IN THE SUPREME COURT OF NEW ZEALAND

SC 95/2013
[2015] NZSC 68

BETWEEN	PIRIHIRA FENWICK, WIREMU KINGI AND HIWINUI HEKE Appellants
AND	JILLIAN NAERA, KEREAMA PENE, ANAHA MOREHU, WARWICK MOREHU AND ERIC HODGE First Respondents
	TAI ERU Second Respondent

Hearing:	18 November 2014
Court:	McGrath, William Young, Glazebrook, O'Regan and Blanchard JJ
Counsel:	D G Hurd and J F Anderson for Appellants F E Geiringer and M I de Villiers for First Respondents No appearance for Second Respondent
Judgment:	20 May 2015

JUDGMENT OF THE COURT

A **The appeal is allowed in part and the matter remitted to the Maori Land Court to decide on the conflicts and on the consequences of a breach of s 227A of the Te Ture Whenua Maori Act 1993 in light of this judgment.**

B **The reasonable costs and disbursements of the first respondents are to be paid by the Whakapoungakau 24 Ahu Whenua Trust (the Tikitere Trust).**

C **The question of costs in the Maori Land Court, the Maori Appellate Court and the Court of Appeal should (if an application is made) be considered by those Courts in light of this judgment.**

REASONS

McGrath, Glazebrook, O'Regan and Blanchard JJ [1]
William Young J 0

McGRATH, GLAZEBROOK, O'REGAN AND BLANCHARD JJ
(Given by Glazebrook J)

Table of Contents

Introduction

[1] This appeal concerns alleged conflicts of interest in relation to a joint venture. The joint venture agreement (and related royalty and option agreements)[1] were entered into by the Whakapoungakau 24 Ahu Whenua Trust, commonly referred to as the Tikitere Trust, with two other Maori trusts (the Paehinahina Mourea Trust[2] and the Manupirua Ahu Whenua Trust) and with a company owned by the Tikitere Trust, Tikitere Geothermal Power Co Ltd (Tikitere Geothermal).

[2] The Court of Appeal held that two of the five trustees of the Tikitere Trust should not have participated in discussions and voting on the above joint venture arrangements because of interests in, and links with, the other trust parties to the joint venture.[3] The Court held that the remedy for such a breach is rescission (the setting aside of the transaction).[4] However, as that remedy is not available where the interests of innocent third parties are affected, the Court remitted the matter to the Maori Land Court for further evidence and consideration on that issue.[5]

[3] On 19 May 2014, this Court granted leave to appeal to the Trustees (the appellants) against the Court of Appeal's findings on the conflict of interest issue.[6] The Court refused leave to appeal by the Beneficiaries (the first respondents) on other issues.[7]

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1 In this judgment we refer to the joint venture agreement and the related royalty and share option agreements as the joint venture arrangements.

2 This is the shortened name of the trust used in the joint venture agreements, with its full name being the Paehinahina Mourea 1 and Tikitere A (Aggregated) Ahu Whenua Trust. For simplicity, and like the parties, we will refer to the trust as the "Paehinahina Mourea Trust".

3 See *Naera v Fenwick* [2013] NZCA 353 (Arnold, Stevens and White JJ) [*Naera* (CA)] at [93]. The allegation that a third trustee was disqualified from voting was not upheld.

4 At [94]–[103].

5 At [104].

6 *Naera v Fenwick* [2014] NZSC 58 [*Naera* (SC Leave)]. In this judgment on the substantive appeal we call the appellants "the Trustees" and the first respondents, "the Beneficiaries".

7 See below at 0 for a fuller description of the Court's leave decision.

Relevant statutory and trust provisions

[4] The Tikitere Trust was set up as an ahu whenua trust under, and governed by, the Te Ture Whenua Maori Act 1993 ("the Act"). Section 227A of the Act deals with conflicts of interest:

> **227A Interested trustees**
>
> (1) A person is not disqualified from being elected or from holding office as a trustee because of that person's employment as a servant or officer of the trust, or interest or concern in any contract made by the trust.
>
> (2) A trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects that person's remuneration or the terms of that person's employment as a servant or officer of the trust, or that directly or indirectly affects any contract in which that person may be interested or concerned other than as a trustee of another trust.

The wording of s 227A is incorporated into the Tikitere Trust Order under cl 4:

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

Section 227 of the Act provides that trustees may act by majority:

> **227 Trustees may act by majority**
>
> (1) Subject to any express provision in the trust order and except as provided in subsections (2) and (3), in any case where there are 3 or more responsible trustees of a trust constituted under this Part, a majority of the trustees shall have sufficient authority to exercise any powers conferred on the trustees.
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> …
>
> (6) Where any trustee dissents in writing from the majority decision of the trustees before the decision is implemented, that trustee shall be

> absolved from any personal liability arising out of the implementation of that decision.

More detailed background

Tikitere Trust

According to the Maori Land Court's records,[8] Whakapoungakau 24 (held by the Tikitere Trust) is a block of Maori freehold land 32.0923 hectares in area. It was created by partition order on 15 December 2003. As at 27 August 2009, there were 1,222 owners in the land holding 83.63567 shares.[9]

The objects of the trust are contained in cl 2 of the trust order, which states:

> **2 Objects**
>
> Except as hereinafter may be limited the objects of the Trust shall be to provide for the use management and alienation of the land to best advantage of the beneficial owners or the better habitation or use by beneficial owners, to ensure the retention of the land for the present Māori beneficial owners and their successors, to make provision for any special needs of the owners as a family group or groups, and to represent the beneficial owners on all matters relating to the land and to the use and enjoyment of the facilities associated therewith.

Clause 3(a) of the trust order allows the trustees, in furtherance of the objects of the trust, to do all or any of the things they would be entitled to do as absolute owners of the land, apart from alienating the whole or any part of the fee simple by gift or sale.[10] Clause 3(b) provides more specific powers including the power to develop and improve the trust lands and to effect improvements.[11]

Amendments to the trust order were allowed by the Maori Land Court on 3 September 2004 and 4 December 2006.[12] The following sub-clauses were added, respectively:

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8 See *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiaraki MB 279 (15 WAR 279) [*Naera* (MLC)] at [16].

9 The Maori Land Online register, as of 12 May 2015, records that there are currently 1,377 beneficial owners.

10 There are exceptions for land exchanges and Public Works Act 1981 acquisitions.

11 Clause 3(b)(iii).

12 See *Naera* (MLC), above n 8, at [25]–[28] and [65]–[75].

(a) Clause 3(b)(xvi) grants the power to "develop the area to support the Geothermal Tourism Park concept".

(b) Clause 3(b)(xviii) grants the power to "join with others and to undertake and form companies and enter into joint ventures with other Maori Authorities sited over the same field to investigate the possibility of establishing a Geothermal Power Station and to take advantage of the findings".

The trustees of the Tikitere Trust

The Trustees at the relevant time were Hiwinui Heke, Pirihira Fenwick, Tai Eru (or Morehu), Winnie Emery and Wiremu Kingi. They voted unanimously in favour of the joint venture arrangements.

The alleged conflicts at the time the trustees entered into the transaction were as follows:

(a) Mrs Fenwick owned 1.57991 shares in the Tikitere Trust out of a total of 83.63567 shares (approximately 1.89 per cent). She was a trustee of the Paehinahina Mourea Trust and her family owned at least 20 per cent of the shares in that trust. She personally owned 93,187.322 out of 1,977,351 shares in the Paehinahina Mourea Trust (approximately 4.71 per cent).

(b) A whanau trust in which Mr Eru was both a trustee and beneficiary held 0.0964 shares in the Tikitere Trust (approximately 0.12 per cent) and 894.9 shares in the Paehinahina Mourea Trust (approximately 0.045 per cent).[13] Mr Eru was also a trustee of the Manupirua Ahu Whenua Trust.[14]

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13 We are not aware of the extent of his beneficial interest in the whanau trust or the extent of the interests of his close relatives in that trust.

14 It is unclear whether Mr Eru was also a beneficiary of the Tikitere Trust and the Paehinahina Mourea Trust in his personal capacity. For example, see *Naera* (MLC), above n 8, at [155] where Judge Harvey appears to suggest that he was. However, there was no mention of these interests by the Court of Appeal.

(c) Mrs Emery's husband was a trustee of the Paehinahina Mourea Trust.[15]

Tikitere Geothermal

Tikitere Geothermal was incorporated on 7 July 2004 and the shares were wholly held on behalf of the Tikitere Trust. At the time of the Maori Land Court decision, the directors were Messrs Gray and Kingi. Mr Eru was a director from 19 March 2009 but had resigned prior to the Maori Land Court decision. The shareholders of the company, as at the date of the Maori Land Court hearing, were Messrs Eru, Heke and Kingi, along with Mrs Fenwick, in their capacity as trustees of the Tikitere Trust.

The other trust parties

The Paehinahina Mourea Trust owns and manages the Paehinahina Mourea 1 and Tikitere A (Aggregated) block ("the Paehinahina Mourea block") which is 869.828 hectares and has some 4997 beneficial owners.[16] The Manupirua Ahu Whenua Trust owns and manages the Manupirua block which is only 0.3237 hectares and has some 2559 beneficial owners.[17]

The land and the geothermal resource

The Manupirua block, the Paehinahina Mourea block and the Whakapoungakau 24 block are situated north of State Highway 30, just northeast of Rotorua above the Tikitere Geothermal Resource, which is expressed on the earth's surface through features such as steaming ground, boiling springs and vigorous steam and gas discharges.[18]

The Whakapoungakau 24 block abuts State Highway 30 and contains the "Hells Gate" geothermal resource and attraction. The Paehinahina Mourea block partially

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15 The Maori Land Court judgment does not indicate that she or her husband were beneficiaries of any of the trusts involved. We thus proceed on the assumption that they were not.

16 As at 12 May 2015.

17 As at 12 May 2015.

18 Stephen Michener, an investment consultant, in an affidavit dated 2 February 2010 stated that "[t]he boundary of the Tikitere geothermal field is not known with certainty. Nor is there certainty on the distribution of the geothermal fluid or its heat and accessibility".

envelops the Whakapoungakau 24 block and occupies a large part of the land between State Highway 30 and Lake Rotoiti. On the south shore of Lake Rotoiti, and also partially surrounded by the Paehinahina Mourea block, is the Manupirua block. Although small, this block of land contains the Manupirua hot springs – a geothermal resource and attraction only accessible by boat.

Mr Gray, Chief Executive of the Tikitere Trust and Project Manager, stated in his affidavit of 13 November 2009, that "[t]he Tikitere resource is extensive. That part of the resource which is beneath the lands of the [Tikitere Trust] and its adjoining trusts is predominantly under land owned by the [Paehinahina Mourea Trust]". In his affidavit, Mr Gray also said that "[t]he proposed power station will be built not on [Tikitere Trust's] land, but on [Paehinahina Mourea Trust's] land."[19]

Joint venture agreement

The Tikitere Project Agreement was entered into on 5 November 2008 for the development of the Tikitere Geothermal Resource. The term of the agreement is 52 years. There are four parties to the Tikitere Project Agreement: the Tikitere Trust, the Paehinahina Mourea Trust, the Manupirua Ahu Whenua Trust and Tikitere Geothermal.

Under the agreement, Tikitere Geothermal is granted the exclusive right to investigate and, if feasible, develop and exploit by means of a power station the geothermal resource on or under the land of the trusts.

The trusts agreed to grant easements, licenses, leases and all other rights of access required to carry out the project. Under cl 12.2, in consideration for this exclusive right, Tikitere Geothermal is obliged to pay rent to the three trusts in accordance with

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[19] The beneficiaries of the Tikitere Trust, at every stage, have argued that the Court needs to consider the conflicts of Mr Gray, and another advisor to the Tikitere Trust, Bruce Carswell (an energy specialist). However, given that leave was only granted with regards to the trustees' alleged conflicts of interests, this issue is outside of the scope of this appeal.

Schedule 4. This Schedule provides that, for each hectare of "affected land",[20] the trust whose land is affected is to be paid a set amount per hectare per annum.

Other agreements

In addition to the joint venture agreement, there were also option and royalty agreements with the two other trusts.[21]

Under the "Option and Royalty Agreement" between the Paehinahina Mourea Trust, Tikitere Geothermal and the Tikitere Trust, Tikitere Geothermal agreed to grant to the Paehinahina Mourea Trust an option to subscribe for ordinary shares in Tikitere Geothermal for nominal consideration[22] or, if the share option was not exercised, to receive substantial upfront fees and royalty payments.

The second relevant agreement is another "Option and Royalty Agreement" under which the Manupirua Ahu Whenua Trust had the option of subscribing for shares in Tikitere Geothermal or obtaining royalties. The level of royalties was lower than under the Paehinahina Mourea Trust's agreement.[23]

The number of shares available under the share options varied depending on whether one or both trusts exercised the share option. At the hearing of the appeal, Mr Hurd, counsel for the Trustees, confirmed that the Manupirua Ahu Whenua Trust opted for the royalty option and thus does not have a shareholding in Tikitere Geothermal.[24] The Paehinahina Mourea Trust opted to exercise its share option and its trustees now

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20 "Affected land" is defined in sch 4 of the agreement as "every part of the Land subject to any Improvements including (but not limited to) all Land utilised for wellheads, pipeline corridors ... any geothermal power station and its associated Facilities, transmissions line corridors ... and road or other access ways to Facilities of any kind".

21 There was also a third option and royalty agreement between Tikitere Geothermal and Green Energy Ltd. Green Energy Ltd was given a management role in the project, but as Mr Hurd, counsel for the Trustees, confirmed at the hearing, the management arrangements with Green Energy Ltd have been terminated and the option has been surrendered: see *Naera v Fenwick* [2014] NZSC Trans 24 [*Naera* (SC Transcript)] at 12.

22 We understand that the nominal consideration was one dollar for all the shares to be purchased, payable on exercise of the option. This was confirmed at the hearing: see *Naera* (SC Transcript), above n 21, at 13 and 36.

23 Counsel for the Trustees, Mr Hurd, at the hearing clarified that, under the Manupirua Ahu Whenua Trust's option and royalty agreement, there were to be no upfront fees: see *Naera* (SC Transcript), above n 21, at 37.

24 At 11 and 37.

have a 65 per cent shareholding in Tikitere Geothermal,[25] with the trustees for the Tikitere Trust holding the other 35 per cent.

Meetings

After the joint venture arrangements were entered into, the Maori Land Court directed a meeting of owners (beneficiaries). This was convened on 6 December 2009.[26] It was well attended and a quorum was achieved. At the meeting a presentation was made by the trustees of the Tikitere Trust and their advisers regarding the Tikitere Project Agreement. Following discussion, a resolution was put to the owners present for consideration – "that the meeting of shareholders [beneficiaries] approves the continuation of the Tikitere Geothermal Group".[27] The resolution was lost 39 votes to 89.

Procedural history

Maori Land Court

Seven of the beneficiaries of the Tikitere Trust objected to the actions of the trustees in entering into the joint venture arrangements. They brought proceedings in the Maori Land Court,[28] objecting to the trustees' actions on a number of grounds, including that the trustees had no power to enter into the joint venture arrangements[29] and that three of the trustees (Mrs Fenwick, Mr Eru[30] and Mrs Emery[31]) had failed to protect the interests of the Tikitere Trust and the beneficial owners of that trust by allowing their personal interests to conflict with

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25 At 42. This percentage seems higher than provided for under the original terms of the relevant Option and Royalty Agreement. We understand there have been some amendments to the agreements since they were entered into.

26 There were other meetings and these are detailed in the Maori Land Court's judgment: see *Naera* (MLC), above n 8, at [21]–[23].

27 As was noted by Judge Harvey in the Maori Land Court, while this resolution was not worded as precisely as it could have been, the intent of the resolution was clear enough: see *Naera* (MLC), above n 8, at [24].

28 In the Maori Land Court, the applicant beneficiaries were Jillian Naera, Eric Hodge, Warwick Morehu, Anaha Morehu, Bunny Ormsby, Kurangaituku Farrell and Kereama Pene: see *Naera* (MLC), above n 8.

29 At [4].

30 Mr Eru formally raised concerns about the joint venture arrangements in June 2009. He did not support the position of the trustees before the Maori Land Court. We understand that he has maintained that position throughout the proceedings but he filed no submissions in this Court.

31 Mrs Emery died on 21 June 2010 (before the Maori Land Court judgment, discussed below, was released).

their duties. All three allegedly conflicted trustees had participated in the decision making process and voted in favour of the joint venture arrangements.

In the Maori Land Court, the seven beneficiaries sought the removal of the then current trustees and the calling of a meeting of beneficial owners to elect replacements. They also sought a review of the trust and argued that an interim injunction, granted on 31 August 2009,[32] restraining the trustees from making decisions or taking any steps in relation to the geothermal power project and other matters should remain in force until the new trustees had a proper opportunity to take advice and consider their position as to the joint venture.

The beneficiaries were unsuccessful in the Maori Land Court. The Court held that the Trustees had the power to enter into the agreement under the terms of the trust order.[33]

On the alleged conflicts of interest, the Court considered the positions of three of the five trustees of the Tikitere Trust:[34] Mrs Fenwick, Mr Eru and Mrs Emery:

(a) As to Mrs Fenwick, Judge Harvey said that because decisions can be made by majority under s 227 of the Act, Mrs Fenwick should have absented herself from the meetings and decisions.[35] However, he went on to hold that "it is also evident that her vote either way was immaterial to the actual decision, given the unanimous support of her colleagues".[36] Judge Harvey also said that he did not accept the suggestion that Mrs Fenwick's conduct was driven by personal financial considerations.[37] While there might be an appearance of conflict, Judge Harvey was not persuaded that such an appearance rendered the decision to enter into the agreement "nugatory".[38]

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32 *Naera v Fenwick – Whakapoungakau 24* (2009) 344 Rotorua MB 115.
33 *Naera* (MLC), above n 8, at [111].
34 See at [16] where the five trustees of the Tikitere Trust are identified.
35 At [146] and [148].
36 At [148].
37 At [149] and [151].
38 See at [145]–[154].

(b) Judge Harvey said that, in light of Mr Eru's connections to more than one trust, "conflicts will be presumed". But he added that what mattered more was how conflicts are managed and whether the trustee participated in a decision that directly concerns his or her interest.[39]

(c) As to the late Mrs Emery, Judge Harvey said that, while the fact that her husband was a trustee of another party to the joint venture (the Paehinahina Mourea Trust) gave rise to the presumption of a potential conflict or at least the appearance of one, there was no real risk of an actual conflict arising.[40] From a practical perspective, given the power to decide by majority under s 227 of the Act, neither Mrs Emery nor her husband's votes were determinative as to their respective trust's decisions.[41]

The Court said that, while the trustees "did not adhere strictly to the trust order and general trust law principles from time to time", those breaches were insufficient to warrant their removal.[42]

Maori Appellate Court

Four of the beneficiaries[43] unsuccessfully appealed to the Maori Appellate Court.[44] With regard to the conflict of interest issue, the Maori Appellate Court agreed with Judge Harvey and said that, "even without the involvement of the 'conflicted' trustees, the same decision would have been reached".[45]

Court of Appeal

Five of the beneficiaries[46] appealed against the Maori Appellate Court decision to the Court of Appeal. The issues dealt with by the Court of Appeal were whether cl 3 of the trust order empowered the trustees to enter into the agreement without reference

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39 At [163].
40 At [142].
41 At [143].
42 At [230].
43 Jillian Naera, Anaha Morehu, Warrick Morehu and Eric Hodge.
44 *Naera v Fenwick – Whakapoungakau 24* (2011) Maori Appellate Court MB 316 (2011 APPEAL 316) [*Naera* (MAC)].
45 At [71].
46 Jillian Naera, Kereama Pene, Anaha Morehu, Warrick Morehu and Eric Hodge.

to the beneficial owners or the Court, whether the variations of the trust order complied with s 244 of the Act,[47] whether the trustees were required to consult with the beneficial owners prior to entering into the agreement, whether the trustees' conflicts of interest invalidated the agreement and finally whether the trustees should have been removed.[48]

As to the interpretive issues, the Court said that cl 3 permitted the trustees to enter into the agreement.[49] With regard to the variations of the trust order, the Court of Appeal held that the beneficiaries were outside of the time frame in which a challenge to a variation order could be brought, and, in any event, the variations were not needed by the trustees in order to enter into the joint venture arrangements.[50] As to the consultation issue, the Court said that, while it would have been best to keep the beneficial owners informed, there was nothing in the trust order, the Act or the common law that required consultation with beneficial owners.[51] The Court upheld Judge Harvey's refusal to remove the trustees as it was not satisfied that the Judge's conclusion was plainly wrong.[52]

On the conflicts of interest, the Court of Appeal held that trustees of Maori land are under the same obligations as other trustees, subject to any modification in the trust order or under the Act.[53] At common law, trustees have a clear obligation of single-minded loyalty.[54] It is sufficient to show that the trustee has placed him or herself in a position of potential conflict to show a breach of this duty.[55] This is because fiduciary doctrine is prophylactic in nature. Without the informed consent of all beneficiaries or the Court, any resulting transaction will be voidable regardless of the fairness or otherwise of that transaction.[56] The honesty or otherwise of the fiduciary is irrelevant.[57]

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47 The variations are discussed above at 0.
48 *Naera* (CA), above n 3, at [5].
49 Clause 3 is discussed above at 0 and 0.
50 *Naera* (CA), above n 3, at [47].
51 At [52].
52 See at [114]–[118].
53 At [85] and [86].
54 At [87].
55 At [87].
56 At [90].
57 At [90].

The Court considered that, while s 227A of the Act relaxes the application of the common law position on conflicts of interest, it is clear that conflicted individuals are not permitted to participate in decision making that has a direct impact on their interests.[58] The Court said that the Act is silent on the consequences if a trustee breaches this requirement and nevertheless participates in decision making. The Court considered that in such circumstances the common law position will apply and the trustee's involvement will constitute a breach of trust.[59]

The Court considered this conclusion strengthened by the fact that s 227A(2) (and cl 4 of the trust order) prohibits an interested trustee from voting and from "participating in the discussion" on a transaction in which he or she is interested. Parliament recognised that by participating in the discussion, even if not voting, an interested trustee could (improperly) influence the decision of the non-interested trustees.[60] Thus, by prohibiting participation outright, the Act and trust order emphasise that a fact-based inquiry (such as was undertaken by the Maori Land Court) into whether or not the non-interested trustees were improperly influenced is not appropriate.[61]

The Court of Appeal also said that s 227 alters the common law position by providing that trustees may make decisions by majority. This provision is a necessary corollary of s 227A, as it allows trust business to continue when one trustee has absented him or herself from decision making. The Court held, however, that s 227 has no effect on the common law requirement that every trustee who participates in decision making must be free from conflict and bring to bear a mind unclouded by any contrary interest. Hence (again contrary to the position taken in the Maori Land Court), if a conflicted trustee participates in decision making, the decision will be voidable regardless of whether there is a majority of non-conflicted trustees. This is consistent with the prophylactic nature of the no-conflict rule.[62]

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58 At [97]. As the Court of Appeal said at n 43, "The only exception to this would be where the individual's conflict arose solely from his or her position as a trustee of another trust".

59 At [97].

60 At [98].

61 At [98].

62 At [99].

[5] Accordingly, the Court considered that it was not open to Judge Harvey to engage in an inquiry into the overall circumstances of the transaction.[63] The Court recognised that applying these principles could cause administrative inconvenience to trustees because many trustees of Maori trusts are likely to be conflicted.[64] However, the Court was confident that the Act provides the appropriate tools for trustees to manage such conflicts. For example, trustees may remove themselves from decision making under s 227A or apply for a variation to the trust deed under s 244. Alternatively, an application for directions to the Maori Land Court might be appropriate. If those mechanisms are thought to be insufficient, the Court said that it may be necessary to consider legislative change.[65]

Before the Maori Land Court, the beneficiaries had not sought a ruling that the conflicts of interest invalidated the joint venture arrangements.[66] However, the possibility was considered by Judge Harvey[67] and taken up unsuccessfully by the beneficiaries in the Maori Appellate Court.[68] In these circumstances the Court of Appeal considered it open to the beneficiaries to make an application to have the joint venture arrangements set aside (rescinded). However, the Court acknowledged that rescission will not be available where the agreement in question is with an innocent third party.[69] As there was disagreement between the parties as to whether any innocent third parties were, or have become, involved in the joint venture arrangements, the Court remitted the matter to the Maori Land Court for further evidence on and consideration of that issue.

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63 At [101].
64 At [103].
65 At [103]. The Court of Appeal noted that the Act is currently under review: see below n 141 as to the proposed legislative changes.
66 Their argument rather was that the conflicted trustees should be removed.
67 See *Naera* (MLC), above n 8, at [154].
68 See *Naera* (MAC), above n 44, at [64].
69 See *Naera* (CA), above n 3, at [104].

Leave application to this Court

On 5 September 2013, five of the beneficiaries[70] (the first respondents in this appeal and called the Beneficiaries in this judgment) applied for leave to appeal against the Court of Appeal's decision. The Beneficiaries sought leave to appeal on the interpretation of cl 3(a) of the trust deed. In the alternative, they sought leave to appeal the validity and scope of cl 3(a).

On 25 September 2013, three of the trustees[71] (called the Trustees in this judgment) applied for leave to cross-appeal against the Court of Appeal's judgment with regard to the conflict of interest issues. By the time of the hearing of the appeal, Pirihira Fenwick had resigned as a trustee of the trust and Hiwinui Heke had died in February 2014. The appeal was therefore conducted by Mr Kingi alone.[72]

In a decision of 19 May 2014, this Court dismissed the Beneficiaries' application for leave to appeal, but granted the Trustees leave to cross-appeal against the Court of Appeal's decision on the conflict of interest issue.[73] The approved questions for determination were:

(a) Was the Court of Appeal correct to hold that the Tikitere Project Agreement was voidable because three[74] of the trustees were beneficially interested in other trusts which were parties to the Agreement?

(b) If so, was the Court of Appeal correct to hold that the remedy of rescission could be withheld only if third party interests were affected

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70 Jillian Naera, Kereama Pene, Anaha Morehu, Warwick Morehu and Eric Hodge. As at 6 June 2014, counsel for the Beneficiaries informed the Court that they had not received renewed instructions from Eric Hodge, Anaha Morehu or Jillian Naera. However, counsel confirmed that Kereama Pene and Warwick Morehu still wished to oppose the appeal and, despite Jillian Naera being out of the country, based on previous instructions, counsel understood her to take the same position as Mr Morehu and Ms Pene.

71 Pirihira Fenwick, Wiremu Kingi and Hiwinui Heke.

72 We nevertheless refer to him as "the Trustees" in this judgment.

73 See *Naera* (SC Leave), above n 6, at [9]–[12].

74 Our understanding is that Mrs Emery had no beneficial interest in any other trusts: see above at 0(c) and n 15. Assuming this was the case, this means that only two of the trustees were beneficially interested in one of the other trusts.

or should it have required general inquiry into whether rescission was in all the circumstances appropriate?

The parties' submissions

The Trustees' submissions

The Trustees submit that ss 227 and 227A of the Act are intended to be a code to deal comprehensively with trustee participation and decision making where there are conflicting interests. The sections leave no room for the operation of the common law. It is submitted that any trustee of the Tikitere Trust, who is also one of the beneficiaries in the trust parties to the joint venture arrangements, is not a person who is "interested or concerned in any contract". Those words are necessarily coloured by the previous categories of interest referred to in s 227A, each of which is a direct and specific interest (as an employee or officer of the trust).

The words in s 227A are also coloured by the context of the Act. In the Trustees' submission, it cannot have been intended to preclude a trustee who is also a beneficiary of the relevant trust from voting on all contracts made by the trust because he or she has an interest in the contract through being a beneficiary in the trust. That would effectively disqualify any beneficiary from being a trustee, as it would be a general impediment in the administration of the trust property. Against this background and the reality of Maori land ownership structures, it is submitted that the words "contract in which that person may be interested or concerned" should be read narrowly.

Even if that is not the case, it is submitted that the circumstances do not come within the inflexible self-dealing rule, which only applies to transactions that squarely, or in substance, involve a trustee selling trust property to themselves. Further, there are two relevant, and applicable, exceptions to the rule. First, where a trustee sells to a company where he or she is a mere minority shareholder or to another trust in which he or she only has a limited beneficial interest. Secondly, where the trustee has been placed in a position of conflict expressly, or by necessary implication, by the settlor or by the terms of the trust.

Section 227A is silent as to the consequences of infringement. It is submitted that this silence does not mandate that, if trustees are in breach of the section, the dealing by the trust is voidable. Under s 237, the Act creates the broadest powers for the Maori Land Court to review trustees' conduct. No doubt in doing so, and in determining the consequences of a particular infringement, the Court would have regard to the common law approach adopted where there is infringement of the self-dealing rule. But it is submitted that the Act does not require rescission as the usual remedy.

The Beneficiaries' submissions

The Beneficiaries do not accept that ss 227 and 227A are a code for all conflicts of interests for trusts administered under the Act.[75] The sections alter the common law in some respects by allowing decisions to be made by a majority of trustees and by adding an exception for trustees who are also trustees in another trust. But, because the term "trust" is not defined under the Act and the Act is largely silent about how trusts under the Act should operate, Parliament clearly intended to import the concept of a trust and the associated common law and equitable principles such as the self-dealing rule.

As to relief, the Beneficiaries oppose the Trustees' contention that the Maori Land Court's statutory powers obviate the need for the remedy of automatic rescission. They submit that the High Court has similar broad powers of review, but these do not supplant the specific rules of the common law and equity setting out what forms of relief ought to be available and in what circumstances.

The Beneficiaries submit that the Court of Appeal was correct to hold that rescission was the proper remedy (subject to there being no innocent third party interests).[76] While the self-dealing rule has a number of exceptions, none of them apply to the current facts. The Beneficiaries point to the fact that the trustees were contracting directly with themselves as trustees of other trusts and that they and/or their families

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75 The Beneficiaries submitted for example that s 227A would not cover grants, which Maori trusts often make. However, we comment that the wording of the section may well include most grants as grants would usually include conditions of use and would therefore arguably come within the term "contract".

76 It is the Beneficiaries' submission that there are no innocent third parties.

have personal beneficial interests in those other trusts, which were not "limited" or "insubstantial". The conflicted trustees took part in deliberations, voted and executed the joint venture arrangements.

Issues

The issues arising from the submissions are:

(c) What is the scope of ss 227 and 227A of the Act?

(d) Does this case fall within the self-dealing rule?

(e) What are the consequences of a breach of s 227A?

To put the second and third issues in context, we examine the alleged conflicts in this case, after deciding on the scope of ss 227 and 227A.

What is the scope of ss 227 and 227A of the Act?

Section 227A(2) provides that a "trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects … any contract in which that person may be interested or concerned other than as a trustee of another trust".

We do not accept the Trustees' submission that s 227A must be construed narrowly. The wording is expansive. It applies to any contract. It applies to both an interest and a concern in a contract. It applies not only to a direct, but also to an indirect, interest or concern in any contract. The fact that specific types of contract are dealt with (as an employee or as an officer) in the subsection cannot colour the generality of the words that follow. These words are intended as a catch all.

Far from being restrictive, it seems to us that the wording is designed to mirror the position in equity, subject to excluding the situation where the only interest (or

concern) in a contract is as a trustee of another trust.[77] This exclusion does not, however, mean that trustees of multiple trusts can put themselves in a position where their duty and interests conflict as Mrs Fenwick (and possibly Mr Eru) did in this case because they were also beneficiaries.[78]

We also do not accept the Trustees' submission that ss 227 and 227A constitute a code. That cannot be right as they do not deal with the consequences of any breach. We agree with the Court of Appeal that general trust law applies to trusts under the Act, but only (as will appear) to the extent that this is consistent with the scheme of the Act.

Alleged conflicts in this case

Three of the trustees were alleged to have conflicts of interest in the Maori Land Court. We set out the alleged conflicts and comment on them. As we are not sure we have all relevant information, we remit the issue to the Maori Land Court for any final decisions on the conflicts in light of this judgment.

Pirihira Fenwick

Mrs Fenwick would not have been considered "interested or concerned" in the joint venture arrangements if she had merely been a trustee of both the Tikitere Trust and Paehinahina Mourea Trust as she would have come under the exception in s 227A(2). However, she was "interested or concerned" in the joint venture arrangements due to the fact that she was a beneficiary of Paehinahina Mourea Trust (holding approximately 4.71 per cent of the shares of that trust).[79] As a result,

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77 In the United States, the position accords with the s 227A(2) exception, as long as the transaction is fair. The commentary to the American Law Institute *Restatement of the Law (Third): Trusts* (3d) (2007), § 78 cmt c(7) states that "The duty of loyalty does not preclude trustees in their fiduciary capacity from dealing with other trusts … including trusts and estates of which the trustee is a fiduciary" as long the transaction is "consistent with the purposes of each fiduciary relationship and for a consideration that is fair to the beneficiaries of the relationships". The same exception is recognised in the Uniform Trust Code (drafted by the National Conference of Commissioners on Uniform State Laws): § 802(h)(3).

78 This too is the position in the United States: see American Law Institute, above n 77, at § 78 cmt a.

79 Mrs Fenwick's family also held 20 per cent of the shares in the Paehinahina Mourea Trust. We have no information on how close the family members are who own those shares and thus make no comment on whether or not this would also constitute a conflict of interest. The role of family in Maori society would have to be considered in reaching a view on this issue. Also see below at n 97.

Mrs Fenwick had a real and appreciable possibility of conflict between interest and duty and should not have taken part in the decision making process.

Tai Eru

Mr Eru was a trustee of both the Tikitere Trust and the Manupirua Ahu Whenua Trust. Additionally, a whanau trust[80] in which Mr Eru was both a trustee and beneficiary holds 0.045 per cent interest in the Paehinahina Mourea Trust[81] and an approximately 0.12 per cent interest in the Tikitere Trust. If Mr Eru's only interest in the Paehinahina Mourea Trust was through the whanau trust,[82] then it is likely that his interest in that trust would be classified as *de minimis*, or, in the words of Lord Upjohn, there may have been "no sensible possibility of conflict".[83] The nature and extent of the joint venture arrangements would, however, be relevant to this question.[84]

Winnie Emery

The late Mrs Emery's alleged conflict arises from the fact that her husband was a trustee of the Paehinahina Mourea Trust. It does not seem to have been suggested that Mrs Emery or her husband had a shareholding in any of the trust parties to the joint venture arrangements. If they did not, then it would have been acceptable, under s 227A(2), for Mrs Emery, had she been a trustee of both the Tikitere Trust and the Paehinahina Mourea Trust, to have taken part in the decision making. In such circumstances, the fact her husband was a trustee of the Paehinahina Mourea Trust would not render Mrs Emery conflicted under s 227A.

Application

Ms Fenwick (and possibly Mr Eru) had beneficial interests in another trust party to the Tikitere Project Agreement. Subject to the issue of Mr Eru's interest being *de*

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80 As noted above at n 13, we are not aware of the extent of his beneficial interest in the whanau trust or the extent of the interest of his close relatives in that trust.

81 He was not, however, a trustee of the Paehinahina Mourea Trust.

82 As noted above at n 14, it is unclear whether Mr Eru was also a beneficiary of the Tikitere Trust and the Paehinahina Mourea Trust in his personal capacity.

83 See *Boardman v Phipps* [1967] 2 AC 46 (HL) at 124, discussed below at 0.

84 A very small interest in a very large transaction could raise a possibility of a conflict between interest and duty. We are not sufficiently apprised of the details of the joint venture arrangements to make a definitive finding on this point.

minimis, this means that they were conflicted. By being beneficiaries in another trust they had something to gain from this transaction. Benefits to the other trust parties included lease payments from Tikitere Geothermal for the use of the trust land and also the share or royalty options. This means that s 227A(2) applied and Mrs Fenwick (and possibly Mr Eru) should not have participated in the discussions surrounding the transaction or in the voting. In this case there were sufficient trustees who had no conflict to consider and vote on the transaction.[85]

It is no answer, contrary to Judge Harvey's view, that the breach of s 227A(2) had no effect, given the ability for decisions to be made by majority.[86] We agree with the Court of Appeal that all trustees participating in decision making must "bring to bear a mind unclouded by any contrary interest".[87] Nor is it an answer that their fellow trustees all supported the transaction. Section 227A provides that a conflicted trustee must not "participate in the discussion" on a matter affecting his or her interests. The reason a conflicted trustee must not participate in discussions is to remove the risk that the other decision makers may be influenced (either consciously or subconsciously) by a person with divided loyalties.[88]

Equally, it is irrelevant that Mrs Fenwick (and Mr Eru) were not driven by personal financial considerations. That may have been so, at least at a conscious level. But it may not have been so subconsciously. Further, the beneficiaries were entitled to be assured that every trustee considering and voting in favour of the transaction did so without a conflict of interest and the risk of being influenced by that conflict (whether or not the person was in fact influenced).

We agree with the Court of Appeal that the rules against conflicts and s 227A are designed with prophylactic effect – to avoid the appearance, and risk, of conflict.[89] This applies both in terms of a conflicted trustee being influenced by the conflict

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85 Had there not been, the trustees should have put the matter before the Maori Land Court for approval (or for the appointment of non-conflicted trustees).

86 See *Naera* (MLC), above n 8, at [154].

87 See *Naera* (CA), above n 3, at [99].

88 In a similar context P Watts, N Campbell and C Hare in *Company Law in New Zealand* (LexisNexis, Wellington, 2011) note at 534 that at equity, "[i]t mattered not even that there was a quorum of disinterested directors". The Companies Act 1993 has altered the position. See s 144.

89 *Naera* (CA), above n 3, at [99], and [101]–[102].

(consciously or subconsciously) and of influencing fellow decision makers (again consciously or subconsciously).

In addition, courts are not well placed to decide the existence and the extent of any influence. Contemporary evidence on such points is likely to be sparse, meaning trustees will be reconstructing the decision-making process with the benefit of hindsight, which could cause distortion. And, if an influence has been subconscious, by its very nature the trustees will not have been aware of it.[90]

As the Court of Appeal said, there were in this case means of avoiding the conflict issue. The conflicted trustees could have withdrawn from the discussions in accordance with s 227A(2). They could have applied to the Court to approve the transaction.[91]

Does the self-dealing rule apply?

We now examine the Trustees' submission that, in equity, the self-dealing rule only applies to purchases. We then examine whether this case falls within two exceptions to the strict self-dealing rule.

As noted above at 0, the position in equity would only apply to the extent not modified by the scheme, purpose, context and (of course) the wording of the Act. However, we think it unlikely that the Act was intended to impose stricter requirements than in equity. This means that, if the exceptions would apply in equity, then they will apply under the Act.

Before we examine the Trustees' submission, we briefly discuss the general law on the extent of trustees' duties and in particular the self-dealing rule.[92]

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90 We thus agree with the comments of William Young J in this regard at 0.

91 The Court of Appeal suggested that the trustees could, possibly, have sought an amendment to the trust deed to allow trustees to vote in situations of conflict. We do not need to decide this issue, but arguably any trust deed amendment may not override the requirements of s 227A(2).

92 This is not meant to be a comprehensive discussion but merely a summary for background.

Trustees' duties

Because of the nature of trusts, equity imposes numerous duties on trustees. The obligations include: the duty of loyalty, the duty of impartiality, the duty to act personally, the duty to keep and render full and candid accounts and the duty to preserve trust property.[93]

The duty of loyalty and its prohibition on trustees (and other fiduciaries) from having conflicts of interests is a central tenet of the fiduciary relationship.[94] Some commentators have even referred to this as part of the "irreducible core" of the relationship.[95] Under the "self-dealing" rule, developed under the duty of loyalty, if a trustee sells the trust property[96] to him or herself,[97] the sale is voidable by any beneficiary *ex debito justitiae* (as of right),[98] however fair the transaction.[99]

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93 Andrew S Butler "Fiduciary Law" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 471 at 476.

94 J Mowbray and others *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2008) [*Lewin on Trusts*] at [20–01]. This may be subject to the relevant trust deed and to the provisions of any relevant legislation. Generally, the trust instrument is the principal authoritative source of relevant rules, and "[t]he general law and statute typically act as supplemental sources": see Andrew S Butler "Trustees and Beneficiaries" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 105 at 107. However, as the comments of Millet LJ in *Armitage v Nurse* [1998] Ch 241 (CA) illustrate, there is a debate as to the extent a trust instrument can alter the duties of a trustee. See further New Zealand Law Commission "Review of the Law of Trusts: Preferred Approach" (NZLC IP31, 2012) at [3.3]–[3.8].

95 Ernest J Weinrib "The Fiduciary Obligation" (1975) 25(1) U Toronto LJ 1 at 16. In trust law, the same term was used by Millet LJ in *Armitage v Nurse*, above n 94, where Millet LJ described "an irreducible core of obligations owed by the trustees to the beneficiaries ... which is fundamental to the concept of a trust".

96 Unless (subject to what is said above) authorised by the trust instrument or where the purchase is authorised by statute or where all beneficiaries being of full age and capacity and fully informed, agree to the transaction: see *Lewin on Trusts*, above n 94, at [20–65].

97 While there is no strict prohibition on a trustee's sale to his or her spouse or to close relatives, such a sale gives rise to very strong suspicions, which if not dispelled, are justification for setting aside the transaction: Butler, above n 93, at 499 citing *Robertson v Robertson* [1924] NZLR 552 (SC) and *Re McNally (deceased)* [1967] NZLR 521 (SC). See also *Lewin on Trusts*, above n 94, at [20–76]–[20–77].

98 The self-dealing rule (eg purchase from a trust) should be distinguished in this regard from the fair-dealing rule; the fair dealing rule (purchase from a beneficiary) is "[(]putting it very shortly) that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable *ex debito justitae*, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest": *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 241 per Megarry VC.

99 *Tito v Waddell (No 2)*, above n 98, at 241 per Megarry VC. See also Matthew Conaglen "Fiduciaries" in John McGhee (ed) *Snell's Equity* (32nd ed, Sweet and Maxwell, London, 2010) 171 [*Snell's Equity*] at [7–021]. The purchase of property cannot be set aside if the property has been resold to a purchaser for value without notice: see *Lewin on Trusts,* above n 94, at [20–110]. The parties in this case dispute whether there has been a sale to or other involvement by innocent third parties. The remedy can also be refused in the case of delay or waiver but those have not been alleged in this case.

There is another rule stemming from the duty of loyalty. Trustees, like other fiduciaries, are not in general allowed to retain a benefit acquired or profit made by them from the use of trust property or in the course of and by virtue of their trusteeship.

In explaining the no-conflict rule and its justifications, Lord Herschell stated in *Bray v Ford*:[100]

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.

Liability for the breach of the no conflict rule is generally strict.[101] It is usually no defence to show that any unauthorised profit was made "'honestly' or in good faith" or that the transaction was fair.[102] The use of strict liability in the context of a fiduciary relationship stems from fiduciary law's traditional prophylactic approach: it is thought that prevention is better than cure in that this provides good protection to beneficiaries and removes temptation from fiduciaries.[103] As Professor Matthew Conaglen has put it, "removing the fruits of temptation is designed to neutralise the temptation by rendering it pointless".[104]

There must, however, be a "real sensible possibility" of a conflict and not just a remote, speculative, or negligible risk. The standard is objective. As Lord Upjohn said: [105]

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100 *Bray v Ford* [1896] AC 44 (HL) at 51.

101 At least with regard to the self-dealing and unauthorised profits rules. See n 98 regarding the fair dealing rule.

102 Butler, above n 93, at [17.2.4]. See Conaglen, above n 99, at 189.

103 Butler, above n 93, at [17.2.4].

104 Matthew Conaglen "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452 at 463. See also the comments of Lord Brougham in *Hamilton v Wright* (1842) 9 Cl & Fin 111 at 123, 8 ER 357 (HL) at 362.

105 *Boardman v Phipps*, above n 83, at 124.

> The reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you would imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

Is the self-dealing rule restricted to purchases?

The Trustees submit that the strict self-dealing rule applies only to purchases by trustees. It is submitted that, in other contexts, provided a transaction (other than a purchase) is fair, it will be upheld. The Trustees cite *Jones v AMP Perpetual Trustee Company New Zealand Ltd*[106] and *Public Trustee v Cooper*[107] for this proposition. We first examine this submission in terms of the general position in equity and then examine the submission in the context of the Act.

We do not accept the submission that in equity the self-dealing rule applies only to purchases. *Jones* dealt with a particular set of facts: a subsidiary company trustee appointing its parent company (a pre-eminent investment company) as its superannuation fund manager. It seems to us that the case was not decided on the basis of an exception to the self-dealing rule but was instead decided on the basis that there was no sensible possibility of a conflict.[108] It therefore does not support the submission that the self-dealing rule only applies in purchase situations.

In *Public Trustee v Cooper*, shares in one company held by a trust were to be sold to an unrelated company. One of the trustees also held a significant number of the shares of the first company in a private capacity and as a trustee for a separate charitable trust.[109] Hart J held that the strict self-dealing rule did not apply in these circumstances. The case does not support the proposition that the strict self-dealing rule only applies to purchases. The case could have been decided on the basis that, while there was a conflict, it was not self-dealing. This is because the trustee had no

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106 *Jones v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR 690 (HC).

107 *Public Trustee v Cooper* [2001] WTLR 901 (Ch).

108 The case is cited in D Hayton (ed) *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th ed, Lexis Nexis, London, 2010) at [55.19] only for the narrow proposition that a subsidiary company-trustee may employ its parent company if it does not create "a real sensible possibility of conflict which could impair the trustee's ability to serve the best interests of the beneficiaries, as where the holding company is a pre-eminent company with an attractive investment record and where the equivalent fee would be payable to any similar company selected to be investment manager".

109 There was another trustee for which the same conflicts were alleged, although Hart J recognised that his personal shareholding was much smaller.

interest or other role in the unrelated company purchaser and thus was not "on both sides" of the transaction.

The self-dealing rule has in any event been applied in commercial transactions other than sales.[110] For example, it has been applied to leases of trust property to trustees.[111] At its most basic level, the self-dealing rule is based on the no-conflict rule: having an interest or duty on both sides of a transaction.[112]

In terms of the Act, the argument that the self-dealing rule only applies to purchases does not accord with the statutory wording. Under s 227A(1) a trustee must not vote or participate in any discussions on "any contract in which that person may be interested or concerned" directly or indirectly. This is very wide wording and is not confined to purchases from the trust.[113]

In this case, the other trusts had the option to receive royalty payments.[114] Further, all three trusts granted exclusive access and use rights to Tikitere Geothermal and would receive rental from Tikitere Geothermal.[115] While these other transactions cannot be classified as "purchases", they clearly fall within the words "any contract" in s 227A.

Even had the rule been confined to purchases, however, there were potential purchases involved in the joint venture arrangements. The other trusts could (for nominal consideration) elect to purchase trust property (shares of Tikitere Geothermal) from the Tikitere Trust. The Paehinahina Mourea Trust exercised that option and now owns 65 per cent of the shares in Tikitere Geothermal.

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110 See *Re Thompson's Settlement* [1986] Ch 99 (Ch) at 115 per Vinelott J; Conaglen, above n 99, at 192; and *Lewin on Trusts,* above n 94, at [20–64] and [20–66]–[20–72].

111 See for example *Re John's Assignment Trusts* [1970] 1 WLR 955 (Ch) at 960.

112 *Lewin on Trusts*, above n 94, at [20–63]. We note that Vinelott J's broad statement of the self-dealing rule in *Re Thompson's Settlement*, above n 110, at 115 covers not only a conflict between interest and duty but also a conflict of duties owed separately to entities involved in a transaction. We do not need to consider whether the rule extends this far, given that the alleged conflicts in this case are between interest and duty, except in the case of Mrs Emery where the exclusion in s 227A(2) for interests as a trustee of another trust applies by analogy.

113 We accept, however, as discussed below at 0, that s 227A also covers situations other than those coming within the strict self-dealing rule.

114 In the end, only the Manupirua Ahu Whenua Trust exercised the option to receive royalty payments from Tikitere Geothermal.

115 See above at 0 and n 20.

Limited beneficial interest exception

The Trustees submit that this case comes within a general exception in equity to the self-dealing rule. In their submission, the strict approach to the self-dealing rule, whereby a transaction is capable of being set aside by any beneficiary as of right, should not be taken where a trustee deals with a company in which the trustee is a mere minority shareholder or where a trustee deals with another trust in which the trustee has only a limited beneficial interest.

The authors of *Lewin on Trusts* state that, while a transaction in favour of a company in which the trustee is a substantial shareholder and managing director has been held to be within the self-dealing rule, in cases where the purchaser is a company and the trustee is a small minority shareholder, the transaction, though suspect, may be justified by showing that the consideration was adequate at the time.[116] The authors of *Lewin on Trusts* cite *Farrar v Farrars Ltd*[117] and *Hillsdown Holdings plc v Pensions Ombudsman*[118] for this proposition.

The authors also cite the case of *Hickley v Hickley*[119] for the proposition that, if two trusts do not share a common trustee, a sale between the trusts will not be set aside under the strict self-dealing rule merely because a trustee of the selling trust has a limited beneficial interest in the purchasing trust.[120]

We doubt that any of these cases provide strong authority for a general exception of the breadth submitted by the Trustees. It is significant that *Farrar* was in the

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116 *Lewin on Trusts*, above n 94, at [20-78].

117 *Farrar v Farrars Ltd* (1888) 40 Ch D 395 (CA).

118 *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 (QB). See also Conaglen, above n 99, at 193 who also cites *Farrar*, above n 117, for the proposition that the strict self-dealing rule may not apply if the trustee is not a director but merely interested in the company. This same distinction, while not discussed in any depth, is also referred to in J E Martin *Hanbury & Martin: Modern Equity* (19th ed, Sweet & Maxwell, London, 2012) at [21–009] fn 53. The authors of *Halsbury's Laws of England* (5th ed, 2013) vol 98 Trusts and Powers at [378] and n 13 also cite *Farrar* and *Re Thompson's Settlement*, above n 110, when stating that if the sale is in all respects in good faith a trustee may sell to a joint stock company of which he or she is a shareholder but the situation is otherwise where the trustee is a director. Hayton, above n 108, at [55.10] and [55.18] also cites the more flexible approaches taken in *Hillsdown* and *Public Trustee v Cooper* and cites *Farrar* and the Privy Council case of *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 (PC).

119 *Hickley v Hickley* (1876) 2 Ch D 190.

120 See *Lewin on Trusts*, above n 94, at [20–82].

mortgagee context and was in any event founded on the genuine transaction rule[121] and not on self-dealing rule. Lindley LJ, when delivering the judgment of the Court of Appeal in *Farrar*, recognised that the position of a mortgagee is very different from that of a trustee:[122]

> A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgagor confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress ... .

As to *Hillsdown*, this involved the transfer of assets between two pension schemes that were associated with the same parent company. Two of the directors were directors of the parent company as well as of the two pension schemes and thus had "a foot in three camps".[123] Knox J held that the self-dealing rule is not as "hard and fast as to require a negotiation between pension fund trustees and the employer to be set aside automatically without investigation if one or more of the trustees are directors of the employer".[124]

The *Hillsdown* case arose in particular circumstances and may be explicable because of the special position of pension funds (discussed in the next section).[125]

In *Hickley v Hickley,* Mr Hickley was an executor under a will and, as such, was charged with selling a number of dwelling houses. The proceeds from these sales

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121 See *Lewin on Trusts*, above n 94, at [20–58]–[20–62] for a discussion of the "two party rule" and the "genuine transaction rule". These two rules cover some of the same ground as the self-dealing rule but, rather than being based on the no conflict rule, are based on the proposition that a person cannot be both seller and buyer. If breached, these rules have the effect of rendering the transaction void. The genuine transaction rule closes a gap in the two party rule by ensuring that a sale to a nominee of the trustee is also caught. It stops a trustee from disguising the true nature of the transaction.

122 *Farrar,* above n 117, at 410 and 411. The authors of *Lewin on Trusts,* above n 94, [20–78] fn 52 do note that *Farrar* should be "approached with a degree of caution" because it relates to purchases from mortgagees. The same can be said about the Privy Council case of *Tse Kwong Lam v Wong Chit Sen*, above n 118. That was also a mortgagee case. It relied on, and confirmed, the principle in *Farrar*: at 59.

123 *Hillsdown Holding plc,* above n 118, at 894.

124 At 895.

125 We make no comment on whether or not the case would be decided in the same way in New Zealand.

were for the benefit of the testator's three daughters and their children and issue. One third of the proceeds were to go to a nuptial trust (under a marriage settlement) that the testator had earlier set up for one of his daughters and in which his son-in-law, Mr Hickley, had a reversionary interest. Mr Hickley and his wife were anxious to retain some of the property and reside in a house on one of the lots. The trustees of the nuptial trust authorised Mr Hickley to purchase a house and the adjoining lots for the nuptial trust.[126]

In the record of the oral argument it was recorded that "the plaintiffs do not desire to set aside the sale, unless it turns out to have been at an undervalue".[127] Bacon VC held that Mr Hickley's conduct had been perfectly proper, that full value had been received and declined to set aside the sale. Given the position taken by the plaintiffs, as well as the unusual facts, we do not consider this case provides strong authority for a general limited interest exception with regard to trusts.

The rationale for a limited interest exception is presumably that, where there is only a very small conflicting interest in the transaction, it may not have influenced it, as long as the person is not also negotiating "on both sides of the transaction" by being a trustee or director of both contracting parties. However, the cases that are put forward by the Trustees and the texts as authorities for the existence of the exception are sparse. They involve singular facts, some are only at first instance and, in the case of the mortgagee cases, arose in a different context.

Further, recent cases have doubted the existence of a general limited interest exception. In *Movitex Ltd v Bulfield*, Vinelott J said:[128]

> While the interest of the fiduciary may be so small that it can as a practical matter be disregarded, if the interest is sufficiently large to be capable of influencing the fiduciary's mind, the strict rule applies. … I think the true explanation of the decision of the Court of Appeal in *Farrar v Farrars Ltd* may lie in the fact that the sale was by a mortgagee. … The decision of Bacon VC in *Hickley v Hickley* is not susceptible of the same explanation,

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126 Mr Hickley appointed an agent to act on behalf of the trustees and to purchase the property.

127 *Hickley*, above n 119, at 193. While Bacon VC says in his reasons at 197 that "I am asked to set aside this sale against the trustees", that statement must be read in light of how the case was pleaded.

128 *Movitex Ltd v Bulfield & Ors* (1986) 2 BCC 99403 (Ch) at 99433–99434. See also the remarks of Nugee J in *Barnsley v Noble* [2014] EWHC 2657 (Ch), doubting the application of *Farrar* in the trust context.

> though it was treated by *Chitty* J in *Farrar v Farrars Ltd* as an authority he was entitled to follow and was mentioned by Lindley LJ without disapproval. … But the case is a very curious one, because it was made clear by counsel for the plaintiffs that they did not desire to set aside the sale unless it turned out to have been at an undervalue. … Insofar as the decision is founded on the proposition that the court has a discretion to refuse to set aside a transaction entered into in breach of the self-dealing rule if satisfied that the transaction was fair and honest, it is in my judgment inconsistent with cases of the highest authority which show that such a sale is voidable, even if a trustee claims to show that he gave full value or more than full value for the property: "So inflexible is the rule that no inquiry on the subject is permitted" (see *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 per Lord Cranworth at p 472).

We do not, however, need to decide whether there is a limited interest exception to the strict self-dealing rule. Even if the limited interest exception does exist, there are two reasons why the exception would not apply to Mrs Fenwick.[129]

First, as indicated above, the limited interest exception (if it exists) does not apply if the person has a limited interest in the other party but is, at the same time, also a director or trustee of the other party and so effectively "on both sides" of the negotiations for the transaction. In this case, Mrs Fenwick was not merely a beneficiary of the Paehinahina Mourea Trust but was also a trustee of that trust. This dual role would mean she did not come within the exception even if her interest could have been deemed limited.[130]

Secondly, (and more importantly) the exception, if it exists, would require a fact-specific inquiry into the nature and extent of the interest held and the nature and significance of the transaction. In this case, had such an inquiry been made, the level of interest Mrs Fenwick had in the Paehinahina Mourea Trust (at almost five per

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129 Mr Eru could, however, come within the exception (if it exists). He had (through the whanau trust) a beneficial interest in the Paehinahina Mourea Trust but was not a trustee of that trust and his interest in that trust, if not *de minimis* (see above at 0), may have qualified as limited, despite the significance of the joint venture arrangements.

130 The situation is not saved by s 227A(2) which would only have allowed Mrs Fenwick's participation in decision making if she had been a mere trustee of the Paehinahina Mourea trust and not if she was also a beneficiary of that trust. As the Maori Appellate Court said, in *Rameka v Hall – Opepe Farm Trust*, (2011) 2011 Maori Appellate Court MB 535 (2011 APPEAL 535) at [86], "section 227A(2) explicitly makes an exception for trustees whose *only interest* is as trustee of another trust" (emphasis added).

cent)[131] could not properly be termed a limited interest, particularly in light of the fact that the joint venture is a significant transaction.[132]

Placed in position of conflict

The second key exception argued for by the Trustees is where the trustee has not placed him or herself in a position of conflict of interest and duty but has been placed in the position expressly or by necessary implication by the settlor or the terms of the trust. They cite *Underhill and Hayton* for this proposition.[133] The three key cases cited in support of this exception are *Edge v Pensions Ombudsman,*[134] *Re Drexel Burnham Lambert*[135] and *Sargeant v National Westminster Bank*.[136]

The issue usually arises in the pension scheme context. Unlike the "limited interest" exception, the onus falls on those attacking the exercise of the function by the trustees to impeach it where this exception applies.

We accept that there is a policy in the Act supporting owner control and therefore trustees will often be in the position of being both beneficiaries and trustees of trusts. It could therefore be argued that the potential conflict between interest and duty by being both a trustee and a beneficiary of a trust under the Act arises by necessary implication from the Act where a trustee/beneficiary is making decisions about that particular trust. Of course in that situation there will rarely be a real conflict of duty and interest. What is in the best interests of the trustee/beneficiary will likely be in the best interests of all the beneficiaries, assuming no differential treatment of beneficiaries.

This argument, however, becomes much more difficult when it concerns an interest or trusteeship in another trust. Although many Maori are beneficiaries and trustees of multiple trusts and the Act may contemplate cooperation between trusts (as discussed in the next section), conflicts of interest cannot be said to arise as a

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131 Her family interests may well also have to be considered.
132 The answer may have been different if the transaction had been a very small one.
133 Hayton, above n 108, at [55.30].
134 *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).
135 *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 (Ch).
136 *Sargeant v National Westminster Bank Plc* (1990) 61 P & CR 518 (CA).

necessary implication of the trust structure and therefore directly due to a policy in the Act. Cooperation between trusts is not mandated by the Act.

In addition, there will always be a conflict between interest and duty in such circumstances and it would be inappropriate to place the onus on beneficiaries to impeach the transaction where a conflicted trustee has participated. Section 227A is quite clear. Conflicted trustees cannot participate in decision-making.

We do, however, note that whether an interest in another trust does engage s 227A will depend on an assessment of the circumstances of the trustee and of the particular transaction and whether there is a "real sensible possibility" of a conflict. Whether this is so must be assessed in a practical manner, having regard to the scheme of the Act and the realities of Maori ownership. Where for example a transaction involved a joint venture amalgamating the existing operations of two trusts in order to gain economies of scale and a trustee's interest in both trusts is small and of similar magnitude in each trust,[137] it is likely to be held that there would be no sensible possibility of a conflict.

Conclusion

For the above reasons, we do not accept the Trustees' submission that the self-dealing rule applies only to purchases or that the joint venture arrangements came within any exceptions to the self-dealing rule under general equitable principles. Nor does s 227A apply only to purchases.

Consequences of breach of s 227A

Submissions

The Court of Appeal held that the joint venture arrangements were voidable as of right at the instance of the Beneficiaries, subject to the interests of any innocent third party.[138] The Trustees submit that rescission should not be an automatic remedy in the case of transactions between trusts that are governed by the Act. In the Trustees'

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137 Which was not the case here for Mrs Fenwick. In addition, the joint venture arrangements had unusual features in this case.

138 *Naera* (CA), above n 3, at [104].

submission, this is because of the policy and structure of the Act and also the realities of Maori landholding. The Beneficiaries support the judgment of the Court of Appeal.

Preliminary comments

Before we deal with the parties' submissions on this point, we comment that we are concerned that the appeal before us has been too narrowly confined. We make some further comment on this, after dealing with the submissions on whether rescission should be an automatic remedy in cases involving parties governed by the Act.

William Young J criticises the Court of Appeal for dealing with the self-dealing issue on a second appeal and determining a number of matters without hearing from the other parties to the joint venture arrangements.[139] The fact is, however, that the Court of Appeal did deal with the self-dealing issue and we therefore must deal with it or the conclusion of the Court of Appeal stands.[140]

Structure of the Act

It is convenient at this point to summarise other relevant provisions of the Act.[141]

The preamble to the Act states:

> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei

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139 At 0 and 0.

140 Before this Court, Mr Kingi's costs were paid by one of the parties to the joint venture, Tikitere Geothermal. 65 per cent of the shares in that company are held by the Paehinahina Mourea Trust, another party to the joint venture arrangements. It may be therefore that Mr Kingi has put before us all the arguments those parties would have made on the points argued before us.

141 We note that, in 2013 and 2014, an expert review of the Te Ture Whenua Maori Act was undertaken and the final report was published in April 2014: see Matanuku Mahuika, Patsy Reddy and Dion Tuuta "Te Ture Whenua Maori Act 1993 Review Panel: Report" (Te Puni Kokiri, April 2014) available at <www.tpk.govt.nz>. In April 2014, the Hon Chris Finlayson announced that the Government would be drafting a new Te Ture Whenua Maori Bill based on the findings of the expert review panel: see Chris Finlayson "Te Ture Whenua Maori Act review report released" (press release, 3 April 2014).

painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Te Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

Section 2 details how the Act should be interpreted. It provides:

2 Interpretation of Act generally

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

Section 6 of Act provides for the continuation of the Maori Land Court. The general objectives of that Court are:

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

(2) In applying subsection (1), the court shall seek to achieve the following further objectives:

(a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:

(d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:

(e) to ensure fairness in dealings with the owners of any land in multiple ownership:

(f) to promote practical solutions to problems arising in the use or management of any land.

Maori land trusts are created by the Maori Land Court. The Court makes both a trust order[142] and an order vesting the land in the trustees.[143] The Court also appoints trustees[144] although it must be satisfied that the appointment would be broadly acceptable to the beneficial owners.[145] It can also, on application add, reduce or replace trustees[146] and also remove trustees for failure or inability to carry out their duties satisfactorily.[147]

The Court has the power, under s 229, to approve an extension of the activities of any trust constituted under the Act, if it is satisfied the beneficial owners have had sufficient opportunity to consider the proposal and there is a sufficient degree of support among the owners. There is also power, under s 244, to authorise variations of trust.

Under s 231, a trustee or beneficiary of a trust constituted under the Act may apply to the court to review the terms, operation, or other aspects of the trust and the court, upon review, may confirm the trust order, vary the trust order, or terminate the trust

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142 Te Ture Whenua Maori Act, s 219 states, that the "court shall, by order, set out the terms of any trust constituted under [Part 12 of the Te Ture Whenua Maori Act]."

143 Tom Bennion "Maori Land" in Tom Bennion and others (eds) *New Zealand Land Law* (2nd ed, Brookers Ltd, Wellington, 2009) 343 at [5.7.03].

144 Under the Te Ture Whenua Maori Act, s 222.

145 Under s 222(2)(b).

146 Under s 239.

147 Under s 240.

if there is sufficient support among the beneficiaries. The Court may also, under s 238 require a trust to file a report on the administration of the trust or a trustee to report on the performance of his or her duties as trustee and may enforce the trustee's obligations.

Finally, under s 237(1), subject to the Act, the Maori Land Court has all the same powers and authorities as the High Court has in relation to trusts generally. Section 237 provides:

> **237 Jurisdiction of court generally**
>
> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Maori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.
>
> (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

Should rescission be automatic?

The issue in this section is whether there should be an automatic[148] right to rescission at the instance of a beneficiary,[149] as the Court of Appeal held was the case.

This must be assessed against the fact that the trusts at issue in this case are constituted under statutory powers. They are therefore governed by relevant express and implied provisions in the Act. Equitable principles apply to the trusts, but only to the extent that they are consistent with the statutory scheme, purpose and context as a whole.[150] The principles set out in the preamble and the general objectives of the Maori Land Court set out in s 17 of the Act give clear guidance on the scheme and purpose of the Act. Important features include the Maori Land Court's exclusive jurisdiction to constitute ahu whenua trusts and its supervision of those trusts, their purpose of providing a practical means of administering ownership interests in Maori land, and the pattern of multiple ownership.

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148 Subject to the interests of any innocent third parties.

149 In equity a single beneficiary can apply for rescission, even if other beneficiaries concur with the transaction: see *Lewin on Trusts,* above n 94, at [39–67]–[39–68] and [39–72]. The authors suggest some narrow exceptions but none are applicable in the present case.

150 In another context, see *The Contradictors v Attorney-General* [2001] 3 NZLR 301 (PC) at [12].

Section 227A applies generally to cases where a trustee is interested or concerned in a contract. It thus includes cases which are not self-dealing but where there is still a conflict. It also applies to employment situations (where there will be an added overlay of employment law). This suggests that the section contemplates that there may be remedies other than rescission (for example an account of profits).

We consider that, consistently with the scheme of the Act, there should be no rigid rule requiring rescission for a breach of s 227A, even in a case which, under equitable principles, would come within the self-dealing rule.[151] The Act does not expressly require an automatic voidability rule and we do not consider that it should be inferred that such a rule must apply. Sections 17(1)(b) and 17(2)(c) and (f) are clear indicators towards the Maori Land Court being able to make a pragmatic assessment.

The general legislative background also militates against rescission being an automatic consequence of breach of s 227A in cases which could be characterised as self-dealing. In this regard, we accept the submission of the Trustees that, because beneficial interests in land held by Maori pass from generation to generation and that interests are likely to extend to different land holdings of their ancestors, beneficial ownership in more than one trust is likely to be common. As Judge Harvey said, these overlapping interests are "simply a reality of kinship and obligation to the wider collective inherent in traditional communal ownership".[152] The Act should be interpreted against that background.

Section 2(2) of the Act requires that the Act be interpreted in a manner that promotes the "retention, use, development, and control" of Maori land. Many trusts may, however, be too small to develop their land alone. We thus accept the Trustees' submission that cooperation between Maori trusts for the joint development of land and resources is an activity that may well fulfil the promotion of the use and thus

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151 At least in the case of ahu whenua trusts. We have not heard argument on whether the same considerations apply to other trusts under the Act.

152 *Naera* (MLC), above n 8, at [155]. In the recent case of *Gemmell v Gemmell – Mohaka A4 Trust* (2014) 32 Takitimu MB 63 (32 TKT 63) at [40]–[48], Judge Harvey, citing *Naera* (CA), above n 3, highlighted the difficulties caused by the significant overlap of trustees in the two relevant trusts.

development of land and must have been contemplated by the Act, albeit not mandated by it.

We also accept the Trustees' submission that there are practical issues in allowing rescission at the instance of one of the beneficiaries. Given the nature of the trusts established under the Act, there tend to be a multitude of beneficiaries. If a contract is automatically voidable without consideration of all the circumstances, there is the risk that one beneficiary could frustrate activity supported by the great majority of beneficiaries in cases where conflicted trustees had participated in the decision-making process. That this could occur could be seen as contrary to the principles of self determination under the Act and the provisions that require the views of beneficiaries to be considered.[153]

While we accept that much of this could be said of any trust with many beneficiaries, ahu whenua trusts are unusual given they often have a large number of beneficiaries and the number of beneficiaries, through inheritance and therefore fragmentation, is increasing all the time.[154] For example, as noted above,[155] at 27 August 2009 there were 1,222 beneficial owners of the Tikitere Trust, but, at 12 May 2015, there were 1,377 beneficial owners.

Ahu whenua trusts are also unusual in the way in which they are established and closely supervised by the Maori Land Court. The Beneficiaries argue that, while the Maori Land Court has broad powers, the High Court has similar broad powers of review, but these do not supplant the specific rules of the common law and equity setting out what forms of relief ought to be available and in what circumstances. While that may be true, the Maori Land Court's role is very different from that of the High Court. The Maori Land Court is actively involved in the setting up of trusts under the Act, sets the contents of the trust order, appoints the trustees, and has a major role in the governance and review of Maori trusts. While the High Court has

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153 See above at 0–0.

154 This point was emphasised in a short paper produced by the Chief Judge of the Maori Land Court, Wilson Isaac: see Wilson Isaac *Maori Land Today* (May 2011) available at <www.justice.govt.nz>.

155 At 0 and n 9.

jurisdiction over trusts, its role in trusts is not comparable to the Maori Land Court's special involvement in trusts created under the Act.[156]

For all of the above reasons (and in particular the purposes, context and structure of the Act), we hold that it is implicit in the statute that the Maori Land Court has the power to decide upon the appropriate consequences of a breach of s 227A and that, even in cases of self-dealing, it may determine whether or not rescission is appropriate.[157]

Given the general objectives and scheme of the Act, including that land is a taonga tuku iho of special significance to Maori, the intergenerational nature of the trusts, the role given to the wishes of owners under the Act, as well as the role of the Maori Land Court in relation to trusts, it would not be sufficient for the Court merely to decide that the joint venture arrangements provided fair value to the trust. A full range of relevant factors must be able to be taken into account by the Maori Land Court when deciding whether or not rescission is appropriate.

As noted earlier, however, in deciding on the appropriate remedy it would be irrelevant (and thus should not be taken into account) that other non-conflicted trustees approved of the transaction. This is because they could have been contaminated by the conflicted trustees (or at least there is a risk and a perception that this may be so).[158] The requirements of s 227A are clear in this regard. Conflicted trustees must not participate in discussions. Additionally, that the conflicted trustees acted in good faith and were not consciously affected by the conflict is also irrelevant (given the possibility of subconscious bias and the perception of bias), although bad faith may point against a transaction being upheld.[159]

In the present case, the Maori Land Court could take into account the following matters (not intended to be an exhaustive list):

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156 See in particular above at 0. We are concerned in this judgment only with ahu whenua trusts.

157 The Maori Land Court's jurisdiction with regard to equitable remedies was dealt with by the Maori Appellate Court in *Mikaere-Toto v Te Reti B and C Residue Trust – Te Reti B and Te Reti C Block* (2014) Maori Appellate Court MB 249 (2014 MAC 249). We were not asked to consider the question of jurisdiction.

158 See above at 0.

159 See above at 0.

(f) the benefits and risks of the joint venture arrangements of the Tikitere Trust;

(g) the features of the joint venture arrangements, including the share option and royalty agreements and the fact that this was not just a case of pooling land resources and sharing profits and expenses;

(h) whether the arrangements gave proper value to the Tikitere Trust;

(i) the existence or otherwise of independent advice and the contents of any such advice;

(j) fairness to all the current and future beneficiaries of the Tikitere Trust;

(k) whether there is a differential in benefit or risk between the Tikitere Trust and the other parties;

(l) any alternative projects (whether now or in the future) or alternative means of carrying out the same type of project;

(m) the terms of the Tikitere trust order;

(n) the purposes of the Act (including development);[160]

(o) the value of the land and the geothermal resource as taonga for the Tikitere Trust's beneficiaries;

(p) the views of the non-conflicted trustees;

(q) the level of fully informed support among beneficiaries of the Tikitere Trust for the project; and

(r) any other relevant cultural (or other) factors.

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[160] See above at 0–0.

If rescission is considered appropriate, then the Maori Land Court will need to consider any terms on which it should be ordered.[161] Further, if one or more of the conflicted trustees received any additional personal gain from the joint venture arrangements,[162] the Court would need to consider whether there should also be an account of profits.

If (for any reason, including the existence of the interest of any innocent parties) rescission is not thought appropriate, the Maori Land Court should consider whether there should be any other remedy for the breach of s 227A, including whether or not there should be an account of profits.

Further comments

As noted above, in the course of preparing these reasons, we became concerned that the appeal before us may have been too confined. For example, we consider that there may be an argument that a more appropriate remedy in this case may have been to replace the trustees (under s 239), even if the threshold for the removal of trustees under s 240 was not met.[163] This is because:

(s) this was a very significant transaction;

(t) the other trustees knew of Mrs Fenwick's conflict;

(u) there remained a possibility that the remaining trustees may (at least subconsciously) have been influenced by Mrs Fenwick as a conflicted trustee; and

(v) the trustees (and not the Maori Land Court) should be the primary decision makers.

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161 The remedy may be moulded to reflect the needs arising in a given case: see for example *Spence v Crawford* [1939] 3 All ER 271 (HL) at 288 and the discussion in *Snell's Equity,* above n 99, at [7.053] and[15.014]–[15.015].

162 Other than as a beneficiary of one of the other trust parties.

163 See above at 0 for a summary of ss 239 and 240.

We have not heard argument on this point and we make no finding on it. As a practical matter, given that there are to be (at least some) new trustees,[164] the issue does not in any event arise. We mention it because (for the same reasons as outlined above) the Maori Land Court should consider whether, instead of deciding at this stage if it should uphold the joint venture arrangements, it should remit that matter to be decided by the new trustees.[165] Whether or not that is an appropriate course of action should be decided by the Maori Land Court after hearing from the parties.

If the matter is remitted to the new trustees, then those trustees will need to decide whether they should seek rescission of the joint venture arrangements because of the s 227A breach. If they decide to do so and the other parties resist rescission, then the best course would be for the trustees to apply to the Maori Land Court for directions. The Maori Land Court could then decide on the appropriate course, which would likely entail having a hearing on the appropriate remedy for the breach of s 227A, in accordance with the procedure discussed above and taking into account the factors set out at 0.

If the matter is remitted to the new trustees and those new trustees decide that the joint venture arrangements are in the best interests of the trust and should be affirmed, then this will be a new decision and not be in breach of s 227A.

If the matter is remitted to the new trustees (or, indeed, if the Maori Land Court does decide to consider at this stage whether it should uphold the joint venture arrangements), the issue of whether there should be further consultation with the beneficiaries arises and, if so, the extent and means of that consultation.

In the courts below, the Beneficiaries had argued that there was a legal obligation, under s 229 or s 244 or the common law, to consult with the beneficial owners before entering into the joint venture agreement. The Court of Appeal upheld the position

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164 As at 6 June 2014, by memorandum to the Court, the first respondents confirmed that there were only two remaining trustees of the Tikitere Trust and that they intended to apply to the Maori Land Court for a meeting of owners so that new trustees could be appointed. We do not know whether new trustees have now been appointed.

165 If that should occur, the Maori Land Court may come to the view that it would not be proper for Mr Eru or Mr Kingi to participate in the decision as they have already indicated set views and there is the risk that they were subconsciously affected by the conflict when the decision to enter into the joint venture arrangements was made.

taken in the Maori Appellate Court and the Maori Land Court that there was nothing in the Act, the trust order or the common law that requires consultation.[166]

Sections 229 and 244 of the Act require the views of the beneficiaries to be sought before authorising an extension of the activities of the trust or a variation of the trust. The courts below held that these sections did not apply as the joint venture arrangements came under the general powers in cl 3(a) of the trust deed. [167]

The Maori Land Court should, however, consider the consultation issue in terms of the context, scheme and purpose of the Act. As we have noted above, general trust law principles only apply to the extent that they are not modified by the Act. The Maori Land Court thus could consider whether ss 229 and 244 of the Act may indicate that, even if the trust deed contains wide-ranging powers, there should be consultation in a case of this kind involving a significant long term transaction of arguably a different nature than has been undertaken in the past. Equally the Court could consider whether the preamble of the Act, with its emphasis on land as taonga and on rangatiratanga, may suggest that the beneficiaries should have been consulted with regard to a transaction of this kind and magnitude. In addition the Court could consider whether the general context of the Act, relating as it does to Maori interests, may also suggest the incorporation of any general principles on consultation in Maori culture and under custom (particularly relating to land use). We are not, however, to be taken as expressing a view as to whether there should be further consultation. That is for the Maori Land Court to decide after hearing full argument on the point.

We considered whether we should seek further argument on the consultation issue and on whether there should be remission to the new trustees but, as the matter was to be returned to the Maori Land Court in any event, it is preferable for that Court to consider these issues as a specialist court and in the context of full argument on the proper consequences of the breach of s 227A in this case (and with the possible participation of the other joint venture participants and any other interested parties if they seek to be heard).

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166 See *Naera* (MLC), above n 8, at [110]; *Naera* (MAC), above n 44, at [56]; and *Naera* (CA), above n 3, at [48]–[52].

167 See above at 0.

Summary

We agree with the Court of Appeal that Mrs Fenwick was disqualified from voting on the resolution to enter into the joint venture arrangements due to her personal beneficial interest in the Paehinahina Mourea Trust.[168] Her voting on the resolution breached s 227A. Mr Eru does not appear to have been disqualified because his indirect beneficial interest in the Paehinahina Mourea Trust appears, on the information available to us, to be *de minimis*.[169] We do not consider that Mrs Emery was disqualified.

In the context of ahu whenua trusts constituted under the Act, we do not agree with the Court of Appeal that the consequence of a breach of s 227A is automatic rescission at the instance of a beneficiary, subject only to the interests of innocent third parties. Instead, the Maori Land Court has the power to decide upon the appropriate consequences of a breach of s 227A in this case, taking into account the factors set out above at 0. The Maori Land Court should also consider whether it should remit the matter to be decided by the new trustees, and if so, what level of further consultation with the beneficiaries should be required.

Result

We allow the appeal in part. The Court of Appeal's order to remit the matter to the Maori Land Court (to deal with the issue of innocent third parties) stands.[170] However, should there be no relevant third party interests, the Maori Land Court should consider what the consequences of the breach of s 227A should be, taking

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168 We have insufficient information to determine whether Mrs Fenwick's family's significant beneficial interest in the Paehinahina Mourea Trust would also constitute a conflict of interest: see n 79 above. The Maori Land Court can determine this if necessary.

169 As we do not have all relevant facts before us, we do not express a concluded view and leave the matter for determination by the Maori Land Court if necessary.

170 In this regard one of the issues to be considered is whether the other parties to the joint venture agreement were aware of Mrs Fenwick's interest in the Paehinahina Mourea Trust and that she participated in the decision of the Tikitere Trust to enter into the agreement. There may also be issues of constructive notice to be considered: see *Lewin on Trusts,* above n 94, at [20–37]. We also note that some authorities suggest that rescission can be ordered even if there are innocent third parties, provided the third party interests can be adequately safeguarded by court order: see GA Dal Pont *Equity and Trusts in Australia* (5th ed, Thomson Reuters, Sydney, 2011) at [35.75] citing *Orix Australia Corporation Ltd v M Wright Hotel Refrigeration Pty Ltd* (2000) 155 FLR 267 at 274–275 (SCSA); *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420 at 433–434 (NSWSC); and *Fenton v Kenny* [1969] NZLR 552 (SC) at 556.

into account the matters discussed in this judgment. The Maori Land Court is also to decide on the existence (or otherwise) of the conflicts in light of this judgment.

Costs

The Beneficiaries seek an order that their reasonable costs should be paid by the Tikitere Trust.

In the Maori Land Court the issue was raised as to whether costs should be paid by the Tikitere Trust. During a judicial conference on 1 July 2014, Judge Harvey indicated a preliminary view that funding out of trust funds should be provided to neither party or to both. As a result Mr Kingi did not pursue the matter.

As Mr Kingi is being funded for this appeal by Tikitere Geothermal, which is partly owned by the Tikitere Trust, the Beneficiaries now seek an order that either both parties' costs be met by the Trust or that the costs of neither party are met. It is submitted that the jurisdiction for an order exists under ss 56 and 79 of Act respectively through s 25(1)(a) or s 25(1)(b) of the Supreme Court Act 2003, and/or under r 44 of the Supreme Court Rules 2004.

It was important and in the interests of the Tikitere Trust that the issues relating to conflict of interest were raised and dealt with. We consider it appropriate to make an order that the Tikitere Trust pay the reasonable solicitor/client costs and disbursements of the Beneficiaries for this appeal. If there is any dispute about the quantum of costs and disbursements, then this can be dealt with by the Registrar of this Court.[171] As Mr Kingi was funded for this appeal by Tikitere Geothermal, there is no need to make any costs order for him.

The question of costs in the Maori Land Court, the Maori Appellate Court and the Court of Appeal should (if an application is made) be considered by those Courts in light of this judgment.[172]

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[171] We understand that legal aid has been granted to the respondents and, if so, this will need to be refunded out of the costs award.

[172] There were other issues raised in those courts and it may well be that the airing of those issues can also be seen as having been of benefit to the Tikitere Trust, even though the Beneficiaries were unsuccessful in their arguments on those points.

WILLIAM YOUNG J

Preliminary comments

I differ from the approach proposed by the majority primarily in respect of the juridical basis upon which the Maori Land Court should act on the reference back.

(w) I consider that the question whether the Whakapoungakau 24 Ahu Whenua Trust (the Tikitere Trust) should seek to rescind the joint venture agreement should be decided by either the trustees for the time being (and here I am assuming that there will be new trustees) or, and more plausibly, by the Court on an application by the trustees under s 66 of the Trustee Act 1956.[173] Such an application should be determined solely by reference to what is in the best interests of the Tikitere Trust.

(x) If the result is a decision that the trustees should seek to rescind the joint venture agreement, the question whether there should be rescission could be addressed in separate proceedings between the trustees and the affected third parties.

(y) At least if the parties all agreed, it may be that the steps just referred to could be conflated in a single hearing which would determine (a) whether it was appropriate for the trustees to seek rescission, and (b) if so, whether rescission was appropriate.

Ahu whenua trusts – the statutory context

The Tikitere Trust is an ahu whenua trust. The institution of ahu whenua trust was created by the Te Ture Whenua Maori Act 1993 and replaced what had previously

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[173] Compare *Re Beddoe* [1893] 1 Ch 547 (CA). As to the way in which such applications are dealt with, see *Re Moritz (deceased)* [1959] 3 All ER 767 (Ch) and *Re Eaton (deceased)* [1964] 3 All ER 229 (Ch). The primary purpose of a *Beddoe* application is to protect the trustee as to costs. But common sense and a perusal of *Beddoe* itself shows that "the wisdom" of the proposed litigation is relevant: see *Beddoe* at 562, per Bowen LJ. A decision by the trustees, one way or the other, as to whether to litigate would, on my appreciation, be open to review by beneficiaries under s 231 of the Te Ture Whenua Maori Act 1993.

been known as "s 438 trusts", a reference to s 438 of the Maori Affairs Act 1953. Section 438 trusts were a favoured method of the Maori Land Court in achieving efficient management of Maori land.[174] They were a pragmatic response to fragmentation of often absentee ownership interests.[175] All existing s 438 trusts became ahu whenua trusts when the Te Ture Whenua Maori Act came into force.[176] As of 2012, some 5,575 ahu whenua trusts were in existence.[177]

The trustees of an ahu whenua trust are appointed by the Maori Land Court under s 222 of the Te Ture Whenua Maori Act. Section 222(2) provides:

> The court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part,—
>
> (a) shall have regard to the ability, experience, and knowledge of the individual or body; and
>
> (b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

The acceptability of potential trustees is usually tested informally, for instance by a show of hands at a meeting.[178]

That the general law of trusts is applicable to trusts created under the Te Ture Whenua Maori Act is apparent from the "trust" and "trustee" terminology of the Act and s 237 which provides:

> **237 Jurisdiction of court generally**
>
> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Maori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.

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174 *Brookers Land Law* (looseleaf ed, Brookers, Wellington) at [14.6.03(1)].

175 See George Asher and David Naulls *Maori Land* (New Zealand Planning Council, Wellington, 1987) at 67–79. See also Tom Bennion "Maori Land" in Tom Bennion and others *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) 343 at 356–358 and 360–363.

176 Te Ture Whenua Maori Act, s 354.

177 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [1.17].

178 See *Brookers Land Law*, above n 174, at [14.6.03(11)]. In the present case Judge Harvey ordered that the replacement for the late Mrs Emery be chosen by way of secret ballot at a meeting of the beneficiaries: see *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiariki MB 279 (15 WAR 279) (Judge Harvey) [*Naera* (MLC)] at [223].

(2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

And in the sense that the trustees of an ahu whenua trust are acting on behalf, and in the interests of others, there is no general incongruity in applying the law of trusts to their actions. It must be the case, however, that the application of the general law of trusts and principles of equity to ahu whenua trusts is subject to the terms, and the scheme and purpose, of the Te Ture Whenua Maori Act.[179]

That this is so is I think supported by ss 17 and 18 of the Te Ture Whenua Maori Act which relevantly provide:

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

(2) In applying subsection (1) of this section, the court shall seek to achieve the following further objectives:

(a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) To determine or facilitate the settlement of disputes and other matters among the owners of any land:

(d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:

(e) to ensure fairness in dealings with the owners of any land in multiple ownership:

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[179] See for instance *The Contradictors v Attorney-General* [2001] 3 NZLR 301 (PC) at [12], where the Privy Council held that the applicability of the general principles of equity were subject to the requirements of the relevant statutory scheme (in that case, the Public Trust Office Act 1957). That this is also the case with respect to trusts created under the Te Ture Whenua Maori Act was affirmed in *Rameka v Hall* [2013] NZCA 203, (2013) 7 NZ ConvC 96–006 at [19].

(f) to promote practical solutions to problems arising in the use or management of any land.

18 General jurisdiction of court

(1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:

(a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

(b) to determine the relative interests of the owners in common, whether at law or in equity, of any Maori freehold land:

(c) to hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land:

…

(i) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

…

Section 18 rests on the assumption that the common law and equity are to be applied by the Maori Land Court but in the very particular context provided by the high level objectives spelt out in s 17(1) and the more practical objectives stipulated in s 17(2) and particularly in (c), (d), (e) and (f).

As I have noted, the ahu whenua trust is a creature of statute and such trusts have characteristics which, in their totality, serve to differentiate them from other trusts:

(z) As discussed, such trusts are usually constituted by order of the Maori Land Court.[180]

(aa) Consequentially, the terms of ahu whenua trusts are settled by the Court.[181]

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[180] Te Ture Whenua Maori Act, s 211(1) provides that the Maori Land Court has exclusive jurisdiction to constitute such trusts but s 211(2) provides such trusts are not prevented from being otherwise constituted.

(bb) Also consequentially, the trustees of an ahu whenua trust are appointed by the Court.[182] The Court also has the power to add, remove or replace these trustees.[183]

(cc) Land held by an ahu whenua trust may be registered in the name of the trust or a tipuna rather than in the names of the trustees.[184]

(dd) The ahu whenua trust is a mechanism for retaining in Maori ownership and managing land which is subject to fractionated ownership.[185]

(ee) There is a real sense in which trustees of an ahu whenua trust are the representatives of the beneficiaries whose views as to who is acceptable are a mandatory consideration for the court.[186]

(ff) Ahu whenua trusts operate in a very particular context in which, because of the nature of kinship relationships, the beneficiaries of one trust are likely to have interests in nearby land owned by other trusts.

(gg) Ahu whenua trusts are under the supervision and control of the Court under particularly s 221 (as to amalgamation), conferral of powers (s 226), authorisation of new ventures (s 229), keeping accounts (s 230), and reviewing "the terms, operation or other aspect" of a trust (s 231) as well as the enforcement of the obligations of a trust (s 238), the termination of trusts (under s 241) and variation (under s 244). In addition, by reason of s 237, the Maori Land Court has in relation to ahu whenua trusts the jurisdiction conferred on the High Court by ss 66 of the Trustee Act 1956, to give directions in response to an application by a trustee.

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181 Section 219.
182 Section 222.
183 Sections 239 and 240.
184 Section 220A.
185 See Ministry of Justice "Maori Land Trusts" (February 2010) at 8.
186 See Te Ture Whenua Maori Act, s 222(2)(b).

(hh) The proceedings of trustees are likely to be comparatively informal. While competence for the task is a material consideration in relation to appointment (see s 222(2)(a)) a trustee may not be appointed unless "broadly acceptable" to the beneficiaries. Trustees may well not have professional qualifications. As well, they may not have the resources to seek independent legal advice. They do, however, have ready access to the Maori Land Court which has an extensive review and supervisory role.

The jurisdiction of the High Court in relation to trusts extends to ahu whenua trusts.[187] As well, pursuant to s 237, the Maori Land Court also has the powers which are generally exercisable by the High Court, under the Trustee Act 1956 or the general law of trusts. That said, the role of the Maori Land Court in relation to ahu whenua trusts is, at least in its totality, very different from that of the High Court in relation to other trusts. There is a substantial sense in which the Court speaks for, and acts on behalf of, beneficiaries. That this is so is illustrated by its power of termination under s 241 which has no analogue in the general law of trusts and its powers of variation under s 244, which are far more extensive than those exercisable under ss 64 and 64A of the Trustee Act.

Sections 277 and 227A of the Te Ture Whenua Maori Act

Sections 227 and 227A relevantly provide:

> **227 Trustees may act by majority**
>
> (1) Subject to any express provision in the trust order and except as provided in subsections (2) and (3), in any case where there are 3 or more responsible trustees of a trust constituted under this Part, a majority of the trustees shall have sufficient authority to exercise any powers conferred on the trustees.
>
> …
>
> **227A Interested trustees**
>
> (1) A person is not disqualified from being elected or from holding office as a trustee because of that person's employment as a servant

[187] See s 237(2).

or officer of the trust, or interest or concern in any contract made by the trust.

(2) A trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects that person's remuneration or the terms of that person's employment as a servant or officer of the trust, or that directly or indirectly affects any contract in which that person may be interested or concerned other than as a trustee of another trust.

The usual rule in relation to trusts which are not charitable and do not have a public character is that trustees must act unanimously.[188] So the effect of s 227(1) is to abrogate that rule in relation to ahu whenua trusts.

Section 227A of the Act was introduced by the Te Ture Whenua Maori Amendment Act 2002, the purpose of which was to further facilitate the development of Maori land under the principal legislation.[189]

There are two aspects of s 227A which warrant comment:

(ii) the trustee exemption; and

(jj) the effect of a breach of s 227A.

In deciding what to make of the trustee exemption, there are two very important considerations to keep in mind:

(kk) trustees are often, and perhaps usually, beneficial owners;[190] and

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188 For the general requirement of unanimity see for instance *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121 (CA) and *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 (HC).

189 The amending legislation was described by the Minister of Maori Affairs as having been "designed to enhance and improve the principal Act", and by the Minister for Courts as affirming the principle of balancing the retention of Maori land with its utilisation and development: see (28 May 2002) 601 NZPD 16628 and (5 October 1999) 580 NZPD 19562. The changes made to the principal Act included empowering the Maori Land Court to make orders enabling access to landlocked Maori land: see s 51 of the 2002 Act and s 326B of the principal Act.

190 We were not taken to any statistics as the makeup of the trustees of ahu whenua trusts but it seems plausible to assume that they are often, and perhaps usually, beneficiaries. This appears especially likely given the historical origin of Maori land trusts. The Law Commission has stated that "[t]here is evidence that trusteeship of Maori land may have arisen from the cultural institution of rangatira who made decisions in relation to land and communities on behalf of the communities": see Law Commission, above n 177, at [1.15] and the authorities cited therein. If this is correct then such rangatira, assuming that they had the same interest in the land as others in the community, were in a position broadly analogous to that of a trustee who has a beneficial

(ll) beneficial ownership in relation to more than one trust is very common.[191]

Against that background, the trustee exemption in s 227A might be thought to presuppose that a trustee's beneficial interest in the other trust in issue will likewise not necessarily engage the s 227A prohibition. It seems to me that the considerations just referred to can be accommodated by a robust application of the *de minimis* principle (discussed by Glazebrook J at 0, 0 and 0).

Section 227A does not provide for the consequences of breach. It does not appear to be an offence to breach the negative duty imposed by s 227A.[192] As to non-criminal consequences, I think that the vote of a trustee who contravenes s 227A is to be disregarded and the presence of that trustee at the relevant meeting is not to be counted for quorum purposes.[193] Such consequences would sometimes be sufficient to result in the formal invalidity of a decision.

In the Maori Land Court and Maori Appellate Court, the challenge to the joint venture agreement was on what I have just described as "formal invalidity grounds". This challenge was rejected, in my view correctly, by both courts on the basis that majority voting is permitted by s 227 and that the disputed votes were not necessary to the adoption of the joint venture agreement.

If s 227A had been complied with to the letter and the joint venture agreement had been approved by an appropriate majority of the trustees, there would have been no scope for application of the self-dealing rule. On the other hand,

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interest in land the trust owns.

191 As of 2014, Maori Land Court records indicated that the 1.466 million hectares of Maori freehold land was held in 27,308 separate titles with over 2.7 million individual ownership interests: see Matanuku Mahuika, Patsy Reddy and Dion Tuuta "Te Ture Whenua Maori Act 1993 Review Panel: Report" (Te Pune Kokiri, April 2014) at 14. Although not all of these interests relate to Maori trusts, the magnitude of the individual interest figure suggests a high number of different beneficial interests per owner.

192 The Te Ture Whenua Maori Act does not create offences. There is perhaps scope for debate whether a breach of s 227A might give rise to liability under s 107 of the Crimes Act 1961 (contravention of a statute). Given s 107(1)(b), I do not think that this is so, essentially because I am of the view that it would be inconsistent with the intent and object of s 227A to hold that contravention is a crime.

193 See for instance art 84(2) of the third schedule to the Companies Act 1955 which provided that where a director voted in breach of the corresponding requirement, that director's vote should not be counted and the director's presence should not be counted for the purposes of quorum requirements.

non-compliance with s 227A means that the self-dealing rule is potentially applicable. One of the purposes of s 227A is to reinforce, and provide a structure for adherence to, the fiduciary obligations of trustees – obligations which, in the case of ordinary trusts (and indeed ordinary fiduciary relationships) are enforced by the self-dealing rule.[194] Against this background, the effect of the breach of s 227A is to provide scope for the application of the self-dealing rule. In other words the breach of s 227A would not in itself result in the joint venture agreement being voidable. Rather it means that what would otherwise be a complete answer to a self-dealing rule argument is not available.

For the reasons just given, I think that the failure of the legislature to be specific as to the consequences of a breach of s 227A is not surprising and I do not see it as particularly relevant to the way in which the self-dealing rule is to be applied.

Was there a breach of s 227A?

In issue on this appeal is the decision made by the trustees of the Tikitere Trust to enter into a joint venture with the Paehinahina Mourea Trust and the Manupirua Ahu Whenua Trust and involving Tikitere Geothermal Ltd (which is owned by the Tikitere Trust) for the development of a geothermal power station.

Mrs Fenwick owned just under two per cent of the shares in the Tikitere trust and she was a trustee of the Paehinahina Mourea Trust in which she and her family had substantial interests (amounting to approximately 25 per cent of the shares). I accept that her interest in the Paehinahina Mourea Trust was sufficiently substantial to preclude resort to the de minimis principle. As well, given the other options available (most obviously not voting) I do not see her participation as permissible on the basis that her appointment inevitably placed her in a conflict of interest (see Glazebrook J at 0–0). The result is that her participation in the decision-making in relation to the joint venture was in breach of s 227A(2).

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194 Some assistance as to this is provided by cases on the disclosure and non-voting obligations of directors: see *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 (NSWCA) and the authorities discussed therein.

Mr Eru was a trustee of the Manupirua Ahu Whenua Trust. Additionally, a whanau trust of which he both is a trustee and a beneficiary held 0.045 per cent of the Paehinahina Mourea Trust and approximately 0.12 per cent of the Tikitere Trust. His position as trustee of the Manupirua Ahu Whenua Trust is to be disregarded under s 227A(2) (and is thus immaterial in the present context) and I would be inclined to see his interests in the Paehinahina Mourea Trust as accommodated under the *de minimis* principle. On this basis, his participation would not have breached s 227A(2).

In the case of Mrs Emery, the only conflict alleged was that her husband was a trustee of the Paehinahina Mourea Trust. Given that her husband's trusteeship of the Paehinahina Mourea Trust would have been irrelevant under s 227A if he had been a trustee of the Tikitere Trust, it seems to me that it could not sensibly be said to have disqualified Mrs Emery.

For ease of discussion I will address the case on the basis that it was only Mrs Fenwick who acted in breach of s 227A. I should say, however, that a conclusion that Mr Eru also acted in breach of s 227A (which may have been the view of Judge Harvey in the Maori Land Court)[195] would not affect my view as to the appropriate outcome of the case.

What is the consequence of Mrs Fenwick's participation in the decision to enter the joint venture?

The approaches of the Courts below

Judge Harvey in the Maori Land Court held that the breaches of s 227A (on the part of not only Mrs Fenwick but also Mr Eru) and the associated "appearance of conflict" did not render the joint venture agreement "nugatory".[196] His reasons for this conclusion appear to have been that the joint venture agreement had the support of all trustees, a majority of whom were not conflicted. He also considered that Mrs Fenwick's conduct was not affected by personal financial considerations.

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195 Judge Harvey did not expressly say that Mr Eru was in breach of 227A. Instead at [164] he just said that as was the case with Mrs Fenwick's conduct, there was "cause for concern" in respect of Mr Eru's involvement.

196 *Naera* (MLC), above n 178, at [154].

The Maori Appellate Court reached the same result but solely on the basis of its conclusion that the participation of Mrs Fenwick (along with that of Mr Eru) did not result in the invalidity of the decision because the same result would have been reached if they had not participated.[197]

As already noted, both Judge Harvey and the Maori Appellate Court were dealing with what I have called formal invalidity arguments. They were not dealing with the self-dealing rule itself. That said, some of the considerations referred to by Judge Harvey are of materiality in the present context.

The Court of Appeal (which was asked to deal with the case on the basis of the self-dealing rule) noted that the Te Ture Whenua Maori Act was silent as to the consequences of a breach of s 227A and held that this meant that the equitable principles were applicable.[198] The prohibition in s 227A (and the trust order) on participation in discussions by interested trustees meant that "a fact-based inquiry into whether or not the non-interested trustees were improperly influenced is not appropriate".[199] In the view of the Court, the beneficiaries were entitled to require a decision-making process in which each trustee would "bring to bear a mind unclouded by any contrary interest".[200] And for these reasons, the Court was of the view that where a conflicted trustee has participated in the decision-making, the resulting decision is voidable "regardless of whether there is a majority of non-conflicted trustees".[201]

The Court of Appeal recognised that its approach might cause some problems but saw these as manageable:

> [103] We acknowledge that it might be said that applying these principles could cause administrative inconvenience to trustees because of the fact that many trustees of Māori trusts are likely to be conflicted. However, we are confident that the Act provides the appropriate tools for trustees to manage such conflicts. For example, trustees may remove themselves from decision making under s 227A, or apply for a variation to the trust deed under s 244.

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197 *Naera v Fenwick – Whakapoungakau 24* (2011) 2011 Maori Appellate Court MB 316 (2011 APPEAL 316) (Isaac CJ, Coxhead and Reeves JJ) [*Naera* (MAC)] at [71].

198 *Naera v Fenwick* [2013] NZCA 353 (Arnold, Stevens and White JJ) [*Naera* (CA)] at [97].

199 At [98].

200 At [99].

201 At [99].

> Alternatively an application for directions to the Māori Land Court might be appropriate. If those mechanisms are thought to be insufficient, it may be necessary to consider legislative change.

To my way of thinking, it is a distinctly odd feature of the case that the Court of Appeal felt able to express conclusions as to the voidability of the joint venture agreements (a) when this issue arose formally for the first time on what was a second appeal, and (b) in proceedings to which the other participants in the joint venture agreement were not parties. As well, the Court's conclusion that it was open to the beneficiaries challenging the joint venture agreement to apply to set it aside is not obvious, at least to me. But, in agreement with the majority, I accept that this Court now has no choice but to engage with the reasoning of the Court of Appeal. On the other hand, and perhaps just as a sop to my anxiety on this issue, my preference is that such engagement should be expressed to be provisional only. Hence some caution in the expression of the views which follow.

The applicability of the self-dealing rule

On the basis of the review of the authorities by Glazebrook J,[202] I am inclined to accept that the self-dealing rule is applicable to joint venture agreements of the kind involved in this case. In other words, as presently advised, I do not see the self-dealing rule as restricted to purchases.

Mrs Fenwick's very substantial interest in the Paehinahina Mourea Trust was well known to the trustees (and no doubt to many of the beneficiaries) of both trusts. The Maori Land Court judgment acquitted her of having acted in her own financial interests or other impropriety and likewise concluded that the other trustees were not influenced in their decision-making by her interest in the Paehinahina Mourea Trust.[203] In issue is whether these considerations, along with the fact that a non-conflicted majority of the trustees supported the joint venture agreement, is an answer to the application of the self-dealing rule.

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202 See above at 0–0.

203 *Naera* (MLC), above n 178, at [150].

The only authority cited by the Court of Appeal in support of its conclusion that the joint venture agreement was voidable despite it being approved by a majority of non-conflicted trustees was *Re Thompson's Settlement*.[204] There Vinelott J said:[205]

> *The principle [ie the self-dealing rule] is applied stringently in cases where a trustee concurs in a transaction which cannot be carried into effect without his concurrence and who also has an interest in or owes a fiduciary duty to another in relation to the same transaction.* The transaction cannot stand if challenged by a beneficiary because in the absence of an express provision in the trust instrument the beneficiaries are entitled to require that the trustees act unanimously and that each brings to bear a mind unclouded by any contrary interest or duty in deciding whether it is in the interest of the beneficiaries that the trustees concur in it.

The passage which I have emphasised shows that the Judge had in mind a trust constituted on the basis that the unanimity of trustees is required. *Re Thompson's Settlement* is therefore not directly on point in the present context.

Despite the absence of authority which is directly on point, I have reached the provisional view that the self-dealing rule is applicable in the present context and its operation is not excluded by the fact that a majority of non-conflicted trustees approved the transaction. As I have noted, trustees of ahu whenua trusts make decisions on behalf of others. There is thus every reason why ordinary fiduciary principles should apply.[206] Indeed, as explained, s 227A is an endorsement of their application. While the potential for conflicts of interest may be greater with trusts under the Te Ture Whenua Act than with other trusts, the Act provides mechanisms for addressing this, including s 227 and 227A and the availability of access to the Maori Land Court. All in all, it seems to me that to conclude that the self-dealing rule is not applicable in the present case would be likely to have an unsettling effect on the performance by trustees of their duties.[207]

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204 *Re Thompson's Settlement* [1986] Ch 99 (Ch).

205 At 115 (emphasis added).

206 Indeed, the panel appointed to review the Te Ture Whenua Maori Act in 2014 recommended that the duties and obligations of Maori land trustees ought to align with the general law applying to similar entities, and that Maori land law should be clarified to achieve this end: see Te Ture Whenua Maori Act 1993 Review Panel, above n 191, at 29.

207 There is academic support for the proposition that equitable rules apply other than to the extent to which s 227A permits conflicts of interest: see Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis NZ, Wellington, 2013) at [29.36].

A rationale of the self-dealing rule is the desirability of avoiding after the fact assessment of decision-making processes of the kind engaged in by Judge Harvey. Those who were involved in challenged decisions can be expected to deny any suggestion of improper influence and such denials may be hard to refute. It is a striking feature of the case that the interest of Mrs Fenwick and her family in the Paehinahina Mourea Trust (at around 25 per cent) is distinctly greater than her interest in the Tikitere Trust (just under 2 per cent). As well, and as noted by Judge Harvey in the Maori Land Court,[208] it is unfortunate that the other trustees acquiesced in her participation despite being well aware of her involvement in the Paehinahina Mourea Trust.

The consequences of the application of the self-dealing rule

As is apparent, I am distinctly uncomfortable with the Court of Appeal reaching a conclusion as to the voidability of the joint venture agreement in proceedings to which those potentially affected by that conclusion were not parties. That said, I am prepared to accept – subject to anything which might be said to the contrary by those yet to have been heard in this dispute – that the effect of the self-dealing rule in the present circumstances is to render the joint venture agreement potentially voidable[209] but that its avoidance would be subject to the interests of innocent third parties. There nonetheless remain questions which, with respect, were not addressed by the Court of Appeal as to whether the joint venture agreement should be avoided and, if so, by whom.

In the case of an ordinary trust and a breach of the self-dealing rule in which no third party is involved (eg where the trustee acquires trust property), the decision whether to avoid the transaction could be made by the trustees for the time being and by any beneficiary.[210] I am, however, inclined to the view that different considerations apply where, as here, in issue is a contract between the trust and a third party to the trust in which one of the trustees is interested and where such avoidance is likely to involve litigation which will have to be funded and possibly a restitutio in integrum

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208 *Naera* (MLC), above n 178, at [148].

209 *Naera* (CA), above n 198, at [90] and [102].

210 See J Mowbray and others *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2008) at [39–67]–[39–76]. The expression "any beneficiary" is used in *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 241.

by the trust if the litigation is successful. On this hypothesis, the beneficiary will not be directly in contract with the third party. It seems to me that where there is an intra-trust dispute (a disagreement among the trustees and beneficiaries as to what should be done) the question whether to avoid the contract (and engage in the ensuing litigation) would be best resolved by an application to the Court by the trustees under s 66 of the Trustee Act. As well, in the present context of the Te Ture Whenua Maori Act, I would see a conclusion that a single beneficiary under an ahu whenua trust has the power to insist on avoidance as inconsistent with what is envisaged by s 17(2)(d) (the "unreasonable minority") of that Act and its scheme and purpose.

The joint venture could be avoided by new trustees appointed by the Court, albeit that if this happened, the actions of those trustees might themselves be subject to review under s 231. In this context, I can see two practical ways of addressing the problem:

(mm) The Maori Land Court could, on the reconsideration which is now required, deal with the issue effectively as an application for directions as to whether to seek rescission, and thus, without the participation of the other parties to the joint venture, decide whether the trustees should take steps to avoid the joint venture agreement. If the trustees were directed to take such steps, they could then commence litigation against the other parties to the joint venture agreement.

(nn) The Court could possibly conflate these steps by joining the other parties to the joint venture to the proceedings and conduct a single hearing. The first issue at the hearing would be to determine whether avoidance litigation is appropriate, when viewed from the perspective of the Tikitere Trust. If so, the second issue would be to determine whether, as between the Tikitere Trust and the other parties, the agreement is to be rescinded.

Such conflation would be dependent upon the Maori Land Court having jurisdiction to deal with the rescission proceedings, a point on which we did not hear argument.[211] And leaving aside this point, I suspect that a conflated process may in the end prove to be the sort of short cut that results in the long way home. For this reason and because of the potential for confusion as to what material may be relevant to what issue, I consider that a conflated hearing should occur only if all parties agree.

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[211] See n 157 above.