

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O AOTEA**

*In the Māori Land Court of New Zealand
Aotea District*

A20170004318

WĀHANGA
Under

Section 67, Te Ture Whenua Māori Act 1993
Section 131, Trusts Act 2019

MŌ TE TAKE
In the matter of

Lot 1 DP 17494 Part Section 2345 New Plymouth
(Old Railway Station) and Other Blocks

I WAENGA I A
Between

DEPUTY REGISTRAR
Te kaitono
Applicant

ME
And

PETER MOEAHU, PERRY CASSIDY, KRISTIN
KATU, WILLIAM NICHOLAS, JACK
CASSIDY, LINDA McCULLOCH, RITA
RUKUWAI, ALLAN TITO, HAYDYN TE RUKI
AND WILLIAM HEALEY
Ngā kaiurupare
Respondents

Nohoanga: 21 March 2023, 465 Aotea MB 4
Hearing (Heard at Whanganui via AVL)

Kanohi kitea: L Watson for applicant
Appearances

Whakataunga: 8 June 2023
Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ A H C WARREN
Judgment of Judge A H C Warren



*Utua te kino i te pai***Hei tīmatanga***Introduction*

[1] Mr Keenan was convicted of theft from the Ngāti Te Whiti Whenua Tōpū Trust (the trust) of almost half a million dollars, taken during the period he was the trust's Chief Executive Officer (CEO).¹

[2] Judge Harvey (as he then was) granted the now former trustees of the trust relief from liability per s 131 of the Trusts Act 2019, in relation to the financial losses caused by Mr Keenan's theft. Judge Harvey reserved his decision on three separate but related liability and relief issues, subject to receiving further submissions.

[3] The outstanding issues are:

- a) Whether the former trustees should refund the fees they received in the period when Mr Keenan undertook the theft of trust funds (the meeting fees).
- b) Whether the former trustees are liable for the final payment made to Mr Keenan in lieu of notice when his employment as CEO was terminated (the payment in lieu); and
- c) The interpretation of clause 7 of the Trust Order, whether the former trustees should be removed, and whether any period of ineligibility to re-stand as trustees should be instated (the trustee removal issue).

[4] For the reasons set out in detail below, I have found that there is no breach of trust justifying the repayment of the meeting fees. I have however, found that there was a breach of trust in respect of the payment in lieu, but I grant relief against liability in respect of that breach in full for all former trustees.

¹ *Deputy Registrar v Moeahu – Lot 1 DP 17494 Part Section 2345 New Plymouth (Old Railway Station)* (2021) 437 Aotea MB 3 (437 AOT 3) at [1].

[5] There will be no further order removing the former trustees and no period of ineligibility for the former trustees to re-stand as responsible trustees.

Te Horopaki

Context

[6] As a result of Mr Keenan's offending, various applications were filed and addressed by Judge Harvey including an application for judicial conference, for review of trust, to enforce obligations of trust, for removal of trustees and for trustees to restore lost trust funds.

[7] All applications were determined by Judge Harvey, in a decision dated 10 September 2021 at 437 Aotea MB 3-47 (the Decision), save for the three outstanding issues.²

[8] After the Decision was released and before any further submissions were filed on the three outstanding issues, Judge Harvey was appointed to the High Court of New Zealand. That appointment meant that the three outstanding issues were left to be determined.

[9] In the Decision, Judge Harvey made the following orders and directions:³

[138] The application for relief from liability for the trust funds lost as a result of the theft of Shaun Keenan is granted.

[139] The former trustees are invited to file submissions within one month from the date of this judgment as to whether they should refund the trustees' fees they received during the period when Mr Keenan undertook the theft of trust funds and whether they are liable to refund the trust for the final payment in lieu of notice made to Mr Keenan when his employment was terminated. Once in receipt of any submissions, then further directions or orders may be issued.

[140] The former trustees and any trust beneficiary is invited to file a submission on the interpretation of cl 7 of the trust order regarding the ineligibility or otherwise of former trustees to stand for re-election where their circumstances fall within the terms of cl 7. Once in receipt of any submissions, further directions or orders may be issued.

[141] If the Court's preliminary interpretation of cl 7 is affirmed, following receipt of any submissions, then any former trustee or trust beneficiary may file a submission on whether any former trustee should be required to serve a period of ineligibility for re-appointment.

² *Deputy Registrar v Moeahu*, above n 1.

³ At [138]-[141].

[10] There were justifiable delays in the filing of the further submissions as directed by Judge Harvey.⁴ Nonetheless a hearing was convened via Zoom on Tuesday 21 March 2023. Mr Watson appeared on behalf of former and current trustees (by consent) and addressed the Court on his written submissions dated 20 March 2023 covering all three outstanding issues.

[11] Mr Watson also filed further submissions after the hearing, dated 11 April 2023.

[12] By direction at 465 Aotea MB 4 on 14 April 2023, I confirmed that I did not need to hear any further submissions on the meeting fees and payment in lieu issues and that a written decision would be issued. I directed however, that I would receive further submissions from interested parties on the trustee removal issue.

[13] After that direction I received the following further submissions:

- a) Email submissions/replies from Peter Capper dated 22 and 24 April 2023;
- b) Email submission/reply from Peter Moeahu dated 23 April 2023; and
- c) Email submission from Siobhan Lynch dated 25 April 2025.

[14] I note for completeness that the submission by Ms Lynch addresses the meeting fees and payment in lieu issues as well.

[15] After reviewing these submissions, I decided to address all three outstanding issues in one judgment, primarily to bring closure to these proceedings.

What is to be determined here?

[16] It was not immediately clear to me, in reviewing the Decision and the relevant applications, how I was required to address the two extant liability and relief issues. Were they specific liability issues or part of the relief against liability application, yet to be determined?

⁴ 462 Aotea MB 221 (462 AOT 221) regarding the impact of Cyclone Gabrielle.

[17] I sought clarification on this issue from Mr Watson via a s 67 judicial conference on 18 May 2023 and he confirmed that the former trustees were ultimately seeking a s 131 order in respect of both outstanding issues, but it was not accepted that there was a breach of trust in respect of these issues.

[18] On that basis, I firstly need to determine whether there is a breach of trust that would justify an order that the trustees are to repay the meeting fees and the payment in lieu (in full or part). In determining any breach of trust, I will need to rely heavily on the findings made in the Decision. This is because Judge Harvey heard and weighed the relevant evidence. I have only heard supplementary legal submissions.

[19] Upon review of the Decision and the submissions filed by Mr Watson, there are two factual matters that were not fully determined by Judge Harvey, that I find are relevant to whether there has been a breach of trust with respect to the payment in lieu. Firstly, whether the former trustees did receive specific legal advice before making the payment and secondly, whether the payment was provided for in the contract between the CEO and the former trustees. I address these two issues later in this judgement.

[20] If I conclude that there is no breach of trust giving rise to personal liability on both issues, then that is the end of the matter. I will not need to make any orders for relief per s 131 of the Trusts Act 2019. However, if I find that there are breaches giving rise to personal liability claims, then I will determine whether relief from personal liability should be granted in part or in full per s 131 of the Trusts Act 2019.

[21] In doing that, I must come to my own views about whether further relief orders should be made. That said, the findings about the former trustees made by Judge Harvey in the Decision will be very persuasive, especially the finding that the former trustees acted honestly and reasonably with respect to the loss of trust funds because of the fraud. It would be difficult to come to a different view on this point, given that the factual matrix is effectively the same. But the overriding discretion as to relief remains.



A Māori Context

[22] Quite apart from the legal trust context, there is also a strong and distinct Māori context here.

[23] The law, at times demands retribution and punishment (for good reason). Tikanga invariably demands ea (also for good reason). These two outcomes may not always align. I am clearly dealing with a Māori context here, where; mana, mamae, whakamā, whanaungatanga, and whenua Māori are all in the mix. This is clear in the Decision and in the submissions filed.

[24] It is a context where significant steps have already been taken to reach a state of ea in very difficult circumstances. As submitted by Mr Watson, it is a context where tikanga principles are relevant. I agree.

The main arguments for the former trustees

[25] The former trustees reject any breach of trust and thus personal liability in respect of the two outstanding liability and relief issues, and seek orders for relief on three principal grounds:⁵

- a) The Decision does not demonstrate findings of trustee culpability that would justify a financial penalty. The former trustees did not stand to personally gain or seek to improperly benefit from their office.
- b) The payment of trustee fees was authorised by the trust order and was not excessive. Furthermore, the trustee fees had been disclosed in the financial accounts and reported to beneficiaries at the regular hui. As such, the refunding of trustee fees would be a penalty not appropriately connected to a finding of breach.
- c) The Decision found that the former trustees have already suffered reputational harm and other considerable personal impacts arising from the

⁵ Mr Watson, Additional Submissions on behalf of Trustees, dated 20 March 2023.

actions of Mr Keenan. Furthermore, the Court has held in a public decision that had the former trustees not resigned, they would have been removed for cause. These impacts have imposed sufficient and proportionate sanctions and penalties on the former trustees.

What did Judge Harvey say?

[26] In the Decision, Judge Harvey noted:⁶

In summary, my conclusion is that the former trustees should be granted relief from liability, as set out above, for the trust funds stolen by Mr Keenan, but as to their own costs at the time when they clearly were not fulfilling their duties to the extent a prudent trustee may have done, then there is an argument that they should refund to the trust the fees they received during the relevant period of Mr Keenan's fraud.

[27] Although His Honour's preliminary comments were subject to further submissions, and now my determination, they leave a strong impression that the former trustees were not fulfilling their duties to the required standard and that some form of repayment or penalty was justified. Whether that impression amounts to a breach of trust is what I now need to determine.

Ngā Ture *The Law*

[28] Per ss 23-27 of the Trusts Act 2019, all trustees have mandatory duties.⁷ Per ss 29-38 of the Trusts Act 2019, the default duties must be performed unless modified or excluded via s 5(4) and (5) of the Trusts Act 2019.⁸ There are no obvious modifications or exclusions in the Trust Order here. Therefore, all default duties apply.

[29] Section 223 of Te Ture Whenua Māori Act 1993 (the Act), provides the following:

223 General functions of responsible trustees

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

⁶ *Deputy Registrar v Moeahu*, above n 1 at [123].

⁷ The mandatory trustee duties are: to know the terms of the trust, to act in accordance with the terms of trust, to act honestly and in good faith, to act for the benefit of the beneficiaries and to exercise powers for proper purpose.

⁸ The default trustee duties include: a general duty of care, to invest prudently, to avoid conflicts of interest, not to profit from role, and to be impartial.

AHCW

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

[30] With respect to the law relevant to a relief against liability order, I adopt the relevant legal principles as set out in the Decision:⁹

[97] Section 131 of the Trusts Act 2019 provides:

131 Court may relieve trustee from personal liability

(1) The court may relieve a trustee who is or may be personally liable for any breach of trust from personal liability for the breach if it appears to the court that—

- (a) the trustee has acted honestly and reasonably; and
 - (b) the trustee ought fairly to be excused for the breach of trust.
- (2) The court may relieve the trustee in whole or in part.

[98] This provision replaces the former s 73 of the Trustee Act 1956, which similarly provided that relief could be granted to a trustee who acted honestly and reasonably and who ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court. An important decision concerning the application of s 73 is *Wong v Burt*, where the Court of Appeal stated:

[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.

[99] For the trustees to claim relief, they must establish all the elements contained in s 131 of the Trusts Act 2019. The onus is on the trustees and, while the Court has a wide discretion to grant relief and the extent of any such relief, that remedy is not given lightly.

[31] For completeness, I also add the following points:

[32] In terms of s 131(1)(a) of the Trusts Act 2019, reasonableness is always a question of fact. To that end, no rules have been laid down by the superior courts, but decided cases give an indication of how any application is likely to be regarded.¹⁰

⁹ *Deputy Registrar v Moeahu*, above n 1 at [97]-[98]. Footnotes omitted.

¹⁰ Lindsay Breach, *Nevill's Law of Trusts, Wills and Administration* (14th ed, Wellington, 2023) at 374.

AHCW

[33] Relief may only be granted in respect of breaches of trust that have occurred.

[34] In terms of honest and reasonable conduct the Court of Appeal held assessment of a trustee's honesty contains both subjective and objective elements.¹¹ The subjective element concerns what the trustees knew about their terms of trust and whether they knew that the impugned conduct amounted to a breach of trust. The objective element requires an assessment of whether, considering what the trustees knew, did they act in a way an honest person would in the circumstances.

[35] In making an assessment, it must be remembered that acting with honesty and sincerity is not the same as acting with prudence and reasonableness. Both must be apparent before the court will grant relief.¹²

[36] With respect to the question of whether trustees ought fairly to be excused from personal liability, the courts have laid down that a trustee must show reasons why they should be excused.¹³

[37] Mr Watson has drawn my attention to several authorities.¹⁴ These authorities provide examples of how this Court has approached similar issues. Acknowledging that I have a broad discretion here, these authorities are helpful and provide considerable guidance.

[38] Mr Watson also relies on tikanga principles to illuminate the impact of Mr Keenan's hara on so many, by drawing on the Supreme Court decision in *Ellis*.¹⁵

[39] With that legal framework in mind, I now address the two outstanding liability and relief issues.

¹¹ *Spencer v Spencer* [2013] NZCA 449 at [131].

¹² *Greenwood v Simpson* [2018] NZHC 845.

¹³ Breach, above n 10 at 375.

¹⁴ *Taueki v Procter – Horowhenua 11 (Lake Block)* (2021) 437 Aotea MB 86; *Taueki v Procter – Horowhenua 11 (Lake Block)* (2020) 415 Aotea MB 1; *Tupe Snr v Everton – Manunui No 1 4th Residue Ahu Whenua Trust* (2015) 334 Aotea MB 227; *Ratima v Sullivan – Tatarakaia C* (2019) 79 Takitimu MB 103.

¹⁵ *Ellis v R* [2022] NZSC114.

Was there a breach of trust justifying the repayment of the meeting fees?

[40] There is no obvious link between the former trustees receiving meeting fees and the theft of trust funds.

[41] The issue seems to be whether the performance issues as found by Mr Webster and supported to some extent by Judge Harvey amounts to a breach of trust,¹⁶ and if it does, does the breach justify an order that the former trustees should personally repay the meeting fees they received during the period of the fraud.

[42] This must be right, given that there was no finding that the former trustees received trustee fees of more than what was reasonable. The finding of Judge Harvey that this was not a situation where “fees and expenses have been taken that were excessive or without authority or both” underscores this.¹⁷

[43] I agree with Mr Watson that the Decision does not demonstrate findings of trustee culpability that would justify a financial penalty in the form of repaying meeting fees. I also agree that the former trustees did not stand to personally gain or seek to improperly benefit from their office.

[44] His Honour found that there was no evidence that the former trustees colluded with Mr Keenan, or were involved in any wrongdoing of a criminal nature.¹⁸ Judge Harvey agreed with Mr Webster that had the 2014 accounts been audited earlier, that would not necessarily have detected or prevented Mr Keenan’s fraud.¹⁹ That does not excuse any poor monitoring by the former trustees, but it is a significant factor in assessing any breach of duty and a subsequent relief claim.

[45] Further, the evidence is clear that the former trustees held regular beneficiary hui and AGMs, at which financial reports were tabled and discussed with beneficiaries. Importantly there has been no owner resolution that the former trustees should repay the meeting fees. Only three individual beneficiaries made submissions in these proceedings seeking

¹⁶ 437 Aotea MB 41 (437 AOT 41).

¹⁷ At [73]-[74].

¹⁸ *Deputy Registrar v Moeahu*, above n 1 at [25].

¹⁹ At [118].

repayment and other relief. Significantly, in their most recent submissions, Ms Lynch and Mr Capper are not seeking repayment of the meeting fees, nor are the current trustees.

[46] I therefore agree with Mr Watson that criticism of the trustees' performance in this period needs to be balanced with the finding made by Judge Harvey that the trustees had "acted honestly". That finding is very relevant as it relates to whether the former trustees were exercising reasonable care and skill, as is required by s 29 of the Trusts Act 2019.

[47] Although there was fair criticism of the former trustees' performance as noted by Mr Webster and Judge Harvey, the performance was not so poor, in the circumstances, to justify a finding that the former trustees breached any of their mandatory or default duties. If there was, then these findings would have been made by Judge Harvey with respect to the loss of trust funds due to the fraud. He made no such finding.

[48] Even if I found that there was a breach of duty and thus personal liability here, I would be prepared to grant relief per s 131 of the Trusts Act 2019 for the same reasons given by Judge Harvey and as submitted by Mr Watson.

[49] Because I find that there is no breach of trustee duty identified in the Decision or through my own assessment, there is no need to consider an order granting relief per s 131 of the Trusts Act 2019. Save to say, such an order would be justified. I address this further at the end of this judgment.

Was there a breach of trust by making the payment in lieu?

[50] The evidence before Judge Harvey disclosed that the trustees had resolved, by majority, to pay Mr Keenan four weeks' salary in lieu of notice when his contract as CEO was terminated.²⁰ The making of this payment is not disputed.

[51] That payment in lieu was \$8,846.00.²¹

²⁰ *Deputy Registrar v Moeahu*, above n 1 at [139].

²¹ Mr Watson, Additional Submissions on behalf of Trustees (No. 2), dated 11 April 2023 at [6.3].

[52] In further submissions, Mr Watson confirmed that the decision to make the payment in lieu was made at a meeting of trustees on 18 December 2016. Three former trustees supported the decision, and one did not.²²

[53] Naturally, there is a greater link between Mr Keenan's fraud and the payment in lieu because some financial irregularities were discovered by the former trustees before the decision was made to make the payment. The payment in lieu was made about five months after the former trustees first became aware of 'red flags' with the trust's financials. That said, I agree with Mr Watson that the context of the payment is important. Mr Watson makes the following points.

- a) The former trustees had discovered irregularities in the trust expenditure and had put these to Mr Keenan for a response. Mr Keenan was at that time a highly trusted member of the community and of their whānau.
- b) The former trustees were not aware at that stage of the quantum of the loss, nor that the loss had been a result of a deliberate and fraudulent scheme to steal money from the trust. All of that came out later because of the BDO audit and the police investigation.
- c) To secure the trust's position and obtain full access to all the documentation and financial systems, the trustees determined to remove Mr Keenan from his role. In so doing, it appears that the trustees considered the risk of further legal exposure if they summarily dismissed Mr Keenan from his position. In that context, most of the former trustees resolved to make a severance payment equivalent to four weeks' pay.

[54] Mr Watson was not able to obtain any further evidence as to whether this payment in lieu decision was supported by independent legal advice or not. That said, he advised that the evidence discloses that the trust had access to, and relied on, legal advice in relation to other matters.²³ It is clear to me that the former trustees did not get legal advice before making this payment, if they did, then that fact would have been easy to confirm.

²² Additional Submissions (No. 2), above n 17 at [4].

²³ 423 Aotea MB 124 (423 AOT 124).

[55] Mr Watson argues that, regardless of the position on legal advice, the former trustees should not be liable for repayment of the payment in lieu, because the primary and appropriate remedy is to obtain repayment from Mr Keenan himself. This is because:²⁴

- a) The extent of Mr Keenan's breach of contract is now known and has been proven through his criminal convictions.
- b) Mr Keenan by way of criminal sanction has been required to agree to a reparations scheme to the trust and this is ongoing.
- c) The trust is undertaking an assessment of its legal options to recover funds stolen.

[56] Mr Watson goes further and suggests that it is not clear whether legal advice would have changed the position about the lack of knowledge of the offending and that the advice may have been, that a termination payment would reduce the overall risk.²⁵ Although this is speculation, it is not without merit.

[57] I am also advised that there is an agreement with the former trustees dated 6 May 2017 where Mr Keenan was required to repay \$220,000.00 to the trust. I also note that the High Court made a reparation order of \$75,000.00 and that Mr Keenan has paid \$25,850.00 as of 30 March 2023.²⁶

[58] There was debate during the proceedings before Judge Harvey about the status of Mr Keenan's contractual arrangements with the trust. The debate was about whether he was an independent contractor at law or an employee. Judge Harvey did not resolve this issue.

[59] The lack of clarity on this issue suggests to me that the former trustees were not clear themselves what the actual legal position was, with respect to Mr Keenan's status. Mr Watson took the view that Mr Keenan was an independent contractor. I do not necessarily

²⁴ Additional Submissions (No. 2), above n 17 at [8]-[10.4].

²⁵ Additional Submissions (No. 2), above n 17 at [7].

²⁶ Ministry of Justice Reparation Payment Statement attached to Additional Submissions (No. 2), above n 17 as at 30 March 2023.

agree with his assessment, but that disagreement is not material to my final decision, so I take it no further.

[60] Mr Watson advised that there was an agreement between the former trustees and Mr Keenan, but that there was no explicit clause allowing the former trustees to make the payment in lieu. It follows that they made the payment of their own motion, without legal advice and with the knowledge that there were some 'red flags' about the trust's financials.

[61] Given these facts, the specific question is whether the making the payment in lieu was a breach of trust.

[62] There is no express duty that a trustee must get legal advice before acting. There are many instances where trustees do not need legal advice and even when they do get advice, it does not always mean that they will be excused from liability. For example, there would be no need for legal advice, if the contract provided an express clause that a severance payment could be made in lieu of notice. That was not the position here.

[63] There, is however a default duty of care and a mandatory duty to act in the best interests of the beneficiaries as codified in the Trusts Act 2019. More specifically, per s 29 of the Trusts Act 2019, a trustee must exercise the care and skill that is reasonable in the circumstances, having regard to any special knowledge or experience that the trustees have.

[64] In the context I have described above, a prudent trustee should have sought legal advice. Once the red flags were raised, the former trustees were on notice, for some five months, regardless of whether any blame could be apportioned to Mr Keenan or not. It was clear not all was well. Even lay trustees should have been on high alert, that any decisions about using trust money in an employment context should have been checked off by an independent expert. The fact that one of the former trustees did not agree to the payment should have further alerted the majority that legal advice was probably necessary.

[65] I would expect a trustee exercising reasonable skill and care in this context, to get legal advice. The fact that they did not, in my assessment, falls short of their duty of care. That said, I do not consider this failure as a serious breach of trust, that was blatant or with some degree of reckless disregard, but it was nonetheless a breach. As Mr Watson submits,



it is likely that the legal advice would have been consistent with what the trustees' decided, coupled with the fact that the value of the payment was modest, places the breach into its proper context.

[66] The former trustee who did not agree to the decision to make the payment, is in a different category, given that per s 227(6) of the Act this trustee would be absolved from any personal liability arising out of the implementation of the decision to make the payment in lieu.

Should the trustees be granted relief?

[67] Having found that there was a breach of trust, I now turn to consider whether I am prepared to grant an order per s 131 of the Trusts Act 2019.

[68] The breach was more than technical, but as noted, it was not a serious breach. Further, Judge Harvey has already found that the former trustees acted honestly and reasonably in the wider circumstances. A finding that led him to conclude, that an order granting relief against personal liability in respect of the loss of trust funds, because of the fraud, was justified. That is a significant finding, because it relates to the loss of a significant amount of trust funds and is at the heart of the proceedings before the Court. Here, the quantum of the payment in lieu was modest in comparison.

[69] Subjectively, the former trustees did not know that their decision to make the payment in lieu, without legal advice, would be a breach of trust. For example, there is no evidence that the former trustee who voted against making the payment, did so on the basis that legal advice was not requested. Objectively, given that the clear motivation for the payment was an attempt to protect the interests of the trust and not their own interests, I find that these former trustees, acted in a manner, that an honest person would in these circumstances. Circumstances that include a strong Māori context, where they were trying to do the right thing. That is, their actions and motivations were reasonable and tika in this context.

[70] On the question of whether the former trustees ought fairly to be excused from personal liability, I find that former trustees have shown good reason why they should be

excused including, the fact that reparation payments have been ordered and are being made by Mr Keenan. In that sense, even if the legal advice was that a severance payment should not have been made, repayment of what was paid to Mr Keenan, has now been recovered.

[71] Importantly, no beneficiary is seeking the former trustees to repay the payment in lieu. Important, because in the Māori world, the views of the people matter, whether they are beneficiaries or part of the wider Ngāti Te Whiti community. I am further influenced by the state of balance that time has allowed to be achieved, for this community. Making an order for repayment, even for a modest amount, as would be the case here, would not serve this Māori community well. At tikanga, I have no doubt that the former trustees have and will continue to feel the effects of Mr Keenan's actions and will continue to reflect on what they could have done better. The Court does not, in these circumstances, need to add to these effects.

[72] I acknowledge that the former trustees have already suffered reputational harm and other considerable personal impacts arising from Mr Keenan's offending. The mana of these former trustees has been significantly dented and no doubt that of their whānau. The former trustees have expressed their deep and enduring sadness, hurt and disappointment at the impact of Mr Keenan's offending on Ngāti Te Whiti descendants, and the kaupapa to build the marae.²⁷ This remorse has all been undertaken in a very public way through the Court system and through the media. Judge Harvey held that this experience has had an immeasurable impact on the trustees.²⁸ Through the submissions of counsel, I too sensed that impact.

[73] For all those reasons, I am satisfied that the elements of s 131 of the Trusts Act 2019 have been met and I grant all former trustees relief against liability in respect of the payment in lieu.

The trustee removal

[74] This issue is not a relief against liability issue, but rather a separate liability issue that requires a different analysis.

²⁷ At [65].

²⁸ At [126]-[127].

[75] An order removing the former trustees is a moot point, given that all trustees resigned, and replacement trustee orders have already been made per s 239 of the Act. There is no basis for me to revisit those orders. The point was settled by Judge Harvey:²⁹

My conclusion is that there was sufficient evidence before the Court at the time of the resignations to justify the removal of the trustees for cause per s 240 of the Act. As set out below, I also consider that, despite such a finding, the matter of whether they could be re-elected and then reappointed would be a question for a future meeting of trust beneficiaries to consider in due course, now possessed of all the relevant facts surrounding the Keenan fraud. Put another way, while I find that, unless they had resigned, they would have been removed, that in itself will not preclude the former trustees from standing for reelection.

[76] That leads to discussion about the applicability of clause 7 of the Trust Order which states in part:

(b) Trustee may be censured or removed

Any Trustee that acts in a manner that brings or is likely to bring into disrepute the Trust may, by resolution passed by a majority of not less than 75% of the other Trustees, be formally censured or be made the subject of an application to the Court for removal from office.

(c) Censure or removal to be notified

The censure or application for removal of a Trustee in accordance with this Trust Order shall, together with reasons, be reported to the beneficial owners of the Trust at the next Annual General Meeting of the Trust following such censure or removal.

(d) Effect of Removal

A Trustee removed from office in accordance with an application under Order 7(b) shall not be entitled to be re-elected as a Trustee for a period of not less than six (6) years following his or her removal.

[77] Judge Harvey came to the following preliminary view:³⁰

In accordance with the conclusions reached above, I decline to impose a term of ineligibility for re-appointment. If, however, following the receipt of submissions from the former trustees and any trust beneficiary, my preliminary view changes, then further directions will be issued on the point. In summary, if any party persuades the Court that the preliminary interpretation of cl 7 above is incorrect and cl 7(d) comes into effect, the result will be the ineligibility by operation of the trust order for any former trustee to be re-elected for six years. Alternatively, if, having received submissions, my preliminary view is affirmed, then any trust beneficiary may file a further submission on the issue of ineligibility for appointment. It should go without saying that the former trustees are entitled to file a further submission on this issue if they wish.

²⁹ At [130].

³⁰ At [133].

AHCW

[78] Mr Watson, Ms Lynch, and Mr Capper filed submissions as directed. Only the first two addressed the interpretation of clause 7.³¹ Both agreed that clause 7 is not applicable and I agree.³²

[79] Clause 7 only applies when there has been an order removing trustees by the Court. That has not occurred here, as noted above.

[80] That said, I agree with Mr Watson that the Court retains a discretion whether to impose a period of ineligibility for re-appointment. That discretion draws from the Court's wide supervisory powers over Māori land trusts.

[81] I therefore confirm that clause 7 of the Trust Order is not applicable. However, the question remains, whether I should exercise my discretion and impose a period of ineligibility.

[82] Only Ms Lynch seeks an order that the former trustees will be ineligible to stand for re-election for a period of six years. Mr Capper, the former and current trustees, do not seek such an order.

[83] The former trustees resigned prior to March 2020. None of them have sought re-appointment to date. That means they have, as Mr Watson submits, implemented a self-imposed non-appointment period since that time.³³

[84] I am satisfied that this self-imposed approach is sufficient, and a Court imposed order will add nothing constructive to the sense of balance that currently exists. I will not make such an order and will leave it to the Court to assess any future application in the normal manner. I assess that such an outcome is consistent with the principles of the Act, including the protection of rangatiratanga. That is, not only the rangatiratanga of the former trustees, but also respecting the will of the beneficiaries.

³¹ I have not taken into account much of the submissions filed by Mr Capper, which focussed on a personal attack on one of the former trustees. This is despite my direction to focus solely on the issues at hand.

³² Mr Watson, Additional Submissions on behalf of Trustees, dated 20 March 2023, above n 5. The removal of trustees clause was not applicable where trustees have resigned.

³³ Additional Submissions on behalf of Trustees, dated 20 March 2023, above n 5 at [36].

Ngā Ōtā
Orders

[85] To avoid all doubt, I have decided to make a comprehensive final order per s 131 of the Trusts Act 2019. This order will grant all former trustees of the trust relief against liability relating to the fraud by Mr Keenan in all respects, including, in relation to any meeting fees received by the former trustees during the period of Mr Keenan's offending, and for the payment in lieu made to Mr Keenan.

[86] This order sits alongside the order already made by Judge Harvey at 437 Aotea MB 3 granting these same former trustees, relief against liability in respect of the trust funds lost because of Mr Keenan's fraud. Together, these orders seek to give these former trustees full relief from personal liability in terms of Mr Keenan's fraud.

[87] I make no order imposing a period of ineligibility for the former trustees to re-stand as responsible trustees of the trust.

[88] There will be no order of costs given the nature of these proceedings and the fact that Mr Watson was granted Special Aid.

[89] That ends all applications before the Court relating to the fraud of Mr Keenan. There are no other claims that I need to determine with respect to the former trustees.

[90] In closing, I acknowledge the work of Mr Webster, Ms Lockett, Mr Watson, and those interested parties who have assisted the Court to this point. Finally, I acknowledge the wider Ngāti Te Whiti whānau and trust that with this decision, focus can now turn to the rebuilding of trust and faith in each other and the kaupapa of your marae.

I whakapuaki i te 2:00 pm I Whanganui, i te rā 8th o ngā rā o Pipiri i te tau 2023

Mauri ora



AHC Warren
KAIWHAKAWĀ