IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CIV-2022-454-21
[2025] NZHC 1621

BETWEEN	JANET ANNE ABIGAIL MCKEAN AND JOHN DUGALD STEWART MCKEAN Plaintiffs
AND	MCKEAN FAMILY TRUSTEE LIMITED First Defendant
	IAN MACGREGOR STEWART MCKEAN Second Defendant

CIV-2022-454-71

BETWEEN	TORWOOD TRUSTEES LIMITED Plaintiff

Hearing:	10 February 2025 – 18 February 2025
Further submissions:	24 February, 3 March and 4 March 2025
Counsel:	L M McKeown and P J M Gerard for Janet McKean and John McKean V T M Bruton KC and E M Thorpe for McKean Family Trustee Ltd N L Walker and P B Trebilco for Ian McKean S D Campbell and C W Martin for Torwood Trustees Ltd
Judgment:	18 June 2025

JUDGMENT OF RADICH J

Table of Contents

Para No.

The participants and the Trust's assets [7]

The two proceedings [16]

The 21 proceeding [17]

The 71 proceeding [21]

The relationship between the proceedings [24]

The terms of the Trust [25]

The sequence of events [35]

2013 – settlement of the Trust [36]

2013 to mid-2018 – harmonious beginnings [51]

2018 to mid-2020 – relationships begin to sour [59]

Mid-2020 to late 2021 – Janet and John engage lawyers [84]

2022 to February 2024 – the litigation begins [108]
The 21 and 71 proceedings are filed [108]
MFTL applies for a pre-emptive indemnity [112]
MFTL is replaced by TTL [117]

February 2024 to the present – preparation for trial and attempts to settle [123]

Preliminary comments about Ian, Janet and John [128]

Analysis of the 21 proceeding [142]

The duties owed [145]

Are Janet and John's allegations against MFTL and Ian made out in fact? [163]
Did Ian mislead John about the terms of the trust? [165]
Allegations about Janet and John not being trustees or directors of MFTL [169]
Did Ian and/or MFTL deprive Janet and John of power and control by varying the Trust Deed in 2019? [191]
Did MFTL or Ian act improperly in relation to distributions from the Trust? [197]
Did Ian and/or MFTL (under Ian's control) breach duties to act honestly and in good faith as a fiduciary and trustee in other ways? [207]
Did Ian and/or MFTL fail to follow the terms of the Trust? [210]
Did Ian and/or MFTL refuse or fail to provide Trust Information? [213]
Did MFTL or Ian breach duties in relation to rent renewals for the farm lease? [217]
Conclusion on allegations against Ian and MFTL [220]

Should MFTL be indemnified for its legal costs? [222]
When can trustees be indemnified? [223]
Reasonableness of MFTL's pre-proceeding costs [232]

Reasonableness of MFTL's costs in bringing the 71 proceeding [240]
Reasonableness of MFTL's costs in bringing its pre-emptive indemnity application [248]
Reasonableness of MFTL's costs as they relate to having Torwood Farm valued and the farm's lease [255]
Reasonableness of MFTL's costs in defending the 21 proceeding [262]
MFTL's second counterclaim – payment of charges for time expended and acts done in connection with the Trust [268]
Should Ian pay for MFTL's costs? [277]
Disclosure of Trust documents [285]
Relevant principles [291]
Analysis [299]
The remaining claim and counterclaim – alleged breaches of duties as protector [306]
Conclusion on the 21 proceeding [312]
The resulting orders [315]
Analysis of the 71 proceeding [316]
The contest between the parties [320]
Legal principles [331]
Does the Court have jurisdiction to make alternative directions to those sought by TTL? [333]
When the Court will "bless" actions proposed by trustees [343]
TTL's power to sell the farm [348]
Should TTL sell the farm on the open market? [351]
The process for selling the farm [356]
Ian's proposed method of sale [357]
The counterclaims [366]
MFTL's second counterclaim – reimbursement for work done in connection with the trust [368]
Ian's counterclaim for reimbursement for work done as a director of MFTL [369]
TTL's costs [371]
The resulting orders [379]
Summary of conclusions [381]
Costs [382]
Post-script [384]

[1] This is a sad story about a beautiful place.

[2] Torwood Farm's 400 hectares of farmland is nestled in Rangiwahia, near the Ruahine Forest Park, and looks out over the Ruahine Ranges and Mounts Ruapehu and Ngauruhoe.

[3] The McKean family's roots in the land are deep. The farm has belonged to the family since 1893. Many family members grew up on the land and others are buried there.

[4] The story is sad because it involves family members arguing bitterly over the way in which the land has been managed under the Torwood Family Trust, a trust set up by the family's matriarch, Flora McKean. They have been fighting so bitterly and for so many years now that they have bled the Trust's liquid funds dry through the cost of these proceedings. The farm now needs to be sold, contrary to Flora's wish that it remain in the family.

[5] The proceedings involve claims and counterclaims over alleged breaches of duties owed by family members as trustees or protectors of the Trust. But, as I come on to explain, none of the allegations can be made out. No one – including the trustee companies (past and present) – acted dishonestly or in bad faith, or otherwise in breach of trust.

[6] The siblings at the centre of the dispute – Janet, John and Ian McKean[1] – were all naive and more than a little confused about the operation of trusts and commercial matters generally. They were inappropriately quick to judge. They dug trenches that they could not find their way out of. While I have found that legal liability does not follow, the family has fragmented and the family legacy that the Trust and Torwood Farm represent has been whittled away.

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[1] Because a number of the members of the McKean family are involved in the proceeding, I will refer to them by their first names, as was the case during the hearing.

The participants and the Trust's assets

[7] The late Flora McKean settled the Torwood Family Trust (the Trust) by deed dated 10 December 2013 (the Trust Deed) when she was 96 years of age. She and her late husband, Rawhiti McKean – known as Ian[2] – were passionate about Torwood Farm and the Trust was designed to keep the farm as a long-term family asset. Flora died in January 2019, aged 101.

[8] Flora and Ian Snr had five children. John, the oldest, is a beneficiary and a named protector of the Trust. He is 79 years old and lives in Canada. He has one child, Alistair. He is one of the two plaintiffs in CIV-2022-454-21 (the 21 proceeding).

[9] Angus, the next eldest, died in 1966. He is known within the family as Gus. He has five children – Stewart, Tracey, Angela, Caroline and Annie. Stewart and Tracey live in the South Island while Angela, Caroline and Annie live in Australia. All five are beneficiaries of the Trust.

[10] Ian is the next eldest. He lives in Auckland and has four children – Cameron and Lachlan, with his first wife, and Logan and Alexander, with his wife, Kaye. Ian is a beneficiary and a named protector of the Trust, and the sole director of the company that was the sole trustee of the Trust. He is the second defendant in the 21 proceeding.

[11] The next eldest of Flora's children is Margaret Elizabeth – known as Elizabeth or Liz – who, in circumstances I come on to describe, owns a 200 hectare farm next door to Torwood Farm. She is not a beneficiary of the Trust and is not a party to these proceedings but is nonetheless a central figure.

[12] Janet is the youngest of Flora's children. She is a beneficiary and named protector of the Trust. She is the other of the two plaintiffs in the 21 proceeding. When many of the events on which this proceeding turns occurred, she lived in

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[2] Rawhiti died before the trust was formed.

the United States, but now lives in Wellington. Her two children, Elizabeth and Daniel, live in Australia.

[13] McKean Family Trustee Ltd (MFTL) was, at the material times, the corporate trustee of the Trust. Ian was and remains its sole director. MFTL is the first defendant of the 21 proceeding.

[14] Torwood Trustees Ltd (TTL) is the current corporate trustee of the Trust. It replaced MFTL in August 2024, after the parties in the 21 proceeding agreed that should occur. TTL is the plaintiff in CIV-2022-454-71 (the 71 proceeding).

[15] Some information about the Trust's assets is necessary for an understanding of the two proceedings. The Trust's primary asset is Torwood Farm which, in April 2024, was valued at just over $3 million.[3] While the farmland is leased, the Trust retains a right to occupy and access the farm cottage and curtilage. The Trust owns, also, non-contiguous parcels of land along Rangiwahia Road (the Rangiwahia Sections), valued at $520,000 (including GST) in April 2024. In March 2021, the Trust had investments and bank accounts totalling just under $462,000. That fund has now, as a result of these proceedings, all been used.

The two proceedings

[16] The proceedings involve a maze of claims, affirmative defences and counterclaims. I summarise them at a high level here before explaining the terms of the Trust and the factual narrative, which I will come to next.

The 21 proceeding

[17] In the 21 proceeding, Janet and John make a range of allegations against MFTL and Ian, saying that they breached various trustee and fiduciary duties.

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[3] Excluding the present lease of the farm which expired on 31 May 2025 but which is subject to two further rights of renewal. The valuation reduced to $2,859,000 including the lease. The values in both cases are before GST.

The allegations then form a basis for six causes of action against both MFTL and Ian:

(a) In the first cause of action, as originally framed, Janet and John sought an order to remove MFTL as trustee. They sought orders that they, and an independent actor, be appointed as directors of a substitute trustee company. As TTL has been appointed by consent, Janet and John now only seek costs on this cause of action.

(b) In the second cause of action, Janet and John seek the removal of Ian as a protector of the Trust.

(c) In the third cause of action, Janet and John seek a review, under ss 126 and 127 of the Trusts Act 2019, of MFTL's decision to withhold communications between Ian or MFTL and MFTL's lawyers, including legal advice provided by MFTL's lawyers, on privilege-related grounds. They seek orders that Ian and/or MFTL provide them with the relevant documents.

(d) In the fourth cause of action, Janet and John seek an order that Ian and MFTL (on a joint and several basis) reimburse $207,608.75 of MFTL's legal costs already paid by the Trust.

(e) The fifth cause of action is a claim for dishonest assistance against Ian, on the basis that he dishonestly assisted in breaches of Trust by MFTL. Janet and John seek an order that Ian account, as a dishonest assistant, for MFTL's breaches of trustee and fiduciary duties.

(f) The sixth cause of action is a claim under s 132 of the Trusts Act that MFTL committed the breaches of Trust that are alleged at the instigation or request or with the written consent of Ian, as a beneficiary. Janet and John seek an order under s 132 of the Act

that MFTL be indemnified out of Ian's interest in the Trust property.

[18] On each of the causes of action, Janet and John seek costs. They seek, in the first instance, orders that MFTL and Ian (or, where appropriate under the relevant cause of action, just Ian) be jointly and severally liable to pay their costs of the proceeding on an indemnity basis. In the alternative, they seek orders that their costs be payable out of Trust property on an indemnity basis. It was agreed during the hearing that, in circumstances in which the first cause of action has been substantively resolved, costs will be determined, as in the ordinary course, following the delivery of this decision.

[19] MFTL pleads as an affirmative defence or counterclaim that it has indemnity for costs it incurred in responding to Janet and John's allegations. In a second counterclaim, MFTL seeks reimbursement for Ian's work and expenses as a director of MFTL – work in the Trust's administration, farm management and farm labour – of up to $332,350 and interest.

[20] Ian makes one counterclaim in this proceeding. He claims that Janet and John breached their fiduciary obligations as protectors of the Trust through their actions leading up to and during this proceeding. He seeks orders that Janet and John reimburse the Trust for what he says are losses attributable to their breaches: MFTL's legal fees, to the extent it is entitled to indemnification from the Trust; and the costs of having TTL as an independent trustee, including TTL's legal fees.

The 71 proceeding

[21] In the 71 proceeding, TTL (the trustee of the Torwood Trust since 15 August 2024) seeks directions from the Court under s 133 of the Trusts Act to the effect that, under the terms of the Trust, the farm and the Rangiwahia Sections are able to be sold and, in each case, to sell the properties on the open market. Orders are sought, as a consequence, to bring forward the vesting date of the Trust until soon after the sale of the farm, to withhold a sufficient sum to cover TTL's liabilities and to then distribute the net proceeds to the beneficiaries. It is

proposed that one-quarter of the net proceeds would go to John, one-quarter to Ian, one-quarter to Janet and one-quarter in equal portions to the children of Angus.

[22] Ian resists the orders sought and says that Torwood Farm needs to be offered to him and any other beneficiaries who wish to retain an interest in it. The practical effect of this proposal, given Ian's intention to purchase the farm if possible, is that any other beneficiaries who would like an interest in the land would have to purchase it alongside Ian. Ian says that any sale would need conditions that all beneficiaries would continue to have reasonable access to the farm and that there would be a right of first refusal for a period after purchase.

[23] There are three counterclaims in the 71 proceeding. MFTL brings the same counterclaims in the 71 proceeding as it does in the 21 proceeding; claims for an indemnity for legal expenses from the Trust's assets and for the payment of Ian's costs for his time as trustee. Ian brings a separate counterclaim in the 71 proceeding for reimbursement for his work and expenses as a director of MFTL – but only as a set-off against any award of damages or costs made against him personally in the proceedings as a whole.

The relationship between the proceedings

[24] The two proceedings are distinct in terms of the orders that are sought but the 71 proceeding follows logically from the 21 proceeding: once responsibility for all of the costs that have been incurred through these proceedings are determined such that the Trust's financial position can be understood, issues relating to the potential sale of the Trust's assets can be considered.

The terms of the Trust

[25] When the Trust was settled, on 10 December 2013, it had the following beneficiary structure:

(a) The "Principal Beneficiary": Flora.

(b) "Class B Primary Beneficiaries": John, Ian, Janet, and Stewart (Gus' son).

(c) "Class C Primary Beneficiaries":

(i) any child or grandchildren of the Class B primary beneficiaries; and

(ii) anyone added under the Trust Deed as a Class C primary beneficiary.

(d) Secondary beneficiaries: anyone added under the Trust Deed as a secondary beneficiary.

[26] Stewart, Flora's grandson, was named in place of his father, Angus, who had passed away. But Angus' four daughters were not included at all – either as Class B or Class C primary beneficiaries.[4]

[27] Flora's daughter, Liz, was not included as a beneficiary either because she had received 200 hectares of land adjacent to Torwood Farm at an earlier time.

[28] The Trust Deed appointed MFTL as the sole trustee of the Trust. Ian was appointed as MFTL's sole director. Clause 11 of sch 2 of the Deed gives trustees broad powers and "absolute discretion" in exercising them, although they must be exercised "for the benefit of the Primary Beneficiaries" while there are Primary beneficiaries alive. The Trust Deed provides also for protectors, who under the Deed have a special role involving a more limited set of rights and obligations than those of the trustee.[5] For example, it provides for disputes between trustees to be referred to the protector for determination.[6] The Trust Deed provides that Flora would be the sole protector of the Trust until her death,

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4 Ian's evidence is that the exclusion reflected his mother being a "product of her generation".
5 Trust Deed, sch 2, cls 25 to 28.
6 Trust Deed, sch 2, cl 26.

after which Ian, Janet and John would become the protectors collectively. They became protectors accordingly when Flora died in 2019.

[29] The Trust Deed records Flora's strong wish to retain Torwood Farm as a long-term asset of the Trust for the benefit of the McKean family, if that could be achieved. Clause 31.4 of sch 2 of the Deed is in the following terms:

> The first responsibility of the Trustees after the death of the Principal Beneficiary [Flora], shall be to retain the Trust's farm as a long term asset of the Trust, and to ensure that sufficient income and capital are retained in the Trust to ensure that the Trust's farm is properly maintained.

[30] Under cl 4 of the Deed, Flora as the settlor of the Trust could provide the trustee with a memorandum of wishes on the basis that it is not binding on the trustees and does not limit the discretions given to them.

[31] On 10 December 2013, the same day that the Trust was settled, Flora signed a memorandum of wishes (the Memorandum of Wishes). It was directed to the trustee of the Torwood Family Trust which, at the time, was MFTL. In it, Flora emphasised her wish that Torwood Farm be kept as a long-term asset for the family. Clause 5.5(b) of the Memorandum mirrors the language of cl 31.4 of the Trust Deed. Then, cl 5.4 of the Memorandum is in the following terms:

> **Property to be retained as permanent assets of this trust**
>
> Please keep the Torwood Farm property at Te Para Para Road, Rangiwahia as a permanent asset of this Trust. Please do not sell this property unless the Trustees unanimously resolve, or in the case of a sole corporate Trustee the Directors of the Trustee unanimously resolve, having considered every possible alternative, that it has no other choice.

[32] The Memorandum of Wishes went on to express Flora's desire that Liz remain excluded from the Trust unless she gifted to the Trust the land she had earlier inherited:

> 5.6 I express the wish that if Margaret Elizabeth Stewart ROBERTSON at some time in the future agrees to gift the 200 acre farm, currently in her name, at Renfrew Road, Rangiwahia being section 20, Block XVI, Hautapu Survey District certificate of title WN223/16 to the Trustee of the Torwood Family Trust conditional upon her and her lineal descendants benefiting in the same manner as my other children

> and their lineal descendants, then I wish the Trustee to add her as a Class B Primary Beneficiary and her lineal descendants as Class C Primary Beneficiaries.

[33] MFTL varied the Trust Deed on 29 May 2020 (the Variation Deed), after Flora's death. The Variation Deed provides for the same beneficiary structure as that provided in the original Trust Deed but replaces Stewart with Gus as the fourth Class B primary beneficiary. The change made all of Gus' children, including Stewart, Class C primary beneficiaries. This aspect of the variation was agreed upon by Janet, John and Ian.

[34] In addition, the Variation Deed:

(a) Reduced the protections against financial liability on the part of trustees or protectors. Under cls 45.3 and 51.2, a trustee (other than a professional trustee employed by the Trust) and a protector can be liable only for any loss caused by their "dishonesty, wilful misconduct, or gross negligence".[7]

(b) Added a requirement that all protectors must act unanimously.[8]

The sequence of events

[35] Before considering the allegations that are made in the proceedings and the causes of action to which they are said to give rise, the story needs to be told.

2013 – settlement of the Trust

[36] When Flora settled the Trust in 2013, she was living with Ian and Kaye in Auckland.[9] Janet and John were both living overseas at the time; Janet in the United States and John in Canada. Both had lived overseas for a number of years although Janet would come back to New Zealand for four to five weeks a year and stay at the farm.

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7 Rather than only for any loss caused by their "actual fraud"; see Trust Deed, sch 2, cls 14.1 and 30.2.

8 Variation Deed, sch 2, cl 46.3.

9 When Ian and Kaye built their house, they created a separate apartment, primarily for Flora to use. It was a generous apartment including two bedrooms and views to Rangitoto.

[37] The catalyst for Flora's desire to set up a Trust was a conversation she had had with a niece about the sale of their family farm after her father's death and contrary to his wishes. Flora was concerned to ensure that nothing similar happened to Torwood Farm and so she asked Ian to contact Ross Holmes, a solicitor, as a result of an advertisement she had heard on the radio promoting his services. She wanted to ensure that the farm would not be sold and that it could be enjoyed by her descendants. Ian wrote to Janet, John and Liz in November 2013 at Flora's request to share with them her intention of creating a family farm for her assets. It was a notion that seemed to have been shared by Janet and John at the time. John had said this in an email to Ian on 29 May 2013:

> You might mention to mum again our concern that if it is not done right the farm will be lost in a short time after she goes if one of us decides they want the money and run. A trust is still the best scheme as it ties it up for 80 years or the discretion of the trustees. She might think twice about it if you remind her that the farm is sacred ground now since two family members are buried on it. Would she be pleased to see some compete stranger take it over? Would she be unhappy if we are unable to visit this sacred place? If she would not like that to happen then the Trust is the way to go with Gus an equal beneficiary and Stewart administering his share to his siblings. Rewriting the Will is an ideal time to deal with it.

[38] In order to instruct Mr Holmes, Flora completed a standard asset protection questionnaire that Mr Holmes asks clients wanting services in this area to complete in the first instance. There was some suggestion in the case that Ian, together with Kaye, were leading this process but it is abundantly clear that it was all driven by Flora. Kaye's handwriting is on the form but, as Ian said, the spaces available for handwritten entries on the standard form are very small, Flora's eyesight was poor – as was his handwriting. Accordingly, Kaye filled in the details on the form, but only as directed by Flora. Flora indicated on the form that the trustee would be a trustee company and that Janet, John and Ian would all be its directors. The form was sent by Ian to Mr Holmes on 28 November 2013.

[39] In an email in response from Mr Holmes the next day, observing that both Janet and John lived overseas, Mr Holmes said that when, on 10 December, Flora came to see him to sign the documents, Ian should be appointed as the sole

director on day one to enable the documents to be signed but that Janet and John would be added as additional directors later.

[40] Flora spoke with Mr Holmes by telephone on 2 December.[10] In that conversation, Flora and Mr Holmes discussed the completed questionnaire. Mr Holmes' handwritten notes, made during the call, can be seen on the questionnaire, together with notes made by Janet Holmes – Mr Holmes' wife and a member of the law firm. Instructions were taken also about Janet, John and Ian all being appointed as her property and welfare attorney and about the settlement date for the sale of the farm to the Trust, which was to be 17 December 2013.

[41] MFTL was incorporated on 4 December 2013 with Ian as the sole director and shareholder. In an email to Janet and John that day, Ian explained that they would be added as directors when they next visited New Zealand. It was an intention shared by all three at that stage and is reflected, also, in draft minutes that Mr Holmes had prepared for MFTL director meetings (in advance and on a template basis) which showed Ian, Janet and John as directors of the company.

[42] Flora met with Mr Holmes on 10 December 2013. Ian drove Flora to Mr Holmes' office but he waited in the car while Flora met with Mr Holmes by herself. While Ian and Mr Holmes' recollections of meeting timings are imperfect, it is apparent that Ian joined Flora and Mr Holmes for about the last 10 minutes of the meeting and that the meeting lasted approximately 90 minutes in total.[11] It can at least be said that sufficient time was taken for Mr Holmes to read the documents to Flora and ensure that she understood the content of them before Ian entered the room.

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[10] Ian thought that Flora met with Mr Holmes in person on 2 December but Mr Holmes' evidence was that it was a phone call with Flora as he was in Rarotonga at the time. Nothing turns on the point.

[11] As confirmed in an email that Mr Holmes later sent to Mr Gubb, then acting for Janet and John.

[43] While Flora and Mr Holmes met alone, Flora instructed Mr Holmes to substitute Stewart for Gus as a beneficiary.[12] Flora then signed the Trust Deed and the Memorandum of Wishes.

[44] Importantly, before Flora signed the documents, it had been decided between Flora and Mr Holmes that Ian would be the sole director of MFTL. Originally, Flora had wanted Ian, Janet and John together to be the directors. That was very much Ian's wish too.[13] In his evidence, Mr Holmes could not remember if Flora instructed him to change that or if it came about after she accepted his advice. He could not remember either if that discussion took place either over the phone or at the meeting in person before Ian entered. What he was clear on though was that Flora understood that the Trust arrangements would have Ian as the sole director of MFTL. He was also clear that it would not have been possible for Janet and John to be added as directors of MFTL in the timeframes available. They were not in the country and so were not able to sign original copies of documents in time.

[45] As a result, Mr Holmes advised Flora that their inclusion as directors was not feasible, at least in the interim. In addition, Janet and John needed to obtain tax advice before signing. As Mr Holmes made clear, tax advice was needed in the first instance because Janet and John's overseas resident status could cause complications for the Trust. Whether Flora requested that outcome or whether she accepted Mr Holmes' advice, at that stage, it was Flora's intention that Ian, alone, would be the director of MFTL.

[46] But Ian was not part of that conversation and his own, personal, understanding of matters was quite different. When Ian came in at the tail end of the meeting, he and Flora signed all of the documents that were put in front of them. Mr Holmes then gave Ian several documents to take home so that he could ensure Janet and John signed them and then mail them back to Mr Holmes.

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12 Mr Holmes had, initially, provided as Gus for a beneficiary so that all of his children would become Class C primary beneficiaries but Flora was adamant in her desire to exclude his daughters, so Mr Holmes changed it back. Subsequently, Ian, with Janet and John's consent, varied the Trust to reverse the position.

13 While Ian was not directly involved in the Trust arrangements, he did make suggestions. Amongst them, he had "insisted" that Janet and John be appointed as directors.

Ian's clear view was that he, Janet and John were all to be directors of MFTL and that that would be the case once all three of them signed some of those documents. As Ian put it, "the technicalities were not explained to me … my understanding of it was, was alright, I've got what needs to make them directors".

[47] This is where things start to go awry; not in fact but in terms of Ian, John and Janet's understanding of what was going on. If Ian had looked at, or otherwise understood, the documents he was signing, he would have realised that none of them could when signed have the effect of appointing John and Janet as directors. In fact what he had signed was:

(a) the Trust Deed (as director of MFTL);

(b) an enduring power of attorney for Flora in relation to property;

(c) an enduring power of attorney for Flora in relation to personal care and welfare;

(d) draft minutes for MFTL, in a template format, for envisaged meetings of the company authorising transactions that it might in the future need to enter into.

[48] The papers he had taken away for others to sign were the last three papers in that list. He understood that some of the documents were powers of attorney but mistakenly thought the draft minutes were directorship forms.

[49] The draft minutes make no sense in their own right because they approve non-existent transactions and fictional items of business. Mr Holmes provides such draft minutes as a matter of course for new trusts to provide directors with examples of the way in which minutes should read in order to cover the business that might lie ahead of the Trust. They were prepared by Mr Holmes in advance of meeting with Flora on 10 December and so recorded all of Ian, Janet and John

as directors of the company. However, at the meeting, it was determined that only Ian would be a director in the first place.

[50] But Ian did not appreciate that. He thought that he had signed documents confirming that he, Janet and John were directors and that, when Janet and John signed when they were next in New Zealand, their directorships would be in place. In evidence Ian accepted, with a good measure of resignation and humility, that he is not at all commercially minded, that he has little understanding of company transactions and that his understanding of what was being signed was limited – and wrong. He apologised in evidence to Janet and John for his mistake. I have noted that his evidence was credible and that his apology was genuine.

2013 to mid-2018 – harmonious beginnings

[51] Janet next visited New Zealand in July 2014, and John in September that year. They each visited Ian and signed the documents in the Trust folder that Mr Holmes had left with Flora and Ian with "sign here" and "note" post-its. The documents they signed were the enduring powers of attorney and the template minutes. Ian showed each of Janet and John where the folders of Trust and MFTL documents were located in his office. He suggested they make copies of any documents. But it is apparent that they did not look at them.

[52] Like Ian, Janet did not understand what she was signing. She confirmed in evidence that she simply signed the documents without even looking to see what they were. She relied on Ian's assurances, which were incorrect, that the documents would make her a director of MFTL. Some of the template minutes are signed by Ian, Janet and John. Others only have two of their signatures. Ian and Janet both thought that the documents that they had signed would make Janet and John directors along with Ian.

[53] We do not know what John's position is. While allegations are made in his name in this proceeding, including, for example, that he was misled or deceived, there is no evidence from him one way or the other.

[54] Where things stood at the end of this was that Ian, Janet and John all thought they were directors of MFTL together but in fact Ian was the sole director. Janet and John were never told by Flora or Mr Holmes that they needed to receive independent tax advice before the process of being appointed directors could begin. While Janet and John were not added as directors of MFTL, Ian operated in accordance with his belief that they were until, late in 2019, Mr Holmes and the company's accountant told him that he was mistaken in that view.

[55] In the several intervening years, Ian, Janet and John worked together harmoniously on Trust administration matters, all thinking that they were directors of the trustee company. Email communications between them were warm and cordial. Janet and John continued to live overseas while Ian spent considerable periods of time on farm administration and management work and at the farm itself undertaking general farm work.[14]

[56] During this time, Ian sent relatively regular updates, by email, to Janet and John about his work relating to the farm.

[57] On the other hand, there appear to have been no annual general meetings involving the three siblings. Ian was not regular in sending fundamental Trust documents, such as annual financial statements. In evidence, Ian said that was because the Trust's accountant handled the annual statements and he would sign a physical copy and mail it back to the accountant to file. He did not have technology at his home to scan the statements and send them to Janet and John. He said that it did not occur to him that Janet and John would want to see them. Ian would, in addition, sign documents on behalf of MFTL. In evidence, he said he believed that he could do that despite being only one of three directors of MFTL (as he believed at the time) because he was the only one in New Zealand.

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[14] Although the farm was leased, the lessee's work was limited when it came to clearing, spraying and repairing – a topic that is discussed in further detail when considering Ian's counterclaim.

[58] Regardless, overall the relationships appear to have been harmonious. Important decisions were made between the three of them, collectively.

2018 to mid-2020 – relationships begin to sour

[59] Communications between Ian, Janet and John from 2018 to mid-2020 were, as Janet accepted in evidence, warm and friendly. They were all getting on well, participating in Trust administration, having meetings and Ian was keeping them informed about farm matters. Just as one example, in an email from Janet to Ian on 4 February 2017, she complimented him for his work on the farm saying, "it seems you worked harder than ever" (over the summer break) and went on to say, of Flora, "she tells me the lovely meals you prepare for her so that's lovely to treat her special".

[60] Ian saw the relationship between him, on the one hand, and Janet and John on the other, as beginning to sour in 2020. From Janet's perspective, it was starting to sour gradually from 2016–2017. Ian's view of when the souring began is understandable because, as late as 21 January 2020, Janet was emailing Ian in warm and open terms. An email sent on that day to Ian concluded with Janet saying:

> I have long thought that the Trust should be paying you for your management work and John agrees. The Trust should pay some amount per year to help cover the time you spend to administer the running of the farm and the time your family work on the farm …

[61] During 2018, it seemed that a number of things started to nag at Janet. For example, she described herself as being upset by emails sent to her and John by Ian in March 2018 in which he explained their health and safety obligations as company directors (which they all thought they all were at the time). Janet described that as being offensive to her in emphasising legal obligations when it was their family farm.

[62] Similarly, Janet saw a comment made by Ian in an email to her in May 2018 about an oddly high power bill[15] as being spiteful. In reality, it was a clumsily expressed tongue-in-cheek comment.

[63] Similarly, she regarded the atmosphere with Ian during her stay at the farm in March 2018 as being "hostile", such that it prompted her to contact the Trust's accountant about Trust affairs, which she did – but not until December that year.

[64] Despite all of this, Janet's emails to Ian during the year were expressed in warm and friendly terms.

[65] When Janet did contact the Trust's accountant, Roy Brooking, in December 2018, Mr Brooking said that he was happy to go over any queries that she had but that he would need "prior authority to do so from the trustees in the first instance". That, understandably, rankled Janet as she thought she was a director of MFTL, the trustee.

[66] Flora passed away on 29 January 2019 at the remarkable age of 101. In about July that year, John and Janet began to have discussions about what Janet has termed "disbursements". They were wanting to have contributions made to them from the Trust's accounts. Janet said that she and John were saying at that time that they needed to "get something"; something in the nature of an inheritance.

[67] The tide really began to turn, as far as Janet and John are concerned, when, later that year and into the beginning of 2020, they began to understand what the Trust really meant. On 6 September 2019, John sent an email to Ian asking for the Trust's financial documents so that he could declare for tax purposes his "share" of the Trust, which he described as an "asset". Two days later, Ian replied, expressing concern that neither Janet nor John seemed to understand what a trust was. He explained clearly that Janet and John did not have assets in New Zealand because the Trust's assets were owned by the Trust

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15 Later confirmed by the provider as being a result of a fault.

itself, not MFTL and not Janet or John. In doing so, he also referred incorrectly to Janet and John as directors of MFTL.

[68] This type of misunderstanding continued into the next year. For example, on 17 April 2020, John sent an email to Ian in which he asked, with reference to the Trust, "what would my inheritance be?". He went on to say that none of their dependants grew up on the farm "so have little emotional attachment to the land and the memory of mum and dad". "The time has come", John said, "for the Trust to make some disbursements". He spoke of the prospect of money being budgeted every year to be paid out of the company's accounts. The suggestion was for something in the order of $25,000 to be split four ways. He asked for a copy of the documents soon as "I'm going to update my will".

[69] In a careful and appropriate response shortly afterwards, Ian explained that the Trust now owns all of Flora's assets and is not something that can be included in their wills. No one, Ian explained, has a share in the Trust. The distinction between a trust's beneficiaries and a company's shareholders was mentioned.

[70] At around the same time, after Flora's death, Janet began to make her own inquiries about the way in which the Trust operated. For example, she contacted Mr Holmes in late March 2019.

[71] During this same period of time, Ian proposed, and Janet and John agreed, that the Trust Deed should be amended to include Gus' daughters as class C primary beneficiaries of the Trust. There were some delays in the preparation of the Variation Deed by Mr Holmes but, ultimately, it was executed by Ian for MFTL on 29 May 2020. When Mr Holmes gave effect to these instructions, he took it upon himself to update the terms of the Trust as a whole to bring it in line with improved trust deed provisions he was then using. As will be discussed a little later, Janet and John attribute the changes to Ian and see them as affecting their positions as protectors, but they were in fact Mr Holmes' work and were not drawn to Ian's attention at the time.

[72] Ian was first told by the Trust's accountant, Roy Brooking, that Janet and John were not directors of MFTL on 10 September 2019. This came about after Ian emailed Mr Brooking to check if he had correctly expressed how the Trust worked from an accounting perspective in his emails to John dated 8 September 2019. Ian did not think that could be right. He followed up with Mr Brooking who, in turn, followed up with Mr Holmes. Mr Holmes confirmed the position to Ian on 14 January 2020.

[73] Ian was, quite genuinely, at a loss as to how to deal with this information. He perceived that Janet and John's attitude towards him and the Trust was becoming troubled, quite apart from this revelation. He wondered if he might combine telling them of the situation with a communication, or an on-line get-together with them, over the Trust variation documents to include Gus' children as beneficiaries. As a result, he did not pass on the information straight away.

[74] In May 2020, he sought advice from Dentons about the situation. As he said in his email to Dentons, he was "shocked" about the situation and was looking for advice on whether his mother had acted legally in not including John and Janet as directors.

[75] Meanwhile, on 18 May 2020, Janet in an email to Ian asked that a videoconference be scheduled to discuss "how we can start making distributions to beneficiaries now that mum is gone" and to discuss "what is the long-term strategy for managing the Trust, and making full distributions to beneficiaries etc".

[76] In an email in response on 19 May 2020, Ian broke the news. He said that he had "been in quite a perplexed state since the end of last year – January this year" as he had "always believed that the three of us were company directors of the trustee company" but that "late last year I became aware that mum had not included you as directors". He spoke of the shock that that caused to him and of his knowledge that the disclosure of the information would "cause significant

hurt". So, he said, he had not known how to deal with it. He asked for a Zoom meeting so that it could be discussed.

[77] The Zoom call between Ian, Janet and John on 20 May 2020 did not go well. Janet and John became angry. Janet, in her evidence, referred to Ian "coming clean" and said that she believed that Ian had tricked her. John, in an email to Ian after the call, said:

> Ian, I do not like to say this but somewhere along the way you have lost your soul. You have become obsessed by money and power …

[78] This, then, was the trigger point. Janet and John already saw Ian as blocking an entitlement to distributions to them from the Trust's funds and now felt that he had deceived them into thinking that they were directors of the trustee company for years when they were not, and that he was excluding them deliberately from the Trust's affairs as a result.

[79] The view that Janet and John took at this point in time is unfortunate. It set matters on a one-way course. There was, in reality, no reasonable basis for the views they had reached. Just like Janet and John, Ian did not realise that they were not directors until earlier that year. He had wanted them to be directors and had wished that they were. And his advice to them about the nature and effect of the Trust – such that there could not be significant distributions to them – was fairly and properly expressed.

[80] Consistent with the evidence that he gave, Ian's bona fides are apparent also from the terms of the detailed report that he prepared for all beneficiaries of the Torwood Trust in June 2020.[16] The report entitled "Torwood Family Trust – what it is and how it involves you" provides a reflection, through Ian, of Flora's wishes and intentions in establishing the Trust, as they were expressed in the Trust Deed and the Memorandum of Wishes. It includes the following passage, just by way of example:

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[16] The report is a professionally presented eight-page document which describes the family's ancestry and how they came to own the land. It tells a number of the family stories and goes on to describe the way in which the Trust operates and what the beneficiaries' rights and entitlements are.

> For Mum the farm is her legacy to us children. She never saw the money it represented as being important, but rather the actual land itself that she and Dad had sculptured and formed – that was the thing of supreme value.

[81] The document went on to say that "Mum's trust is never going to make you rich!", explaining the economic realities of running a farm of that size. Having referred to Flora's directives "that the first responsibility is to retain the farm as a long term asset of the trust", the report went on to say:

> That means from the assets of the Trust we have to find a balance where we maintain the farm, while providing beneficiaries with disbursements from the assets."

[82] Ian then explained in the report the Trust's proposal to make regular distributions to beneficiaries:

> The intention is that starting this year (30th November 2020) that every 5 years you'll receive a substantial sum from the trust and for the other 4 years a much lesser amount. We'll use the four years to build up capital and if all is well on the 5th year we'll pay a substantial sum again. In that way we honour Mum's Trust Deed that the farm is well maintained, and you also receive a benefit.

[83] Regrettably, the intention could not be fulfilled as the cost of the course of action that followed drained the Trust's liquid resources.

Mid-2020 to late 2021 – Janet and John engage lawyers

[84] Janet and John's approach then took matters to a boiling point. They engaged a lawyer, Brian Gubb, who on 20 July 2020 wrote to Ian in the most aggressive of terms.

[85] In the letter (the terms of which Janet confirmed in evidence that she had approved) Mr Gubb alleged:

(a) that MFTL could not properly claim to be a trustee of the Trust;

(b) that Ian had made changes to the Trust that, deliberately, were adverse to Janet and John's interests;

(c) that an application was proposed to the High Court to invalidate the Trust Deed on the basis that Flora was at the time "95 years old and did not have the degree of cognition that was needed to understand the meaning and implications of the documents that she was asked to sign", that her eyesight was such as to make it impossible for her to have read the documents, and that even if she could have read the documents she would not have been able to understand the meaning and implications of them;

(d) that an application would be made to invalidate Flora's most recent will, which was signed at the same time as the Trust Deed and which were consistent with its terms. That application, it was said, would be made on the grounds that Flora lacked sufficient mental capacity, that she did not know and approve the terms and effect of her will and that "she signed the documents [relating to both her will and the Trust] as a result of your undue influence";

(e) that a declaration might be sought to remove MFTL as trustee on the basis that it had misused its powers to modify the Trust.

[86] The letter appeared to be motivated by Janet and John's desire to "get something" from the Trust, with Mr Gubb stating:

> 10. As things stand at present my clients have received nothing from the Trust nor are they likely to do so and they will contend that it is inconceivable that your mother intended when she created the Trust that two of her children would receive nothing from it.

[87] Mr Gubb went on to say that, with those documents set aside, Flora's previous will, made in 1995, would apply such that the assets would devolve to Ian, John, Janet and Liz as tenants in common in equal shares – although, in view of Liz already receiving a separate part of the farm, it was "assumed that she may be willing to reduce the interest that she is entitled to receive under the 1995 Will".

[88] If a distribution was made on the basis that Janet and John proposed – in accordance with the terms of Flora's 1995 will – then, despite Janet indicating in her evidence that her actions were motivated by her desire to get much-needed financial benefits for Gus' children, they would have received nothing and Liz may have been entitled to receive a quarter of the farm, contrary to Flora's wishes that Liz did not benefit further given the inheritance she had received separately.

[89] Dentons responded on behalf of MFTL on 22 September 2020. It dealt thoroughly and appropriately with each of the points raised. For example, it pointed to evidence of Flora's mental capacity at the time she created the Trust, the fact that Ian and MFTL had not requested the changes to the Trust Deed that upset Janet and John, and the fact that Janet and John had received benefits from the Trust in that they had the option to visit and enjoy the farm. The point was made also that further benefits were anticipated, with MFTL now in a position to make regular distributions as set out in Ian's report of June 2020. The letter concluded by inviting Janet and John to make a proposal for how the Trust should be administered, without "accompanying baseless allegations" and by saying that regard would need to be had to the interests of the Class C beneficiaries (which now included Gus' daughters). It was said in the letter that MFTL would consider any such proposal, observing that the trustee is bound to consider the views of beneficiaries.

[90] Unfortunately, Mr Gubb's letter of 12 October 2020 in reply doubled down on the allegations. It repeated, for example, that:

> … it was inconceivable Mrs McKean at the age of 95 and with her health deficiencies would have understood some of the important complexities of the Trust structure that was to be created and which would defeat much of the purpose of the Trust.

[91] The letter alleged that Ian had been determined to treat the farm as his own possession and that he was responsible for in effect denying Janet and John their inheritance:

> 15. Ian's apparent determination that the Trust should retain its ownership of the farm for the benefit of the beneficiaries is all the more unreasonable when one considers that most of the beneficiaries live

> overseas. … By contrast Ian is in New Zealand and can treat the farm as his personal holiday home. …
>
> 16. Ian's attitude as trustee is to leave his brother and sister with virtually no inheritance. …
>
> 17. If Mrs McKean considered that a farm of that value [the 200 acres given to Liz] was "adequate provision" for [Liz], it is appropriate that the Trust should provide similar "adequate provision" for my clients. At present they stand to receive virtually nothing from either their father or their mother, a state of affairs that is both unreasonable and unacceptable.

[92] The letter went on to make a proposal, in the following terms:

> The simplest solution would be for Ian to buy the farm and for the proceeds of sale to be divided into four equal portions among Ian, John, Janet and Angus' children.

[93] The proposal is not one that Ian felt he could accept as the director of MFTL. As he said in giving evidence, he distinguished his duties in acting for MFTL as trustee from any interest he might have had to purchase the farm for himself. His focus was properly on Flora's clearly expressed intention to keep the farm for the benefit of the beneficiaries.

[94] In a response from Dentons on 9 November 2020, the new allegations were addressed comprehensively. The letter pointed out that MFTL was not prioritising retention of the farm over the beneficiaries' interests because it was Ian's personal preference, but because it was clearly stipulated in the Trust Deed and fell in line with Flora's intentions as the settlor of the Trust. The letter went on to reject Mr Gubb's proposals. Somewhat unhelpfully, the letter at this point was worded from Ian's point of view, rather than MFTL's. It explained the decision to reject the first proposal in a way that seems to reference Ian's views as director of MFTL and MFTL's trustee obligations, as well as Ian's personal views as a beneficiary:

> 4.2 With respect to the first option, it is not Ian's wish to own the farm. His wish is to honour his mother's wishes and for the farm to be a unifying 'McKean family' legacy. …
>
> 4.3 The two letters you have sent attacking Ian, his character, motives, actions and management of trust affairs has left him very upset … He is concerned that if he were to purchase the farm he would be

> seen to have 'cheated' your clients out of it. … In addition, it does not make financial sense for Ian and his family to incur debt so the rest of the beneficiaries can obtain a capital distribution.

[95] While, it was said in the letter, Ian was reluctant for the matter to go to court, the view was expressed that he was resigned to the need for the Court to review his actions so that the allegations could be dismissed.

[96] In another lengthy letter from Mr Gubb on 2 February 2021, Flora's intention of prioritising the retention of the farm over capital distributions to beneficiaries was challenged. Mr Gubb argued that Ian and MFTL were interpreting the Trust Deed and Flora's wishes in an excessively rigid way – Flora would not, he said, have wanted to provide no meaningful provision for her children. Flora's capacity was challenged once more and it was proposed at this point that the Trust property ought to devolve in accordance with the terms of Flora's 2002 will (which had by this point come to light). Under that will, Gus' daughters were to have received $10,000 each, Liz would have had a $100,000 loan forgiven and the farm would have been divided between John, Ian, Janet and Stewart.

[97] As Janet said in evidence, a solution along the lines of selling the farm was her preference, despite being at odds with her mother's wishes.

[98] Dentons responded, again, to the allegations that were being made in a letter of 9 March 2021. It again emphasised that Flora's intention of retaining the farm as a long-term asset were clear:

> 3.4 … Your clients have changed their mind about the merits of the trust and the protection of the farm, now that they would like to realise cash from the trust assets. Perhaps their circumstances have changed, or their understanding of what the trust would mean for the farm and their 'inheritance' has changed, but the purpose of the trust has not changed. It was always clear that the intention was that the farm was to be placed in trust in order to preserve it as a McKean family asset and to prevent future family disharmony.

[99] The letter proposed that a meeting take place to try and resolve matters.

[100] A meeting was rejected by Mr Gubb in his 15 April 2021 letter because Janet and John did not think the meeting had a "realistic prospect of causing [Ian] to change his mind". Instead, it was said, an application would be made seeking orders to invalidate the Trust Deed and Flora's last will.

[101] MFTL sought advice from Ms Bruton KC on the allegations that were being made and on proposed solutions. Ms Bruton's advice, shared with Janet and John, of 24 May 2021 explained why the allegations that were made in Mr Gubb's letters could not properly be sustained. The point was made that one can empathise with Janet and John's frustration as overseas beneficiaries who are unlikely to be able to enjoy the farm as much as New Zealand based beneficiaries. Accordingly, the suggestion was made that Janet and John might relinquish their interests in the Trust in return for a capital distribution that would be made up of part of the Trust's cash or some or all of the Rangiwahia Sections – rather than the sale of the farm.

[102] Before Ms Bruton's advice was shared with Janet and John, a further letter was received from Mr Gubb. Mr Gubb's letter to Dentons on 3 June 2021 attached draft affidavits from Janet and John. There is little to be gained from describing them here but suffice to say that they are quite extreme in their language and in the nature and extent of the allegations that are made. Mr Gubb asked for a without prejudice discussion to take place saying the alternative would be litigation.

[103] Correspondence between the parties continued including, now, from Anthony Grant on behalf of Janet and John who repeated previous allegations and added more, saying that Ian was responsible for a number of "falsities" including, just as one example, that Ian had arranged for his wife Kaye to record that she had witnessed both Janet and John sign the documents when she had not been present when either person had done so and lacked the status of a witness. The allegations being made were particularly serious and there was little option but for Dentons to respond, which it did in its letter of 12 August 2021.

[104] On 16 August 2021, Anthony Grant, Ms Bruton and a solicitor from Dentons had a without prejudice meeting to discuss the possibility of settlement. Needless to say, it was not successful. On 26 October 2021, Mr Grant wrote and made three further proposals for resolution. The first was for Janet and John to pay $800,000 to Ian in return for MFTL ceasing to be a trustee and for Ian to relinquish any interest in the farm. The second was for the transfer of "one third of the shares" in MFTL to each of Janet and John. And the third was to divide the farm in two with Ian to retain one of the titles after buying out Gus' children and with the other half being retained by Janet and John.

[105] Dentons responded on 3 November 2021 explaining that the connection that Ian and his family have with the farm is such that they do not wish to relinquish their interests and that dividing shares or land was not practical for a number of reasons. It went on to say that, because little progress was being made on resolution and because Ian recognised that his sole directorship of the company was "a source of upset to your clients", he proposed, in his role as a protector, that Perpetual Guardian or a similar professional trustee company be appointed in substitution for MFTL.

[106] At this, Mr Grant approached Perpetual Guardian directly, in response to which Ms Bruton, for MFTL, emphasised in an email on 26 November 2021 that any change of trustee needed to be part and parcel of an overall settlement "to end the various and many allegations that your clients have made, and the costs they have caused". Mr Grant, in response, asked for a draft of the proposed terms of resolution, in response to which Dentons, on 17 December 2021, said that any change of trustee would require:

> (a) Binding confirmation that your clients will not pursue their claims of invalidity of the trust, for any reason whatsoever, and whether presently asserted or not.
>
> (b) Binding confirmation that your clients will not promote some sort of deal with Margaret Elizabeth Robertson ('**Liz**') or her family, or entities associated with her or her family. She was not included in the Trust by Flora because she had already been given 200 acres, and because of disputes between her and Flora.
>
> (c) Confirmation that your clients will not pursue any claims against Ian McKean or his wife Kaye McKean for any matter

> relating to the trust or estate or care of Flora, howsoever arising and whether presently asserted or not (this is raised because there have been many and various outlandish allegations from the outset of Mr Gubb's correspondence).

[107] In all of the circumstances – in particular, the tenor of Mr Gubb's letters and the draft affidavits – the conditions were reasonable. Conditions of that sort would be needed if resolution was to be achieved. However, no response was received from Janet and John's lawyers. In evidence, Janet said:

> … when these conditions came, I was tired to be honest and I thought:
>
> > I'm just tired of these endless letters, I wanna go to court where a judge can rule.
>
> And that's when I went and found Lisa [McKeown] to help us move to another stage.

2022 to February 2024 – the litigation begins

The 21 and 71 proceedings are filed

[108] Janet and John filed the 21 proceeding on 19 April 2022 and MFTL filed the 71 proceeding on 13 September 2022.

[109] MFTL's original intention was to file the 71 proceeding early in 2022. Its solicitors had instructions to do so. For reasons on the part of the solicitors (rather than MFTL) there was a delay. As was originally pleaded, MFTL in the 71 proceeding sought:

(a) a declaration that the Trust is valid;

(b) an order removing John and Janet as protectors;

(c) an order under s 133 of the Trusts Act that, following valuation, the farm be sold to any beneficiaries who wished to retain an interest in it or to a new trust settled for their benefit, and that the Trust be wound up with its property then divided between beneficiaries;

(d) a direction that the parties should participate in a mediation process under s 145 of the Trusts Act; and

(e) a decision on whether the Court was minded to remove the trustee from office under s 114 of the Act, with MFTL indicating that it would abide the decision of the Court.

[110] When the directions sought under s 133 in the original 71 proceeding were put to Janet in evidence, she was supportive of them, accepting they were "absolutely" a "jolly good plan".

[111] However, by then, Janet and John had filed the 21 proceeding. No longer did they allege that the Trust, or Flora's will, were invalid as a result of incapacity or frailty on Flora's part. And no longer did they allege that MFTL was not rightfully the trustee. Rather, the focus was now on Ian allegedly causing MFTL to breach the terms of the Trust such as to cause them loss. They sought recovery of the legal costs MFTL had already incurred and to remove MFTL and Ian from involvement with Trust decision-making.

MFTL applies for a pre-emptive indemnity

[112] When it filed the 71 proceeding, on 13 September 2022, MFTL applied also for pre-emptive authorisation for its litigation costs in both the 21 and 71 proceedings to be paid from Trust property. It was pre-emptive in the sense that the proceedings had not yet concluded, rather than because MFTL had not yet paid any legal fees. By that stage, MFTL had incurred legal costs of $290,371.26. Following an interim decision on 13 March 2023,[17] Churchman J, in a decision of 10 May 2023, held that:[18]

(a) both the 21 proceeding and the 71 proceeding were hostile and, therefore, MFTL should not be entitled to pre-emptive

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17 *McKean Family Trustee Ltd v McKean* [2023] NZHC 482 [Interim decision].

18 *McKean Family Trustee Ltd v McKean* [2023] NZHC 1098 [Pre-emptive indemnity decision].

indemnification costs in relation to the proceedings in advance of their substantive outcomes;[19] and

(b) even if the proceedings were not hostile, legal costs that had been paid by MFTL already in the administration of the Trust had been incurred improperly or were otherwise unreasonable;[20] but

(c) regardless, MFTL may have properly incurred some of those costs; as a result, in part because of what was referred to as a generous concession by Janet and John, MFTL could be indemnified for 30 per cent of its costs already incurred, or $82,762.51, in order to account for proper administration.[21]

[113] The outcome was that MFTL became indebted to the Trust for the remaining 70 per cent of the costs it had already incurred, or $207,608.75, and it was not entitled to pre-emptive indemnification for costs to come in the 21 and 71 proceedings.

[114] Churchman J reached those conclusions for a number of reasons. First, he had expressed an expectation that MFTL would abide the decision of the Court and would not take substantive steps.[22] With that in mind, he found it was difficult to justify costs that MFTL had incurred up to that point, including through engaging senior counsel.[23] Secondly, he had concerns that MFTL appeared to have sided with Ian and to have incurred costs for his benefit, rather than acting for the beneficiaries as a whole.[24] Thirdly, he saw the 71 proceedings as superfluous and unnecessary.[25]

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19 At [59] and [62].
20 At [64].
21 At [79]–[80] and [91].
22 Interim decision, above n 17, at [47].
23 Pre-emptive indemnity decision, above n 18, at [65]–[66].
24 At [67] and [68].
25 At [69].

[115] In reaching the conclusion that MFTL should have an allowance for 30 per cent of its costs, Churchman J considered costs already incurred by MFTL within each of the following categories:[26]

> (a) correspondence with Mr Brian Gubb and Mr Anthony Grant (previous counsel for Janet and John);
>
> (b) preparation of directions application [the 71 proceeding];
>
> (c) defence of the removal proceedings [the 21 proceeding];
>
> (d) correspondence regarding the lease;
>
> (e) instructions and correspondence with BakerAg [consultants] regarding the valuations of the Torwood Farm and sections;
>
> (f) receiving and responding to Janet and John's notice of opposition to the costs application;
>
> (g) memorandum of counsel for October 2022 case management conference; and
>
> (h) correspondence regarding potential mediation, submissions and preparation for costs application hearing.

[116] The parties agree that, while Churchman J's decision should be taken into account, and while I might be assisted by it, it was limited expressly to findings about MFTL's ability to be indemnified pre-emptively and could not give rise to any form of issue estoppel.[27] Only relatively limited affidavit evidence and submissions were available to Churchman J whereas I have had the benefit of hearing evidence from the parties, examined the contents of the considerable common bundle and hearing detailed submissions over a seven-day period. The ability of MFTL to claim an indemnity for all or some of its costs is a central issue in this proceeding and must be considered afresh.

MFTL is replaced by TTL

[117] On 12 June 2023, counsel for MFTL filed a memorandum in the 71 proceeding in which it was proposed that the Court appoint the Public Trust,

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26 At [81].

27 As the Court of Appeal said in *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 at 42–43, considerable caution is needed before coming to a conclusion that an interlocutory judgment, even if expressed with finality, could found a subsequent issue estoppel.

as an independent trustee in place of MFTL, under s 114 of the Trusts Act. Its position was that an independent trustee was needed in light of Churchman J's decision and that the order was needed as Janet and John had not agreed to the appointment of Perpetual Ltd.

[118] Janet and John's position (through a memorandum filed in response) was that, while they agreed that MFTL should be replaced, it needed first to reimburse the Trust for the $207,608.75 that Churchman J found it should not be indemnified for on a pre-emptive basis.

[119] As counsel for MFTL said in response, it did not have the funds to reimburse the Trust – which was one of the reasons for proposing its replacement.

[120] Counsel for Ian consented to the appointment of either the Public Trust or Perpetual.

[121] Janet and John did not consent to the appointment of either and, because matters could not otherwise be resolved, MFTL sought a hearing to determine who should replace it as trustee. Ian preferred Perpetual Ltd while Janet and John preferred Touchstone Trustees Ltd, another independent trustee company. But Janet and John wanted to include terms directing the new trustee to sell the farm and to wind up the Trust. Ultimately, that proposal to sell the farm was abandoned by Janet and John, given Ian's opposition to it, and the parties agreed, shortly before a scheduled hearing on 2 November 2023, to the appointment of Touchstone. Consent orders made by La Hood J on 2 November 2023 saw a trustee company incorporated by Touchstone – TTL – replace MFTL as trustee.

[122] The consent orders resolved the first cause of action in the 21 proceeding. Janet and John applied for costs on the first cause of action. In his 15 March 2024 decision, La Hood J reserved costs on the cause of action until the conclusion of the substantive hearing, finding that it was not appropriate to determine costs on one cause of action when it formed but one part of the broad

range of related issues in the proceeding.[28] Moreover, as La Hood J said, it was difficult to conclude, at that stage at least, that Janet and John had been the successful parties on the first cause of action. As he said, they had achieved some, but not all, of what they wanted to achieve, as had both MFTL and Ian.[29]

February 2024 to the present – preparation for trial and attempts to settle

[123] On 15 August 2024, orders were made by consent for the two proceedings to be heard together, replacing MFTL with TTL in the 71 proceeding, joining TTL as an interested party in the 21 proceeding and authorising TTL's reasonable costs of involvement to be met out of Trust assets. MFTL's ongoing involvement in the 21 proceeding was to be "solely to extent required to advance its right to an indemnity for costs incurred as trustee during the period it was trustee".[30]

[124] Then, in October 2024, TTL filed an amended statement of claim, in its name, in the 71 proceeding, and Janet and John filed an amended statement of claim in the 21 proceeding, following which the counterclaims described earlier were filed.

[125] Accordingly, given the nature and extent of the allegations made against it, it is appropriate for MFTL to involve itself in the proceeding to the extent of defending Janet and John's claim that it should not be indemnified for its legal costs because it breached its duties to act in accordance with the terms of the Trust, honestly and in good faith, for the benefit of the beneficiaries, impartially and for a proper purpose (the fourth cause of action in the 21 proceedings and the related counterclaim by MFTL for its reasonable costs and expenses incurred in administering the Trust).

[126] When it filed its amended pleadings in the 71 proceedings, TTL filed also an interlocutory application to debar MFTL from participating in the trial of the

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28 *McKean v McKean Family Trustee Ltd* [2024] NZHC 162 at [28] and [32].
29 At [26].
30 *McKean v McKean Family Trustee Ltd* HC Palmerston North CIV-2022-454-21 (Minute of Skelton AJ) at [7].

proceeding based upon its failure to reimburse the $207,608.75, to which Churchman J had found it was not entitled pre-emptively.

[127] On 20 December 2024, Associate Judge Skelton concluded that MFTL should not – through not having refunded the money that it was not entitled to pre-emptively – be denied the right to participate in the trial to defend itself against, as the Judge put it, the serious allegations of misconduct and breach of duty levelled against it and to pursue its affirmative defence/counterclaim for indemnity.[31] To debar MFTL would, it was said, result in "irretrievable prejudice".[32] As will become apparent, that would most certainly have been the case.

Preliminary comments about Ian, Janet and John

[128] Before turning to consider the allegations upon which the causes of action are based, I pause to make some general comments about the evidence that was given.

[129] Janet and Ian were both credible witnesses. I have no doubt that their evidence was honest and that the views they held were genuine. They were open and quick to concede at appropriate points.

[130] MFTL and Ian have both described Janet and John as having an "inheritance objective". In their view, Janet and John did not and do not want to prioritise Flora's wish to keep the farm for the benefit of the family over their desire for an inheritance. Janet denied that this was the case, saying she and John have acted in the interests of Gus' daughters, some of whom were in real financial need at various points. It is difficult, however, to reconcile Janet and John's actions with a pure motivation of providing financial benefit for Gus' daughters. Janet and John's actions in seeking to invalidate the Trust would, if successful, have resulted in Gus' daughters receiving no financial benefit at all. Moreover, the issues Janet and John take with Ian's actions as director of MFTL

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31 *McKean v McKean Family Trustee Ltd* [2024] NZHC 3927 at [33].
32 At [35].

include a decision to make a small distribution to Annie, one of Gus' daughters, and include an allegation that Ian prioritised the needs and welfare of Class C primary beneficiaries (a class including Gus' daughters) over the needs of Class B primary beneficiaries (a class that includes Janet and John).

[131] I accept that a desire to help Gus' daughters was a motivation for Janet and John. But I do not accept that it was the only motivation. Living overseas meant they were not able to enjoy the benefits of visiting the farm in the same way that Ian and his family could. It meant their children did not grow up with the deep connection to the land that Ian's children have. While it seems they wanted to retain access to parts of the farm (with Janet, for example, wanting to build a holiday cottage on part of it) they did not see a need to keep the entire farm. The Trust's money became, at least at earlier stages, more important to Janet and John than the McKean legacy the farm as a whole represents, and more important than Flora's wishes. This view would be perfectly reasonable were it not for Flora's clearly expressed wish in Trust instruments that the farm's maintenance and provision was to be the trustee's first responsibility. Janet and John both failed to understand that the Trust's assets were not their assets. They failed to understand that Flora's decision to place the farm in a Trust had real consequences. It meant their desire for a substantial inheritance was not necessarily compatible with the choices available to MFTL and to Ian as its director. As a result, they both blamed Ian for actions that in truth flowed from Flora's decision to create the Trust in the way that she did.

[132] Importantly, as so many of the allegations are levelled against him, I have found Ian to have acted appropriately and reasonably in his role as a director of MFTL. He is passionate about the farm and about Flora's wishes to keep it within the family. Flora's wishes were clearly expressed in the Trust Deed and Memorandum of Wishes. When acting on behalf of MFTL, Ian had an obligation to respect those wishes. Appropriately, the need for Flora's wishes to be upheld has framed his thinking. At several points when he gave evidence he drew a distinction between "Ian the trustee" (referring to when he was acting on MFTL's behalf) and "just Ian". For example, he said that while he might have liked to have accepted proposals made to him to buy the property himself, that was not,

he thought, something that "Ian the trustee" could properly do because it would be out of step with Flora's wishes, as expressed in the Trust Deed and Memorandum of Wishes. Similarly, while Ian might himself have thought that emphasising the need for health and safety compliance to his brother and sister was a little over the top, "Ian the trustee" saw it as being an important thing to do. As I will go on to explain, the often vicious allegations made against him were not justified.

[133] While Janet was genuine in her views, they were in most respects misguided. She and Ian, both, have only a limited understanding of commercial matters. However, Ian did understand MFTL's responsibility as a trustee. But it is not clear that Janet had, in making the allegations that were made, a sufficient grasp. Certainly, as she said, she signed the relevant papers here without looking at them at all and without understanding what was happening. Unfortunately, her perception of what was going on was driven by a series of triggers, some of them very minor. It was a case of confirmation bias: once Janet began to suspect that Ian's behaviour was motivated by selfishness and that he wished to be the only person to benefit from the Trust to the exclusion of others, she could not see any other explanations for his behaviour, including motivations to comply with MFTL's legal obligations as a trustee.

[134] An example can be seen in Janet's evidence of Ian not responding to her request for the code to the door lock at the farm when she visited on two occasions and to her struggling with access as a consequence. She emailed Ian with a request for the combination and then took offence when the email went unanswered. But the evidence revealed quite polite exchanges between Janet and Kaye in which Kaye gave the code without question.

[135] Another example is offence taken by Janet to Ian having, in an email communication with Mr Gubb (in response to Mr Gubb's request for certain documents) having signed himself off as:

> Ian.S.McKean, MA
> Clinical Director
> Family Psychotherapist

[136] This is something that occupied some space in Janet's evidence, and submissions for Janet and in cross-examination. It is something that is only of peripheral relevance to the issues in the case. The sign off appears in a bespoke printed letterhead that Ian created for this particular letter (only). He explained that, because he had available to him a number of the documents that Mr Gubb was seeking, he thought he would send them directly. He was taken aback at that time, not only with the heavy handed terms of Mr Gubb's letters, but with a recent comment he recounted John having made to him to the effect of "you're the worst family therapist". Ian explained that he then created this letterhead for his covering letter to Mr Gubb on the basis that the "family psychotherapist" entry was a form of rebuttal. He referred to it as being in the nature of satire.

[137] It was not a wise or sensible thing to do. But it cannot in my view inform any of the issues in the proceeding.

[138] Ian, on the other hand, has become overly focused on the position of Liz. It is accepted that Flora was concerned to ensure that Liz was not involved in the Trust because she already had received 200 acres. However, that does not preclude Liz from purchasing the farm, or part of the farm. It simply precludes her and her descendants from being added as beneficiaries of the Trust unless she gifts her 200 acres to the Trust. That does not appear to have been Ian's view, who has disapproved of what he has seen as Liz working collaboratively with Janet, and perhaps John, to secure the purchase of the farm, either on her own behalf or with Janet and John. Ian is also of the view that Liz has inserted herself inappropriately in Trust matters more generally. For example, Ian refers to an email that Liz sent to Ian and copied to other family members. It is fair to say that the email is in particularly uncharitable terms. But it does not help with the issues in the case.

[139] When Tracey McLean (Gus' daughter and Janet's niece) read the email, she responded to it in kind. She said to Ian in the email that she sent on 31 January 2022:

> It seems to me that you have led an ego driven lust for power and complete control of our family trust, wasting valuable funds in costly

> legal fees, which should be funnelled into property maintenance (judging from the recent photos and report) and disbursements to beneficiaries. It is an outrage that you are using our inheritance for this means.

[140] In a similar way, but from the other side, Alexander McKean (Ian's son) when giving evidence referred to what Janet and John had said in relation to the proceeding as being "lies and being prompted by maliciousness" warranting "a public apology".

[141] None of these inappropriately strong allegations, from either side of the fence, are warranted on the facts. It demonstrates that the narratives that exist on both sides have overtaken the facts such that common ground has become impossible to find.

Analysis of the 21 proceeding

[142] The 21 proceeding is made up of six causes of action, based upon allegations that Ian and MFTL did a number of things that breached a range of duties owed by them to beneficiaries in various capacities. It is complex because the factual allegations overlap and because the line between Ian's actions as Ian the beneficiary and as Ian the director of MFTL is hard to draw. I propose to deal with them through answering the following questions:

(a) What are the duties owed, by whom, at what times?

(b) Are Janet and John's allegations against MFTL and Ian made out in fact?

(c) Should MFTL be indemnified for legal costs? This is the question that sits at the heart of the dispute. It encompasses, first, the fourth cause of action, in which Janet and John seek an order that MFTL and Ian reimburse the Trust $207,608.75 of MFTL's legal costs which the Trust has already paid. Secondly, it encompasses MFTL's counterclaims – in which it seeks indemnification for its historic legal expenses and its legal expenses in defending the 21

proceeding, as well as an order that it is entitled to payment for its work as trustee.

(d) Should Ian pay MFTL's legal costs? This question encompasses the fifth and sixth causes of action in which Janet and John seek an order that Ian account, as a dishonest assistant, for MFTL's breaches of duty; and an order under s 132 of the Trusts Act that, if MFTL is to be indemnified, it is indemnified solely from Ian's interest in the Trust property. It encompasses also Ian's affirmative defence invoking the protector's exemption of liability.

(e) Must Trust documents which relate to legal advice given to MFTL and Ian be disclosed to Janet and John? This issue encompasses the third cause of action (where Janet and John seek orders that Ian and/or MFTL provide them with the relevant documents) and the related issue of whether TTL, which now holds the documents on behalf of the Trust, may disclose them.

(f) Did Ian, Janet or John breach their duties as protectors of the Trust? This issue encompasses the second cause of action (in which Janet and John seek the removal of Ian as a protector) and Ian's counterclaim (in which Ian seeks orders that Janet and John reimburse the Trust for MFTL's indemnified legal fees and funds expended on TTL).

[143] The first cause of action has been resolved. The only issue that remains is costs. The costs issues that arise on the first cause of action are not for determination at this point and time. In the first cause of action, as pleaded initially, Janet and John sought MFTL's removal as trustee and the appointment of a replacement trustee company with Janet, John and an independent person as directors. Ultimately, MFTL was removed and replaced as trustee by TTL by consent. However, Janet and John repleaded the first cause of action, expressing it as a claim for costs on the application to remove MFTL and to appoint a new

trustee. It is not an appropriate cause of action. The question of costs is part and parcel of any cause of action – whether it succeeds, fails or is otherwise resolved. In any event, the parties agreed that costs on the first cause of action would be dealt with by the Court when it considers costs following the conclusion of the proceeding as a whole.

[144] Before discussing the live issues, it is important to identify the allegations that Janet and John make against Ian and MFTL. There are many of them. The allegations are these:

(a) Ian misled John as to the terms of the Trust.

(b) Ian failed to appoint Janet and John as directors of MFTL, contrary to Flora's wishes.

(c) Ian misled Janet and John by saying they were directors of MFTL, when they were not.

(d) Ian represented to others that Janet and John were directors of MFTL, when they were not.

(e) Ian and/or MFTL refused to change the trusteeship or directors of MFTL by appointing John or Janet as trustees or directors when it was discovered that Janet and John were not directors of MFTL.

(f) Ian and/or MFTL varied the terms of the Trust Deed in 2019 in ways that deprived Janet and John of power and control.

(g) Ian and/or MFTL acted improperly in relation to distributions from the Trust because he and/or it:

    (i) failed to provide Janet and John with information about distributions MFTL made from the Trust;

(ii) in 2019 made distributions to Annie McKean and Tracey McKean, two of Gus' daughters, when they were not at the time beneficiaries of the Trust; and

(iii) failed to make distributions to Janet and John despite making distributions to Class C primary beneficiaries, and in so doing failed to adequately consider the needs and welfare of Class B beneficiaries in priority to Class C beneficiaries.

(h) Ian and/or MFTL failed to act honestly and in good faith because Ian made several misrepresentations.

(i) Ian and/or MFTL failed to follow the terms of the Trust by:

(i) focusing unduly on providing benefit to Class C rather than Class B beneficiaries;

(ii) saying incorrectly that "all disbursements have to be equal" in an email; and

(iii) saying incorrectly that Flora wished for her bank investments to be set aside for future land purchases to add to Torwood Farm.

(j) Ian and/or MFTL refused or failed to provide Trust information promptly to Janet and John, including information about legal advice received by Ian and/or MFTL.

(k) Ian deferred the rent review on the farm's lease and failed to provide relevant information to Janet and John;

(l) Ian and/or MFTL paid MFTL's legal fees from Trust assets during hostile litigation in advance of seeking pre-emptive orders from

the Court for an indemnity, and then failed to reimburse the Trust as later ordered by the Court.

The duties owed

[145] There are no differences between the parties on the nature and extent of the duties of trustees. Counsel provided helpful summaries of the relevant principles in closing. It is important to identify them.

[146] First, a trustee must know the terms of the trust[33] which will include all documents, papers and deeds relating to the trust property that come into trustees' possession and control.[34]

[147] Secondly, and importantly, a trustee must act in accordance with the terms of the trust.[35] It is the trustee who will undertake the trust and they are bound in their obligation to do so.[36] Accordingly, here MFTL had to act in accordance with the Trust Deed – and the requirement in it that the trustee's first responsibility should be to retain Torwood Farm as a long-term asset of the Trust. The Memorandum of Wishes was not binding, but MFTL did have an obligation to consider it to the extent it was not inconsistent with the terms of the Trust.[37]

[148] Thirdly, a trustee must act honestly and in good faith.[38] The term "good faith" requires trustees to give genuine and reasonable consideration to the exercise of their powers.[39] They must "not act irresponsibly, capriciously or

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33 Trusts Act 2019, s 23.

34 Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) [Garrow and Kelly on Trusts] at [20.13], citing *Hallows v Lloyd* (1888) 39 Ch D 686 at 691.

35 Trusts Act, s 24.

36 Garrow and Kelly on Trusts, above n 34, at [20.18].

37 *Chambers v S R Hamilton Corporate Trustee Ltd* [2017] NZCA 131, [2017] NZAR 882 at [36].

38 Trusts Act, s 25.

39 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) [Lewin on Trusts] at [29–0034], citing *McPhail v Doulton* (1971) AC 424 (HL) at 449 per Lord Wilberforce.

wantonly"[40] but honest carelessness or even gross negligence does not of itself amount to a lack of good faith.[41]

[149] "Honesty" is generally described as an absence of dishonesty. The test for dishonesty is objective, judged against the background of what the trustee subjectively knew.[42]

[150] Fourthly, a trustee has a duty to act for the benefit of the beneficiaries. They must hold and deal with the trust property for their benefit in accordance with the terms of the trust.[43] The duty does not require that all beneficiaries benefit equally (or at all) from any decision made by the trustees.[44]

[151] Fifthly, trustees have a duty to exercise their powers for a proper purpose.[45] The first step in considering the exercise of the duty is to identify the purpose for which a power is given and the second is to determine whether the trustee's subjective intent was inconsistent with that purpose.[46]

[152] Sixthly, a trustee has a duty not to exercise a power directly or indirectly for the trustee's own benefit.[47] The duty is sometimes known as the "rule against self-dealing" and is "part of the duty of loyalty".[48] In accordance with this duty, a trustee cannot sell the trust property to themselves, however fair the transaction.[49]

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40 Nicola Peart *Trusts Act 2019: Act & Analysis* (Thompson Reuters, Wellington, 2024) [Peart on Trusts] at [TU25.02], citing *Kain v Hutton* (2004) 1 NZTR 14–022 (HC) at [226].

41 Garrow and Kelly on Trusts, above n 34, at [20.38], citing *Karger v Paul* [1984] VR161.

42 *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [77]–[78]; adopting the approach taken by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97 (PC) [*Royal Brunei*] at 107–109 and *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333.

43 Trusts Act, s 26.

44 Garrow and Kelly on Trusts, above n 34, at [20.42].

45 Trusts Act, s 27.

46 *Wong v Grand View Private Trust Co Ltd* [2022] UKPC, 47, [2022] 25 ITELR 630 at [55]–[57]; and *Legler v Cornelia* [2024] NZSC 173, [2024] 1 NZLR 710 at [5].

47 Trusts Act, s 31.

48 Peart on Trusts, above n 40, at [TU31.01], citing *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at [70].

49 Lewin on Trusts, above n 39, at [46–008].

[153] Seventhly, a trustee has a duty to avoid conflicts of interest.[50] The only exceptions are where the conduct is authorised by the trust deed or sanctioned by the Court.[51]

[154] Finally for these purposes, a trustee must act impartially in relation to the beneficiaries. The trustee must not be unfairly partial to one beneficiary or group of beneficiaries to the detriment of the others.[52] However, a trustee's primary duty is to the trust as a whole, even if the effect of fulfilling that duty is to disadvantage one beneficiary in favour of another.[53] Accordingly, as with the duty to act for the benefit of the beneficiaries, a trustee is not required to treat all beneficiaries equally, but all beneficiaries must be treated in accordance with the terms of the trust.[54]

[155] However, trustee duties are not the only duties at play in this proceeding. Ian, Janet and John all have duties as protectors of the Trust. Protectors are largely a creature of the trust instrument by which they are made. The role of protector is not created or moderated by the Trusts Act or by any other statute. The only form of check the Trusts Act provides is under s 94 which requires that any person with the power to remove or appoint trustees must exercise any such power honestly and in good faith and for a proper purpose. Protectors frequently have such a power and so must act in accordance with s 94. However, the Act does not generally regulate protectors. Accordingly, the source of a protector's power and the extent of any checks on those powers will stem largely from the wording of the relevant trust instruments.

[156] Here, the Trust Deed and Variation Deed requires that a protector must act honestly and in good faith for the benefit of the beneficiaries:[55]

> 29. Exercise of Protector's Discretions

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50 Trusts Act, s 34.
51 *McLaughlin v Laughlin* [2023] NZCA 473 at [116].
52 Trusts Act, s 35(1).
53 Lewin on Trusts, above n 39, at [29–062].
54 Trusts Act, s 35(2).
55 Clause 29.1 of sch 2, in the original Trust Deed, and cl 50.1 of sch 2, in the Variation Deed. Clause 50 of sch 2 of the Variation Deed is identical to cl 29 of sch 2 of the original Trust Deed, other than references to multiple protectors, rather than a singular protector.

> 29.1 The Protector must act honestly and in good faith for the benefit of the Primary Beneficiaries until they have all died or ceased to exist, and for the benefit of the Secondary Beneficiaries after all of the Primary Beneficiaries have died or ceased to exist.
>
> …

[157] Importantly, a protector of this Trust will only owe these duties when exercising the discretions of the protector. This seems to me to be clear from the wording of the title of cl 29. This interpretation is supported by various appellate decisions about the nature of fiduciary relationships[56] (bearing in mind that the protector role is not automatically fiduciary,[57] although it is under the terms of this Trust) as well as common sense. While it could be said that a protector owes fiduciary duties in respect of any dealings relating to the relevant trust, that approach risks imposing inappropriately broad duties in the absence of corresponding powers. It could make it impossible for a person who is both a protector and a beneficiary to make requests from the Trust that would only benefit them individually. A narrower interpretation accords with the scope of the duty imposed under s 94 of the Act. An intended departure from that common sense approach could be expected to be clear in the wording of a trust instrument.

[158] So then, if protectors only owe a fiduciary duty when exercising a discretion, what are the discretions that the protectors may exercise under the Trust? They include:

(a) appointing and removing trustees;[58]

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56 *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [55]; and *A v D* [2024] NZSC 161, [2024] 1 NZLR 579 at [56].

57 Whether the role is fiduciary will depend on the nature of the power granted to a protector. Even the power to appoint and remove trustees may not be automatically fiduciary: see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), [2017] All ER (D) 72 at [203]; *Brkic (as trustees of the Madeg Trust) v White (as trustees of the Awhitu Trust)* [2021] NZCA 670, [2021] NZFLR 840 at [35]; and Peart on Trusts, above n 40, at [TU94.02].

58 Clause 28 of sch 2 of the Trust Deed and cls 42 and 43 of sch 2 of the Variation Deed.

(b) determining disputes between trustees, custodian trustees, trust advisors, or investment managers;[59]

(c) assisting in the resolution of differences between the trustees and the Primary beneficiaries;[60] and

(d) rights to request and receive trust information.[61]

[159] Accordingly, a protector of this Trust will only owe a duty of honesty and good faith for the benefit of the primary beneficiaries when exercising one or more of those discretions. It will be important, when discussing whether Ian or whether Janet and John breached their duties as protectors, to bear this principle in mind.

[160] There is one category of duties left to discuss. And that is the duties owed by the director of a trustee company. While a corporate trustee will itself owe fiduciary duties to beneficiaries, a director of a corporate trustee only owes duties to the corporate trustee itself. There is no direct fiduciary relationship between the directors of a corporate trustee and the beneficiaries of the trust for which the company is a corporate trustee.[62] That can cause problems for beneficiaries seeking remedies for breach of trust: a corporate trustee will usually only have as its assets the assets of the trust itself.[63] However, directors may be liable to beneficiaries based on other claims including, relevantly, for providing dishonest assistance in a breach of trust.

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59 Clause 26 of sch 2 of the Trust Deed and cl 48 of sch 2 of the Variation Deed.
60 Clause 27 of sch 2 of the Trust Deed and cl 49.1 of sch 2 of the Variation Deed.
61 Clause 10.1 of sch 2 of the Trust Deed and cl 7.13 of sch 2 of the Variation Deed.
62 *Bath v Standard Land Company Ltd* [1911] 1 Ch 618 (CA) at 627.
63 The Law Commission | Te Aka Matua O Te Ture in 2012–2013 considered a proposal for legislation to require that directors of a corporate trustee have the same obligations to the beneficiaries of the trust as they would have had if they and not the company had been the trustees – see Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at P36 – but ultimately deferred further consideration of the issue until its corporate trustee review, after the proposal was strongly criticised by submitters – see Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [16.9]–[16.10]. The traditional approach has been questioned, with some arguing that the relationship between director and beneficiary demonstrates the trust and confidence that would indicate the presence of a fiduciary relationship – see, by way of example, A Steele "Does the corporate shield protect directors of company trustees?" [2020] NZLJ 337 – but that position has not been taken here.

[161] For dishonest assistance to be made out here, the following elements must be established:[64]

(a) the existence of a trust or fiduciary relationship;

(b) a breach of trust or fiduciary duty by the trustee or fiduciary;

(c) causation of loss;

(d) procurement or assistance by the defendant in the breach of trust or duty; and

(e) the defendant to have acted dishonestly.

[162] The meaning of "dishonestly" in this context was explained by the Supreme Court in *Sandman v McKay*.[65] The test is objective, judged against the background of what the defendant knew subjectively. The question is whether, given the defendant's knowledge of the relevant facts, their participation in the breach of trust was objectively dishonest, with no requirement that they realised they were acting dishonestly. However, negligence alone will not amount to dishonesty. A defendant will be dishonest if they have actual knowledge that the transaction is one in which they could not honestly participate. Wilful blindness, where a defendant strongly suspects a breach of trust but makes a deliberate decision not to inquire in case the inquiry results in actual knowledge, suffices also.

[163] This is all to say that Ian did not owe direct duties to the beneficiaries when acting as a director of MFTL. To the extent that he could be liable for MFTL's actions, MFTL must have breached the Trust and Ian must have dishonestly assisted in that breach. There would be no difficulty in demonstrating the "assistance" component: Ian as MFTL's only director played the sole active decision-making role. There may be difficulty, however, in

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64 *Royal Brunei*, above n 42, at 107–109.
65 *Sandman v McKay*, above n 42, at [77]–[78].

demonstrating dishonesty when, for example, Ian in his capacity as director does not have a duty to know the terms of the Trust. A scenario might be envisaged in which MFTL breached its duty by failing to know the terms of the Trust, but Ian did not dishonestly assist that breach because he as MFTL's director did not know the terms of the Trust. It must be assumed that the fact Ian would not assume a direct fiduciary relationship with the beneficiaries was known to Flora when she settled the Trust.

[164] Before moving on to the substantive allegations, I make one final observation. One of the difficulties in this proceeding is that Janet and John's pleadings do not differentiate between Ian acting in his capacity as MFTL's representative, Ian acting as a protector, and Ian acting in his personal capacity as a beneficiary of the Trust. It is difficult to criticise this when, practically, the line between those separate personalities has been blurred. Yet, as can be seen by the discussion just had, there are real differences in the duties Ian owed, and to whom, depending upon the capacity in which Ian was acting.

Are Janet and John's allegations against MFTL and Ian made out in fact?

Did Ian mislead John about the terms of the Trust?

[165] In Janet and John's amended statement of claim it is alleged that:

(a) in or about November 2014 (after the Trust Deed had been signed), Ian provided an unsigned trust deed to John, purporting that it was the final version of the trust deed;

(b) the version provided by Ian was in fact a draft and that this constitutes a breach of the duty to act honestly and in good faith.

[166] There is nothing in these allegations. The evidence shows that Ian sent various draft deeds to Janet and John in December 2013, before the Trust was settled and that, when John visited in September 2014, he stayed with Ian for approximately two weeks during which time a folder containing the relevant

suite of Trust documents was available to him, with Ian encouraging him to take copies of the documents he wished to have.

[167] There is no evidence about a copy of a trust deed – draft or final – being sent to John in November 2014. The only draft trust deed in evidence has a different name for the corporate trustee and includes Gus' daughters as beneficiaries, so John would have noticed that.

[168] In any event, John has, despite the allegations made in his name, provided no evidence in the proceeding. He has not filed an affidavit and did not come to the hearing. These allegations cannot be made out.

Allegations about Janet and John not being trustees or directors of MFTL

[169] Janet and John allege that:

(a) Flora wanted Ian, Janet and John to be either trustees of the Trust or directors and shareholders of a trustee company;

(b) Ian knew of Flora's wishes and, as the sole director and shareholder of MFTL, was the person who had the power to appoint them as directors; but

(c) knowing that they were not directors, Ian failed to appoint them as directors and proceeded on the basis that he was the sole director (by signing financial statements and annual returns for MFTL) while, at the same time, misleading Janet and John as to their status and representing to others that Janet and John were directors of MFTL.

[170] As outlined earlier in this decision, Flora had, initially, intended that Ian, Janet and John would all be appointed as directors of MFTL. However, following advice from Mr Holmes to the effect that Janet and John needed tax advice in the first instance, Flora changed her position. The intention was that they might be added at a later time, when that advice had been obtained.

However, Ian did not realise this. He thought that they were, all three, to be directors and he thought the papers he signed that day, and the papers he later gave to both Janet and John to sign, gave effect to the director appointments for all three of them.

[171] Ian was not present at either of the two meetings that Flora had with Mr Holmes and during which Flora's instructions were discussed. He came in only for a short period at the end of the 10 December meeting to sign the necessary papers. He left Mr Holmes' office thinking that all would be in place for him, together with Janet and John, to be directors. And all three of them – Ian, Janet and John – thought they had indeed become directors when they signed the documents in the Trust folder during their respective visits to the farm in July and September 2014. The rub was that nobody really understood the papers they were signing. If Janet had looked at them, she would have realised that she was not signing papers to become a director, but was signing powers of attorney and draft template minutes for meetings that might take place in the future. She assumed that they were directorship forms. But they were not.

[172] Ian made the same assumption. He spoke of reading the enduring power of attorney documents but he did not understand the nature of the documents that Janet and John signed. Again, there is no evidence from John about what he thought or about what he knew.

[173] Several conclusions follow. The first is that there was no failure to appoint Janet and John as trustees or directors of MFTL that was contrary to Flora's wishes. Flora did not add Janet and John as initial directors nor did she record such a wish in the Trust Deed or Memorandum of Wishes. Secondly, while Ian did mislead Janet and John about their status as directors of MFTL, MFTL did not – at least until early 2020, when Ian discovered the truth – breach its duties of honesty, good faith and to act for the benefit of the beneficiaries. Ian genuinely believed the three were together directors. All three misled themselves by failing to understand the documents they had signed.

[174] Janet and John disagree strongly with the second conclusion. They say that Ian cannot have genuinely believed there were three directors of MFTL when he acted unilaterally, as a sole director would, by:

(a) signing MFTL's financial statements each year without Janet and John's approval and without providing them with copies;

(b) signing MFTL's annual returns, naming himself as the sole director;

(c) signing "trustee meeting" minutes alone, without consistently providing copies to Janet and John; and

(d) making distributions to non-beneficiaries in 2019 without Janet and John's approval.

[175] The fact that Ian signed accounts, annual returns and minutes alone up until this time makes no difference to matters one way or another. Ian said in evidence that he thought he was signing documents for MFTL as its sole resident director and on behalf of Janet and John. This understanding is reflected, for example, in the minutes of various meetings, at which Ian, Janet and John were all present but where Ian alone signed next to the names of Ian, Janet and John under the heading "Signed by Directors of MCKEAN FAMILY TRUSTEE LIMITED as Trustees of TORWOOD FAMILY TRUST". There is no dishonesty or bad faith in this – or a failure to act in the best interests of the beneficiaries.

[176] Similarly, Ian explained that he did not always provide copies of documents to Janet and John because he did not have a copying or scanning machine at his home, so when he needed to post documents to the Trust's accountant, Roy Brooking, he did not always have time to copy or scan them first. Again, this does not found a conclusion of dishonesty.

[177] Janet and John say that Ian had some experience as a director of companies and so should have known better than this. Certainly, Ian's practices could have been better on these fronts. But I accept that Ian was genuine in his evidence here.

[178] In many other ways, Ian did act consistently with a belief that he was one of three directors of MFTL. For example, regular meetings with Janet and John were held to discuss important Trust decisions. This leads to the simple conclusion that Ian did have the belief he says he had: that all three were directors of the Trust.

[179] Janet and John's allegation that Ian misrepresented them as directors to other people is resolved in the same way. Janet and John allege, for example, that Ian wrote to Flora's solicitor, Mr Holmes, and later to Mr Brooking saying "falsely" that he, Janet and John were all directors of MFTL. Ian did write in those terms. They reflected his understanding of the position. However, in evidence, Janet referred to this correspondence as being part of a plan on Ian's part to cover up dishonesty. She said:

> … And I think Ian had to find a way to kind of come out and be honest and by writing to these professionals. I believe he hoped they'd come back and say actually, which is what happened in September [2019, when Mr Brooking informed Ian he was the sole director of MFTL].

[180] That is an unsustainable allegation. When Ian wrote the emails in question his genuine understanding was that all three were directors. He came to be aware of a possible error in his understanding later, in September 2019, when Mr Brooking informed him of it. The position was only confirmed for Ian when Mr Holmes verified it in his email of 14 January 2020 and he was so upset about it that he – ill-advisably but genuinely – could not bring himself to tell Janet and John about it until May 2020. As Ian said in evidence, "if I let them know now that Mum's excluded them, we've already got a bonfire going, we will push the neutron bomb".

[181] Ian did accept in evidence that, looking back, he would do things differently. However, the delay did not amount to dishonesty by Ian or MFTL

in circumstances in which this was a family, rather than a commercial, operation and when Ian did tell the others within six months.

[182] Janet and John then go on to allege MFTL and Ian refused or failed to:

(a) appoint them as directors of MFTL or as trustees of the Trust; or

(b) retire MFTL as a trustee in favour of a new trustee; or

(c) join with Janet and John to exercise the protector's power to remove MFTL as a trustee and appoint a new one.

It is said that these actions constitute a breach of the duties to act honestly and in good faith and for the benefit of beneficiaries.

[183] I agree with Ian that these pleadings are misconceived. MFTL could not have breached duties in failing to act in the ways proposed. If MFTL retired as a trustee, it would be ineffective until the protectors appointed a new trustee,[66] and MFTL did not have a power to appoint Janet and John as directors – Ian, as sole shareholder of MFTL, held that power. Therefore, the focus here is squarely on Ian. Importantly, in making decisions about appointing directors of MFTL, Ian did not owe duties to the Trust – only to the company. As a result, the only way Ian's duties are engaged are through his role as protector. Because the protectors hold the power of appointment of trustees, Ian's decision not to exercise that discretion was subject to his duties as a protector. The sole question, then, is whether Ian's alleged failures to act amounted to a breach of his duties as a protector.

[184] Ian's written and oral evidence was that, upon learning of the real position in September 2019, his first thought was to make arrangements to have Janet and John appointed as directors. But he paused in doing so. In the first place, he was quite shocked about the situation and knew that Janet and John would be too. As discussed earlier in this decision, between 2018 and mid-2020,

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66 Under cl 44.2(b), sch 2 of the Variation Deed.

relationships had begun to sour between Janet and John on the one hand and Ian on the other. There was no real basis for the souring but perceptions amongst the siblings were such that their dealings with each other, and their thoughts about each other, had taken on something of an edge. Accordingly, in the first instance, Ian tried to find a way to add them as directors without upsetting them.

[185] Ian's email to Matthew Ockleston at Dentons on 22 May 2020 gives voice to the conundrum in Ian's mind. He asked for advice about the situation that arose because of Flora's decision to exclude Janet and John as directors of MFTL. He was concerned that Flora may not have acted legally in excluding Janet and John.

[186] Ian's concerns about Janet and John's reactions were well founded. In the Zoom call between the three of them on 21 May 2020, Ian faced real negativity from Janet and John over the situation. And then, to put matters beyond any doubt at all, on 20 July 2020, Ian received the first of what was to be a string of letters from Mr Gubb in which, as discussed above, a number of unwarranted accusations were made.

[187] There was no breach of duty in any of this. The level of hostility that Janet and John were projecting towards Ian at this stage meant that there was no credible basis upon which it could have been thought that the three of them could work together. Moreover, Janet and John had already demonstrated a real lack of understanding when it came to the duties of the trustee to comply with Flora's wishes as expressed in the Trust Deed and the Memorandum of Wishes.

[188] Nonetheless, MFTL and Ian did in November and December 2020 go on to promote the removal of MFTL and its replacement with an independent trustee. Janet and John did not respond to that proposal at all. Instead, they filed the 21 proceeding in April 2022.

[189] Accordingly, there could be no actionable failure on Ian's part in not appointing John and Janet as trustees in his capacity as a protector. There was nothing that Ian did or did not do, having regard to the fiduciary nature of the

protector role, that was anything other than honest, in good faith and for the benefit of the beneficiaries.

[190] For completeness I would add that, even had MFTL owed duties under this head, I would have found it did not breach them in failing to take the steps that would have given Janet and John positions as trustees or directors.

Did Ian and/or MFTL deprive Janet and John of power and control by varying the Trust Deed in 2019?

[191] Janet and John allege that Ian and/or MFTL neutralised or, at least lessened, their powers as protectors by varying the Trust Deed through the Variation Deed. Their claim is that the Variation Deed created a requirement that protectors must act unanimously and gave MFTL the power to remove a protector. This, it is pleaded, amounts to a breach of fiduciary duties to act in good faith and for the benefit of beneficiaries, and the duty to exercise powers for proper purposes and not for only MFTL's or Ian's own benefit.

[192] Ian was acting as MFTL's director at the relevant time, not as a protector. He did not owe direct duties to the beneficiaries. The inquiry is limited to whether MFTL breached its duties as trustee.

[193] Unfortunately, these allegations are another example of significant misunderstandings on the part of Janet and John. They suspected Ian had acted intentionally to dilute their control of the Trust but that was speculation on their parts. There was no evidence to that effect. Their views on the topic added considerable fuel to the fires that they were burning. As both Mr Holmes and Ian said in evidence, the changes to the protector provisions were not requested by Ian or MFTL. They were changes that were made by Mr Holmes, of his own volition, as a part of his updating of standard form trust deed terms. Ian's instructions to Mr Holmes, acting on MFTL's behalf, were to vary the Trust – with the consent of Janet, John and Stewart – so that Gus' children would become beneficiaries. Mr Holmes did that but took the opportunity, while he was at it, to modernise the Deed's terms. As Mr Holmes confirmed in evidence, he did not draw these additional changes to Ian or MFTL's attention.

[194] Janet accepted this when she gave evidence but was of the view that, whether Ian did it or not "it took away our power, that was for sure". But that is not wholly the case either. The original Trust Deed most likely already required protectors to act unanimously, even if that requirement was not explicit. It provided that protectors must not delegate their powers and mechanisms were provided to resolve disputes between them.[67] Provisions of that sort would not be consistent with non-unanimous decision-making. In addition, under the original Trust Deed, trustee decisions must be unanimous.[68]

[195] The same cannot be said for the other change made in the Variation Deed: that trustees, rather than the Principal Beneficiary (Flora), could now appoint or remove protectors.[69] However, Mr Holmes' desire to update that provision is understandable given Flora's death made it impossible for anyone to appoint or remove protectors. There is no evidence MFTL or Ian sought for trustees to have that power under the Variation Deed.

[196] Accordingly, these allegations cannot be made out. MFTL did not act in its own interest, or in Ian's interest. It acted in good faith for the benefit of all the beneficiaries.

Did MFTL or Ian act improperly in relation to distributions from the Trust?

[197] Janet and John allege that Ian and/or MFTL:

(a) First, did not provide details about payments or distributions that had been made from the Trust and that, as protectors, they were entitled to have that information.

(b) Secondly, failed to make distributions to Janet and John. It is said that they failed to adequately consider the needs and welfare of Class B primary beneficiaries in priority to Class C primary beneficiaries.

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67 Clauses 26.2 and 29.4 of sch 2 of the Trust Deed.
68 Clause 6, sch 2 of Trust Deed.
69 Trust Deed, sch 2, cl 24.3 can be compared with the Variation Deed, sch 2, cl 46.4.

(c) Thirdly, made distributions to non-beneficiaries without Janet and John's consent.

[198] These allegations are made in the context of MFTL having made at least the following distributions from the Trust's assets:

(a) In April 2019, a distribution of $500 to Tracey McKean, who was not then a beneficiary.

(b) In June 2019, a distribution of around $1,500 to Annie McKean, who was not then a beneficiary.

(c) In November 2020, a distribution of $3,000 to Gus' children, who were all beneficiaries by that stage.

[199] There was, in addition, a plan to make, in April 2021, a distribution of $2,400 each to Stewart and Tracey, who lived in New Zealand, and a distribution of $2,500 each to Gus' other children who lived in Australia – Caroline, Annie and Angela. However, because of the proceedings Janet and John had by then commenced, the Trust became unable to pay anything further.

[200] I observe again that in this setting Ian was acting entirely as MFTL's director. He owed no direct duties to the beneficiaries.

[201] The problem with the first allegation is that the information was provided. Ian told Janet and John about the $1,500 payment made to Annie in September 2019 and John commented on it (and expressed some concern about it, on the basis it was not discussed with him and Janet in advance and because he felt it was unfair not to give out distributions to one but not others of Gus' children) in an email to Ian and Janet on 5 September 2019. And, in a letter of 9 March 2021, MFTL's solicitors, Dentons, explained the other distributions. In a subsequent letter from Mr Gubb to Dentons of 15 April 2021 (the terms of which are, again, inflammatory), a request is made for that information – which had already been provided.

[202] The second allegation does not land either. MFTL under cl 1(b) of sch 2 of the Variation Deed (with the original Trust Deed having been in substantially the same terms)[70] had a responsibility – after the primary responsibility of retaining Torwood Farm – to:

> … give consideration to the needs and welfare of the Class B Primary Beneficiaries, and if any of them die and leave children, to the children of that Class B Primary Beneficiary.

[203] The clause goes on to give the trustee discretion to take into account the financial need of beneficiaries and to pay Trust monies to any beneficiaries in such shares as the trustee in its "absolute discretion" decides.

[204] Accordingly, MFTL needed to give consideration to the needs and welfare of Janet and John as Class B primary beneficiaries. However, it was also entitled to consider Gus' children, as Class C primary beneficiaries who were the children of a deceased Class B primary beneficiary. There is nothing in the Trust Deed or Variation Deed that requires MFTL to have considered Janet and John's needs in priority to Class C primary beneficiaries who are the children of a deceased Class B primary beneficiary. And there is also nothing that requires any distributions to be equal between beneficiaries – although the Memorandum of Wishes does express Flora's wish that distributions are equal. All that was required was consideration to be given and for, in that context, MFTL to act in accordance with its duties as trustee.

[205] MFTL did give consideration to Janet and John, having intended initially to make distributions to all beneficiaries. It is really not surprising that MFTL did not make distributions to Janet and John in circumstances in which they were alleging that the Trust was invalid and seeking to dissolve it. There was also nothing to suggest Janet or John were in financial need. There was no breach of duty in MFTL deciding not to give them distributions at that time. There was no breach, either, in MFTL ultimately stopping distributions all together. As Ian explained, in a report to beneficiaries on 30 November 2022, that further distributions at that point would not be likely given the legal expenses that were

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[70] Trust Deed, sch 2, cl 31.4(c).

being incurred in responding to Janet and John's claims. It is only a shame that that MFTL's intended course of action could not be pursued.

[206] The third allegation has more to be said for it. Ian accepted in evidence that the $1,500 payment made to Annie in June 2019 and the $500 payment made to another of Gus' daughters, Tracey, in April 2019 were payments made to non-beneficiaries. It was a breach of the terms of the Trust. Ian (and therefore MFTL) knew the terms of the Trust were such that he could not make distributions to non-beneficiaries, as seen, for example, in an email from Ian dated 15 March 2021 in which he acknowledged that. However, the breach does not support the allegations that Janet and John made. When John expressed his concerns at the time, Ian offered to repay the advances personally. His offer was rebuffed. While Annie and Tracey were not yet beneficiaries, Janet, John and Ian (as well as Stewart) had all already agreed that Gus' daughters should have been beneficiaries from the beginning and needed to be added as beneficiaries – and they duly were, meaning there was no practical detriment to any other beneficiaries. Annie and Tracey had particular needs to which Ian was sympathetic in making the payments; needs to which Janet was sympathetic also, as she said in her evidence. In those circumstances, it is difficult to find that the decision was a substantive breach of duty on MFTL's part.

Did Ian and/or MFTL (under Ian's control) breach duties to act honestly and in good faith as a fiduciary and trustee in other ways?

[207] Janet and John plead that Ian and/or MFTL breached the duties to act honestly and in good faith as a fiduciary or trustee in a number of other ways. Again, I observe that, while MFTL owed duties of honesty and good faith to the beneficiaries as trustee, Ian did not owe those duties to the beneficiaries directly. In none of the situations mentioned below was he exercising a protector's discretions. So he was not subject to the protector's fiduciary duties. I will deal with each allegation briefly:

(a) First, there is Janet and John's ongoing concern about Ian having, in a single email communication, used the term "family psychotherapist". I have addressed this already when making

preliminary comments about Ian, Janet and John. It is, for the reasons already given, simply not relevant and has occupied Janet and John's thinking in a disproportionate way. It is not sufficiently serious to amount to a substantive breach of duty.

(b) Secondly, Janet and John allege that Ian arranged for them to sign enduring powers of attorney for Flora, misrepresenting them to be documents concerning the Trust and/or the farm. As I have found, Janet, John and Ian all thought the documents they were signing were documents concerning the Trust. Each was mistaken.

(c) Thirdly, Janet and John allege that they were misled by Ian as to their status as trustees and directors of MFTL. The point has been addressed already. While they were misled, there was no breach of duty.

(d) Fourthly, Janet and John allege that Ian told them that he was not involved in setting up the Trust, when he was. This allegation is not made out. Ian was involved in setting up the Trust only in a peripheral way and had no involvement in instructing Mr Holmes, in determining the terms of the Trust or in putting it in place. He helped his mother with the relevant forms. But they were Flora's words. He drove Flora to an appointment with Mr Holmes and only came into the room when the documents needed to be signed.

[208] Janet and John have made several other allegations of dishonesty and bad faith in their submissions. Again, I deal with each briefly:

(a) Janet and John allege that Ian or MFTL, through Ian's affidavit of 12 October 2022, made serious but untrue allegations about Janet and her husband's tax position. This is not sufficiently serious as to amount to a substantive breach of duty by MFTL.

(b) Secondly, Janet and John allege that Ian "acted egregiously in respect of Flora's ashes", by moving some of them to another location without telling other family members. This allegation is not relevant to the proceeding. Ian was not acting as a protector or as MFTL's director. He did not owe duties of honesty or good faith when attending to Flora's ashes and MFTL was simply not involved.

[209] There is nothing in these allegations.

Did Ian and/or MFTL fail to follow the terms of the Trust?

[210] Under this head in the amended statement of claim, Janet and John have, from hundreds of pages of communications between the parties, selected extracts from three emails from Ian and have alleged them to constitute a breach of his duties to know the terms of the Trust, to act impartially, to exercise powers for a proper purpose and not to exercise powers for Ian and/or MFTL's own benefit. The words selected are:

(a) a reference to positioning the Trust to provide the best benefits for the children of Ian, Janet and John and their children;

(b) a reference to disbursements from the Trust having to be equal;

(c) a reference to a wish on Flora's part that her bank investments be set aside for future land purchases to add to the current farm land.

[211] None of these comments reveal a breach of a trustee's duty on their face and, moreover, when read within the context of each of the communications as a whole, cannot be said to be inaccurate to such an extent as to amount to a breach. It was apparent from the evidence he gave to the Court that Ian was well versed in his duties as a director of a trustee company, the terms of the Trust and on the way in which the trustees' powers could and could not be exercised.

[212] These allegations are unable to be sustained.

Did Ian and/or MFTL refuse or fail to provide Trust information?

[213] Janet and John allege that Ian and/or MFTL refused or failed to provide information contrary to s 52 of the Trusts Act and cls 23.4(h) and 47 of sch 2 of the Variation Deed.

[214] The first set of information that is the subject of this pleading is the list of documents sought in a 20 July 2020 letter from Mr Gubb. The documents referred to in that letter were a signed and dated copy of the original Trust Deed and Variation Deed, financial statements for the Trust from 2013 to 2019, copies of any other deeds that record changes to the original Trust Deed and communications with Mr Holmes about the Variation Deed. In addition, the pleading refers to information sought in a 15 April 2021 letter from Mr Gubb to Dentons which sought copies of "any legal advice and fee narrations that record the advice, that has been paid for with trust monies."

[215] All of this information has been provided with the exception of information that is the subject of the third cause of action. That cause of action relates to:

(a) all communications between Ian and/or MFTL and the Trust's lawyers; and

(b) all legal advice or opinions obtained by Ian and/or MFTL as trustee (including, but not limited to, advice paid using Trust property).

[216] Under cross-examination, Janet was taken through all of the documents sought (with the exception of those that are the subject of the third cause of action) and agreed ultimately that, in terms of all of the information requests made, she and John had been provided with all documents except for the two categories mentioned above. On that basis, I do not spend any further time on these allegations and address the two categories referred to above in my discussion of the third cause of action.

Did MFTL or Ian breach duties in relation to rent renewals for the farm lease?

[217] In the amended statement of claim it is pleaded that documents relating to the renewal of the lease for the farm were not provided in a timely way. However, they were provided and, as mentioned, the only outstanding disclosure issues are those to which the third cause of action relates.

[218] The claim then goes on to plead that Ian or MFTL did not carry out the rent reviews under the lease when they were due on 1 June 2022 or 1 June 2023.

[219] The deferral of a rent review in 2022 was the result of difficulties in having a valuer visit the farm due to the COVID-19 pandemic. And the fact that a 2022 valuation for MFTL concluded that the lease value was "high enough" at that point and time would suggest that the same was so in 2023 and 2024. These were not allegations that were much tested at trial and the explanations given are tenable. They are not such as to warrant allegations of breaches of trustee duties.

Conclusion on allegations against Ian and MFTL

[220] None of the allegations against Ian and MFTL are made out. On the very few occasions on which it could be said that minor issues arose on the part of Ian or MFTL, there was no detriment to the beneficiaries more broadly and they were not sufficiently serious to amount to a breach of the duties owed by MFTL as trustee or Ian as protector to act honestly and in good faith for the benefit of the beneficiaries.

[221] Several issues remain:

(a) Should MFTL be indemnified for its legal costs? The considerations that are involved in answering this question are a little different from those involved in the assessment of whether MFTL breached substantive duties. It involves also the question of whether its costs were reasonable and whether there are any other factors – such as partisanship towards one beneficiary or

unreasonable conduct in the course of the litigation – that might deprive it of indemnity.

(b) If the answer is yes, should Ian have to pay the costs for which MFTL is indemnified, as Janet and John say he should?

(c) Should legal communications between MFTL and its lawyers be disclosed?

Should MFTL be indemnified for its legal costs?

[222] This issue really forms the cornerstone in the proceeding. The central issue is whether MFTL is entitled to be indemnified for its costs. It encompasses the fourth cause of action and MFTL's counterclaim in the 21 and 71 proceedings. It brings into play also MFTL's second counterclaim for payment of time expended and acts done in connection with the Trust.

When can trustees be indemnified?

[223] The general rule is that trustees are entitled to an indemnity for reasonable costs and expenses incurred in the administration of a trust.[71] The entitlement is against the trust itself. The principle is reflected in s 81 of the Trusts Act and provision is made for it here in cl 29 of the sch 3, and cl 38.2 of sch 2 of the Variation Deed.

[224] Where a trustee successfully defends proceedings brought by a beneficiary, the starting point is that the trustee should be entitled to an indemnity out of trust property for any costs not recovered from the beneficiary.[72] As Hammond J said in *Re O'Donoghue*:[73]

> The consequence of this general principle is that it is beneficiaries who are meeting the trustee's expenses. It follows that it is critical that there be a check on those expenses and costs incurred by the trustee. The classical Chancery principle was, from the outset, that it is only

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71 *McCallum v McCallum* [2021] NZCA 237, (2021) 32 FRNZ 851 at [30], as endorsed by the Supreme Court in *Lambie Trustee Ltd v Addleman* [2023] NZSC 7 at [8].

72 At [32].

73 *Re O'Donoghue* [1998] 1 NZLR 116 (HC) at 121.

> expenses which are "properly incurred" which are the subject of a trustee's indemnity…

[225] A trustee's entitlement to be indemnified may be limited or removed in the case of misconduct on the trustee's part.[74] Misconduct includes careless and unreasonable conduct in litigation or in the management of the trust. It includes cases where a trustee is partisan in their own interests or favours the interests of some beneficiaries. Accordingly, a trustee may not be entitled to indemnification in cases in which they have taken an unsuccessful or partisan position in hostile litigation between rival claimants to a beneficial interest in the subject matter of the trust.[75]

[226] In addition, a trustee has a duty to protect the trust assets for the benefit of the beneficiaries. That duty extends to bringing and defending claims that are necessary in order to fulfil that duty. Bringing or defending a claim are steps that should be taken by a trustee where the grounds of action, or defence, are reasonable. The trustee must exercise care and skill. If there is doubt about what they may do, the trustee should seek legal advice and they might seek directions from the Court.

[227] There is no dispute between the parties about these principles. The real question is whether MFTL's costs were reasonably and properly incurred.

[228] Unlike a case in which pre-emptive indemnity costs are sought, an assessment of the nature of the litigation – and whether or not it is hostile – is not relevant at this stage in a proceeding.[76] This principle takes us back for a moment to Churchman J's decision on MFTL's pre-emptive indemnity application that I discussed earlier. As mentioned, the parties agreed that Churchman J's conclusions about MFTL's ability to be indemnified pre-emptively cannot give rise to any form of issue estoppel. That is so as a matter of principle and having regard also to the relatively limited affidavit of evidence and submissions that were available at that point and time. As

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74 *McCallum v McCallum*, above n 71, at [31]; *Lambie Trustee Ltd v Addleman*, above n 71, at [9].

75 *Spencer v Fielder* [2014] EWHC 2768 (Ch), [2015] 1 WLR 2786 at [26].

76 *Grimthorpe* [1958] Ch 615 at 623. See also Lewin on Trusts, above n 39, at [48–005].

Churchman J said, if (as was the case) pre-emptive indemnification was not granted but MFTL's position is found to be well-founded, then it is likely to have its costs indemnified out of Trust property.[77]

[229] And, as Churchman J went on to say, it would not until the substantive proceedings be known whether MFTL's expenses were properly incurred or whether, as Janet and John allege, the costs were the result of dishonesty, misconduct and breach. If, as Churchman J said, it is established following the substantive hearing that MFTL has losses incurred in the conduct of its duties that are not caused by such things, as alleged, it will be appropriate for it to be reimbursed for its losses at that point and time.[78]

[230] As I have concluded already, Janet and John's allegations against Ian and MFTL cannot be made out. It follows as a matter of course that MFTL is entitled to be indemnified for its legal costs so long as its costs were reasonable and properly incurred. A trustee must be entitled to defend allegations made against it, particularly allegations of the type so strenuously made in this proceeding. If vindicated, as is the case here, indemnification ordinarily follows.

[231] Considering whether MFTL's legal costs were reasonable does not involve a forensic analysis of invoices. Rather, it asks whether the trustee acted reasonably in paying the costs which, in turn, requires an assessment of the nature and level of the payments made. It comes back to the point made by Hammond J that, in the interests of the beneficiaries, it is critical that there be a check on expenses and costs incurred by a trustee.

Reasonableness of MFTL's pre-proceeding costs

[232] From the time at which Mr Gubb was engaged to write his first letter in July 2020, costs to the Trust skyrocketed.

[233] As has been described already, Mr Gubb together with Mr Grant made repeated allegations – in correspondence from July 2020 until June 2021 – that

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77 Pre-emptive indemnity decision, above n 18, at [62].
78 At [77].

the Trust was invalid and needed to be set aside in favour of arrangements that included the terms of Flora's previous wills that would have disadvantaged some beneficiaries; Gus' children in particular.

[234] The nature and extent of the allegations culminated in draft affidavits from Janet and John that have been discussed already.

[235] Dentons endeavoured to respond in appropriate terms to the series of letters received but the allegations kept coming. Accordingly, MFTL acted appropriately in engaging senior counsel to provide fresh and expert advice. Ms Bruton's opinion was shared with Janet and John. The opinion proposed a negotiated settlement under which Janet and John could be bought out of the trust, failing which, it was recommended that MFTL should seek directions from the Court.

[236] I am satisfied that MFTL acted appropriately in the advice that it sought and obtained and in instructing its solicitors to respond as they did. The advice obtained, correspondence prepared and settlement endeavours (between October and December 2021 in particular) were all reasonable steps and delivered at a reasonable value. Throughout this period, MFTL, instructed by Ian, acted appropriately to defend the Trust from the ongoing allegations of invalidity made by Janet and John and to facilitate the provision of information to them.[79]

[237] The costs were certainly significant – $65,510.13 to Dentons and $21,988 to Ms Bruton – but that is what it cost to deal with Janet and John's allegations and the way in which they were being advanced. The invoices have all been produced in evidence and explained carefully in submissions. They reflect an approach, both on the part of Dentons and Ms Bruton, of endeavouring to minimise costs given the nature of the work that was being undertaken. Ms Bruton, for example, did not record time for all of the steps taken.

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[79] While in some letters, Dentons referred to Ian's position, it did so in the context of his position as MFTL's director – for example, its letter of 9 November 2020 to Mr Gubb and its letter of 17 December 2021 to Mr Grant.

[238] For these reasons I am satisfied that MFTL should be indemnified fully for its legal costs incurred before proceedings were filed; not just for 30 per cent of them as was set at the pre-emptive indemnity application stage.

[239] Accordingly, in the case of the pre-proceeding costs, the fourth cause of action is unsuccessful and MFTL's first counterclaim – seeking an indemnity for legal expenses from Trust assets for work during this period – is successful.

Reasonableness of MFTL's costs in bringing the 71 proceeding

[240] Janet and John say that the 71 proceeding (described earlier in this decision) was superfluous. They say that the cost of it was unnecessary.

[241] They say that it was not necessary for MFTL to have filed separate proceedings seeking orders about who the trustees should be. That, they say, was covered by the 21 proceeding which had been filed some months before the 71 proceeding was filed. They say that, in addition, it was not necessary for MFTL to seek a declaration confirming the validity of the Trust as that had "long been acknowledged by Janet and John". They say that trustees are under no duty to seek advice or to pose questions through a directions application where the answer is obvious.[80]

[242] Janet and John say that the clauses in the Variation Deed enabling trustees to be reimbursed for expenses incurred in the performance of their duties (including in connection with any legal question) and which entitles indemnification from the Trust for losses and liabilities properly incurred – cls 29 of sch 3 and 38.2 of sch 2 – will not operate where there is dishonesty, wilful misconduct, gross negligence or a wilful breach of trust. They allege trustee dishonesty, misconduct and breach.

[243] However, for the reasons that I have given, allegations of that sort cannot be made out. It is clear from the relevant documents, from Ian's evidence and from counsel's argument that much of the work in preparing the application in

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[80] Referring to *New Zealand Māori Council v Foulkes* [2015] NZHC 489, (2015) 4 NZTR 25-003 at [31].

the 71 proceeding was undertaken before the 21 proceeding was filed. At that stage, Janet and John continued actively to seek to invalidate the Trust. While that was not an issue that was raised on the pleadings in the 21 proceeding, it was not until Janet's September 2023 affidavit in the proceeding that the position became clear. Up until then, the efforts to invalidate the Trust had been considerable. It was in those circumstances understandable that the 71 proceeding would seek to have the Court confirm the position once and for all. In addition, I observe that Janet and John do clearly, by their allegations, continue to harbour suspicions relating to how the Trust was formed, even if they are no longer formally pursuing invalidity.

[244] That aside, the primary focus of the 71 proceeding as originally drafted (and prior to responsibility for its carriage being assumed by TTL) was to seek directions about the sale of the farm. MFTL sought directions in the proceeding that the farm could be sold – to the beneficiaries or by enabling the beneficiaries to be bought out from the trust. This is not something that was covered in the 21 proceeding. It is an essential aspect of the proceedings as a whole and was properly brought in circumstances where the beneficiaries were in deadlock.

[245] In applying for directions about the sale of the farm, MFTL was acting on the advice of Ms Bruton; advice that had been shared with Janet and John and which was sensible in all of the circumstances.

[246] Moreover, the 71 proceeding sought a direction on whether MFTL ought to be replaced by an independent trustee; a notion that Janet agreed – when the terms of the orders sought in the original 71 proceedings were put to her under cross-examination – was a sensible idea.

[247] The costs incurred by MFTL in preparing the directions application were $42,567.32 for Dentons and $15,180 for Ms Bruton. In the circumstances I have described, I am satisfied that these costs were reasonable and incurred as part of MFTL's proper administration and protection of the Trust. They are to be met out of Trust property.

Reasonableness of MFTL's costs in bringing its pre-emptive indemnity application

[248] In his decision on MFTL's pre-emptive indemnity application, Churchman J, having found Janet and John to have been the largely successful parties, decided that it was appropriate that their costs – in their capacities as protectors – be met out of Trust property in full.[81] He concluded that Janet and John's costs in defending the application had been incurred properly in the course of their roles as protectors such that they were indemnified for their costs in defending the application under cl 29.2 of sch 3 of the Variation Deed.

[249] While, on the basis of the considerable evidence given at trial, the grounds for an indemnity for MFTL's costs at all stages of this proceeding have been made out, the pre-emptive application – at an interlocutory level and with limited evidence and argument – produced different conclusions on an interim basis and it was quite in order for Janet and John's costs as protectors to be met from the Trust's assets accordingly.

[250] However, it has since proved to be the case that MFTL's actions in pursuing its pre-emptive indemnity application were reasonable and in the interests of the Trust. Janet and John say that it has been determined already that they – not MFTL – were entitled to costs on that application and that MFTL cannot have a second bite. However, the circumstances here are a little unusual. While grounds were not made out for an indemnity for costs to be awarded on a pre-emptive basis, grounds have been established for an indemnity for costs to be awarded on a substantive basis.

[251] A trustee in making a *Beddoe* application[82] is entitled to have their costs on that application indemnified out of trust assets.[83] There is no basis for a finding of misconduct on the part of MFTL in making the pre-emptive indemnity application that displaces its ordinary right to a remedy. Just as MFTL's

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81 Pre-emptive indemnity decision, above n 18, at [89].

82 An application in which a trustee seeks the Court's pre-emptive authorisation or approval to bring legal proceedings on behalf of a trust.

83 *Pratley v Courtney* [2021] NZHC 102 at [49], citing *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (Ch) at [1224].

application for directions in the 71 proceeding was reasonable and appropriate, its application for a pre-emptive authorisation to provide information to assist the Court (but otherwise to abide the Court's decision) was reasonable and appropriate. Limited *Beddoe* orders of the kind sought are an orthodox step.[84]

[252] The costs for MFTL under this head are $46,031.32 for Dentons and $9,735.60 for Ms Bruton.

[253] Having examined carefully the costs claimed under this head, I am satisfied that Dentons' costs are reasonable and appropriate for the nature and extent of the work involved. The same is particularly so for the costs of Ms Bruton who only invoiced for a portion of her time in preparing for the hearing of the application and did not charge MFTL at all for appearing at the hearing. She did not consider it appropriate to charge for the hearing given the concerns expressed by Churchman J during the course of the hearing about pre-emptive indemnification.

[254] MFTL is to be indemnified for these costs accordingly.

Reasonableness of MFTL's costs as they relate to having Torwood Farm valued and the farm's lease

[255] I am satisfied that MFTL's legal costs incurred in obtaining farm valuations in August and September 2022 of $4,104 were reasonable. They were incurred as part of MFTL's administration of the Trust in the sense that they were obtained in an endeavour to achieve a negotiated or mediated outcome pursuant to the direction sought by MFTL in the 71 proceeding. MFTL was seeking orders that included the prospect of beneficiaries purchasing the farm or having their interests bought out.

[256] Valuations were not for the purpose of informing the lease obligations, as had been the suggestion in the pre-emptive indemnity application hearing.

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84 *McCallum v McCallum*, above n 71, at [66]–[67] and [71].

[257] Valuations of that sort were always going to be necessary in the context of the 71 proceeding. TTL has, itself, sought updated valuations in support of its directions application in the 71 proceeding.

[258] MFTL is entitled to be indemnified for the $4,104 cost accordingly.

[259] Equally, MFTL's legal costs relating to correspondence with Duncan Cotterill about the farm leases in May and June 2022 were reasonable. Again, they were incurred as part of MFTL's administration of the Trust.

[260] While Churchman J was concerned that MFTL might have acted contrary to its duty to provide information to John and Janet and that MFTL might have prejudiced the beneficiaries in committing the Trust to new lease arrangements, the conclusions I have reached, having heard all of the evidence, is that MFTL did not delay unreasonably in providing requested information and that the lease arrangements did not prejudice the beneficiaries.

[261] Accordingly, these costs may be the subject of indemnification.

Reasonableness of MFTL's costs in defending the 21 proceeding

[262] As I have said, earlier in this part of the decision, it follows as a matter of course from the conclusions I have reached that MFTL is entitled to be indemnified for its legal costs in defending the 21 proceeding. I have then gone on to look at the reasonableness of all of MFTL's other costs: the pre-proceeding costs, the costs of the 71 proceeding, the costs of the pre-emptive indemnity application, and the costs of the farm valuation. Equally, MFTL's costs in defending the 21 proceeding generally are able to be indemnified.

[263] I am satisfied that the costs incurred (over and above those that I have assessed already) have been moderate in the circumstances.

[264] Back in May 2023, counsel for MFTL had proposed the appointment of Perpetual Ltd as sole independent trustee on the basis that the costs of the dispute and the differences so far would lie where they fell. Counsel for Janet and John

responded on the basis that they were not prepared to engage in any discussion about the appointment of an independent trustee, or participate in a judicial settlement conference for example, unless Ian paid, personally, the $207,000 balance (between the cost that MFTL had incurred and the 30 per cent indemnity granted in Churchman J's decision). It is apparent that they were focused on having Ian pay this sum personally. On the basis of the conclusions I have reached about Janet and John's allegations, that was an unfortunate approach to have taken at that point and time.

[265] Ms Bruton did not charge MFTL (or Ian to the extent that he was providing MFTLs instructions) from 2 March 2023 until July 2024 – including for the work leading up to the costs decision of La Hood J of 15 March 2024. From October 2024, when work needed to be undertaken to prepare for trial, Ms Bruton has worked for MFTL at half of her usual hourly rate.

[266] I am quite satisfied that these arrangements, the invoices that have resulted and Dentons' invoices are all, as I say, moderate and that MFTL is entitled to be indemnified for them.

[267] These conclusions span the fourth cause of action in Janet and John's amended statement of claim and MFTL's first counterclaim. I now address MFTL's second counterclaim.

MFTL's second counterclaim – payment of charges for time expended and acts done in connection with the Trust

[268] MFTL has filed a counterclaim seeking payment or reimbursement from the Trust for administration work, farm management work and farm work of up to $332,350 plus interest and costs. The counterclaim was filed belatedly – two and a half years into the proceeding.

[269] The counterclaim is most appropriately brought in the 71 proceeding but, as it is pleaded in both, I deal with it here in the first instance. The discussion equally applies to Ian's counterclaim in the 71 proceeding.

[270] There are a number of reasons for concluding that this claim is misguided and cannot succeed. First, the reality is that it is brought tactically and in response to Janet and John's claims against Ian personally. Ian confirmed this to be the case when he gave evidence. At no time prior to 18 October 2024 (when the counterclaim was filed) had Ian or MFTL sought payment from the Trust. Quite to the contrary, as Ian said in affidavit evidence, he "did this work out of love for our family". He repeated that view when he was giving evidence.

[271] Ian and members of his family stay at the farm regularly. They enjoy doing so. The farm has been an integral part of their lives and they have undertaken work on, and for, the farm accordingly. There was no expectation of personal reward – or of a corresponding liability on MFTL's part – when the work was undertaken. It would not be appropriate to allow the claim on that basis alone.

[272] But, even if it was permissible, MFTL and Ian are seeking on average $23,000 per year, over 10 years. However, the net income of the Trust barely exceeded that each year.

[273] Moreover, the lessee received a rent reduction for the first five years of the lease on the basis that the lessee would do particular work to improve the farm. I accept, as Ian said in evidence, that did not mean that the lessee did everything that was needed – or did it particularly well. As Ian put it, "you don't wash a rental car". However, that could not properly be a basis to make the claim that Ian has – at a value well in excess of the value of the reduction the lessee achieved to undertake much the same work.

[274] Furthermore, I am not satisfied that the expenses claimed here fall within the terms of the indemnity provisions in the Trust Deed and Variation Deed as they relate to the "usual professional business and trade charges".[85] As TTL submits, I do not think that an independent trustee "as a touchstone" would have reacted positively to a request by Ian that he undertake this work at the rates in question and involving the time in question.

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[85] Trust Deed, cl 37.1 of sch 3 and Variation Deed, cl 29.1 of sch 3.

[275] Finally under this head, the claim is quite likely to be time barred, at least for the most part. Much of it relates to work done on or before 18 October 2018 and is, therefore, likely to be beyond the limitation period in s 11(1) of the Limitation Act 2010.

[276] For any and all of these reasons, MFTL's counterclaim – in both the 21 and the 71 proceedings – for reimbursement for work done in connection with the Trust does not succeed.

Should Ian pay for MFTL's costs?

[277] I now turn to the fifth and sixth causes of action.

[278] The fifth cause of action in Janet and John's amended statement of claim is in dishonest assistance. It is pleaded on the basis that breaches of Trust on the part of MFTL are made out and on the basis that Ian, acting with dishonesty, participated by assisting MFTL in its breaches of Trust. Because none of the breaches of Trust by MFTL have been proven, this cause of action is not activated.

[279] In any event, I observe that I have found no dishonest conduct on Ian's part and, to the contrary, have found him to be honest, conscientious and motivated only to uphold the terms of the Trust as he knew them.

[280] The sixth cause of action in Janet and John's amended statement of claim seeks that MFTL be indemnified out of Ian's interest in the Trust property. It is brought under s 132 of the Trusts Act, which applies if a trustee commits a breach of trust at the instigation or request or with the written consent of a beneficiary. The Court may in those circumstances make an order indemnifying the trustee out the beneficiaries interest in the trust property.

[281] Once more, the cause of action is not activated because MFTL has committed no breach of Trust causing loss to the Trust.

[282] Even if that had not been the case, then I do not see the provision as applying in circumstances in which Ian did not request any of the alleged actions, or instigate them, in his capacity as a beneficiary. He was acting as MFTL's director, which is quite different. Moreover, there is no identifiable share in the Trust's assets out of which MFTL could be indemnified.

[283] For completeness, I observe that, had there been findings of breaches of Trust on the part of MFTL and had there been findings of dishonest assistance or instigation on Ian's part (the fifth and sixth causes of action), then Ian's affirmative defence – based upon a protector's exemption of liability under the Trust Deed – would have come into the frame.

[284] Under the original Trust Deed, which applied until 29 May 2020, protectors are not liable for any loss unless such loss is caused by their actual fraud.[86] Under the Variation Deed, protectors are not liable for any loss unless such loss is caused by their dishonesty, wilful misconduct or gross negligence.[87] This exemption may have only applied to any loss Ian was found to have caused while acting as a protector, rather than more broadly acting as a beneficiary or director of MFTL.[88] If so, it would only have applied to any loss caused by Ian refusing to exercise his protector powers to join with Janet and John to remove MFTL and appoint a new trustee. While academic only, I can say that there would have been a good case for Ian to succeed on his argument he did not as a protector act dishonestly, and that there was no wilful misconduct or gross negligence. Even on Janet and John's allegations, the alleged conduct could not be described as fraudulent.

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86 Under cl 30.2 of sch 2 of the original Trust Deed.

87 Under 51.2 of sch 2 of the Variation Deed.

88 There may be a question of whether the liability exemptions contained in the Trust Deed and Variation Deed should be interpreted as only applying when a person is exercising the discretions of a protector, in much the same way that I have found that a protector's duties only apply when they are exercising the relevant discretions. That could well be the case as a matter of common sense – on the other hand, the wording of the relevant clause is admittedly broad with both the original Trust Deed and Variation Deed providing, "No Protector shall be liable for any loss suffered by the Trust or the Beneficiaries unless…".

Disclosure of Trust documents

[285] In the third cause of action in the amended statement of claim it is alleged that, after being served with the statement of claim and in the course of the proceeding, MFTL has provided all but the following documents:

(a) all communications between Ian and/or MFTL and the Trust's lawyers;

(b) all legal advice or opinions obtained by Ian and/or MFTL as trustee (including, but not limited to, advice paid using the Trust's funds).

[286] There are now two aspects to this issue. The first is whether MFTL's decision in declining to disclose these documents to Janet and John was reasonably open to it under ss 126 and 127 of the Trusts Act. Or, in other words, were Janet and John entitled to the documents as of right? The second relates to TTL. In the circumstances I come on to describe, TTL now holds those documents and has indicated a willingness to disclose them to Janet and John. Janet and John say that TTL is entitled to disclose the documents if it wishes, even if they are not necessarily entitled to receive them as of right. Ian and MFTL do not accept that TTL is able to disclose the documents. The second aspect is not something that is pleaded in the proceeding, and is not something on which TTL has made a formal application for directions. But it goes hand in hand with the third cause of action and the parties have spent some time on it in their submissions so I will consider them together.

[287] Although the release of these documents by MFTL was the subject of this cause of action in the proceeding, Janet and John pursued TTL to release the documents ahead of the trial. Ultimately, on 7 February 2025 (the Friday before the commencement of the trial on Monday, 10 February) TTL wrote to counsel for the other parties in the proceeding and said that, having considered Janet and John's requests it had decided that it would provide the parties with access to the documents ahead of trial. An urgent teleconference was held on the afternoon of 7 February 2025 at which time I directed that the documents should not be

disclosed at that stage and that the issue would be considered further at the beginning of the trial. As I said at that time, the disclosure of 1.5 gigabytes of material – possibly hundreds of documents – one working day before the trial would inevitably in my view require an adjournment of the trial. I saw that as being unsustainable in circumstances in which a careful timetabling process had been in place leading up to trial over a five-month period.

[288] At the beginning of the trial on 10 February 2025, I heard counsel on the issue in greater detail. In my oral decision, delivered following that argument, I made an order declining the further disclosure which, essentially, Janet and John sought and TTL was willing to provide, in advance of the trial.[89] The issues that arise are very similar to the issues that arise on the third cause of action. They needed to be considered, following evidence, in the ordinary way and not pre-emptively before the cause of action was heard.

[289] Ms McKeown acknowledges that, generally, once a beneficiary has commenced litigation about the administration of a trust, the beneficiary is not entitled to disclosure of legal advice received by the trustees about the litigation. However, the position for Janet and John is that:

(a) the documents sought are now in the possession of TTL and, as a result, MFTL waived any privilege it may have had in the documents;

(b) Janet and John have sought the documents directly from TTL, and TTL does not have a separate privilege in the documents;

(c) TTL was not the entity that sought or obtained the legal advice and therefore solicitor/client privilege under s 54 of the Evidence Act 2006 does not extend to TTL;

(d) MFTL and TTL do not have a common-interest privilege in the advice, having different interests in the proceedings; and

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89 *McKean v McKean Family Trustee Ltd* [2025] NZHC 149.

(e) there is no prejudice in TTL disclosing the documents now that the proceedings are over.

[290] Ian opposes the disclosure of the information on the basis that:

(a) the information is not "trust information" as that is defined under the Trusts Act;

(b) the information is privileged against Janet and John – and TTL does not have the right to waive that privilege; and

(c) regardless, MFTL's decision not to disclose the documents was reasonably open to it in terms of ss 126 and 127 of the Trusts Act.

Relevant principles

[291] As the subheading to sections 49 to 55 of the Trusts Act provide, those provisions deal with "giving information to beneficiaries".

[292] Under s 52, there is a presumption that a trustee must within a reasonable period of time give a beneficiary or the representative of a beneficiary the "trust information" the beneficiary has requested. However, before giving the information, the trustee must consider the factors set out in s 53 and, if the trustee reasonably considers (after taking into account those factors) that the information should not be given to the person, then the presumption does not apply and the trustee may decide to refuse the request for trust information.

[293] Factors in s 53 include, for example, the nature of the interests in the trust held by the beneficiary and other beneficiaries; whether the information is subject to commercial confidentiality; the expectations and intentions of the settlor of the trust about the giving of information; the age and circumstances of beneficiaries; the effects on beneficiaries of giving the information, including relationships within the family; and the nature and context of the request. Importantly in the context of s 52, "trust information" is defined in s 49 in the following way:

trust information—

(a) means any information—

(i) regarding the terms of the trust, the administration of the trust, or the trust property; and

(ii) that it is reasonably necessary for the beneficiary to have to enable the trust to be enforced; but

(b) does not include reasons for trustees' decisions.

[294] Is, then, the information that is sought "reasonably necessary for the beneficiary to have to enable the trust to be enforced"?

[295] A careful distinction needs to be drawn between disclosure under the Trusts Act, and obligations under a discovery process for the purposes of litigation.[90] Here, we are not concerned with notions of relevance and proportionality but with the necessity for access to documents to enable a trust to be enforced.

[296] In this case, the trustee, in terms of s 52, has decided to refuse the request for trust information. Accordingly, the Court is reviewing a trustee decision under ss 126 and 127 of the Trusts Act.

[297] Under s 126, a court may review a decision of a trustee on the basis that it "was not or is not reasonably open to the trustee in the circumstances". And, under s 127, an applicant for review under s 126 must produce evidence that raises a genuine and substantial dispute as to whether the decision was reasonably open to the trustee in the circumstances.

[298] In this sense, the Court's role is supervisory. It will only intervene if a trustee has acted ultra vires, taken into account irrelevant considerations or failed to consider relevant considerations, acted in bad faith or for an improper motive or has reached a decision that is perverse, capricious or irrational.[91]

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90 See *Taylor v Inder* [2022] NZHC 73 at [52].

91 *Paton v Acropolis Holdings Ltd* [2024] NZHC 43 at [57]–[59].

Analysis

[299] The first point is that the information sought is not information that it is reasonably necessary for Janet and John to have to enable the Trust to be enforced. It would, in addition, be information that includes reasons for the trustees' decisions – which is excluded from "trust information" under s 49.

[300] It could, more appropriately, have been information that was sought under a discovery process. However, even if that were not the case, I am satisfied that a valid claim to privilege exists.

[301] If the beneficiaries of a trust have a joint interest in privileged information, then it must be provided to them. But that principle relates to advice that is obtained for the benefit of beneficiaries as a whole. It will not apply in circumstances in which a joint interest does not exist, or comes to an end.[92] Janet and John have received privileged information in relation to which they have a joint interest. That privileged information includes advice from and correspondence with Mr Holmes about updating the Trust Deed and Ms Bruton's 24 May 2021 opinion to MFTL on the dispute that was then emerging and on steps that might be taken to resolve it.

[302] However, from the point at which Mr Gubb began to write in terms that were hostile, the position changed. MFTL needed to obtain ongoing advice about how to deal with that hostility and the 21 proceedings that were the product of it. The documents sought are clearly privileged on that basis.

[303] Finally under this head, the outcome is not as I see it altered in any way by reason of the fact that Janet and John are protectors, as well as beneficiaries. Under cl 47 of the Variation Deed, protectors have rights to request information "to enable the Protectors to properly exercise their powers". These proceedings are not a proper exercise of those powers in terms of the Trust that Flora established.

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92 *Lambie Trustee Ltd v Addleman*, above n 71, at [74].

[304] For these reasons, the third cause of action cannot succeed. MFTL's decision not to disclose the documents to Janet and John was reasonably open to it.

[305] I turn to the position as it relates to TTL. The position is not altered by reason of the fact that the documents are now in the possession of TTL. The privilege passed from MFTL to TTL. The privilege belongs to the trust, not to the trustee. The "once privileged always privileged" principle applies – a successor in title is able to maintain and assert privilege in a document.[93] MFTL did not waive privilege in relation to the documents and TTL holds the privilege on behalf of the Trust. There are, then, grounds for TTL to maintain its position. That is for it to decide. But in doing so, it might consider whether disclosure is appropriate in terms of s 53 and the high risk of protracting the already lengthy dispute between Ian and MFTL, on the one hand, and Janet and John, on the other.

The remaining claim and counterclaim – alleged breaches of duties as protector

[306] In the second cause of action in the amended statement of claim, Janet and John allege that, as protector, Ian breached a fiduciary duty and a duty under cl 50.1 of sch 2 of the Variation Deed, requiring him to act honestly and in the interests and for the benefit of beneficiaries. An order removing him as a protector is sought.

[307] Equally, Ian counterclaims against Janet and John for breaches of their duties as protectors of the trust. He says that they have misused their position as protectors for the improper and self-interested purpose of achieving their objective of receiving distributions from the Trust, and dissolving the Trust, rather than upholding Flora's wishes. The point is made that, while Ian was only acting in his capacity as protector when he refused to join with Janet and John to remove MFTL as a trustee, Janet and John were likely acting as protectors at all material times: they were seeking to use the powers of removal and appointment of trustees, and their rights as protectors to information.

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93 *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [44].

[308] I would add that Janet and John were indemnified by Churchman J for their costs in defending MFTL's pre-emptive indemnity application, on the basis that they were acting properly as protectors. That adds to the position that Janet and John have been acting in their capacity as protectors at material times.

[309] I am quite satisfied that none of Janet, John or Ian failed to act honesty and in good faith for the benefit of primary beneficiaries in terms of cl 50.1 of the Variation Deed. As is apparent from the conclusions reached to this point in the decision, I have not found any of the alleged breaches of duties on Ian's part as having been made out. That is all the more so when one limits the enquiry to potential breaches on Ian's part as a protector, as is appropriate.

[310] Equally, while, as I have said earlier, Janet and John have been misguided in their understanding of their positions and of Ian's actions, they have not acted dishonestly or otherwise than in good faith. With the information available to them, and the understandings they had, one can see how they reached the position they did. They have made a number of proposals to endeavour to resolve issues, even if they came at them from that misguided perspective.

[311] All of that said, the shells that are fired from the opposing trenches on this topic are empty given that everyone now accepts that the Trust's property needs to be sold, and the Trust wound up, one way or another.

Conclusion on the 21 proceeding

[312] The 21 proceeding has failed in its entirety. MFTL's counterclaims in the proceeding for indemnity costs throughout the 21 proceeding (including on MFTL's pre-emptive indemnity application) and in the 71 proceeding (until TTL's appointment) have succeeded.

[313] MFTL's counterclaim for work done by Ian is unsuccessful.

[314] Ian's counterclaim against Janet and John for a breach of fiduciary obligations as protectors is unsuccessful.

The resulting orders

[315] I make the following orders:

(a) MFTL is to be indemnified by the Trust for:

(i) all of its pre-proceeding costs;

(ii) its costs in bringing and pursuing the 71 proceeding (prior to responsibility for the proceeding shifting to TTL);

(iii) its costs in pursuing the pre-emptive indemnity application;

(iv) its costs in defending the 21 proceeding;

(v) farm valuation costs and costs relating to the farm lease.

Analysis of the 71 proceeding

[316] In the 71 proceeding, TTL seeks directions under s 133 of the Trusts Act blessing resolutions passed by the trustees enabling the farm and the Rangiwahia Sections to be sold and to then bring forward the vesting date for the Trust and to distribute the net proceeds to the beneficiaries.

[317] It raises, in the first instance, an "interpretation issue". The interpretation issue arises from the terms of cl 1(a) of sch 1 of the Variation Deed.[94] The clause is set out earlier in this decision but, given its relevance here, I will set it out again:

> The first responsibility of the trustees after the death of the Principal Beneficiary [Flora], shall be to retain the trust's farm as a long term asset of the trust, and to ensure that sufficient income and capital are retained in the trust to ensure that the trust's farm is properly maintained.

[94] Which is in the same terms as cl 1.4 of sch 2 of the original Trust Deed.

[318] With this interpretation issue in mind, the trustee passed the following resolutions:

(a) To seek directions from this Court as to the Interpretation Issue and the correct interpretation of clause 1(a) of the first schedule of the trust deed in relation to the ability to sell the Farm.

(b) To file an interlocutory application seeking enforcement of a costs order made by the High Court against MFTL and, pending payment of that costs award, to prevent MFTL from taking further steps in the High Court proceeding.

(c) Subject to the blessing of this Court, to do the following (**Conditional Trust Resolutions**):

(i) To the extent the Interpretation Issue means that the Farm cannot be sold, variation of the trust deed to enable the sale of the Farm by striking out clause 1(a) of the first schedule of the trust deed (**Proposed Trust Variation**).

(ii) To the extent the Interpretation Issue permits sale of the farm, to sell the Farm.

(iii) In each case, to sell the Farm on the following terms and conditions:

(1) Engaging a reputable real estate agent or salesperson in the local area that is experienced in managing farm sales.

(2) Taking and accepting advice from that local real estate agent or salesperson as to mode of sale, length of marketing campaign, the setting of any reserves (if applicable).

(3) Selling the Farm if the real estate agent or salesperson recommends sale and the trustee considers the price and terms to be acceptable.

(4) The net proceeds of sale will be held by TTL or be distributed in accordance with paragraph 8(c)(v).

(iv) Sell the Non-Contiguous Land on the following terms and conditions:

(1) Engaging a reputable real estate agent or salesperson in the local area that is experienced in managing farm sales.

(2) Taking and accepting advice from that local real estate agent or salesperson as to mode of sale, length of marketing campaign, the setting of any reserves (if applicable).

(3) Selling the Non-Contiguous Land if the real estate agent or salesperson recommends sale and the trustee considers the price and terms to be acceptable.

(4) The net proceeds of sale will be held by TTL or be distributed in accordance with paragraph 8(c)(v).

(v) Advance the vesting date of the trust to a date that is one calendar month after the later date of sale of the Farm or Non-Contiguous Land (**Advanced Vesting Date**).

(vi) On the Advanced Vesting Date, to:

(1) Withhold a sum sufficient to cover TTL's genuine and reasonable estimate of future contingent liabilities, acting on professional advice if applicable (**Contingency Estimate**).

(2) Distribute the net proceeds of the trust fund, less the Contingency Estimate, set out in **schedule two**.

(vii) After the Advanced Vesting Date, any residual sum left over after meeting any contingencies is to be distributed to beneficiaries in the same proportions as outlined in paragraph 8(c)(vi)(2).

(viii) To issue a statutory demand against MFTL for repayment of the former trustee debt.

[319] Orders are sought:

(a) that it is lawful for the trustees to sell the farm in light of the interpretation issue;

(b) in the alternative to (a) a direction blessing the proposed Trust variation;

(c) following the making of order (a) or (b), a direction blessing the balance of the resolutions and an order that the costs of the proceeding be met from Trust assets on an indemnity basis.

The contest between the parties

[320] TTL says that the directions sought are well within the range of decisions that could have been made by a trustee and there is no basis to disturb or alter them. It accepts that there would have been other decisions reasonably open to

it to make. However, it says that it did not make those decisions and that the question for the Court is a binary one: whether it ought to bless the decisions made by TTL or not. It is clear, both in its amended statement of claim and its submissions, that it does not consider itself to have surrendered its discretion to the Court such that the Court could make alternative directions.

[321] It refers to the multiple attempts it has made in an endeavour to encourage the parties to reach an agreement to resolve the litigation.[95] But, to no avail.

[322] TTL says that there are a number of benefits to an open-market sale – principally the competitive advantage it provides on price, the ability to retain the farm in the family for a sufficiently motivated beneficiary, the fairness between beneficiaries, and the finality that will be provided by a sale.

[323] Janet and John agree. They say that, although cl 1(a) of sch 1 of the Variation Deed[96] does reflect Flora's wishes, both the Variation Deed and original Trust Deed she put in place permit trustees to sell the farm.

[324] They say that Flora's wishes are not binding on TTL. Rather, they are one factor (but not the only factor) that TTL should consider. They refer to TTL having considered Flora's wishes carefully but having decided that in all of the circumstances a sale is the most appropriate option.

[325] Janet and John agree that the farm should be sold on the open market.

[326] Ian, on the other hand, says that the Court is not restricted to a binary approach of giving TTL's proposed directions its blessing or not. Instead, he says, the Court has jurisdiction under s 113(3) of the Trusts Act and its inherent jurisdiction to make an alternative direction. He proposes a direction in the following form:

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95 For example, TTL wrote to the parties to encourage resolution on 24 April, 27 June and 11 November 2024 – resulting in substantive exchanges in response.

96 Which is identical to cl 31.4 of sch 2 of the original Trust Deed.

> Sale of the farm could only be a decision reasonably open to a trustee properly acquainted with the terms of the trust deed if offered on the following terms:
>
> (a) the farm will be offered to Ian and any other beneficiary who wishes to retain an interest in the farm;
>
> (b) the farm will be sold at current market valuation (where the valuation will be sought by TTL and paid for by Ian);
>
> (c) all beneficiaries will continue to have reasonable access to the farm;
>
> (d) any beneficiary who wishes to participate in Ian's offer to purchase the farm may do so;
>
> (e) the purchase will be subject to a right of first refusal for a five year period after Ian's (and any other beneficiaries' purchase); and
>
> (f) with leave reserved for further directions in relation to (c) (access) or (d) (the terms of participation) as necessary.

[327] Ian's position is that the Court does have jurisdiction to make directions other than those sought by TTL, despite TTL not having surrendered its discretion to the Court. He says that s 133 and the Court's inherent jurisdiction are sufficiently broad to comprehend such an approach and points to *A Trustees Ltd v W*, a case where the Jersey Royal Court declined a trustee's application for directions and made alternative, unsought, directions.[97]

[328] If the Court were to agree that it had jurisdiction to make alternative directions, Ian's position is that it should compare the directions proposed by TTL and those he has proposed and choose the outcome that is in the best interests of the beneficiaries. In this formulation, TTL's proposal should not be given any greater weight than Ian's. In the alternative, Ian says that TTL's approach is not something that is reasonably open to it because it goes against Flora's clear wish to retain the farm as a long-term asset of the family, it would enable Liz to obtain the farm, against Flora's wishes, and it would allow Janet and John to "benefit from their misdeeds". Rather, he says, the only decision that is reasonably open to TTL is one that would involve the farm being offered

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97 *A Trustees Ltd v W* [2008] JRC 97 at [18].

for sale to the beneficiaries, such that the farm would at the least stay in family hands.

[329] In the event the Court did not agree it had jurisdiction to make alternative directions, Ian's position is that TTL's proposed directions are not reasonably open to it.

[330] TTL, in response, submits that Ian as a beneficiary does not have standing to apply to the Court for directions and so the Court should not consider the directions he has proposed.

Legal principles

[331] The primary basis for the court's jurisdiction to make the directions sought lies in 133 of the Trusts Act, which provides:

> **133 Trustee may apply to court for directions**
>
> (1) A trustee may apply to the court for directions about—
>
> (a) the trust property; or
>
> (b) the exercise of any power or performance of any function by the trustee.
>
> (2) The application must be served, in accordance with the rules of court, on each person interested in the application or any of them as the court thinks fit.
>
> (3) On an application under this section, the court may give any direction it thinks fit.
>
> (4) This section does not restrict the availability of alternative proceedings within the court's jurisdiction, including a declaration interpreting the terms of the trust.

[332] Section 133 is a restatement of the court's broader equitable jurisdiction in relation to trusts that has long resided in the Chancery Courts.[98] As such, s 133 does not displace the court's inherent supervisory jurisdiction over trusts.

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98 *Chambers v S R Hamilton Corporation Trustee Ltd*, above n 37, at [32]; *New Zealand Māori Council v Foulkes*, above n 80, at [44]. This is reflected in the purpose behind the section: Te Aka Matua o te Ture | Law Commission *Review of the Law of Trusts: A Trust Act for New Zealand* (NZLC R130, 2013) at [12.5].

Does the Court have jurisdiction to make alternative directions to those sought by TTL?

[333] I do not agree with Ian's submission that the Court has jurisdiction to make alternative directions in this case.

[334] There is no one approach the court will take when it is asked to adjudicate on a course of action proposed or taken by trustees. The approach will depend on the reason the issue is before the court. Both English and New Zealand authorities show that where the reason is that the trustees are seeking the court's guidance – as will be the case with virtually all applications under s 133 – the extent of the court's advice will be guided by the extent to which the trustees surrender their discretion to the court. In other words, the court's approach will depend on "the nature of the question it is being asked to answer and on the jurisdiction which it is being invited to exercise".[99]

[335] This principle can be seen from Robert Walker J's explanation of four common situations in which the court is asked to adjudicate on a course of action proposed or actually taken by trustees:[100]

(a) The first category is when there is doubt as to whether some action the trustees are contemplating is within their powers.

(b) The second category is where there is no doubt as to the ability of the trustees to pursue the course of action they are contemplating but the decision is sufficiently momentous that it is appropriate the trustees seek the court's blessing to proceed with that course. In such circumstances:

> … there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence

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

100 Robert Walker J's decision is unnamed and unreported, as it was given in chambers. It was quoted at length and endorsed by Hart J in *Public Trustee v Cooper*, above n 99, at 922–924. The Court of Appeal referred to the categories positively in *Chambers v S R Hamilton Corporation Trustee Ltd*, above n 37, at [24]; and the High Court accepted that the Court had jurisdiction under s 66 of the Trustee Act 1956 (the old equivalent of s 133) to hear category two type applications for directions in *Re Honoris Trust* [2017] NZHC 2957, [2018] 3 NZLR 160 at [42].

> of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.

(c) The third category is where, for reasons of deadlock or other extraordinary circumstance, the trustees are unable to act and therefore surrender their discretion to the court. Under this category, the court is exercising its own discretion whereas, under the second category, the court is approving (or not approving) the exercise of the trustees' discretion.

(d) The fourth category is where the trustees have already acted and that action is subject to attack from beneficiaries as having fallen outside the trustees' powers.

[336] While the framework described above is helpful, the categories are not closed[101] and strict adherence to them can be unproductive. As Hart J said in *Public Trustee v Cooper*:[102]

> There may be variations within each category; and a particular application may straddle more than one category. Moreover, some caution needs to be exercised before assuming that there is always a bright-line distinction between the case where trustees surrender their discretion and a case where they do not … Even where the trustees are surrendering their discretion, the question will arise as to what discretion is being surrendered.

[337] Nonetheless, there is a well-known distinction between a category two case and a category three case. Where trustees make an application for the court's advice on a question without surrendering their jurisdiction, the court will limit the exercise of its discretion to simply answer "yes" or "no" to the question. It would not be appropriate for the court to go further and impose alternative directions.

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101 In Robert Walker J's decision, he said "there are *at least* four distinct situations (and there are no doubt numerous variations of those as well)" [emphasis added].

102 *Public Trustee v Cooper*, above n 99.

[338] This issue was confronted squarely by the Court of Appeal in *Chambers v S R Hamilton Corp*, a case in which the appellant argued that the trial Judge erred in giving directions that he thought were appropriate, namely that the trust property should offered to each of the three beneficiaries at market value of $1,725,000, rather than limiting himself to making or refusing to make the specific orders sought by the trustees, namely that the property should be sold to one beneficiary for $945,000.[103] The Court said:[104]

> [33] Trustees do not necessarily surrender their discretion to the court simply by seeking directions for orders that they act in a certain specified way. They are entitled to come to court on the limited basis of seeking particular directions. Nevertheless it is clear that trustees may come into a court and say that they are in doubt as to how they ought to exercise their discretion, and surrender that discretion.

[339] The Court did not allow the appeal, finding that the trustees had surrendered their discretion on how to dispose of the property. The third amended statement of claim, the Court held, specifically invited the Judge to make alternative orders if the Judge was not prepared to make any of the specific directions sought.[105]

[340] This issue was confronted earlier by the High Court in *Gailey v Gordon*, where O'Regan J, found, similarly, that the court's role depended on the extent to which trustees had surrendered their discretion:[106]

> [33] In the present case the application has been made on a limited basis, seeking a Yes or No answer to each of the issues raised. That is the basis on which the issues have been placed before the Court by the trustees in their application and in my view it is inappropriate for the Court to go further than answering the questions put to it. While *Marley* and *Allen-Meyrick* permit trustees to surrender their discretion if they wish to do so, they are not authorities for the proposition that any application under s 66 involves a surrender of discretion by the applicants even if that is not what they seek to do.
>
> [34] I propose to adopt the approach of considering the application made by the trustees and giving the Court's advice or directions on it, but not going further and assuming the trustees' role of exercising their discretions. If the outcome is a negative answer, it will be up to the trustees then to reconsider the exercise of their discretion in the light of

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103 *Chambers v S R Hamilton Corporation Trustee Ltd*, above n 37.
104 Footnotes omitted.
105 At [39]–[42], [45] and [52].
106 *Gailey v Gordon* [2003] 2 NZLR 192 (HC).

> the Court's views and to exercise their discretion again in the manner they believe is appropriate in the circumstances.

[341] Here, TTL has been clear in saying that it is not surrendering its discretion to the Court. It is a case that falls squarely within the second category. As a result, while I am hesitant to conclude in an absolute sense that the Court does not have jurisdiction to order the alternative directions proposed by Ian, it is clear that such an outcome would be inappropriate.

[342] For completeness, I address TTL's submission that Ian as a beneficiary does not have standing to suggest alternative directions. In my view, if TTL had invited me to make alternative orders, and in the event that I was not prepared to make its proposed directions, then there would be nothing stopping Ian as a beneficiary from proposing alternatives because he would not need to bring an application for directions to do so. I observe that, had that been the case, there would remain an obligation on the court to consider any specific directions sought by TTL first, before moving to consider any alternative directions.[107]

When the Court will "bless" actions proposed by trustees

[343] As Hart J said in *Public Trustee v Cooper*, the duties of the court in considering an application for a "blessing", or a category two case, depend on the circumstances of the case.[108] In that case, Hart J held the Court had to be satisfied that:[109]

(a) the trustee had in fact formed the opinion to take the course of action that the court is asked to bless;

(b) the opinion formed was one at which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived; and

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107 At [42].
108 *Public Trustee v Cooper*, above n 99, at 925; and see *Re Honoris Trust*, above n 100, at [56].
109 At 925.

(c) the opinion was not vitiated by any conflict of interest under which any of the trustees might be labouring.

[344] The only issue for the Court here is whether the approach that the trustees wish to adopt through the resolutions is one at which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clauses, could properly have arrived.

[345] It is not for the Court to second guess the decision of trustees if the decision they have made is reasonably open to them; so long as the Court is satisfied upon a consideration of the evidence that the decision is one that was open to the trustees to make. As the Court put it in *Turvey v Vance*, where a trustee's decision is "within the range of reasonable decisions the trustee could make, the Court should not hesitate to bless it", but the blessing does require a "scrupulous consideration of the evidence".[110]

[346] Equally, a degree of caution must be exercised because any blessing will deprive an opportunity for a party to allege that the action constitutes a breach of trust.[111] However, the Court should not be overly cautious. The England and Wales Court of Appeal put it this way:[112]

> The Court will not approve a trustees' decision without a proper evidential basis for doing so. But the Court should equally not deprive a trustee of approval without good reason.

[347] If the decision for which a blessing is sought involves the sale of an asset, then the Court must be mindful to ensure that the sale occurs in such a way as to give every possible advantage to the beneficiaries, to ensure that there is proper competition and not to prefer factors that are relevant to one beneficiary class over the other.[113]

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110 *Turvey v Vance* [2022] NZHC 1167 at [25].
111 Trusts Act, s 134; and see *Richard v Mackay* [2008] WTLR 1667 (Ch) at 1671.
112 *Cotton v Brundenell-Bruce* [2014] EWCA Civ 1312 (CA) at [84].
113 *Killearn v Killearn* [2011] EWHC 3775 (Ch), as cited in *Folds Farm Trustees Ltd v Oliver Alister Sydney Cuffs* [2024] EWHC 12 (Ch).

TTL's power to sell the farm

[348] The question about whether or not TTL has power to sell the farm – the "interpretation issue" identified in the statement of claim and in the relief sought – is no longer in dispute. The parties accept that there is a power to sell. Both the Trust Deed and the Variation Deed permit the trustee to sell the Trust property.[114]

[349] The dispute between the parties lies in the terms on which it should be sold. Guidance may be had from Flora's Memorandum of Wishes in which a clear preference was expressed to keep the farm as a permanent asset of the Trust but in which the prospect of trustees resolving unanimously to sell the farm was provided for – so long as they had considered every possible alternative and concluded that they had no choice.[115] In those circumstances, Flora said in her Memorandum of Wishes that, if the farm was sold then she would wish for the Trust's funds to be distributed evenly to the Class B primary beneficiaries or, if they have died, equally between their surviving children.[116]

[350] While Flora's wishes are not binding on TTL, they are relevant consideration and TTL has considered them appropriately.

Should TTL sell the farm on the open market?

[351] Answering this question is the most straightforward aspect of the case. The way in which the parties have conducted themselves – their inability to agree upon anything and their deep distrust for each other – is such that no arrangement that would involve any need for cooperation between beneficiaries would be tenable. Sale on the open market is the most appropriate solution.

[352] Moreover, a number of the beneficiaries are away from New Zealand and have no enduring connection to the land. The trustees have duties of

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114 Clauses 9.1.1 and 9.1.2 of sch 2 of the Trust Deed and cl 17.16 of sch 3 of the Variation Deed.
115 Memorandum of Wishes at [5.4].
116 Memorandum of Wishes at [5.5(d)].

even-handedness and impartiality that require the interests of all classes of beneficiaries to be considered. That is what TTL has sought to do.

[353] In any event, TTL is right to say that sale on the market is the orthodox approach here because of the presumptive position that the duty of trustees is to facilitate a sales process that achieves the best price available to the benefit of beneficiaries as a whole.[117]

[354] As was said recently in *Ruscoe v Houchens*, "[w]here a trustee has a power of sale, their obligation is to obtain the highest possible price and not to do anything that would prejudice the sale".[118] I accept Ian's submission that where, as here, the power of sale is over property that is of sentimental importance to the beneficiaries and the settlor, as expressed in the trust deed, it might quite possibly be open to trustees to offer the property at market value to beneficiaries before turning to sell it on the open market. However, as TTL has said, the question for the Court is not which of several options TTL should take. It is whether, TTL having formed the opinion that its proposed method of sale is the best option, that course of action is reasonably open to it.

[355] In my view it clearly is. Any beneficiary who wishes to participate in the sale process may do so and, this way, there is at least a prospect of the farm staying within the "family" – a preference expressed in the Trust Deed. Sale out of the Trust into one family division would not achieve that aspiration but, as I have mentioned, the best price obligation will ordinarily prevail in any event.

The process for selling the farm

[356] The process that TTL has resolved to adopt involves engaging a reputable real estate agent or salesperson in the local area with appropriate experience, taking and accepting advice from the agent about the mode of sale, the marketing campaign and the setting of reserves (if applicable) and selling the farm if the agent recommends and if TTL considers the price and terms to be acceptable.

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117 *Killearn v Killearn*, above n 113.
118 *Ruscoe v Houchens* [2024] NZHC 419 at [10(b)].

There could be no objection to proceeding on that basis. The best price will be achieved, all beneficiaries will have the opportunity to participate, and the opportunity for the farm to remain in the family is provided.

Ian's proposed method of sale

[357] For the reasons I have given, it would be inappropriate for the Court to make the directions proposed by Ian. The issue is solely whether the decision TTL has made is one at which it could properly have arrived. And, on the basis just discussed, it most certainly is.

[358] However, for completeness, I will say something about Ian's proposal. As set out earlier in this part of the decision, Ian proposes a direction that the "only… decision reasonably open to a trustee properly acquainted with the terms of the trust deed" is an offer for sale "to Ian and any other beneficiary who wishes to retain an interest in the farm". It is proposed that a valuation would be obtained (and paid for by Ian), that any beneficiary who wishes to participate "in Ian's offer" to purchase the farm may do so and that, following sale, "all beneficiaries will continue to have reasonable access to the farm".

[359] Ian's deep connection with the farm is understandable. The farm has been in the McKean family since 1893. It is the final resting place of Flora, Gus and Liz's first husband, Bruce. Ian said in evidence that "the real, intrinsic value of Torwood is the stories". He spoke of his father's treasured Pinetum, which is QE2 covenanted and the largest collection of conifers in the Southern Hemisphere. He spoke of the land carrying stories from McKean ancestors that are of significant value. His love of the farm is reflected in the documents that he has prepared for and distributed to beneficiaries, including the photograph booklet entitled "The farm – a journey of memories and trustee reports", the terms of which demonstrate Ian's deep personal connection with the land and his wish to share it with, and for it to be shared by, beneficiary members of the family.

[360] Ian sees himself as carrying and passing on this deep connection; not only as a personal imperative but as an approach that honours his mother's wishes.

The notion that others might have different views is an affront to him; to this deep relationship he carries and the responsibilities he sees it as entailing. Ian's approach is understood. And it is respected.

[361] Ian's attachment to the land, handed down to him from his parents, is something that Ian has, in turn, handed down to his sons. Logan McKean spoke warmly about his connection with the farm, accepting ultimately that if the farm has to be sold, then an auction (for example) at which all beneficiaries could bid was reasonable. But he wishes for an arrangement whereby whoever purchases it would enable continual access to the farm for other beneficiaries. Alexander McKean spoke in terms that were similarly warm of his connection with the land. But he did not support the notion of a sale outside of the family and the terms he used to describe Janet and John were such as to underline the extent to which the inter-family division would prevent any prospect of a shared family sale process being tenable.

[362] In making his proposal, Ian emphasises Flora's wishes, the needs and interests of the beneficiaries, and the "liquidity crisis" the Trust is experiencing. However, then it becomes a little personal. A key reason advanced by Ian in submissions is his view that "Janet and John have conducted themselves poorly and should not be permitted to reap any benefit from their misdeeds". Reference is made, by way of analogy, to the "clean hands" doctrine in equity. And then Ian has turned on TTL, submitting that it has "failed to adopt a position of true neutrality". Things, at this point, are starting to get a little out of hand and show again why an open market sale is the only tenable option.

[363] One last thing needs to be mentioned under this head. Much has been made by Ian of his view that Flora had intended to exclude his sister, Liz, from the Trust and, therefore, from any prospect of her buying the farm.

[364] It appears that Liz was not included as a beneficiary of the Trust because she had already obtained the adjacent farm land from Flora. But there is no basis in evidence to suggest that there was any animosity between Flora and Liz over that. To the contrary, what is known is that Flora expressed the wish that, if Liz

wanted to become part of the Trust arrangements, then, if she was to gift her farm to the Trust, she and her lineal descendants would be added as beneficiaries.

[365] However, all of that becomes somewhat academic now: as a result of the lamentable breakdown in relations between beneficiaries, the land needs to be sold and the Trust must then vest. There is nothing to preclude Liz from participating in the sale process.

The counterclaims

[366] MFTL has filed a counterclaim in the 71 proceeding seeking an order that it is entitled to receive reimbursement from the Trust for all legal fees and expenses incurred in the performance of its duty as trustee and an order confirming that it was entitled to pay its legal costs and expenses incurred by it from Trust assets from July 2020 to 8 February 2024.

[367] For the reasons that I have given in relation to the 21 proceeding, those orders will be made.

MFTL's second counterclaim – reimbursement for work done in connection with the trust

[368] For the reasons given earlier in the course of considering this counterclaim in the context of the 21 proceeding, MFTL's counterclaim for reimbursement for work done in connection with the Trust cannot succeed.

Ian's counterclaim for reimbursement for work done as a director of MFTL

[369] Ian advances this counterclaim only in response to claims made by Janet and John against him personally. He puts it on the basis that, in recognition of his past reluctance to seek compensation for his work on the farm, he pursues the counterclaim only in response to Janet and John's claims against him. Accordingly, the counterclaim would only have been relevant in the event that Janet and John had succeeded against Ian personally. They have not.

[370] In any event, for the same reasons as those given when assessing MFTL's counterclaim for the same work, the claim would not have succeeded, had it been relevant.

TTL's costs

[371] TTL is entitled to an order that its costs in the proceeding be met from Trust property on an indemnity basis.

[372] For Ian it is said that TTL is entitled to its costs, but subject to a requirement that they be reasonably and properly incurred. On that basis, he submits that the costs incurred by TTL in pursuing its interlocutory application to debar MFTL from further participation (pending repayment of the $207,608.75 that was not covered by the pre-emptive indemnity award) were not reasonably incurred.

[373] Janet and John do not oppose the payment of TTL's reasonable costs on an indemnity basis. But they reserve their position on whether Ian and/or MFTL should be ordered to reimburse the Trust for any such costs to the extent that TTL's costs have been incurred as a result of Ian's defence to its application and/or Ian and MFTL's counterclaims.

[374] In the first place, it can be said that TTL has conducted itself reasonably and neutrally at all times. It accepted appointment on the basis that its reasonable costs and expenses (legal fees) would be met from Trust property.

[375] It inherited lease documentation that was in a state of some confusion and lease arrangements needed to be regularised. The pleadings in this proceeding needed to be amended and interlocutory steps were needed, including through advancing the position that the 71 proceeding be tried together with the 21 proceeding.[119]

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[119] This approach was opposed by Ian and MFTL but ultimately an order was made in a minute of Associate Judge Skelton of 15 August 2024 that they be tried together. However, that was adjusted to some extent through the joint memorandum of counsel for conduct of trial dated 5 February 2025.

[376] The 71 proceeding, as amended by TTL, was necessary – as was its involvement in the 21 proceeding. And it has been successful. MFTL and Ian became at odds with TTL when TTL sought to recover what it saw as being a form of court ordered debt. While, ultimately (and only after hearing and considering the evidence) the Court has found that there is no such debt, TTL took steps to secure repayment of the sum that was not indemnified in advance – and to debar MFTL from participating in the proceeding until repaid – on the basis of its view that that course of action was in the best interests of the beneficiaries as a whole. It was a firm approach but it followed the Court's decision on the issue on a pre-emptive indemnity basis and was not unreasonable in the circumstances.

[377] TTL could not become disentitled to its costs on either proceeding on an indemnity basis as a result. I am satisfied that it has worked hard to stay out of the hostile beneficiary claims and to limit itself to involvement, and to assisting the Court, in those aspects of the 71 proceeding that it needed to pursue in the interests of the beneficiaries. It has worked hard to encourage the parties to settle and has acted at all times on the advice of counsel. It is entitled to be indemnified fully under s 81 of the Trusts Act and cl 29 of sch 3 of the Variation Deed.

[378] While Ian has been unsuccessful in this proceeding, there is no basis to suggest, as Janet and John do, that Ian – or MFTL – should be ordered to reimburse the Trust for these costs.

The resulting orders

[379] I make orders:

(a) That it is lawful, in light of the "interpretation issue" TTL has raised, for TTL to sell Torwood Farm and the Rangiwahia Sections.

(b) Blessing the resolutions made by TTL that are set out in paragraphs 8(c), (ii), (iii), (iv), (v), (vi) and (vii) of the first amended statement of claim.

(c) That the costs of this proceeding and of the 21 proceeding incurred by TTL be met from Trust property on an indemnity basis.

[380] For the reasons given in this decision as it relates to the 21 proceeding, the order sought in paragraph 8(c)(viii) of the first amended statement of claim is not made.

Summary of conclusions

[381] In this decision, I have concluded as follows:

Janet and John's allegations

(a) None of Janet and John's allegations against MFTL and Ian are made out.

The costs issues

(b) MFTL is entitled to be indemnified by the Trust for:

(i) all of its pre-proceeding costs;

(ii) its costs in bringing and pursuing the 71 proceeding (prior to responsibility for the proceeding shifting to TTL);

(iii) its costs in pursuing its pre-emptive indemnity application;

(iv) its costs in defending the 21 proceeding;

(v) farm valuation costs and costs relating to the farm lease.

(c) MFTL is not entitled to be indemnified for Trust administration work, farm management work and farm work undertaken by Ian.

(d) Accordingly, in the 21 proceeding:

(i) the fourth, fifth and sixth causes of action do not succeed;

(ii) MFTL's first counterclaim for indemnity costs succeeds;

(iii) MFTL's second counterclaim for payment of Ian's costs does not succeed.

Disclosure issue

(e) Janet and John's third cause of action – seeking disclosure of Trust documents – does not succeed. And I would suggest that TTL should not disclose the documents in accordance with my observations on that point.

Protector duties

(f) Janet and John's second cause of action – alleging breaches of duty by Ian as protector – does not succeed and Ian's counterclaim – alleging breaches of duty by Janet and John – does not succeed.

Sale of the farm and other Trust assets

(g) TTL's claim in the 71 proceeding – that it is lawful to sell the farm and for orders blessing the trustee's resolutions – succeeds.

(h) MFTL's first counterclaim for indemnity costs in the 71 proceeding (prior to responsibility for the proceeding shifting to TTL) succeeds.

(i) MFTL's second counterclaim – for Ian's costs – does not succeed.

(j) Ian's counterclaim – for work undertaken – does not succeed.

Costs

[382] I have found that MFTL is entitled to be indemnified for its costs in the 21 proceeding. I have found that MFTL is entitled to be indemnified for its costs in the 71 proceeding up until the time at which it stepped down as trustee. And

I have found that TTL is entitled to be indemnified for its costs in both proceedings. Any costs issues as between Ian, Janet and John, TTL and MFTL (aside from the indemnity) that cannot be resolved by discussion between them (and I do encourage that) should be the subject of memoranda to be filed as follows:

(a) by all parties in the first instance by 5 pm on 18 July 2025;

(b) by all parties in reply by 5 pm on 15 August 2025;

[383] Memoranda (including any schedules) should not exceed seven pages in length.

Post-script

[384] I began this judgment by describing it as a sad story. In many ways it is tragic. The battle between brothers and sisters has been so bitter that it has created deep factions amongst their children also; factions between cousins. But, more than that, it has meant that Flora's wishes for a cohesive family unit, prospering both personally and financially through land that has been in the family for 130 years, is lost due to the now inevitable need for the property to be sold, for the cost of all of this to be deducted from the price, and for the Trust to now vest. It must be time now for wounds to heal.

Radich J

Solicitors:
Duncan Cotterill, Wellington for Plaintiffs in CIV-2022-454-21 and Respondents in CIV-2022-454-71
Wynn Williams, Christchurch for First Defendant in CIV-2022-454-21 and Applicant in CIV-2022-454-71
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