IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20130007632
A20150001249

UNDER	Sections 237, 238 and 239, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waiwhakaata 3E4C Lot 2A
BETWEEN	TAMATAI TATA, ANNETTE TATA, ALVY TATA-HOHEPA, NATHAN WHANGA, RODNEY WHANGA AND LISA KIRI AS TRUSTEES OF HIIONA MARAE Applicants
AND	RENE DAWN KATIPA, RODNEY WHANGA, BOYD KATIPA, NGAITU KARA, ALBERT HOMAI WHANGA, CLAUDE HERBERT WALKER, DAVE (MANNY) TATA (JNR), EDWARD T WHANGA, ISAAC KATIPA (JNR), JOE TEPOURA ELLIOT AND SHARINA TE AROHA TAWHAI, FORMERLY TRUSTEES OF HIIONA MARAE First Respondents
AND	TANIA MARTIN Second Respondent

Hearing:	1-2 May 2017 10-11 October 2017 (Heard at Hamilton)
Appearances:	A Hope for the applicants C Hockly for certain respondents N Kara, B Katipa and T Martin
Judgment:	19 October 2018

JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Hiiona Marae is located on Waiwhakaata 3E4C2A near Ngutunui. Between 2008 and 2010, $37,803.34 in Marae funds was paid into Tania Martin's personal bank account. The applicants allege these funds were paid in breach of trust.

[2] Despite being served, only some of the trustees in office at the time the funds were transferred have participated in this proceeding. Ngaitu Kara, Boyd Katipa and Mrs Martin ("the active respondents") argue some of the funds transferred were payment for a feasibility study carried out by Mrs Martin, and the balance were reimbursements for costs Mrs Martin paid on behalf of the Marae. They contend that all payments were properly approved and accounted for.

[3] New trustees for the Marae were elected on 3 January 2015. Mr Kara, Mr Katipa, and Mrs Martin were amongst the highest polling candidates. The applicants oppose their appointment as trustees.

[4] The issues in this case are:

(a) Did the first respondents breach their obligations concerning the payments to Mrs Martin?

(b) If so, should I enforce those obligations?

(c) Should I appoint Mr Kara, Mr Katipa and Mrs Martin as trustees of the Marae?

Background

[5] Hiiona Marae was set apart as a Māori reservation for the common use and benefit of Ngati Porahui and its sub-tribes.[1] At the time the funds were transferred to Mrs Martin, the first respondents were the trustees of the Marae.[2]

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1 "Setting Apart Māori Freehold Land as a Māori Reservation" (28 January 1982) 7 *New Zealand Gazette* 247 at 275.

2 110 Waikato MB 56-57 (110 W 56-57).

[6] Mrs Martin was not a trustee. She is a beneficiary of the Marae and had been assisting the first respondents with administering the Marae. Mrs Martin is closely related to two of those former trustees, Rene Katipa, who is her mother, and Boyd Katipa, who is her brother.

[7] Following the death of Te Arikinui Dame Te Atairangi Kahu, Te Arataura paid a one-off grant of $50,000.00 to each Waikato-Tainui Marae in honour of her memory. Hiiona Marae received one of those grants ("the one-off grant"). Between 14 August 2008 and 6 August 2010, 53 separate payments were made via telephone banking, which deposited a total of $37,803.34 from the one-off grant into Mrs Martin's bank account.

Procedural history

[8] This proceeding has a long and complicated history. I set out a summary of this history below.

[9] On 8 June 2011 and 30 January 2013, this Court granted orders replacing the first respondents, who were the trustees, with the applicants, who became the newly appointed trustees, for the Marae.[3]

[10] On 14 May 2013, Adrian Martin, on behalf of several others, filed an application seeking to remove the applicants as trustees ("the removal application").[4]

[11] On 23 August 2013, the applicants filed the current application seeking to enforce the first respondents' obligations, as trustees, concerning the payments to Mrs Martin ("the enforcement application").[5]

[12] On 19 November 2014, the applicants filed an application seeking an injunction to freeze the Marae trust bank account, prevent an election of trustees from taking place and prevent persons not appointed by the Court from purporting to act as trustees ("the injunction application").[6] In response, Mrs Martin filed an application seeking to enforce the

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3 22 Waikato Maniapoto MB 292-298 (22 WMN 292-298); 52 Waikato Maniapoto MB 41-42 (52 WMN 41-42).

4 A20130004406. The applicants are recorded as Adrian Martin, Judy Semenoff, Kiel Katipa, Boyd Katipa Snr, Ariana Keegan, Rene Katipa, Tamihana Persen, Boyd Katipa Jnr, Wally Semenoff, William Emery and Tania Martin.

5 A20130007632.

6 A20140012467.

obligations of trust requiring the applicants to hold an election ("the second enforcement application").[7] I heard those applications on 27 November 2014. Agreement was reached between the parties on a way forward.[8] I issued a minute recording that agreement as follows:[9]

(a) The outstanding applications concerning Hiiona Marae (A20130004406, A20130007632, A20130007633 and A20140012467) were to be continued before me per s 38(2) of Te Ture Whenua Māori Act 1993 ("the Act");

(b) I directed the trustees to call an AGM to conduct an election of trustees; and

(c) I issued timetabling directions concerning the enforcement application.

[13] I convened a telephone conference on 23 December 2014.[10] Mr Hope, for the applicants, raised that he had served some of the respondents with the enforcement application, but had been unable to locate the rest to effect service. I directed Mr Hope to file an affidavit confirming who had been served and how, and what steps had been taken to serve the remaining respondents. I also issued directions for substituted service on the remaining respondents by placing notice in the Waikato Times and New Zealand Herald.

[14] Pursuant to my earlier directions, the annual general meeting, and the election, were held on 3 January 2015. On 23 January 2015, Theresa Leigh filed an application to replace the trustees based on the outcome of that election ("the replacement application").[11]

[15] On 11 March 2015, I convened a telephone conference with counsel. I issued the following directions:[12]

(a) Confirming substituted service of the proceeding on certain respondents by newspaper notice as set out in my direction of 23 December 2014; and

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7 A20140012571.
8 92 Waikato Maniapoto 116-133 (92 WMN 116-133).
9 90 Waikato Maniapoto MB 78-80 (90 WMN 78-80).
10 92 Waikato Maniapoto MB 295-301 (92 WMN 295-301).
11 A20150001249.
12 96 Waikato Maniapoto MB 54-59 (96 WMN 54-59).

(b) Mr Hope and Mr Sharp (who at that time was acting for the active respondents) were to exchange all relevant documents in the possession, power or control of their clients, by way of informal discovery, within 30 days.

[16] I heard the replacement application on 16 July 2015. Objections were raised to the appointment of Mr Kara, Mr Katipa and Mrs Martin due to the unresolved issues in the enforcement application. There was no objection to the appointment of the remaining persons elected at the AGM. I granted the following orders by consent:[13]

(a) I appointed Edward Elliot, Theresa Leigh, Adrian Martin, Judy Semenoff and Kylie Walker as trustees of the Marae in replacement of all existing trustees except for Tamati Tata who was re-elected.

(b) I adjourned the application to appoint Mr Kara, Mr Katipa and Mrs Martin pending the determination of the enforcement application, as the outcome of that application, and any findings on breach of trust, are relevant to whether those three are suitable for appointment, in the replacement application.

[17] On the same day, I convened a judicial conference concerning the enforcement application. Mr Hope filed an affidavit confirming that substituted service had been effected by newspaper notice as directed. The respondents (other than the active respondents) did not respond to those notices. I issued timetabling directions for the filing of further evidence, and any further application for discovery from Mr Hope.[14]

[18] On 3 August 2015, I issued a minute concerning the removal application, the injunction application and the second enforcement application. As I had already appointed trustees in the replacement application, I raised whether these applications (which sought the removal of trustees and orders restraining or compelling an election) were redundant and should be dismissed.[15] Mr Hope and Mr Sharp confirmed these applications were redundant and should be dismissed. I dismissed those applications on 20 August 2015.[16] This meant

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13 102 Waikato Maniapoto MB 111-127 (102 WMN 111-127).
14 102 Waikato Maniapoto 128-131 (102 WMN 128-131).
15 103 Waikato Maniapoto MB 1-2 (103 WMN 1-2).
16 106 Waikato Maniapoto MB 226-227 (106 WMN 226-227).

the only substantive applications before me were the enforcement application, and the remaining part of the replacement application, to determine whether I should appoint Mr Kara, Mr Katipa and Mrs Martin as trustees.[17]

[19] On 2 and 3 September 2015, Mr Hope filed applications seeking discovery, and answers to interrogatories, from the respondents. On 2 October 2015, I convened a telephone conference to hear from counsel on these applications. I directed Mr Sharp, for the active respondents, to file evidence and a response to the applications seeking discovery and answers to interrogatories. I also directed Mr Hope to file an application for non-party discovery against Westpac Bank.[18]

[20] I convened a further telephone conference on 13 November 2015. After hearing from counsel, I granted the following orders:[19]

(a) Requiring the first and second respondents to answer the interrogatories per Mr Hope's application;

(b) Requiring the first and second respondents to provide discovery per Mr Hope's application; and

(c) Requiring Westpac Bank to provide discovery per Mr Hope's application.

[21] I convened a further telephone conference on 29 March 2016. Westpac complied with my order for discovery. The respondents failed to comply with my order. They did not answer the interrogatories, nor did they provide discovery.[20] In response, Mr Hope advised he would seek third party discovery from ANZ Bank New Zealand Ltd ("ANZ"), to obtain copies of Mrs Martin's bank statements which the Marae funds had been paid into. I directed Mr Hope to file and serve that application and directed Mrs Martin and ANZ to file any response.[21]

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17 I note further applications have since been filed with the Court concerning Hiiona Marae, though those applications are not being heard by me.
18 107 Waikato Maniapoto 209-210 (107 WMN 209-210).
19 110 Waikato Maniapoto MB 1-4 (110 WMN 1-4).
20 The active respondents filed answers to the interrogatories much later on 6 May 2016. They never provided discovery.
21 117 Waikato Maniapoto MB 176-177 (117 WMN 176-177).

[22] Mr Hope filed the application for non-party discovery against ANZ. The active respondents opposed the application. ANZ did not respond. On 19 May 2016, I issued a written decision granting that order.[22]

[23] On 27 May 2016, the active respondents sought leave to appeal against that decision. On 4 July 2016, I issued a minute raising whether that decision was a provisional or preliminary determination within the meaning of s 59 of the Act, and whether I was able to grant leave to appeal.[23] The active respondents then withdrew their application seeking leave to appeal.

[24] On 1 August 2016, I convened a telephone conference with counsel (by this stage Mr Hockly had been instructed by the active respondents), where I addressed the following:[24]

(a) Dismissing (by consent) the application seeking leave to appeal the non-party discovery order against ANZ;

(b) Setting down the inspection of the documents discovered by ANZ;

(c) Timetabling the filing of further evidence; and

(d) Setting the applications down for hearing.

[25] On 31 August 2016, the active respondents sought discovery against the applicants. Despite the very late filing of that application, I granted that order on 3 October 2016.[25] I then issued further timetabling directions on 20 December 2016 and 8 February 2017.[26]

[26] The enforcement application and replacement application were heard on 1 and 2 May 2017 in Hamilton.[27] I was unable to hear all of the evidence in that time and so I adjourned the applications and set them down for further hearing. I heard the remaining evidence on

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22 *Tata v Kara – Waiwhakaata 3E4C Lot 2A, Māori Reservation known as Hiiona Marae* (2016) 121 Waikato Maniapoto MB 2 (121 WMN 2).
23 123 Waikato Maniapoto 156-157 (123 WMN 156-157).
24 126 Waikato Maniapoto 72-80 (126 WMN 72-80).
25 128 Waikato Maniapoto 294-297 (128 WMN 294-297).
26 133 Waikato Maniapoto 68-69 (133 WMN 68-69) and 135 Waikato Maniapoto MB 81-82 (135 WMN 81-82).
27 140 Waikato Maniapoto 298-456 (140 WMN 298-456).

10 and 11 October 2017. I also directed the filing of closing submissions.[28] The final submission (in reply) was filed on 26 February 2018.

What legal principles apply?

[27] Trustees of a Marae must hold and administer the Marae and its assets for the benefit of the beneficiaries.[29] They must act in good faith in the exercise of their powers and administer the reservation:[30]

(a) To promote the purpose of the reservation;

(b) For the benefit of the persons entitled to use and enjoy the reservation; and

(c) In accordance with the Act, the Māori Reservation Regulations 1994, and any order of the Court.

[28] General principles of trust law also apply including:[31]

(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;

(d) A duty to act fairly by all beneficiaries;

(e) A duty to invest trust funds in accordance with the trust instrument or as the law provides;

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28 149 Waikato Maniapoto 217-335 (149 WMN 217-335) and 150 Waikato Maniapoto 1-106 (150 WMN 1-106).

29 Te Ture Whenua Māori Act 1993, s 338(7).

30 Māori Reservation Regulations 1994, reg 6.

31 *Rameka v Hall* [2013] NZCA 203 at [29]. It should be noted that general trust law only applies to the extent that those principles are not inconsistent with the statutory and regulatory regime concerning Māori reservations.

(f) A duty to keep and render accounts and provide information;

(g) A duty to act diligently and prudently;

(h) A duty not to delegate his or her powers not even to co-trustees; and

(i) A duty not to make a profit for themselves out of the trust property or out of the office of trust.

[29] Trustees have a duty of loyalty to act in the best interests of the beneficiaries. Trustees must not place themselves in a position where their duty and interest conflict. Under the "self-dealing" rule, if a trustee sells trust property to themselves, the sale is voidable as of right at the election of an affected beneficiary, no matter how fair the transaction. The self-dealing rule is not restricted to purchases, but extends to any contract with the trust where a trustee has an interest or duty on both sides of the transaction.[32]

[30] Transactions between trustees and a close relative do not fall in the same strict category, but it gives rise to strong grounds of suspicion, which, if not dispelled, is sufficient to set aside the transaction.[33]

[31] In *New Zealand Maori Council v Foulkes*, Williams J rejected an argument that payment to a solicitor, who was the wife of a trustee, breached these principles.[34] That case turned on specific facts, and does not change the general restriction on trustees entering into dealings with close relatives.[35]

[32] When appointing trustees:[36]

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32 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at [69] – [81]. This is different to the "fair dealing" rule, where a trustee purchases a beneficiary's interest. Under the fair dealing rule, the Court will assess whether the trustee gave full disclosure and value to the beneficiary before voiding the transaction. The onus is on the trustee to prove transparency and good conscience: *New Zealand Māori Council v Foulkes* [2014] NZHC 1225 at [12].

33 *Henderson v Woodroofe* [1921] NZLR 411 at 418, *Robertson v Robertson* [1924] NZLR 552, *Re McNally* [1967] NZLR 521, *Ormsby v The trustees of Whakaaratamaiti 2B6 (Meeting House) Maori Reservation - Whakaaratamaiti 2B6* (2009) 12 Waiariki Appellate Court MB 167 (12 AP 167), *New Zealand Maori Council v Foulkes* [2014] NZHC 1225.

34 *New Zealand Maori Council v Foulkes* [2014] NZHC 1225.

35 Williams J had granted an earlier order by consent that legal costs were to be met from trust funds, the parties were aware of the identity of the solicitor when they agreed with that order, and the Court would only approve the payment of fair and reasonable costs.

36 See Te Ture Whenua Māori Act 1993, ss 222(2), 236, 239, 338(7), *Paora – Te Tii Waitangi A (Waitangi*

(a) I must have regard to the ability, experience or knowledge of the proposed trustee; and

(b) I must be satisfied the proposed trustee is broadly acceptable to the beneficiaries.

What are the questions in this case?

[33] The following questions arise:

(a) Did the first respondents breach their obligations engaging Mrs Martin to undertake the feasibility study?

(b) Did the first respondents fail to keep and render accounts?

(c) Did the first respondents fail to protect trust funds?

(d) Did the first respondents delegate their powers to Mrs Martin?

(e) Should the first respondents' obligations be enforced?

(f) If so, should Mrs Martin be held jointly and severally liable with the first respondents?

(g) Should I appoint Mr Kara, Mr Katipa and Mrs Martin as trustees?

[34] I consider these questions in turn.

Did the first respondents breach their obligations engaging Mrs Martin to undertake the feasibility study?

[35] Mrs Martin argues the first respondents allocated 60 per cent, or $30,000.00, of the one-off grant towards restoration of the wharekai. She contends they approved payment of $21,000.00 of this amount to her, to undertake a feasibility study prior to the restoration work

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Marae) (2015) 94 Taitokerau MB 134 (94 TTK 134) and *Clarke v Karaitiana* [2011] NZCA 154 at [51] to [53].

being carried out. The balance of the $30,000.00 allocated to the restoration were to be used for associated expenses including working bees.

[36] Mrs Martin argues that the feasibility study was broken into three major milestones:

(a) Completing an application for a Marae facilities grant ("MFG application");

(b) Completing an application for a Marae heritage grant ("MHG application"); and

(c) Completing Marae access and urupā research.

She contends that the trustees approved payment of $7,000.00 for each milestone.

[37] No minutes of trustee meetings or other documents have been produced to confirm this was ever approved by the trustees. The absence of trust records is a significant feature in this case. I address this further below.

[38] Mr Katipa confirmed that the first respondents approved payment of $21,000.00 to Mrs Martin for the feasibility study. Mr Kara states the first respondents agreed to pay Mrs Martin for the feasibility study. He was not aware of any approval of three payments of $7,000.00. He considered that the first respondents simply approved individual payments to Mrs Martin when those came to trust meetings.

[39] I consider the first respondents did engage Mrs Martin to carry out the feasibility study. However, the failure to produce minutes of trustee meetings, or any records at all, confirming what was approved, is problematic. Despite that, even on the evidence before me, the first respondents breached their obligations engaging Mrs Martin.

The arrangement was not in writing

[40] The first respondents did not enter into a contract or any form of written agreement when engaging Mrs Martin to prepare the feasibility study. The first respondents paid her a significant amount of money to undertake work on behalf of the Marae. This arrangement

should have been confirmed in writing to ensure that there was a clear record of what Mrs Martin was engaged to do, and the payment she was to receive.

[41] The first respondents should have been aware of the need to confirm agreements in writing where significant funds are involved. Clause 7.2.6 of the Marae charter provides that all contracts must be recorded in the trust minute book, and all contracts valued in excess of $2,000.00 must be in writing. Despite that, the first respondents failed to confirm this arrangement in writing. As a result, there is considerable uncertainty as to what was agreed.

[42] Mrs Martin and Mr Katipa state Mrs Martin was to be paid a total of $21,000.00. Mr Kara does not recall this but instead understood that individual payments were going to be approved at trustee meetings. According to Mr Kara, there was no limit or cap put in place on the total amount of funds set aside to pay Mrs Martin. Failing to confirm this arrangement in writing when such significant payments were required, was not prudent.

There is no basis or justification for the fee charged

[43] There was also no proper basis or explanation for Mrs Martin's fee of $21,000.00. Mrs Martin advised this fee was payment for her time and travel expenses. However, in response to my questions, she advised that she did not use an hourly rate when calculating this figure. She was unable to explain how she arrived at this figure and how it was commensurate with the time required to complete the various milestones in the feasibility study.

[44] Mr Katipa and Mr Kara were also unable to explain the basis of this fee. There was no proper explanation provided justifying this amount. The first respondents did not seek competing quotes or estimates from other persons who may have been able to undertake the feasibility study. There was no proper basis upon which the first respondents could satisfy themselves that this fee was reasonable. It is hard to escape the conclusion that this amount was selected arbitrarily.

Mr Katipa voted in favour of paying his sister which was a conflict of interest

[45] A conflict of interest arose when this matter came before the first respondents. Mrs Martin is Mr Katipa's sister. Mr Katipa confirmed that he voted in favour of the payments

to his sister. Mr Katipa did not declare his conflict prior to the vote although I accept his explanation that the other trustees knew she was his sister.

[46] Mr Katipa could not explain why he did not refrain from voting. Instead, he voted in favour of the Marae paying significant funds to his sister, in circumstances where the arrangement was not in writing, and there was no basis or justification for the fee charged. Clearly this gives rise to strong grounds of suspicion which have not been dispelled. Mr Katipa should have refrained from voting as there was a clear conflict between his duty to act in the best interests of the beneficiaries and his loyalty to his sister. That did not occur.

[47] Mrs Martin's mother, Rene Katipa, did not give evidence. It is not clear if she participated in the vote in favour of her daughter. If she did, her duty as a trustee, and her loyalty to her daughter, would also have been in conflict.

The claim that Mrs Martin was part of a sub-committee is no excuse

[48] Mrs Martin, Mr Katipa and Mr Kara assert that Mrs Martin was acting as part of a working group or a sub-committee in carrying out this role. They appear to put this forward as justification for the lack of process or formality when engaging her. I do not accept this explanation.

[49] Mrs Martin was paid to provide services for the Marae. The trustees entered into a contractual arrangement with Mrs Martin involving a significant payment of trust funds. The trustees had to take the same prudent steps as they would when entering into any contract. They failed to do so.

[50] Even if Mrs Martin was acting in her capacity as a member of the sub-committee this does not excuse these shortcomings. Schedule 2 of the charter sets out the rules governing the formation, dissolution and proceedings of sub-committees. Part 8 relates to finances. Clause 8.1 states that sub-committee members "shall not keep any monies".

[51] While not eloquently drafted, the intention of this provision is clear. Sub-committee members are not to be paid. Paying Mrs Martin as a member of the sub-committee was in breach of the trustees' own policies as set out in the charter.

The Marae received little if any benefit from the feasibility study

[52] The feasibility study was not produced. It is not clear what, if any, final report was actually made available to the first respondents or what benefit they received. There is also little, if any, justification for paying Mrs Martin to carry out the milestones in the feasibility study.

[53] According to Mrs Martin, the first milestone was completing the MFG application. She gave the following evidence:[37]

> The MFG application is submitted to the Waikato Raupatu Lands Trust (WRLT), which is the administration arm of Te Kauhanganui. The WRLT check the application against the criteria, and if there are any problems with the application, staff of the WRLT will assist marae to make the appropriate changes. In this context, there is no such thing as an unsuccessful application.

[54] On her own evidence, WRLT staff assist applicants to complete the application, to the point there is no such thing as an unsuccessful application. When this was put to Mrs Martin, Mr Kara and Mr Katipa, they were unable to provide a proper explanation as to why the first respondents had to pay Mrs Martin $7,000.00 to complete an application that cannot fail.

[55] The second milestone was to complete the MHG application. Little information has been provided about what that involved or why the first respondents needed to pay someone to complete that application. Again, there is no explanation justifying a fee of $7,000.00 for that work.

[56] The first respondents did not receive the Marae facilities grant or the Marae heritage grant. The payment of $14,000.00 to Mrs Martin to complete those applications is clearly not money well spent. If Mrs Martin did complete and file those applications, as she says, surely copies of the applications could have been obtained from the organisations who received them. Despite that, copies of those applications were not filed.

[57] The final milestone was to complete Marae access and urupā research. Mrs Martin states the Marae and urupā are landlocked. She says she researched records with the Māori

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[37] Affidavit of Tania Martin, sworn 18 April 2017, at [18].

Land Court, the Waipa District Council and the Otorohanga District Council. Again, no objective evidence has been filed confirming this. Nor is there any evidence of what this research uncovered or what benefit it provided to the Marae.

[58] Mrs Martin did file a copy of a quarterly report she prepared for the Marae in August 2015. This report refers to "initial research work on our pā access and urupā access" between 2008 to 2009. This only makes very general comments and includes the phrases "[a]ccording to some stories, a public road was apparently in the historical planning" and "it is possible that we were denied our right to a public access-way to the pā". This section of the report ends with the following comment:[38]

> …Overall, we need to look at long-term sustainable access.
>
> The sustainability of our pā access will be wholly dependent on our mokopuna knowing what options are available to us now, and how they might pursue those options or other options in the future. For this reason, it's on us to do the groundwork for them.

[59] This hardly seems to be the result of extensive research resolving the access issue. In her oral evidence, Mrs Martin also made reference to an easement which provides access. A copy of the easement was not filed. The quarterly report states the easement was put in place by "Uncle Fraser" and "Uncle Ike" in 1999.[39] This was a decade before Mrs Martin was engaged to undertake the feasibility study. Clearly, she cannot claim credit for this as part of her engagement.

[60] There is no explanation as to why the first respondents did not engage a registered surveyor to provide advice on access. This would have resulted in complete and professional advice. There is no evidence to show engaging a surveyor to undertake this work would have cost more than the $7,000.00 paid to Mrs Martin.

There is no evidence the consultation was carried out or that this was necessary

[61] Mrs Martin provided a summary of the work she says she undertook when completing the feasibility study. This included extensive consultation with other Marae as far away as Whakatane, and also consultation with the McGarvey family in Ruatoki. Once

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38 Affidavit of Tania Martin, sworn 18 April 2017, appendix C, at 28.
39 Ibid at 26.

again there is no objective evidence confirming this consultation actually took place. The McGarvey family were not called to give evidence nor did they advise in writing that they met with Mrs Martin on these issues.

[62] Mrs Martin advised those meetings were in relation to tikanga concerning the Kingitanga, and alterations those whānau made to their Marae. Mrs Martin was unable to provide any proper explanation as to why she needed to travel to Whakatane and Ruatoki to consult with those persons in relation to the funding applications she was preparing for a Marae in Waikato.

[63] Mr Katipa said he was unaware that his sister had been consulting the McGarvey family in Ruatoki as part of the feasibility study. It is not clear if any of the first respondents knew they were paying for this. Mr Katipa also confirmed that there are kaumātua and kuia from Hiiona Marae who could have provided advice on the tikanga of the Kingitanga. This further confirms:

(a) That the consultation undertaken by Mrs Martin, if it occurred at all, was unnecessary; and

(b) The importance of recording the arrangement in writing so the first respondents knew in advance what they were paying for.

The letter from Te Kauhanganui does not justify the feasibility study

[64] Mrs Martin filed a letter from Waikato-Tainui Te Kauhanganui Incorporated ("Te Kauhanganui") dated 5 October 2017. This letter states:

(a) Te Kauhanganui has been undertaking a significant project to assess all Waikato-Tainui Marae;

(b) At that time, they had prepared 51 Marae profiles;

(c) Following recent discussions with Mrs Martin, and their commitment to address some of the concerns raised, Te Kauhanganui agreed to prioritise Hiiona Marae's facilities upgrade in the 2018/2019 work program;

(d) Te Kauhanganui's current assessment indicates $450,000.00 of work is required;

(e) Te Kauhanganui will undertake a site visit and condition assessment to determine the exact work required; and

(f) Te Kauhanganui will cover the cost of the site visit and assessment with the standard charge being approximately $11,700.00.

[65] Mrs Martin states this letter, and the offer now in place from Te Kauhanganui, is a direct result of her feasibility study. She contends $50,000.00 of the funds referred to in the letter is to reimburse Hiiona Marae for the one-off grant that was spent on her feasibility study and expenses, and the remaining $400,000.00 referred to in the letter is the cost of the rebuild based on her assessment in the feasibility study. She also contends that this letter is (in part) in recognition of her research on the access issue.

[66] I do not accept Mrs Martin's evidence. The author of the letter was not called to give evidence, nor was anyone else from Te Kauhanganui. Her evidence is her interpretation of the letter. It is not supported by any objective evidence and is inconsistent with the contents of the letter.

[67] The letter does not say that the offer is based in any way on Mrs Martin's feasibility study. It does not refer to her study at all. Rather, it states that Te Kauhanganui is undertaking an assessment of all Waikato-Tainui Marae as part of their Marae facilities upgrade programme.

[68] The letter does state that Te Kauhanganui agreed to prioritise Hiiona Marae following discussions with Mrs Martin. However, it does not disclose the content of those discussions, nor does it refer to the feasibility study itself.

[69] The letter does not state that the $450,000.00 figure is a combination of reimbursing the one-off grant, and the estimated cost of the rebuild as assessed by Mrs Martin. It clearly states this is Te Kauhanganui's current assessment of the work that needs to be carried out. There is no reference to the one-off grant or the feasibility study in any way.

[70] The letter also states that a further site visit and assessment needs to be undertaken to determine the exact work required. This is inconsistent with Mrs Martin's evidence that she already completed this work in her feasibility study. I also note Te Kauhanganui's standard cost to carry out this assessment, of $11,700.00, is almost half of what Mrs Martin charged for the feasibility study she carried out.

[71] Finally, if Te Kauhanganui prepared this letter based on Mrs Martin's feasibility study, then they must have a copy of it. Despite that, the study was not produced even though Mrs Martin knows it is a key issue in this case.

Summary of findings on the feasibility study

[72] The first respondents entered into an arrangement to pay Mrs Martin a significant amount of funds to prepare a feasibility study. The arrangement was not confirmed in writing. This was not prudent and was in breach of the trustees' own policies under the charter.

[73] There was no justification or explanation for the fee charged. The two trustees who gave evidence couldn't agree on the basis of the fee. One said they agreed to three payments of $7,000.00, while the other said they just approved individual payments without ever agreeing to a limit or cap on the funds paid. This was not prudent or responsible. Mrs Martin's fee of $21,000.00 is almost double the standard fee Te Kauhanganui charge to assess upgrade works for a Marae.

[74] Mr Katipa voted in favour of the payments to his sister. There was a clear conflict between his duty and interest. It is not clear whether Mrs Martin's mother voted in favour of the payments as well. If she did, the same conflict would arise.

[75] The explanation that Mrs Martin was part of a working group or a sub-committee does not justify or excuse the first respondents' failures and was, once again, in breach of their own policies under the charter.

[76] The study itself was not produced, and there is little if any evidence of benefit received, or justification for paying someone to complete the three milestones in the study.

[77] There is no evidence the consultation was carried out or that this was necessary as part of the feasibility study.

[78] The letter from Te Kauhanganui is not evidence that the feasibility study was carried out. Nor is the letter evidence of benefit the study has produced for the Marae.

[79] The first respondents breached their obligations engaging Mrs Martin to carry out the feasibility study.

Did the first respondents fail to keep and render accounts?

[80] Trustees have a duty to keep and render accounts. No accounts have been produced for the period when Marae funds were transferred into Mrs Martin's bank account.[40] Both sides blame each other for either failing, or refusing, to keep and produce the accounts.

[81] Mrs Martin contends the first respondents kept full financial records accounting for all trust funds. She alleges that:

(a) Following the trustee election in August 2010, new trustees were elected.

(b) At a meeting at Mr and Mrs Tata's house on 11 September 2010, a briefcase containing those records were handed to Mr and Mrs Tata.

(c) The trust computer which contained the electronic records was also offered to the incoming trustees but was not taken. This was taken back to the Marae and left in the storage room.

(d) The first respondents had no further possession or control of those documents and are now unable to produce the records in support of the payments made.

[82] Mr Katipa and Mr Kara were not at the meeting at Mr and Mrs Tata's house where the handover occurred. Mr Katipa 'thinks' the documents were 'probably' handed to Mr and Mrs Tata. As he has no personal knowledge on the matter, I place no weight on his evidence. Mr Kara said he does not know where the records are.

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[40] Other than the bank statements which the applicants obtained through discovery.

[83] Mrs Tata confirmed a briefcase was handed to her and her husband at the meeting at their house. She contends the briefcase had a small number of documents inside it but they did not go through those documents in any detail.

[84] Mrs Tata states an issue arose over the election which was conducted in August 2010 and so a new election was held. As a result, they returned the briefcase to the trustees by placing it on the table at the Marae where Mrs Martin and other trustees were sitting. Mrs Tata says no documents were removed from the briefcase before it was returned.

[85] Mrs Martin said she could not recall whether the briefcase was returned.

[86] I accept that a briefcase was handed to Mr and Mrs Tata at their house. I also accept Mrs Tata's evidence that this briefcase, along with its contents, was returned to the first respondents. I consider Mrs Tata was an honest and reliable witness and she gave an accurate account of what occurred. While Mrs Martin could not recall the briefcase being returned, she did not deny this happened. No explanation has been provided as to what happened to the Marae computer, which contained the electronic records for the trust.

[87] I also consider that the conduct of the parties in this proceeding is relevant. The applicants have been seeking copies of the relevant financial records from the outset of this proceeding. They have sought various discovery orders against the respondents, Westpac and ANZ in an attempt to obtain the relevant financial records.

[88] The only financial records that have been produced in this proceeding were filed by the applicants. This includes the bank statements for the Marae bank accounts, and the bank statements for Mrs Martin's personal account, which were obtained by discovery. There are a limited number of minutes from trustee meetings, financial reports and statements for the relevant period which have been filed. Again, those were filed by the applicants. I consider they have taken reasonable steps to try and obtain the relevant records for this proceeding. I also consider that they have filed all financial records and accounts in their possession.

[89] In contrast, Mrs Martin, Mr Katipa and Mr Kara have not filed any financial or trust records. They opposed the applications for discovery and failed to comply with my order

requiring them to provide discovery. They have remained in contempt of that order to the present day.

[90] Mrs Martin attempted to reconstruct financial statements accounting for the relevant funds on two separate occasions. The first was in her affidavit sworn 28 October 2015 ("the first affidavit"). The second attempt was in her affidavit sworn 18 April 2017 ("the second affidavit"). No supporting documents were filed to corroborate these statements.

[91] I cannot rely on these reconstructed statements. Aside from being self-serving, Mrs Martin's evidence on these statements, the payments made to her, and the whereabouts of the financial records, is not reliable or credible.

[92] In her affidavits, Mrs Martin sets out details of trustee meetings, and payments made to her, with remarkable clarity. In the first affidavit, she recreated minutes of trustee meetings held on 17 February and 11 May 2008. This included the date and venue of the meetings, each trustee who was present, elected trustees who were present, beneficiaries who were present, apologies from those who were absent and the resolutions passed or decisions made by the trustees. The reconstructed financial statements in the first and second affidavits provide a breakdown of the costs paid, the date the costs were paid, and what each payment related to. However, when cross-examined on individual payments made to her account, Mrs Martin often could not recall or could only provide very vague and general answers. I cannot rely on her memory used to reconstruct the financial statements in those affidavits, when her memory was found so wanting in questioning.

[93] The financial statements in the two affidavits are also inconsistent with each other. In the first affidavit, Mrs Martin states that $19,271.65 was paid to her for the feasibility study. In the second affidavit, she states the trustees approved three separate payments of $7,000.00, or a total of $21,000.00. Mrs Martin was unable to properly explain the difference between the two figures.

[94] In her first affidavit Mrs Martin gave the following breakdown of funds paid into her account:

(a) $19,271.65 for the feasibility study;

(b) $12,500.00 for maintenance and working bees; and

(c) $2,103.00 for buildings and grounds and administrative purposes.

This comes to a total of $33,874.65.

[95] In the second affidavit, Mrs Martin gave a different breakdown of funds paid into her account as follows:

(a) $24,972.00 for the feasibility study (this also exceeds the $21,000.00 she says was approved by the trustees); and

(b) $11,832.00 for working bees and general expenses.

This comes to a total of $36,804.00.

[96] The payment for the feasibility study, the working bees and expenses, and the overall totals, in the two affidavits are inconsistent. The breakdown of the monthly payments in the two affidavits are also inconsistent. Neither of these statements account for the full amount paid to Mrs Martin's account of $37,803.34.

[97] As noted, Mrs Martin also argued that all accounts and financial records were handed to Mr and Mrs Tata at the meeting at their house in 2010. In cross-examination, Mr Hope produced an email dated 2 January 2012 from Mrs Martin to Maria Graham, a member of the Court staff, where Mrs Martin said:

> At another level, I presented all financial reports and minutes of Hiiona Marae meetings held to support financial decisions from 2007 to the present day to my lawyers …

[98] After being confronted with this email Mrs Martin initially said she did give the financial records to her lawyer. After being pressed further, she said the comment in that email was an exaggeration. Eventually, Mrs Martin admitted that she lied in that email to Court staff about the location of the records.

[99] There is no credible or reliable evidence that the first respondents retained financial records for the trust during the period 2008 to 2010. They have been unable to properly account for those funds during the course of this proceeding. I find that they failed to keep and render those accounts.

Did the first respondents fail to protect trust funds?

[100] Trustees have a duty to protect and preserve trust funds and ensure that funds are only applied for proper purposes. There is no question that the first respondents were entitled to use trust funds to undertake renovations, maintenance and improvements to the Marae. I also accept that, depending on the circumstances, it may be appropriate to engage someone to undertake an assessment of the work required. However, the first respondents had to act prudently at all times, ensuring that the payment of funds was properly approved, was justified, and was accounted for.

[101] I have already found that the first respondents breached their obligations engaging Mrs Martin to undertake the feasibility study. There is also little evidence demonstrating that there were proper processes and procedures in place concerning the payment of trust funds.

[102] Mrs Martin argues 60 per cent of the one-off grant, or $30,000.00 was allocated towards the restoration works. Of this, $21,000.00 was payment for her feasibility study, with the balance, for the working bees. There is little credible or reliable evidence to support this. Even if I were to accept that evidence, the trustees paid $37,803.34 into Mrs Martin's account, far in excess of the 'approved budget'.

[103] Only two of the first respondents gave evidence. Their evidence differed on what the first respondents agreed to pay for the feasibility study. Mr Katipa said the first respondents approved three payments of $7,000.00 while Mr Kara said they only approved individual payments without ever agreeing to a cap or limit.

[104] Mr Kara also said that cheques were provided to Mrs Martin for costs associated with the working bees. None of the 53 payments in this proceeding were made by cheque. All were telephone transfers.

[105] Mr Katipa and Mr Kara:

(a) Were unable to explain the basis of the fee paid to Mrs Martin, or how they determined whether the fee was reasonable;

(b) Were unable to recall the individual payments made, or what they related to;

(c) Did not know the total amount of money actually paid into Mrs Martin's account; and

(d) Have not retained records of the payments made and were unable to account for those payments.

[106] The first respondents failed to protect the trust funds.

Did the first respondents delegate their powers to Mrs Martin?

[107] Trustees have a duty not to delegate their powers not even to co-trustees. The applicants argue the first respondents delegated their powers to Mrs Martin, in breach of this duty.

[108] Mrs Martin was not a trustee. There is some support for the argument that the first respondents delegated their powers to her. She was certainly prominent and active in trust business, attending trustee meetings, and organising and carrying out work on behalf of the trustees such as working bees.

[109] The active respondents assert that Mrs Martin was merely assisting the trustees. They contend she helped them with the administration of the Marae, but that all decisions were made by the first respondents, and she simply carried out tasks on their behalf, pursuant to those decisions.

[110] The absence of trust records means there is little objective evidence to determine what actually took place. The active respondents' explanation is plausible. While there is some attraction to the applicant's argument that the first respondents went further and delegated trustee functions to Mrs Martin, this has not been established on the evidence.

Should the first respondents' obligations be enforced?

[111] Where there is a breach of trust, liability extends to all loss caused directly or indirectly to the trust estate. A trustee is generally liable for loss suffered by the wrongful act of a fellow trustee as liability is joint and several, even if there are varying degrees of blameworthiness. There may be instances where there is a breach of trust but no demonstrable loss and therefore no resulting liability.[41]

[112] $37,803.34 in trust funds was paid into Mrs Martin's personal bank account. The first respondents breached their obligations engaging Mrs Martin to undertake the feasibility study. They failed to keep and render accounts and failed to protect the trust funds concerning these payments. There was also little, if any, demonstrable benefit to the Marae from the payment of these funds. I consider the payment of these funds to Mrs Martin is a loss to the trust arising directly from these breaches.

[113] I also consider the first respondents should be held jointly and severally liable for this loss. Although only two of the first respondents participated in this proceeding, all were served.[42] The evidence demonstrates a lack of cohesion, process, and accountability amongst the first respondents generally while they were in office.

[114] Only three of the first respondents were authorised to make telephone transfers of trust funds: Ngaitu Kara, Rodney Whanga (senior) and Rene Katipa. It could be argued that as they transferred the funds, liability should rest with them. This argument is even more pronounced for Mrs Katipa given she is Mrs Martin's mother. Holding those three liable would have more weight if this case concerned a one-off transfer of funds, and the other trustees were not aware of it. However, there were 53 transfers over a period of three years. The first respondents either knew, or should have known, that significant funds were being paid to Mrs Martin. None of them took steps to address this or to raise the alarm. All must now bear responsibility for failing to protect the trust funds.

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41 *Ratima v Sullivan – Tataraakina C* (2017) 64 Takitimu MB 121 (64 TKT 121); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 213 (HC); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA); *Selkirk v McIntyre* [2013] 3 NZLR 265.

42 Some by way of substituted service through newspaper notice.

[115] Finally, s 73 of the Trustee Act 1956 provides that the Court may relieve a trustee from personal liability where the trustee has acted honestly and reasonably and ought to be fairly excused for the breach and for failing to seek directions from the Court.[43] In *Moeahu v Winitana – Waiwhetu Pā No 4*, Judge Harvey considered the application of this provision. He found:[44]

> [26] It is well settled that in assessing whether relief from liability should be granted under s 73, the onus of proof is on the trustee. All of the requirements must be met to satisfy s 73 and the Court has a wide discretion both whether to grant relief at all and if so the level of such relief. While there is specific statutory authority enabling the Court to grant relief, that remedy is not lightly given: in *re: Tauhara Middle 4A2B2 C-Opepe Farm Trust*. In this decision Judge Savage was critical of trustees who had used trust resources incorrectly even though they had relied on advice.

[116] The respondents have not sought relief pursuant to this provision. Even if they had, I do not consider this provision applies. Nor do I consider the first respondents should be excused from liability in this case.

Should Mrs Martin be held jointly and severally liable with the first respondents?

[117] Mr Hope, for the applicants, argues that Mrs Martin should be held jointly and severally liable with the first respondents for the funds paid to her in breach of trust. He contends that Mrs Martin received trust property knowing that such receipt was in breach of trust and so she holds it as a constructive trustee.[45]

[118] In response, Mr Hockly argues the key issue is whether Mrs Martin had knowledge that the funds were used in breach of trust. He contends that, to the best of Mrs Martin's knowledge, the trustees were abiding by the charter and the rules applying to trustees. Mr Hockly also refers to the fact that Mrs Martin has not been a trustee for Hiiona Marae.

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43 *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166); *Tauhara Middle 4A2B2C Block - Opepe Farm Trust* (1996) 68 Taupō MB 27 (68 TPO 27); *Spencer v Spencer* [2013] NZCA 449 at [122]; *Apatu v Apatu* HC Napier CIV 2009-441-515, 19 December 2011, at [21].

44 *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166) at [26].

45 Mr Hope relies on the commentary in Dal Pont, G.E. & Chalmers, D.R.C., *Equity & Trusts in Australia and New Zealand*, LBC Information Services 1996 at page 696.

What legal principles apply?

[119] The type of constructive trust argued by Mr Hope is also known as recipient liability. Recipient liability arises when a third-party stranger has knowingly received trust property and dealt with it inconsistently with the trust.[46]

[120] Recipient liability was considered by the Court of Appeal in *Westpac Banking Corporation v Savin.*[47] In that case, Aqua Marine (Christchurch) Limited, sold boats on behalf of various owners. The sale proceeds were banked into Aqua Marine's trading account with Westpac, which was heavily overdrawn. Westpac benefitted from the reduction in debt owed by Aqua Marine. Aqua Marine subsequently went into liquidation and the owners of the boats never received the sale proceeds. They sued arguing, amongst other things, that Westpac received the sale proceeds on constructive trust. Richardson J found that Aqua Marine were acting as agent for the owners and was not entitled to pay the sale proceeds into their trading account, and certainly not one overdrawn. On the claim of constructive trust, the Court held:[48]

> In a case such as the present what must be established is that the bank had actual or constructive knowledge (i) that the money it received was the property of the plaintiffs and (ii) that the payment of those moneys into the overdrawn account of Aqua Marine was a breach of fiduciary duty on that company's part.

[121] Richardson J found that Westpac had the requisite knowledge and received the money on constructive trust.

[122] There has been some debate over how to identify the type of knowledge required to found recipient liability. In *Baden v Societe Generale pour Favorise le Developpement du Commerce et de l'Industrie en France SA*,[49] Gibson J identified five categories or types of knowledge:

(a) Actual knowledge;

(b) Knowledge that is obtainable but for "shutting one's eyes" to the obvious;

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46 Andrew Butler (ed), *Equity and Trusts in New Zealand*, (2nd ed, Brookers, Wellington, 2009) at [13.4.4].
47 *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 (CA).
48 Ibid at 52.
49 *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161 at 235-236,248.

(c) Knowledge that is obtainable but for wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;

(d) Knowledge of circumstances that would indicate the facts to an honest and reasonable person; and

(e) Knowledge that is obtainable for inquiries that an honest and reasonable person would feel obliged to make, having been put on notice as a result of his or her knowledge of suspicious circumstances.

[123] Categories (a) to (c) above are generally accepted. The main debate is whether categories (d) or (e) will suffice to establish recipient liability.[50]

[124] In *Powell v Thompson*, Thomas J preferred to decide the issue on the basis of principles of equity. He considered the requisite knowledge is:[51]

> …knowledge of the trust attaching to the property received by the third party in circumstances where he or she asserts a right to the property contrary to the interest of the beneficiary or otherwise acts in a way which is inconsistent with the trust. In deciding whether or not the defendant's enrichment is unjust, a court of equity will then have regard to all the circumstances relating to the transfer of the trust property. Its determination will depend not just on the defendant's knowledge, but on all the circumstances including, no doubt, factors relating to the deprivation suffered by the innocent plaintiff.

[125] Thomas J determined that it is enough for the plaintiff to be able to say, that if the defendant did not know, then he or she ought to have known.[52]

[126] In *Equiticorp Industries Group Ltd (in stat man) v R,* Smellie J also referred to the modern approach of placing weight on principles of equity. Smellie J found that:[53]

> …the Crown either wilfully shut its eyes to the obvious, and if not that, then certainly wilfully and recklessly failed to make the inquiries that a reasonable and honest commercial party would (should) have made in all the circumstances.

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50 Andrew Butler, *Equity and Trusts in New Zealand*, (2nd ed, Brookers, Wellington 2009) at [13.4.4]; *Powell v Thompson* [1991] 1 NZLR 597 (HC); *Equiticorp Industries Group Ltd (in stat man) v R* [1996] 3 NZLR 685.

51 *Powell v Thompson* [1991] 1 NZLR 597 (HC) at 608.

52 Ibid at 608, 610.

53 *Equiticorp Industries Group Ltd (in stat man) v R* [1996] 3 NZLR 586 (HC) at 605.

[127] I agree with the approach in *Powell* and *Equiticorp* that when considering this issue, the Court should have regard to general principles of equity rather than attempting to lay down a strict formulaic approach. Equity after all is founded on a flexible body of legal principles reflecting doctrines of good conscience and fairness. It is not necessary in this case to resolve whether categories (d) and (e) in *Baden* should be adopted, as this case falls squarely within one of categories (a) to (c).

[128] I have already found that the trustees paid the funds to Mrs Martin in breach of trust. To establish recipient liability, it must be shown that Mrs Martin had actual or constructive knowledge that:

(a) The funds were trust property; and

(b) The payment of those funds was in breach of trust.

[129] Mrs Martin knew the funds in this case were trust property. That is not in dispute. The question is whether she had actual or constructive knowledge that the funds were paid to her in breach of trust.

Did Mrs Martin have constructive knowledge?

[130] I found that the trustees breached their obligations concerning the payments to Mrs Martin as:

(a) The arrangement engaging her to prepare the feasibility study was not in writing;

(b) There was no justification or explanation for the fee charged;

(c) Mr Katipa voted in favour of the payments to his sister;

(d) The study was not produced and there is little if any evidence of benefit received, or justification for paying Mrs Martin to complete the three milestones in the study;

(e) The trustees failed to keep and render accounts concerning these payments; and

(f) The trustees failed to protect the trust assets.

[131] Mrs Martin had personal knowledge of each of these. She knew the arrangement was not recorded in a written agreement. Mrs Martin herself was unable to properly explain or justify the basis of her fee. In her second affidavit, Mrs Martin states she attended the trustee meetings where the payments to her were approved. As such, she would have known that her brother voted in support of those payments.

[132] Mrs Martin did not produce the feasibility study. She says the MFG and MHG applications were completed but did not obtain copies of those from the bodies who received them. She also states Te Kauhanganui relied on her feasibility study concerning its Marae Facilities Upgrades Programme, but once again did not obtain a copy from them.

[133] Mrs Martin knew the trustees did not need to pay someone to complete the MFG application. In her own words staff helped to complete the application and "there is no such thing as an unsuccessful application".[54]

[134] Mrs Martin was paid for consultation with persons as far away as Ruatoki and Whakatane. This was not necessary as the requisite expertise was available at Hiiona Marae. Mrs Martin's own brother did not know about this. It is not clear whether any of the first respondents knew.

[135] Mrs Martin's own 2015 quarterly report to the trustees indicates the access issue was not resolved.

[136] Mrs Martin was present when the briefcase was handed to Mr and Mrs Tata and when they handed it back. She is also aware of the repeated requests from the applicants (both before and during this proceeding) seeking the accounts and financial records concerning the payments to her.

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54 Affidavit of Tania Martin sworn 18 April 2017, at [18].

[137] Even on the most favourable evidence to the respondents, the trustees paid funds to Mrs Martin in excess of what was "approved". Mrs Martin knew this as she requested the payments, and received them into her own account.

[138] Mr Hockly contends that Mrs Martin had no knowledge of the breach of trust as:

(a) She has never been a trustee for Hiiona Marae; and

(b) To the best of her knowledge, she considered the trustees were complying with the charter and their duties.

[139] I do not accept this argument. It is not necessary to show that Mrs Martin knew the particular legal obligations owed by the trustees and that those obligations were breached. She had knowledge of the various facts which gave rise to the breach of trust. As noted in *Baden* and *Equiticorp*, she either wilfully shut her eyes to the obvious, or if not that, then she wilfully and recklessly failed to make the inquiries that a reasonable and honest person would have made in all the circumstances.

[140] I find that Mrs Martin had constructive knowledge that the funds were paid to her in breach of trust.

Did Mrs Martin have actual knowledge?

[141] I consider Mrs Martin had actual knowledge that the funds were paid to her in breach of trust. In particular, she took active steps to try and hide the payments made, to conceal what had occurred.

[142] Financial statements for the Marae were filed for the years ending 31 December 2005 to 2009, and for the 2010 year up to 31 July 2010 ("the Nixon accounts"). Accompanying these statements is a letter from "S.Nixon" who, according to the letter, is a chartered accountant. I do not consider the Nixon accounts are accurate, legitimate, or that they were prepared by a chartered accountant.

[143] Firstly, the accounts only record income and expenses. There is no description of the trust, no statement of assets and liabilities, no depreciation schedule, and no statement of

accounting policies, all of which one would normally expect to find in properly prepared financial statements.

[144] Secondly, no evidence was presented as to who S Nixon is, whether she is a chartered accountant, or which firm she worked for.

[145] The Nixon accounts also fail to disclose the full amount of funds actually paid to Mrs Martin:

(a) The statement for the year ending 31 December 2008 records that Mrs Martin was paid $1,300 during that period. She was actually paid $21,771.65.

(b) The statement for the year ending 31 December 2009 records that Mrs Martin was not paid any funds during that period. She was actually paid $12,243.00.

(c) The statement for the year 1 January 2010 to 31 July 2010 again records that Mrs Martin was not paid any funds during that period. She was actually paid $1,360.00.

[146] The cover letter to the accounts state:

> In preparing the accounts unknown deposits in 2007, 08, 09, 10 and missing receipts for 2005, 07 limited an ability to analyse and present accordingly.

[147] This only refers to unknown deposits, not unknown payments. The missing receipts do not relate to the relevant period in this case of 2008 to 2010.

[148] This is not a case where there was a simple typographical error, or where one or two transactions may have been overlooked. 53 electronic payments were made into Mrs Martin's bank account. Every payment is clearly recorded in the bank statements for the Marae account. These payments total $37,803.34. It is inconceivable to suggest that a chartered accountant would miss all of these payments, and instead only record a payment of $1,300.00. This is particularly so given this was not raised in the cover letter accompanying the accounts.

[149] Ms Nixon's identity was raised during the course of the hearing. Mr Katipa and Mr Kara said they do not know S Nixon, they do not recall the first respondents ever engaging S Nixon, and they had never seen those accounts. I had the following exchange with Mr Hockly:[55]

> **A Hope:** Your Honour that doesn't quite answer my question, I was wanting to know whether Mr Hockly knows who this S Nixon is, and whether his client Tania Martin knows, because if we're suddenly produced with a record or a person, or a photo, or an email or something when Tania Martin gives evidence, that in my view would be improper because it should have been put now.
>
> **The Court:** Mr Hockly perhaps I'll just ask you squarely, will you be presenting evidence from your side as to who Cynthia Nickson is?
>
> **C Hockly:** Sylvia Nixon Sir.
>
> **The Court:** Sylvia Nixon.
>
> **C Hockly:** The evidence already before the Court indicates that Tania Martin says it was Sylvia Nixon, and it's completely in line with that for Mrs Martin to say that it was Sylvia Nixon.
>
> **The Court:** Okay, so that's the evidence that you're relying on in terms on the questions that you are putting to Mrs Tata?
>
> **C Hockly:** At this stage yes Sir.
>
> **The Court:** At this stage you are not intending to call Mrs Nixon to give evidence?
>
> **C Hockly:** Ms Nixon, I'm not sure she's available at all Sir my instructions and I don't want to give evidence from the bar is that she is no longer a practising accountant.
>
> **The Court:** Okay. Well perhaps to ensure if that is the basis of the question to ensure that it is properly put to Mrs Tata, you may need to put to her that Mrs Martin will give evidence that Sylvia Nixon is a chartered accountant who prepared the accounts. That may address the issue that Mr Hope is raising.
>
> **A Hope:** Yes.
>
> **C Hockly:** Thank you Sir. I put it to you Ms Tata that Mrs Martin will present evidence and state that the author of this document is Sylvia Nixon.
>
> **A Tata:** Yes sorry.

[150] In cross-examination, Mr Hope repeatedly asked Mrs Martin if she knew who S Nixon was. Mrs Martin repeatedly said she did not. I asked Mrs Martin the same question and she provided a different answer:[56]

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55 140 Waikato Maniapoto MB 298-456 (140 WMN 298-456) at 440 – 441.
56 150 Waikato Maniapoto MB 1-106 (150 WMN 1-106) at 12.

> **The Court:** So we have the cover letter there and there's the full accounts, I think that are in exhibit 3, but your evidence yesterday was that you don't know Sylvia Nixon and you didn't engage her?
>
> **T Martin:** I didn't her and I denied doing this report, yes.
>
> **The Court:** But do you know her?
>
> **T Martin:** I think by email I know Sylvia. I'm not sure that the same… well, actually, I think that might be the same Sylvia Judge. I'm not sure, but that's why I did actually refer that matter to the trustees because they were responsible for engaging. All I did is having worked with Phillip Child and knowing him as the accountant, I referred Vazey Child to them. I think Sylvia came along. I know that under Kim she probably was part of the MBFS Programme with Te Puni Kōkiri, one of Kim's clients, and she would've or the trustees would've asked her. All I know is I just did that part because she was referred to the trustees by Kim who's my boss, was.
>
> **The Court:** Because if you look at the cover letter there, the third paragraph down it states, "A full audit report is still in progress with the Vazey Child Accountants and I have instructed Tania Martin as to the information required."
>
> **T Martin:** By email yes and that email is in here. However, she was putting those accounts together, as I think trustees do Your Honour, just putting them together. This is for this et cetera, et cetera, and then it was just going to get the sign-off I guess from Vazey Child, which is the explanation given to me, because that's sort of been a bit of a thorn since we seen it in August 2013 when we got Nathan Whanga's affidavit.
>
> **The Court:** So you did have dealings with Sylvia Nixon over those accounts and you were aware of what she was saying there that they were to go to Vazey Child Accountants?
>
> **T Martin:** I think that was the plan that the trustees had, certainly the plan that I thought we'd have because the more work that you do in preparation for accountants or in preparation for an audit, that would lessen the amount. And then I think, although I'm not too sure Judge, that she ended up being the less expensive alternative. And those actually sufficed I think when they were presented back to the beneficiaries when the trustees presented them back.

[151] In addition to these inconsistencies, there is a body of objective evidence, which links Mrs Martin to the preparation of these accounts.

[152] Minutes have been filed of a trustee meeting held on 25 July 2010. Under the heading "Finance Report" the minutes record there was a lengthy discussion and a number of questions were put to Mrs Martin concerning the expenditure of the funds from the one-off grant. The minutes record as follows:

> Audit report is still work in progress, but T. Martin explained that the need for this report to cover the last 3 years is necessary, if only to re-address ongoing queries

> regarding the $50,000.00 one-off grant the marae received in late 2006. NOTE: There will be a cost attached to purchasing this report.
>
> **ACTION:** *Meeting demanded that T. Martin present Audit Report at the next meeting*.

[153] Attached to these minutes is a document titled "RESPONSE DOCUMENT TO QUERIES MADE AT OUR LAST MEETING Sunday 25th of July 2010 Prepared by Tania Martin". Under the heading "Audit Report" it states:

> I've organised for us to have an audit report done by the next Trustees meeting.

[154] The Nixon accounts were then prepared as noted above. The cover letter to those accounts is dated 26 August 2010. This is one month after the meeting where there was a demand for Mrs Martin to produce the accounts.

[155] The cover letter to the accounts further states:

> A full audit report is still in progress with Vazey Child Accountants and I have instructed Tania Martin as to the information required for them to report your financial position accurately for your building project proposal.

[156] Mr Hope wrote to Vazey Child Accountants inquiring about this comment. Tricia Hunt responded by letter dated 7 June 2017 on behalf of Vazey Child. She states:

(a) Vazey Child has never carried out work for Hiiona Marae;

(b) Vazey Child have never undertaken any auditing work for any organisation as they are not qualified to do work of this nature;

(c) Vazey Child have never employed a S Nixon or Sylvia Nixon in any capacity; and

(d) Ms Hunt spoke with the directors of Vazey Child and they are not aware of anyone by the name of S Nixon or Sylvia Nixon who may work in the accounting industry.

[157] The statement in the cover letter to the Nixon accounts that a full audit was in progress with Vazey Child Accountants is clearly false and misleading.

[158] Mrs Tata said she attended the next trustee hui following the meeting on 25 July 2010. She said the Nixon accounts were produced at that meeting. Mr Tata was then elected as an incoming trustee in August 2010. Mrs Martin and Edward Whaanga met with Mr and Mrs Tata at their house on 11 September 2010 where they handed over the briefcase. On 13 September 2010, Mrs Tata sent an email to Mrs Martin which states:[57]

> Tamati has asked that I contact companies that we still have dealings with i.e. our accountants, power, insurance and architects to make them aware of our change in executive committee so that all correspondence can through our inwards to table at meetings.
>
> So I will proceed to do this as soon as I can.
>
> I am not really sure who S Nixon is for our annual accounts but I am sure it will be in minutes when we get to go through these.

[159] Mrs Martin sent the following response to Mrs Tata on the same day:[58]

> Our annual accounts have been done, and the Trustees will get the receipt for payment as soon as I get it. You need not worry about writing a letter to Sylvia, as she's not likely to do anything more for the marae. Remember, we've been waiting for the trustees to decide on our project, and through Sylvia, I enlisted Vazey Child Accountants. Look them up on the internet. I know one of the partners, Phil, who I've worked with through the company I work for in Hamilton – Stratigi Ltd.

[160] Mrs Martin disputes the accuracy of the minutes for the meeting on 25 July 2010. In closing submissions, Mr Hockly contends Mrs Martin was referring to Sylvia Pikari, not Sylvia Nixon, in her correspondence. Mrs Martin filed copies of email correspondence with Ms Pikari to support this. I don't accept this argument.

[161] The emails filed by Mrs Martin show Ms Pikari sent Mrs Martin an engagement letter on 25 October 2010. Mrs Martin responded the same day asking if "…we could still engage your services…".[59] This is two months after the Nixon accounts had been prepared. This is also one month after Mrs Martin had emailed Mrs Tata advising the accounts "have been done". The email correspondence between Ms Pikari and Mrs Martin does not refer to an audit by Vazey Child Accountants which is referred to in both the cover letter to the Nixon accounts and Mrs Martin's email to Mrs Tata.

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57 Affidavit of Nathan Whaanga, sworn 2 August 2013, Exhibit E.
58 Ibid.
59 Affidavit of Tania Martin sworn 28 October 2015, exhibit A.

[162] The deception does not end there. The applicants also filed a finance report for the month ending August 2010. This report lists various payments made from trust funds for that month. This includes the following two entries:

(a) S.Nixon – Accountant – Annual Accounts: 03/08/10 - $950.00.

(b) Bains Liquid and Disposal – Sump Clean: 06/08/10 - $478.69.

[163] The bank statements show that on 3 August 2010, $950.00 was paid from trust funds into Mrs Martin's bank account. On 06 August 2010, $478.69 was paid from trust funds into Mrs Martin's bank account. There are no other payments of trust funds, on those dates, for those amounts.

[164] The Bain account was not paid by Mrs Martin. The applicants paid the Bain account by cheque on 17 August 2011. Mrs Tata has filed email correspondence with Bain Liquid confirming this. Mrs Martin argued the payment of $950.00 into her account was not to pay the costs for preparing the Nixon accounts, but rather was payment to her for work she undertook for the Marae. There is no objective evidence to support this. Mrs Martin could not explain what the $478.69 payment into her account was for.

[165] Mrs Martin denied that she prepared the August finance report. She and the other active respondents contend this would have been prepared by the secretary, who was not called to give evidence. Despite that, the minutes for the trustee meeting on 21 November 2010 state:[60]

> Tania presented the finance report for August at the meeting at Te Kauwhata on the 11th of September.

[166] Mrs Tata confirmed that Mrs Martin did present the August finance report at the meeting at her house. I accept her evidence. This is consistent with the minutes and the sequence of events as noted above. As such, even if Mrs Martin did not prepare the August finance report (and I still have doubts about that) she nevertheless was aware of it, and relied on it when presenting it to the incoming trustees.

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60 Exhibit 1.

[167] Viewing this evidence as a whole, I make the following findings. Mrs Martin received significant payments of trust funds into her account between 2008 and 2010. It seems that over this period these payments largely went unchecked. At the trustees meeting on 25 July 2010, a large number of people attended. Mrs Martin was questioned about the one-off grant, and those in attendance demanded that Mrs Martin present audited financial statements, accounting for the use of those funds.

[168] One month later, the Nixon accounts were prepared. The cover letter to those accounts said that a full audit report was in progress with Vazey Child Accountants. That was not true. The cover letter also said Mrs Martin was providing the information for the audit. Those accounts recorded that Mrs Martin was paid $1,300.00 when she had actually been paid $37,803.34.

[169] In August 2010, an election was held and Mr Tata was elected as a trustee. Mr and Mrs Tata then met with Mrs Martin and Edward Whaanga for the handover. Two days after that meeting, Mrs Tata, on behalf of her husband, wrote to Mrs Martin, inquiring about S Nixon. Mrs Martin responded that through Sylvia she enlisted Vazey Child, which, once again, was not true. Mrs Martin also tried to discourage Mrs Tata from contacting Sylvia. One month later, Mrs Martin attempted to engage Sylvia Pikari to prepare accounts for the Marae.

[170] There is no evidence that Sylvia Nixon exists or that she is a chartered accountant. The two trustees who gave evidence did not know her and had never seen those accounts. Mrs Martin repeatedly told Mr Hope she did not know S Nixon then told me that she did know her by email.

[171] I find that Mrs Martin manufactured the Nixon accounts, and the cover letter, in a deliberate attempt to try and conceal the amount of trust funds that had been paid to her. She did this in response to increasing pressure from beneficiaries, and the incoming trustees, who were seeking financial records accounting for the expenditure of those funds. Mrs Martin then had the trustees pay funds to her to meet Ms Nixon's costs. In reality, Mrs Martin was paying herself for accounts she fabricated in order to conceal the other payments made to her. Mrs Martin knew the funds had been paid to her in breach of trust and she was trying to hide that.

[172] I find that Mrs Martin had actual knowledge the funds were paid to her in breach of trust.

Should I hold Mrs Martin jointly and severally liable with the first respondents?

[173] The action in recipient liability is made out. Despite that, I still have a discretion as to whether Mrs Martin should be held liable to repay those funds along with the first respondents.

[174] I take into account that some of the funds paid to Mrs Martin may have been legitimate. For example, if a working bee was held, and Mrs Martin did pay for costs associated with the working bee, she was entitled to be reimbursed. As such, it could be argued that holding her liable to repay the full amount is inequitable. The difficulty is there is no way to determine what costs were legitimate and what were not.

[175] It is also clear some of the payments were not legitimate. Mrs Martin was paid $950.00 for manufacturing the Nixon accounts. She was also paid for the Bain invoice even though this account was not cleared until a year later and then by a separate payment. The fact that the 53 payments into her account were often for round figures, occurred frequently, and usually when Mrs Martin was low on funds, that her mother was able to transfer funds by telephone on her own, and that her mother did not give evidence, heightens my suspicion that other payments were not legitimate either.

[176] I also consider that Mrs Martin's conduct disentitles her to any relief from this Court. She has shown a strident and defiant attitude throughout this proceeding. She denied all accusations but filed no objective evidence to support her position. She refused to comply with my order for discovery, lied to Court staff about the location of the records, and intentionally manufactured documents to conceal the payments made to her. Her evidence has been evasive and inconsistent with earlier statements. Mrs Martin must be held responsible for her actions and will be held liable to repay those funds along with the first respondents.

[177] Given Mrs Martin's deception, I did consider whether this may excuse the first respondents for failing to protect the trust assets. That is, if Mrs Martin tried to deceive beneficiaries, incoming trustees, and the Court, she may have deceived the first respondents too. I do not accept that proposition. Even if that had occurred, there were 53 transfers into Mrs Martin's account over a period of three years. Any trustee who reviewed the bank statements over that period would have quickly discovered what was happening. The first respondents failed to take steps to protect the trust assets and are now required to account to the trust along with Mrs Martin.

Should I appoint Mr Kara, Mr Katipa and Mrs Martin as trustees?

[178] In *Clarke v Karaitiana* the Court of Appeal found that, when appointing trustees, the Court would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of an election. Despite that, the Court is not bound to appoint the leading candidates resulting from an election. A candidate who has strong support from the owners might be regarded as unsuitable through lack of ability, experience and knowledge or for other reasons.[61]

[179] Mr Kara, Mr Katipa and Mrs Martin were elected as trustees at the AGM on 3 January 2015. The applicants have not challenged the process or outcome of that election. I am satisfied that they are broadly acceptable to the beneficiaries as demonstrated by the outcome of the election.

[180] Despite that, I am not satisfied that Mr Kara, Mr Katipa and Mrs Martin are suitable for appointment as trustees. I have already found that Mr Kara and Mr Katipa breached their obligations as trustees on this very trust causing a loss of trust funds. Their evidence demonstrates that they fail to understand the most basic obligations of trustees such as acting prudently when using trust funds, protecting trust assets and keeping and rendering accounts.

[181] Mrs Martin charged the Marae a significant amount of funds to undertake the feasibility study. She was unable to justify her fee. She was unable to demonstrate the work she carried out was necessary, or that it resulted in any benefit to the trust. The evidence shows that at least some of the payments to her account were not legitimate. She also took

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61 *Clarke v Karaitiana* [2011] NZCA 154 at [52].

active steps to try and conceal the payments. While she was not a responsible trustee at the time of those actions, her conduct demonstrates that she lacks the ability, honesty, integrity and judgement required to be a trustee.

[182] I have also held Mr Katipa, Mr Kara and Mrs Martin jointly and severally liable (along with the other first respondents) for the loss suffered. Until those funds are repaid, Mr Katipa, Mr Kara and Mrs Martin are debtors to the trust. It is not appropriate to appoint debtors as trustees.

Decision

[183] The first respondents, as trustees of Hiiona Marae, breached their obligations by engaging Mrs Martin to undertake the feasibility study.

[184] The first respondents failed to keep and render proper accounts, and failed to protect trust funds, concerning the payments made to Mrs Martin between 2008 and 2010.

[185] The first respondents are jointly and severally liable for the loss caused to the trust as a result of those breaches.

[186] Mrs Martin is also jointly and severally liable, along with the first respondents, for this loss.

[187] Mr Kara, Mr Katipa and Mrs Martin are not suitable for appointment as trustees. I decline to appoint them to that office.

[188] I grant an order per ss 37(3), 236, 237 and 238 requiring the first and second respondents to pay to the Waiwhakaata 3E4C Lot 2A Māori reservation, also known as Hiiona Marae, the sum of $37,803.34 (thirty-seven thousand, eight hundred and three dollars and thirty-four cents).

[189] Mr Hope seeks costs. Both sides have been granted aid from the Māori Land Court Special Aid fund. I issue the following directions:

(a) Mr Hope is to file and serve submissions on costs within three weeks;

(b) Mr Hockly is to file and serve submissions on costs three weeks thereafter; and

(c) Mr Hope is to file and serve submissions in reply (if any) two weeks thereafter.

[190] The submissions on costs will need to address that both sides have been granted aid, as well as the conventional principles concerning costs. I will then decide costs on the papers.

Pronounced at am in Whangārei on Friday this 19th day of October 2018.

M P Armstrong
JUDGE