what they might have been entitled to from an objective point of view. Put another way, even the trustees acknowledged that they had been taken advantage of by their "partners" with adverse consequences for the owners. Those consequences are likely to have financial implications, given the issues involved, which will need to be considered further.

[216] In short, one of the trustees accepted that they had "dropped the ball" to the point where the owners would appear to have suffered a potentially significant financial loss. There is well known authority for the proposition that where beneficiaries suffer such loss there can be instances where trustees are required to make good on those losses.[89] This issue is likely to require further submissions from the parties in due course, given the serious implications of any such findings.

[217] The trust has since had the benefit of Mr Kusabs' input even though this too has understandably come at a cost given his professional background. More importantly, if recent reports are to be relied on, the project is at last making considerable progress with

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89 *Re Mulligan* (Deceased) [1998] 1 NZLR 481

well drilling now underway.[90] In arriving at this juncture it is appropriate, despite the many criticisms of them detailed in this judgment, to nonetheless acknowledge the impetus for the project from the trustees, as well as Mr Kusabs, and their dogged efforts in seeking to have it advance to the present point of progress. Doubtless then the owners of Kawerau A8D can remain optimistic that at some point in the near future they may at last see some tangible benefit from their land and from the trust, once all of the current debts have been repaid.

**Decision**

[218] The current trustees of Kawerau A8D are all removed for cause with the exception of Andrew Kusabs who will remain as responsible trustee until further order of the Court.

[219] The Registrar, in concert with Mr Kusabs, will convene a general meeting of owners for the purpose of electing three replacements for the trustees who have been removed and to provide an update on the activities of the trust since the last general meeting, within three months from the date of this judgment. To avoid doubt, the trust's accounts should be presented to the meeting and the auditor should also be in attendance at the hui to answer any questions that might arise.

[220] The Registrar is directed to engage a suitable expert as the Court's witness to undertake a forensic review of the payments made to the former trustees, directly or indirectly, in any capacity whatsoever within six months from the date of this decision with terms of reference to be concluded by way of separate directions to be issued within one month. The Registrar is also directed to consult with the former trustees over the terms of reference for the proposed forensic review.

[221] Once a final report is produced, the Court may either convene to receive any further submissions and evidence in rebuttal to any such report or deal with any outstanding issues on the papers, once any submissions and further evidence have been filed and considered.

[222] The former trustees are invited to file submissions on whether or not their removal should be indefinite or for a set term of disqualification within two months from the date of this judgement.

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90 http://www.eastland.nz/2016/06/08/drilling-is-underway-at-te-ahi-o-maui/

[223] There will be no order as to costs.

Pronounced at 4.55 pm in Rotorua on Wednesday this 31st day of August 2016

L R Harvey
**JUDGE**