IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-1620
[2017] NZHC 3278

UNDER	Part 18 of the High Court Rules, Sections 51 & 56 Trustee Act 1956, Section 21 Administration Act 1969 and the inherent jurisdiction of the Court
IN THE MATTER	of the CLEMENT FAMILY TRUST and the Estate of NOLA VALERIE CLEMENT
AND	In an application for the removal and replacement of Trustee and directions as to distribution pursuant to Sections 51 & 68 Trustee Act 1956 and the inherent jurisdiction of the Court. And for removal of Administrator of Estate pursuant to Section 21 Administration Act 1968
BETWEEN	KEITH TREVOR CLEMENT as beneficiary of the CLEMENT FAMILY TRUST and Administrator of the Estate of NOLA VALERIE CLEMENT Plaintiff
AND	COLIN JAMES LUCAS AND SAMUEL M W BASSETT as Trustees of the CLEMENT FAMILY TRUST First Defendants …/cont

Hearing: 24-27 and 31 October 2017

Appearances: G Stringer and C Tuck for Plaintiffs
S Robertson QC and AHH Choi for First Defendants
V Bruton QC and P Brown for Second Defendants
N Woods for Third Defendant

Judgment: 21 December 2017

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 21 December 2017 at 2.00 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

	AND	BRIAN CAMPBELL CLEMENT as beneficiary of the CLEMENT FAMILY TRUST and Administrator of the Estate of NOLA VALERIE CLEMENT Second Defendant
		DERENE WENDY CLEMENT as beneficiary of the CLEMENT FAMILY TRUST and Administrator of the Estate of NOLA VALERIE CLEMENT Third Defendant

Solicitors:	Inder Lynch, Papakura Robert Burton, Papakura Rice Craig, Papakura
Counsel:	V Bruton QC, Auckland S Robertson QC, Auckland

Introduction

[1] This case concerns a family farming enterprise in Hunua, Papakura that was put into a family trust, and decisions made by the trustees on the distribution of trust assets to the children of the settlors of the trust. The case illustrates the difficulties and sadness that can arise when beneficiaries cannot agree on how to give effect to arrangements made by their parents for their own wellbeing and for the protection of the wealth the parents had accumulated over their lifetime. That the beneficiaries in this case are in their late 60s and early 70s and nurse deep grievances about each other only adds to the sadness.

[2] The second defendant, Brian Clement (Brian), challenges a decision of the trustees of the Clement Family Trust (Trust) to sell the assets of the Trust - the farm and homestead - and the trustees' signalled intention to distribute the proceeds equally among the three beneficiaries of the Trust - Brian, his brother, Keith Clement (Keith), and their sister, Derene Clement (Derene). Brian considers these courses of action, which Keith and Derene support, are not what their parents, Walter Clement (Walter) and Nola Clement (Nola), had in mind when they established the Trust and are at odds with promises made to him over the course of his life's work on the farm. Brian says the Trustees acted in bad faith by failing to take into account relevant considerations, taking into account irrelevant considerations and behaving unreasonably, that is, making decisions no reasonable trustee could make in the circumstances.

[3] The proceeding began when Keith applied to the court to appoint himself and another person as trustees, following the deaths of Walter and Nola, who had been trustees of the Trust, and the retirement of the then remaining trustee, Derek Dallow of the law firm Davenports Harbour Limited (Davenports). That aspect of the proceeding was settled following the appointment, by consent, of Colin Lucas, solicitor, and Sam Bennett, accountant, as independent trustees (Trustees).

[4] Brian revived the proceeding to challenge the decision made by Mr Lucas and Mr Bennett to sell the Trust assets and their signalled intention to distribute the assets equally among the three siblings after one or more of the siblings had objected to two other options for the distribution of Trust assets put forward by the Trustees. Brian,

who had supported one of the other options, had also objected to the proposed sale of the assets.

[5] With the agreement of the three beneficiaries, the Trustees, through their counsel, Ms Robertson QC, played a full part in the proceeding as contradictors of the case advanced by Brian. Keith and Derene were also represented and participated actively through their counsel, Mr Stringer for Keith, and Mr Woods for Derene. The argument was largely a contest between Brian, through his counsel, Ms Bruton QC, on the one hand, and counsel for the Trustees, Keith, and Derene on the other. Brian, Keith and Derene each gave evidence, as did the Trustees.

[6] Brian's position on relief changed during the proceeding. In his statement of claim, he sought orders directing the Trustees to implement a subdivision of the farm in accordance with a memorandum of wishes made by his parents. At the start of the hearing on 24 October 2017, he proposed a different reconfiguration of the farm's titles for which he was able to secure resource consent prior to the hearing, but only on conditions to which he objected and which the other parties considered unacceptable. At the end of the hearing, Ms Bruton for Brian argued for a transfer of part of the land to Brian, the transfer of the farm homestead to Derene, and the sale of the remaining land with the proceeds of sale to be distributed according to Brian's view of an equitable outcome. Ms Bruton urged the Court to direct this outcome, although there was no amendment to the pleadings to procure this result.

[7] Keith and Derene maintained their support for the Trustees' proposed actions throughout the hearing, although Mr Woods for Derene indicated an openness to the last arrangement proposed by Brian, subject to an adjustment of the proposed distribution of proceeds.

[8] The Trustees acknowledged that they had become aware during the hearing of relevant information that they had not known when they made their decisions, and that they had acted on the basis of legal advice they later accepted was incorrect. However, the Trustees continued to assert that the best solution was the sale of all Trust assets and the equal distribution of the proceeds among the three beneficiaries and they maintained their counterclaim for orders to this effect if the Court should hold that the

Trustees' earlier decisions were outside their powers. Through Ms Robertson, the Trustees declined an invitation by Brian through Ms Bruton to surrender to the Court their discretion over the distribution of Trust assets.

Background Facts

[9] In 1970 Walter and Nola, who with their children had lived and farmed in Huntly, moved to Hunua after Walter had purchased a farm comprising 500 acres (202 hectares) of land. The farm, known as Te Rangi, was in three titles and was accessible from both Gillespie and Ponga Roads. The formed section of Gillespie Road ended close to the entrance of Te Rangi but continued as a paper road through the farm, separating one title from the other two titles.

[10] Walter farmed sheep and dry stock on the land. Walter and Nola, as well as Keith and Derene, lived in the main farm house known as "the Red House".

Arrangements on the farm

[11] Brian, the oldest child who had been living in Auckland, moved to Hunua after the farm had been acquired to work with his father on Te Rangi. Brian bought his own 80-acre farm on land adjoining Te Rangi. Walter provided a guarantee to enable Brian to purchase his farm but Brian otherwise was responsible for the purchase of his land. Brian managed his farm separately from Te Rangi but also worked without wages with his father on Te Rangi for the best part of the next 40 years.

[12] In the late 1970s, Keith married and moved with his wife to a cottage on Te Rangi which he and his wife considerably improved and made comfortable for themselves and their children. In the 1980s, Walter gifted Keith the title to the land, comprising 160 acres (64.7 hectares) on which he had been living and which was one of the three titles making up the original farm. This title was known as 167 Gillespie Road.

[13] Following the transfer to Keith, Te Rangi comprised two titles: a northern title accessible from Gillespie Road (Northern Title) of approximately 93.5 hectares and a southern title accessible from Ponga Road (Ponga Road Title) of 29 hectares. The

Northern Title was made up of 2 Lots: Lot 1 comprising 15.85 hectares and Lot 2 comprising 77.6 hectares.

[14] The Red House was on the title transferred to Keith, and Keith was told the house would become his in time. But it was understood that the Red House would be Walter and Nola's home for as long as they wanted it. At some point the land on which the Red House sat was sub-divided off and put into a separate title, with the address 168 Gillespie Road. This land became known as "the Home Block".

[15] The woolshed, cattle yards and farm equipment used for Te Rangi were also on the title transferred to Keith. It appears Walter expected that these important components of farm infrastructure would continue to be available to the whole farm as they had been before the transfer to Keith.

[16] Keith became a painter and decorator and spent much of the working week in those occupations. However, in the evenings, on weekends and on such other days as he chose, Keith worked and improved the land he had received from his father. He also worked on Te Rangi, and in particular on an area of about 23 hectares of fertile land in the Northern Title immediately adjacent to his own land. He also grazed sheep on an area of just over 8 hectares of sloping land on the Ponga Road Title where it abutted his land.

[17] Walter also made dispositions of land from Te Rangi to Brian and Derene, although these were smaller in size and value than the land transferred to Keith:

(a) When Derene married in the late 1970s, a one-acre section was subdivided off from the Ponga Road Title and a house was built on it where Derene and her husband lived for a time. When Derene and her husband later moved to Taranaki, the house and land were sold and the proceeds invested in the acquisition of a new home in New Plymouth. For completeness, I note that after Derene's marriage ended, Walter gifted her $70,000 to enable her to purchase a freehold property in New Plymouth.

(b) Two other lots were subdivided off from the Ponga Road Title and given to Brian as part of an arrangement putting conservation covenants over areas of native bush on the Northern Title. Brian on-sold those lots for about $135,000 each and retained the proceeds.

[18] Keith also subdivided off three sections from his land which he on-sold for approximately $100,000 each – after incurring subdivision and associated costs of $150,000.

[19] In 1982, at his parents' invitation, Brian purchased half of Walter's sheep flock which he was told he should continue to farm on the Northern Title. Brian was also told he should farm and manage the Northern Title as if it were his own land – subject to Keith's use of the area next to Keith's land.

[20] A few years later, at his parents' invitation, Brian took over the farming and management of the Ponga Road Title on the same basis as he had taken over the Northern Title - subject again to Keith's use of the area adjacent to Keith's land. Apart from the area used by Keith, which was steep and had bush cover, the Ponga Road Title was productive land which Brian used to breed and farm cattle.

Establishment of the Trust

[21] In the late 1990s, Walter and Nola sought advice over how to manage their assets. Their financial planners referred them to Derek Dallow, a solicitor at Davenports, who specialised in estate planning. The advice from Mr Dallow was to establish a family trust.

[22] As was acknowledged by all parties, the basic scheme of the Trust - which was not unusual in farming families - was to ensure the land passed on to the next generation of sons while provision was made for the daughter through cash or other non-real assets.

[23] Correspondence between Mr Dallow and the financial planners that was disclosed during discovery shows that when establishing the Trust, Walter and Nola were conscious that Keith had already received 120 acres of the original farm and that

they intended to use the Trust to "even the ledger" by making provision for the transfer of assets to Brian and Derene. However, Keith was also to benefit. The correspondence referred specifically to the intention to transfer 260 acres to Brian and the Red House to Keith, and that Derene would receive investment funds which, at the time, were significant.

[24] The Clement Family Trust was established by deed dated 23 June 1999. The settlors were Walter and Nola. The original trustees were Walter, Nola and Mr Dallow. The Final Beneficiaries are the Settlors' children – namely, Brian, Keith and Derene. The Discretionary Beneficiaries are, as "primary beneficiaries", any of the Final Beneficiaries, any of the Settlors, and any of the Final Beneficiaries' children.

[25] The Trust Deed is a largely standard-form document and has no unusual provisions. For present purposes, it is sufficient to note:

(a) The first recital records the Settlors' wish "to make provision for the benefit of the persons and purposes named in this deed" but no specific purposes are set out in the Deed.

(b) Under clause 2:

(i) The "Trust Period" means the period from the date of the Deed until Vesting Day;

(ii) "Vesting Day" means eighty years from the date of the Deed or such earlier day as the Trustees may by deed appoint pursuant to clause 6.

(c) Clause 4 empowers the Trustees, after payment of Trust expenses, to pay or apply income from the Trust Fund to one or more of the discretionary beneficiaries.

(d) Clause 6 empowers the Trustees to pay or apply all or any part of the capital of the Trust Fund to one or more of the Discretionary Beneficiaries.

(e) Clause 7 requires earlier distributions to a beneficiary from the Trust Fund to be taken into account when deciding that beneficiary's share on Vesting Day.

(f) Clause 10 provides that on Vesting Day the Trustees may:

(i) Distribute capital to such of the Final Beneficiaries or their issue in such shares as the Trustees decide; or

(ii) Vest the Trust Fund in any Final Beneficiaries then living as tenants in common in equal shares.

(g) Clause 11:

(i) Grants the Trustees broad powers to deal with the Trust Property as if it were their own, but subject to the trusts imposed by the Deed;

(ii) Confers broad discretions on the Trustees in typically broad terms:

> 11.2 Discretions: Except as otherwise expressly provided by this deed, the Trustees may exercise all the powers and discretions vested in the Trustees by this deed in the absolute and uncontrolled discretion of the Trustees at such time or times, upon such terms and conditions, and in such manner as the Trustees may decide.

(h) Clause 16 provides that the power to appoint and remove Trustees vests in the Settlors or the survivor of them in their lifetime and, after the death of the surviving Settlor, in such persons as nominated by deed or will to exercise the power.

[26] In February 2003, Walter and Nola transferred the Northern Title, the Ponga Road Title and the Home Block to the Trust. These parcels of land were and remain the only assets of the Trust Fund.

The Memoranda of Wishes

[27] Walter and Nola made several Memoranda of Wishes indicating how they wanted the Trust assets distributed upon their deaths. These Memoranda, the last of which was made solely by Nola following Walter's death, were successively amended in response to changing circumstances.

[28] The Memoranda of Wishes stated the following desired distributions of Trust assets:

(a) Memorandum dated 20 April 2000:

(i) A "further" 60 acres, as well as the Home Block, to Keith;

(ii) The balance of the farm to Brian;

(iii) $200,000 plus the contents of the Red House to Derene.

(b) Memorandum dated 14 June 2005:

(i) Home Block to Keith;

(ii) Ponga Road Title to Brian;

(iii) Northern Title to be subdivided into two separate titles with Brian and Keith to receive one title each;

(iv) Any funds in any bank accounts and proceeds received from their estates to Derene.

(c) Memorandum dated 8 August 2008: largely the same as the memorandum dated 14 June 2005 with additional provisions regarding access to the woolshed, yards and farm equipment.

(d) Memorandum dated 2 September 2008:

(i) Home Block, plus land in the Northern Title farmed by Keith (coloured orange in an attached plan) (Orange Block), to Keith;

(ii) Balance of Northern Title (coloured blue in plan) (Blue Block) to Brian, with a right of way over the land in orange;

(iii) Sloping section of Ponga Road Title grazed by Keith (coloured pink in plan) (Pink Block) to Derene;

(iv) Balance of Ponga Road Title (coloured green in plan) (Green Block) to Brian.

(e) Memorandum of Wishes dated 12 July 2010:

(i) Home Block to Derene;

(ii) Blue Block to Brian, with right of way over Orange Block;

(iii) Orange Block to Keith;

(iv) Pink Block to Keith;

(v) Green Block to Brian.

Attached to the Memorandum was Survey Plan 2922 showing the intended distribution of the land. Noted on that Plan was a Proposed Covenant under which the Orange and Pink Blocks would be held in conjunction with Keith's land at 167 Gillespie Road and would not be transferred or leased separately without Council consent.

A copy of Survey Plan 2922 is attached to this judgment.

[29] It appears two factors in particular influenced the evolution of the wishes in the Memoranda. By far the more important was the loss of investments through finance company failures following the Global Financial Crisis. This meant it was no

longer possible to implement the basic scheme of giving the land to Brian and Keith and investment assets to Derene. This was addressed in the Memorandum of 2 September 2008 by providing that Derene should get the Pink Block. However, the Memorandum of 12 July 2010 changed the distribution to provide that Derene should get the Home Block and Keith the Pink Block.

[30] Derene's evidence, which I accept, is that the Pink Block was of little use or value to her and that her parents intended even in September 2008 to allocate the Home Block to Derene but did not follow through after objection from Keith to whom the Home Block had been promised years earlier. However, as reflected in a letter Nola wrote to Mr Dallow on 26 June 2010, Nola subsequently recognised that with the loss of the investments she needed to do more for Derene and so provided in the Memorandum of 12 July 2010 for the Home Block to go to Derene and the Pink Block to go to Keith.

[31] In her letter of 26 June 2010 to Mr Dallow, Nola said:

> As far as I can ascertain Brian's and Keith's share of the land is valued at roughly 1 million dollars each, and the Homestead is also valued at approx. 1 million also, therefore it seems to be fair to leave the homestead to Derene.

At the end of the letter, she added:

> P S Walter always said that each of the family should have a fair share.

[32] On 29 August 2010, Nola wrote a letter to Keith explaining her decision which, she acknowledged, would disappoint him. In explaining her decision, Nola stated, "You will still have a lovely freehold farm in a valuable area."

[33] The other factor was a deterioration in the relationship between Brian and Keith which manifested in difficulties over Brian getting access to the woolshed, yards and the farm equipment on Keith's land. Walter and Nola attempted to address this problem in various ways:

(a) On 12 November 2007, the Trustees adopted a resolution stating that legal access from Brian's "sheep land" (likely a reference to the Blue

Block) needed to be set down in a new "division" being prepared by Birch Surveyors.

(b) The Memorandum of Wishes of 8 August 2008 stated Brian was "always to have unrestricted access" to the woolshed, sheepyards, tractor workshop, plant and farm vehicles and that any future purchaser of Brian or Keith's land should be bound by the same restrictions.

(c) The Memoranda of Wishes of 8 August 2008 and 12 July 2010 and Survey Plan 2922 provided for a right of way from the Blue Block over the Orange Block.

[34] None of those arrangements was put into effect. The relationship between the brothers became steadily worse. After Nola and Walter had moved off the farm, Keith denied Brian access to the woolshed, yards and farm equipment and Brian stopped his sheep operations on the Blue Block. Each brother accused the other of bad behaviour ranging from Keith's accusations of Brian's poor animal husbandry, sub-standard farm management practices, unwillingness to share in costs jointly incurred and prevarication and indecision in resolving family matters, to Brian's accusations of Keith's denial of Brian's access to the woolshed, yards and farm equipment, interference in Brian's farming operations, misappropriation of farm vehicles and groundless complaints to the SPCA.

[35] These difficulties are emblematic of the distrust between the brothers that made the new Trustees' task so difficult.

The parents die and the siblings try to take responsibility

[36] In 2008, Walter and Nola moved off the farm to live in a house at Papakura. The Home Block was leased to tenants.

[37] Walter died in September 2008. After Walter's death, Derene came back from Taranaki to live with and care for her mother in Papakura. No trustee was appointed to replace Walter as a trustee of the Trust.

[38] In about 2012, Nola and Derene moved back to the Red House. At some point around this time, Keith and Brian agreed to share payment of the rates for the Trust properties, notably those for the Home Block.

[39] Nola died in March 2013. Under Nola's will:

(a) Derene was the sole beneficiary of the estate – which was later determined to be worth some $63,000;

(b) Brian, Keith and Derene were appointed executors and trustees of the will;

(c) Brian, Keith and Derene were nominated jointly to exercise Nola's power of appointment and removal of trustees under the Trust.

[40] No trustee was appointed to replace Nola as a Trustee of the Trust.

Discussions among siblings and their lawyers

[41] Following Nola's death, Brian, Keith and Derene had discussions among themselves and through their legal representatives about administering Nola's estate and disposing of the Trust's assets. After some delay, Brian and Derene proposed a draft Deed of Family Arrangement which was intended to give effect to the 12 July 2010 Memorandum of Wishes and included proposals to formalise arrangements for Brian to access the woolshed and yards on Keith's property. However, no agreement was reached on any of these matters and the relationship between Brian and Keith continued to deteriorate, to the point that Keith issued Brian with a trespass notice for being on Keith's land. There were also issues between Keith and Brian about Brian's failure to pay his share of the rates for the Trust property.

[42] These discussions played out over a two-year period – a process complicated by delays and changes of legal representation by Brian and by the animosity between the brothers. Brian's insisted that the Memorandum of Wishes of 12 July 2010 had to be implemented while Keith questioned the feasibility of achieving a subdivision to

implement the Memorandum of Wishes because of planning hurdles and cost. Keith proposed as alternative dispositions of the Trust assets:

(a) That Derene receive the Home Block, Brian the Northern Title and Keith the Ponga Road Title; or

(b) That all three assets be sold and the proceeds, after the deduction of outstanding expenses and costs, be divided equally between Brian, Keith and Derene.

[43] Brian and Derene did not accept either alternative proposed by Keith, although Derene did not play a significant separate part in the discussions until she instructed her own solicitors, possibly at the point where the relationship between Derene and Brian soured following an altercation between Brian and Derene's son.

[44] Separately, Mr Dallow signalled his desire to step down as Trustee.

[45] In July 2015 Keith brought this proceeding seeking the appointment of himself and a solicitor as Trustees. Keith's application also sought court approval of his proposed distribution of Trust assets which was:

(a) Home Block to Derene;

(b) Northern Title (ie Blue and Orange Blocks) to Brian

(c) Ponga Road Title (ie Green and Pink Blocks) to Keith.

New Trustees appointed

[46] In the event, Brian, Keith and Derene agreed on the appointment of Mr Bassett and Mr Lucas as replacement Trustees so no Court orders were made. However, the proceeding was not discontinued.

[47] Mr Bassett and Mr Lucas set about the task of considering how to distribute the Trust assets. They familiarised themselves with the Trust Deed and the various

Memoranda of Wishes – of which Mr Lucas prepared a table to analyse and compare their terms, and associated documents. The Trustees also took out a loan on behalf of the Trust to enable then to carry out their duties.

[48] The Trustees' review of the historical documents did not include the pre-Trust correspondence between Mr Dallow and Walter's financial advisers which, among other things, indicated that part of the rationale for establishing the Trust was a desire to "even the ledger" among Keith, Brian and Derene. However, even before Mr Lucas and Mr Bassett had had a chance to meet, they received letters from the solicitors representing Brian and Keith setting out their clients' perspectives on the history and purpose of the Trust arrangements and what should happen next.

[49] Between 23 May and 12 August 2016, Mr Lucas and Mr Bassett met separately with Keith, Brian and Derene and received letters from the lawyers acting for Keith and for Brian, and then from solicitors engaged by Derene, with each sibling putting directly and through their lawyers their views on how the Trustees should dispose of the Trust assets.

[50] On 12 August 2016, the Trustees wrote to the three sets of lawyers, noting they had met with each of Brian, Keith and Derene and had heard their perspectives on the family history, the background to the acquisition of the Trust properties, the background to the creation of the Trust and the details of the issues that had "brought about a collapse of the family relationship". The letter stated:

> Whilst unfortunate, we do not consider that it is our role to deal with or attempt to resolve the collapse of the family relationship, rather we consider our focus is to deal with the Trust's property in a manner that takes into account the best interests of the beneficiaries.

[51] The Trustees' letter went on to state the three options the Trustees considered available in relation to the Trust properties and the relative pros and cons of these options:

(a) Subdivision as set out in the draft deed of family arrangement. This which would "follow the theme of the most recent Memorandum of Wishes", was "largely approved by Brian and Keith" but would involve

significant time delay because the Northern Title straddled two zones in the proposed Auckland Unitary Plan and expense, perhaps in excess of $100,000, which the beneficiaries would have to fund.

(b) Transfer of the existing titles to the beneficiaries as had been proposed by Keith: Home Block to Derene, Northern Title to Brian; Ponga Road Title to Keith. This was "quick and easy" but "ignored the Memorandum of Wishes" and the costs incurred to date.

(c) Sale of the land, reserving to the beneficiaries the ability to purchase such of the properties as they wished with the proceeds. This also "does not follow the theme of the last Memorandum of Wishes".

The letter invited the beneficiaries' comments on the options and said the Trustees would make a decision regarding the assets and the fate of the Trust once they had heard from all beneficiaries.

[52] The legal representatives for Keith, Brian and Derene responded, commenting on the Trustees' options and on the reactions, both anticipated and received, of the other siblings, with some letters generating further correspondence and comment from the respective lawyers. In summary, the siblings' positions were:

(a) Keith:

(i) Subdivision: Not preferred; costs prohibitive, outcome uncertain. Brian's delays and performance on rates further illustrated the need for a "clean break".

Anticipating Brian's support for this option, said Brian's past behaviour cast doubt on parties' ability to work together to agree the necessary steps.

(ii) Transfer of titles: Preferred option; simple and logical.

(iii) Sale: next preferred option if transfer could not be achieved in timely way.

(b) Brian – after extensive narrative on the family history, establishment of the Trust, the expectations of the Settlors and other matters including factors presumed to lie behind Keith's position:

(i) Subdivision: the fairest option that would distribute the property as the parents intended; the costs not believed to "be anything like $100,000" and Brian prepared to reduce costs to the other beneficiaries and meet some costs himself – although the extent of this offer was not clear.

(ii) Transfer of titles: Brian's second preference "but quite a way behind the first"; not workable or practical because of access issues and distances from homes of Brian and Keith.

(iii) Sale: "Brian is implacably opposed to this. His life's work of over 40 years would disappear overnight."

(c) Derene - after asserting that Derene had received the least from the Trust and had demonstrated the greatest financial need, that the Memorandum of Wishes could not be effected and was misconceived:

(i) Subdivision: not a realistic option; "Keith and Brian would not make that option work."

(ii) Transfer of titles: "Our client does not agree to this option. It ignores the differing values apportioned to the properties."

(iii) Sale: "This remains an option." But Derene wished to purchase the Red House at market price and, following sale of the Northern and Ponga Road Titles, to receive a one-third share of the total Trust assets.

The Trustees' decisions

[53] On 3 October 2016, the Trustees wrote to the lawyers for the three Clement siblings advising they had considered the responses and noting that "… it is clear to us that there are completely divergent views on what steps the trustees should take." The letter went on to state:

> Because it is impossible to reconcile the divergent opinions the trustees have agreed that in the first instance the properties should be sold on the open market, recording that this will not prevent the beneficiaries from participating in the purchase process, and then once the properties are sold the proceeds of sale will be distributed to the beneficiaries in a manner that it yet to be determined.

[54] The Trustees' letter of 3 October 2016 elicited enquiries from the solicitors for Keith and Derene about the process envisaged for the marketing and sale of the Trust properties. Counsel for Brian also wrote recording that the Trustee's decision was "extremely disappointing" to Brian and was "not a full and proper decision" and called on the Trustees to provide reasons. His letter also stated that "The Trustees should advise now how the sale proceeds would be distributed after sale."

[55] The Trustees met on 19 October 2016 to consider their next steps. On 20 October 2016, Mr Lucas wrote to Davenports and Mr Bennett attaching for comment a draft letter to the lawyers for the Clement siblings. In his covering letter, Mr Lucas stated:

> We are concerned that consideration of matters pre-dating the creation of the trust would be a breach of our powers as Trustees under the Trust.
>
> The writer considers that consideration of such matters is not possible as the Trustees can only consider matters relating specifically to the affairs of the Trust. …
>
> We think in general terms that other than allowances for contributions for rates and similar made during the life of the trust that distribution should be made equally between the beneficiaries.

The letter concluded by asking to Davenports to comment on these matters "as they are of concern".

[56] Davenports responded by email on 25 October 2016. The key part of the message read:

> I think the letter looks good. In relation to the distribution approach I think that equality is best. I agree that the trustees cannot take into account things which happened outside of the trust.

[57] On 25 October 2016, the Trustees sent their letter to the lawyers for the Clement siblings, stating that they did not propose and were not required to provide reasons for their decisions. The letter also stated the Trustees were taking advice regarding the disposition of the sale proceeds and anticipated being able to report further once that advice had been received and considered.

[58] On 11 November 2016, Davenports wrote on behalf of the Trustees to counsel for Brian and the solicitors for Keith advising on the steps being taken to market the properties. The letter also stated:

> In terms of distribution, the trustees are considering dividing the proceeds of sale (after deduction of costs) equally among the siblings.

[59] Davenport's letter may have crossed with a letter dated 10 November 2016 from Brian's counsel to the Trustees advising that Brian had given instructions to challenge the decision to sell the Trust properties. In any event, on 2 December 2016, the Trustees wrote to counsel and solicitors for the Clement siblings advising that they had decided to defer marketing the properties until the New Year pending Brian's application to determine the validity of the decision to market the properties.

Resumption of the proceeding

[60] On 7 December 2016, Brian filed and served a statement of claim seeking orders pursuant to s 68 of the Trustees Act 1956 setting aside the Trustees' decisions to sell the Trust properties and distribute the proceeds of sale equally among Brian, Keith and Derene. The relief sought was that the Trustees be directed either to implement the Memorandum of Wishes or to reconsider their decisions.

[61] However, at the hearing in October 2017, Brian's counsel initially contended for implementation of an alternative arrangement based on a boundary adjustment involving the two Lots comprising the Northern Title that would:

(a) Expand Lot 1 to include an area of almost 22 hectares that would take in most of the Orange Block plus some additional Blue Block land from Lot 2;

(b) Create a reconfigured Lot 2 of 101 hectares comprising the residue of Lot 2 in the Northern Title plus the Ponga Road Title.

[62] Implementation of this arrangement would enable the transfer of Lot 1 to Keith while Brian would receive Lot 2 and Derene would receive the Home Block.

[63] Craig Forrester, a Registered Surveyor, gave evidence that on Brian's instruction he had obtained resource consent from the Auckland Council for this boundary adjustment. However, a condition of the consent was that Gillespie Road be formed and sealed from the end of the existing formed road for a further 250 metres to the same standard as the existing formed road. Mr Forrester accepted at the hearing that the costs of implementing this condition would be in the order of $400,000. Mr Forrester said he had lodged an objection to the condition on the grounds the condition did not fairly and reasonably relate to the development authorised by the consent – largely because the boundary adjustment did not result in any new building sites that would have warranted such a condition. While Mr Forrester expressed confidence that the condition would be removed or modified, at the time of writing this judgment no word had been received from Brian's counsel as to whether the objection had been successful. In any event, and as I discuss below, by the time the hearing ended Brian, through his counsel, was advocating a different form of relief.

Counterclaim by Trustees

[64] In addition to denying Brian's claim, the Trustees counterclaimed, asserting that if the Court found that the decision to sell the Trust properties and/or the order to distribute the net proceeds of sale equally among the beneficiaries was outside the Trustee's powers, the distributions were expedient in the management and administration of the Trust and were in the best interests of the beneficiaries. Accordingly, the Trustees sought orders pursuant to s 64 of the Trustees Act authorising the Trustees to sell the properties and distribute the net proceeds equally among the beneficiaries.

The Law

[65] Section 68 of the Trustees Act provides:

> **68 Applications to court to review acts and decisions of trustee**
>
> (1) Any person who is beneficially interested in any trust property, and who is aggrieved by any act or omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to anticipate any such act or omission or decision of a trustee by which he will be aggrieved, may apply to the court to review the act or omission or decision or to give directions in respect of the anticipated act or omission or decision; and the court may require the trustee to appear before it, and to substantiate and uphold the grounds of the act or omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require:
>
> provided that no such order shall—
>
> (a) disturb any distribution of the trust property made without breach of trust before the trustee became aware of the making of the application to the court:
>
> (b) affect any right acquired by any person in good faith and for valuable consideration.
>
> (2) Where any such application is made, the court may,—
>
> (a) if any question of fact is involved, direct how the question shall be determined:
>
> (b) if the court is being asked to make an order that may prejudicially affect the rights of any person who is not a party to the proceedings, direct that any such person shall be made a party to the proceedings.

[66] Ms Robertson for the Trustees submitted that s 68 confers no jurisdiction on the Court in this case because the decisions under challenge taken pursuant to the Trust Deed and not "in the exercise of a power conferred by this Act". However, as argued by Ms Bruton, where the source of a trustee power is concurrent as between the Act and a trust deed, s 68 still applies.[1] The power to sell the Trust properties is conferred concurrently by s 14 of the Trustee Act as well as by Clause 11 of the Trust Deed. I am satisfied the Court has jurisdiction to make orders pursuant to s 68.

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[1] *Re Havill* [1968] NZLR 217 (SC) at 223; *Jaspers v Greenwood* [2012] NZHC 2422 at [18].

[67] Subject to a point raised by Mr Woods regarding the powers being exercised by the Trustees which I discuss below, it was common ground among the parties that in taking the decisions challenged by Brian the Trustees were exercising discretionary powers under the Trust Deed.

[68] There was no serious disagreement among counsel as to the scope of the Court's jurisdiction to intervene in the exercise of the Trustees' discretionary powers. Reference was made to the decision of the United Kingdom Supreme Court in *Pitt v Holt*[2] where Lord Walker of Gestingthorpe, for the Court, considered and clarified the "Rule in *Hastings-Bass*"[3] – which for some years had been taken as authority for the proposition that:[4]

> … a trustee when exercising a power (for example) of appointment or advancement shall take into account all relevant considerations and refrain from taking into account any irrelevant consideration, and opens his decision to challenge if he fails to do as so required.

[69] Counsel also referred to the decision of the High Court in *Masters v Stewart* where Mander J considered the application of *Pitt v Holt* in a case whose facts had some similarities to the present.[5] As Mander J stated:

> [28] The circumstances in which a Court will intervene in the exercise of a trustee's discretionary power are limited. Trustees, in the exercise of their fiduciary discretion, however, must act in good faith, responsibly and reasonably. The parameters of those obligations require greater definition.
>
> [29] Insofar as it is relevant to the present case, the parties are agreed that the Court will only set aside a trustee's decision if he or she has considered irrelevant considerations; failed to consider relevant considerations, or reached a decision that is perverse or capricious. …

[70] As Mander J went on to discuss, following the decision in *Pitt v Holt* there are important qualifications to these statements of principle. In the context of the present case, those qualifications are important.

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2 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.
3 Derived from *Re Hastings-Bass (decd)* [1975] Ch 25 (CA).=
4 As stated in *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2013] Ch 409 at [2].
5 *Masters v Stewart* [2014] NZHC 2419.

[71] In *Pitt v Holt*, Lord Walker undertook a comprehensive review of the origins of the Rule in *Hastings-Bass* and the way the Rule had developed particularly in cases concerning trusts and tax-planning arrangements where, as Lord Walker noted:[6]

> the arrangements have for one reason or another proved unexpectedly disadvantageous and, and the court has been asked to restore the status quo ante under the *Hastings-Bass* rule.

[72] It is apparent from Lord Walker's judgment, notably in his citing of academic criticism of the evolution of the rule in *Hastings-Bass*,[7] that a key consideration in the Supreme Court's decision was to put limits on a rule that had enabled trustees to unwind transactions to which they had consented but which turned out to have unforeseen tax disadvantages. However, that was only one aspect of the Supreme Court's criticisms of a Rule the Supreme Court considered had started from a misinterpretation of the original *Hastings-Bass* decision. In its decision, the Supreme Court clearly intended to offer guidance applicable to challenges to trustee decisions generally and not just to those dealing with taxation issues.

[73] Drawing on the decision of Lightman J in *Abacus Trust Co (Isle of Man) v Barr*,[8] Lord Walker approved or stated the following propositions about the circumstances in which the courts will intervene to set aside decisions of trustees said to have been made without regard to relevant considerations:

(a) As to whether a trustee's failure to consider relevant considerations must be fundamental:[9]

> … the rule does not require that the relevant consideration unconsidered by the trustee should make a fundamental difference between the facts as perceived by the trustee and the facts as they should have been perceived. All that is required in this regard is that the unconsidered relevant considerations would or might have affected the trustee's decision.

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6 At [2].
7 At [8].
8 *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2013] Ch 409.
9 *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2013] Ch 409 at [21]; quoted and approved in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [39].

(b) As to the relevance of the circumstances giving rise to the error by a trustee:[10]

> What has to be established is that the trustee in making his decision has … failed to consider what he was under a duty to consider. If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect.

In *Pitt v Holt*, Lord Walker said of the above statement by Lightman J:[11]

> That is in my view a correct statement of the law, and an important step towards correcting the tendency of some of the earlier first instance decisions. If in exercising a fiduciary power trustees have been given, and have acted on, information or advice from an apparently trustworthy source, and what the trustees purport to do is within the scope of their power, the only direct remedy available (either to the trustees themselves, or to a disadvantaged beneficiary) must be based on mistake (there may be an indirect remedy in the form of a claim against one or more advisers for damages for breach of professional duties of care).

(c) If the rule applies, a trustee's decision is voidable:[12]

> … Lightman J held that in cases where the rule applies … it makes the trustees' disposition voidable, not void. The Court of Appeal agreed with his analysis and so do I.

[74] I agree with the reasoning of the United Kingdom Supreme Court in *Pitt v Holt.* Given the absence of contrary authority from the New Zealand Supreme Court or Court of Appeal, I consider that its reasoning should be applied in New Zealand.

[75] The Supreme Court in *Pitt v Holt* did not consider whether unreasonableness constitutes a separate ground for intervention – in the sense that a court should be prepared to intervene if trustees reach a decision that the court concludes no reasonable trustee could rationally have reached in all the circumstances. As Mander J noted in *Masters v Stewart*,[13] there have been different approaches on this issue in New Zealand

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10 *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2013] Ch 409 at [23].
11 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [41].
12 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [43].
13 *Masters v Stewart* [2014] NZHC 2419 at [30]-[31].

High Court decisions.[14] Following *Pitt v Holt* and the limits established by the United Kingdom Supreme Court for judicial intervention in trustee decisions, it would seem New Zealand courts should be slow to recognise unreasonableness as a separate ground for intervention if a trustee's decision is otherwise consistent with the trustee's duties and within the trustee's powers.

Discussion

[76] It is convenient to consider the issues raised at the hearing under the issues for determination identified by Ms Bruton in her closing submissions. These encompass, albeit in a different order, the issues identified by Ms Robertson in her opening submissions. They are:

(a) Had the Trustees resolved to distribute the net proceeds of sale equally?

(b) Was the Trustees' decision-making process flawed? In particular, did the Trustees fail to consider relevant considerations?

(c) If the Trustee's decision-making process was flawed, should the Court exercise its discretion to set the decisions aside?

(d) Are there other orders the Court should make?

(e) Costs.

[77] To these, I add the question raised by Mr Woods about whether, in signalling their intention to make a distribution of the Trust assets, the Trustees should be taken as intending a distribution of capital before vesting day under Clause 6 of the Deed or should it be regarded as a final distribution under Clause 10 of the Deed. I address this question after the first question above.

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[14] See *Craddock v Crowhen* HC Christchurch M425/92, 10 February 1995 (Tipping J); *Wrightson Ltd v Fletcher Challenge Nominees Ltd* HC Auckland CP129/96, 21 August 1998 (Fisher J); *Blair v Vallely* HC Whanganui CP8/93, 23 April 1999 (Wild J) where the Courts considered that intervention on the grounds of unreasonableness was open to them, as compared with the more cautious approach in *Gailey v Gordon* [2003] 2 NZLR 192 (HC) (O'Regan J).

Had the Trustees resolved to distribute the net proceeds of sale equally?

[78] Brian's statement of claim and the Trustees' statement of defence and counter-claim, as well as various documents filed by counsel prior to the hearing, proceeded on the basis the Trustees had made two decisions: one to sell the assets and one to distribute the proceeds of sale equally to Brian, Keith and Derene. However, at the hearing Ms Robertson insisted the Trustees had not decided to sell and that the letter of 11 November 2016 sent by Davenports to counsel for Brian and the solicitors for Keith stating that the Trustees were considering dividing the proceeds of sale equally was "a tentative view based on the premise of equality".

[79] In their evidence, Mr Lucas and Mr Bassett confirmed they had not taken a final decision on distribution. That said, Mr Lucas and Mr Bassett also accepted that the indication of equal sharing given in the Davenport's letter was in response to inquiries from counsel for Brian and the solicitors for Derene about the intended distribution. Mr Bassett accepted that the beneficiaries would rely on this indication.

[80] Moreover, as Ms Bruton pointed out, the fact that the Trustees asked in their counterclaim for an order directing the proceeds of sale be distributed equally among the three beneficiaries means the correctness or otherwise of equal distribution is before the court in any event. I agree.

Were the Trustees making a distribution of capital before or on vesting day?

[81] Mr Woods argued that since it was accepted by the Trustees and the final beneficiaries that all Trust assets would be distributed or, as he put it, "vested" and the Trust wound up, this amounts to a final distribution. Accordingly, he submitted the Trustees have no discretion other than to exercise their powers under clause 10.1(a)(ii) of the Trust Deed which requires equal distribution to all Final Beneficiaries.

[82] That submission overlooks the following:

(a) Before settling on their decision to sell the assets and making their "in principle" decision to divide the assets equally, the Trustees were

actively contemplating other options for distributing the assets. They were not acting as if "Vesting Day" had arrived.

(b) The Trustees have not nominated a Vesting Day earlier than that provided for in the definition of that term in Clause 2.1 of the Trust Deed – which, absent any nomination of an earlier date by the Trustees, is eighty years from the date of the Deed.

(c) Even if Vesting Day were upon them, the Trustees have a discretion under Clause 10.1(a)(i) to make distributions to some Final Beneficiaries to the exclusion of others.

[83] Accordingly, I do not accept that what the Trustees had in mind was a Vesting Day distribution or that the proposed distribution should be considered as such.

Was the Trustee's decision-making process flawed? Did the Trustees fail to have regard to relevant considerations?

[84] In her closing submissions, Ms Bruton identified four considerations which she said the Trustees admitted they had failed to consider:

(a) Walter and Nola's overall trust and estate planning objectives, including those apparent from the correspondence between Mr Dallow and Walter's financial planning advisers about Walter's estate planning objectives and the intention to even the ledger between Brian and Derene on the one hand and Keith on the other;

(b) The parents' promises to their children about what they would receive of the family property and their reliance on those promises;

(c) Earlier distributions of family property and the broad present-day value of that property;

(d) The "total pot" comprising family property already received and the existing trust pot.

[85] While Ms Bruton identified the above considerations as four separate categories, they all relate to the key question of whether, in considering how to dispose of the Trust assets, the Trustees adequately considered the purposes for which the Trust was established and, in that context, whether the Trustees should have had regard to pre-Trust distributions:

(a) On the Settlors' wishes, the issues to which Ms Bruton drew attention in the schedule to her closing submissions were the intended differential distributions of land as between Brian and Keith and, in that connection the "evening of the ledger" bearing in mind the earlier transfer of land to Keith.

(b) On the parents' promises and siblings' reliance, the issues to which Ms Bruton drew attention are, again, the earlier transfer of land to Keith as well as their father's intention of dividing the land roughly equally between Brian and Keith.

(c) The earlier distributions of family property involve, again, the earlier transfer of land to Keith plus the smaller transfers to Brian and Derene as well as the sale of land by Keith after subdividing off sections of his own land.

(d) The total "pot" argument brings the above considerations together to demonstrate an alleged mismatch in value received by Brian and Derene as compared with what Keith received – the main differential being, again, the land earlier transferred to Keith.

[86] I do not accept, therefore, that these are four separate categories. In substance, they are different ways of addressing the same point.

[87] The first question I have to decide is whether it was a purpose of the Trust and the intention of the Settlors that the Trust should be used to "even the ledger" among the siblings, taking into account pre-Trust distributions? I consider the answer to that question is clearly "Yes". This is apparent from the pre-Trust correspondence and

from the Memoranda of Wishes. The evidence of Keith and Brian and the letters Nola wrote around the time she made the last Memorandum of Wishes reinforce that conclusion.

[88] Keith stated the rationale for the Trust succinctly in the affidavit he swore when commencing this proceeding:

> 15. The rationale of our parents in forming the Trust and preparing the Memoranda of Wishes was to equalise the areas of the original holdings between Brian & me and to ensure Derene also received an appropriate share of property or money. I had the 167 Gillespie Road property, Brian had the conservation lots and so would receive a greater share of trust assets.
>
> 16. Derene received the house at Ponga Road, financial assistance, the property at 168 Gillespie Road [the Home Block] and is the beneficiary of our mother's estate. …

[89] Brian endorsed these paragraphs in his evidence.

[90] In his oral evidence, Keith expanded on what he considered his father's intentions to be:

> … saying that, "Brian would receive a greater share of the trust assets" means that the area of land he was to receive was quite a bit greater and if I remember correctly father's original decision in dividing the farm was that it was really to make it equal in sizes between the two of us. So, since I already had 167 [Gillespie Road] and I was to have the pink and orange lots added to that that … would have made in total a similar land area as Brian with the green and the blue.

[91] Leaving aside the value of the assets, this evidence confirms what was in the pre-Trust correspondence: that one purpose of the Trust as envisaged by Walter and Nola was to "even the ledger" among the siblings so that in making distributions from the Trust they would have expected the Trustees to have had regard to pre-Trust distributions of family property. So, adopting the analogy in Mr Stringer's closing submissions, and subject to the issue of value, the Settlors would have expected the Trustees to have "moved the cursor" in favour of Brian and Derene – at least as far as land area was concerned.

[92] As far as value is concerned, under the Marsh & Irwin valuations obtained by Keith, the Blue and Green Blocks (comprising some 97 hectares in total) had a

combined value of $700,000, whereas the Orange and Pink Blocks (comprising 25.5 hectares) had a combined value of $400,000, when valued on the basis intended under the Memorandum of Wishes, namely that the Orange and Pink Blocks be held together with Keith's land at 167 Gillespie Road. Using Mr Stringer's analogy, this confirms that the Settlors intended, as between Brian and Keith, to "move the cursor" in Brian's favour both as to land area and as to value. That remains the case even if the $300,000 ascribed to a building site in the valuation of the Green Block is removed from consideration.

[93] In her letter of 26 June 2010 to Mr Dallow, Nola said she understood that "Brian's and Keith's share of the land was valued at roughly 1 million dollars each" and that the homestead was also valued at approximately 1 million also. In her post-script Nola recalled Walter's wish that each family member should have a "fair share". Mr Stringer said this letter suggested that equal shares of the existing Trust assets would be appropriate. I consider it more likely, however, that when Nola wrote of "Keith's land" she was referring to the land he had already received at 167 Gillespie Road. The letter Nola wrote to Keith two months later to explain her decision to give the Home Block to Derene tends to confirm that. Nola tries to mollify Keith by referring to "the lovely freehold farm" "you will still have". In other words, as she thought about fairness, Nola made no distinction between land already received and Trust land.

[94] The Trustees acknowledged they did not have regard to the pre-Trust correspondence that explained Walter and Nola's intentions in setting up the Trust and which referred explicitly to the gifting of 160 acres to Keith, the wish to "even the ledger" by making provision for the other two children, and to the intention to transfer 260 acres to Brian as well as the homestead to Keith. The Trustees cannot be faulted for not considering the correspondence because Davenports had not brought it to their attention. Nonetheless, it was very relevant information, as the Trustees acknowledged in cross examination.

[95] However, the Trustees, Keith and Derene said this did not matter because the Trustees had had regard to the Memoranda of Wishes which gave expression to Walter and Nola's intentions and they also were fully briefed on the parents' intentions by

each of the siblings. There is force in that submission given the meetings the Trustees had with each of the siblings and the extensive correspondence from the siblings' lawyers.

[96] However, it is apparent from the Trustees' own correspondence that they were far from clear that "evening the ledger" was a purpose of the Trust and an important component of the Settlors' wishes. In his letter of 20 October 2016 to Davenports and Mr Bennett asking their views on whether the Trustees could take pre-Trust distributions into account, Mr Lucas stated:

> I glean from the correspondence the suggestion that the trustees should consider compensating beneficiaries as a consequence of provision made to them in various ways before the trust was settled.

This tentativeness of that proposition indicates that whatever might have been conveyed in the meetings and correspondence, the Trustees had not grasped this aspect of the Trust's purpose and the Settlors' intentions.

[97] In her closing submissions Ms Robertson said a failure to take account of a relevant consideration must be sufficiently serious to amount to a breach of a trustee's duty. This is a point made by Mander J in *Masters v Stewart*,[15] by Lightman J in *Abacus Trust*,[16] and, as noted above, was approved by Lord Walker in *Pitt v Holt*.

[98] There can be no doubt that the Trustees were under a duty to consider the purposes for which the Trust was established and the intentions of the Settlors even if, as Ms Robertson properly reminded me, the Trustees have a wide discretion in exercising their powers under the Trust Deed. As I have already held, the purposes of the Trust and the intentions of the Settlors included "evening the ledger" among the siblings by having regard to earlier distributions. On its face, failing to have regard to such matters amounts to a breach of the Trustees' duty. However, following *Abacus Trust* and *Pitt v Holt*, that is not the end of the matter.

[99] The Trustees sought and received professional legal advice, not directly on the purposes of the Trust but on the related question of whether the Trustees could have

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15 *Masters v Stewart* [2014] NZHC 2419 at [35].
16 *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2013] Ch 409 at [23].

regard to previous distributions of family property. Davenports' advice was somewhat cursory – a brief email stating that "the trustees cannot take into account things which happened outside the trust." Moreover, as the Trustees later acknowledged, that advice was wrong.

[100] While it might have been expected that legal advisers would have given a more thorough and reasoned response to an issue of considerable importance to the Trustees and to the beneficiaries, in the words of Lord Walker in *Pitt v Holt*,[17] Davenports were "an apparently trustworthy source" on whom the Trustees could expect to rely. The Trustees accepted and acted on that advice. Accordingly, following *Abacus Trusts* and *Pitt v Holt*, decisions taken by the Trustees based on that advice and within the scope of the Trustees' powers cannot be impugned.

[101] However, Davenports' advice was sought on 19 October 2016 and was provided on 25 October 2016 – some weeks after 3 October 2016, the date the Trustees conveyed their initial decision to sell the assets to the beneficiaries' lawyers. It follows that the initial decision to sell the assets could not have been based on Davenports' advice and so is not protected from challenge under the decisions in *Abacus Trusts* and *Pitt v Holt*. The only decision to which Davenports' advice could have been relevant was the later decision to distribute the net proceeds of sale equally to all beneficiaries. The Trustees themselves have insisted that that decision was only a decision in principle so, necessarily, can be revisited.

[102] My conclusion, therefore, is that before deciding to sell the assets the Trustees should have had regard to the fact that one of the purposes of the Trust was to "even the ledger" as between the siblings and in that regard they should have taken pre-Trust distributions into account and in failing to do they breached their duty as Trustees. The fact they sought and obtained apparently competent professional legal advice after that decision does obviate the breach of duty. I am satisfied that consideration of that purpose and the earlier distributions "would or might have affected" the Trustees' decision - in the words of Lightman J in *Abacus Trusts*, in a passage quoted with approval by Lord Walker in *Pitt v Holt*.

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[17] At [41].

[103] For completeness, I record that Ms Bruton did not pursue in argument the contentions made in Brian's statement of claim that the decisions were perverse, capricious or unreasonable. The evidence would not have supported such conclusions in any event, regardless of whether there is a basis for intervention on unreasonableness as a distinct ground.

Should the Court exercise its discretion to set the decisions aside?

[104] I consider that the circumstances warrant setting aside the initial decision to sell the Trust properties and to direct the Trustees to reconsider both that decision and the decision in principle to distribute the net proceeds equally among the beneficiaries. The decision in principle was predicated on the first decision to sell, so cannot stand - notwithstanding Davenports' advice.

[105] It is apparent from the correspondence that the Trustees looked at their initial task as essentially limited to three options: implement the Memorandum of Wishes, distribute the assets as proposed by Keith, or sell – although the Trustees said in evidence that there were sub-options within those options. The only one of the three main options reflective of the Trust's purpose was the first: implementation of the Memorandum of Wishes. But this was not favoured because of costs and, I infer, because it was opposed by Keith. Indeed, the Trustees' letter of 3 October 2016 says it was the inability to reconcile divergent opinions (presumably on the first and second options) that the Trustees went for the sale option - without acknowledging that Brian was "implacably opposed" to this option.

[106] I recognise the validity of the observation made by the Trustees in their letter of 12 August 2016 to the beneficiaries' lawyers that it was not their role to deal with or attempt to resolve the collapse of the family relationship. Equally, it was not their role to find a solution that all beneficiaries could accept. Rather, their role was to reach a distribution on the Trust assets having taken account of the Trust's purposes, which include "evening the ledger" and, in that connection, taking account of earlier distributions – even if that produces a result with which one or more beneficiaries do not agree.

[107] It is not obvious to me that if the Trustees approach the task in that light they will reach the same decision as the one they reached earlier. Having said that, I acknowledge the point made forcefully by Ms Robertson that the Trustees have a wide discretion under the Trust Deed and it cannot be presumed that they would have made any different decision had they taken pre-Trust distributions into account. That, of course, is for the Trustees.

Counterclaim by Trustees for orders pursuant to s 64 of the Trustees Act

[108] The Trustees counterclaimed seeking orders authorising them to sell the Trust properties and distribute the net proceeds equally among the beneficiaries if the Court found that the Trustees' decisions to sell the properties and distribute the proceeds equally were outside the Trustees' powers.

[109] I decline to make the orders sought in the counterclaim. While I recognise that sale of the assets and equal distribution of the net proceeds may be expedient in the management and administration of the Trust, I am not persuaded they are in the best interests of all beneficiaries. Moreover, I am not satisfied those are the only appropriate criteria, having regard to my decision setting aside the Trustees' decision to sell the assets.

Where to from here for the Trustees? Should the Court make any other orders?

[110] Ms Robertson was clear that the Trustees have not surrendered their discretion to the Court and do not ask the Court to make orders for the distribution of the Trust's assets. Indeed, the Trustees have made no application for directions under s 66 of the Trustee Act. In these circumstances, and having regard to the decision of the Court of Appeal in *Chambers v S R Hamilton Corporate Trustee Ltd*,[18] I am satisfied that it would not be appropriate for me to make orders for the distribution of the assets, notwithstanding Ms Bruton's invitation to do so and the powers of the Court in its inherent jurisdiction and under the Trustees Act.

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

[111] Even so, I am acutely conscious that a great deal of time, money and emotion has already been expended in this unhappy dispute over the distribution of the Trust assets, and that there a need for finality as soon as possible. With those considerations in mind, I offer the following observations for the assistance of the Trustees, while noting that these are not directions and are not binding on the Trustees:

Nature of the task

[112] I do not see the Trustees' task as requiring them to achieve precise equality among the three siblings, having regard to the earlier distributions. I consider the relevant purpose of the Trust and the Settlors' intentions as being:

(a) to achieve broad equality between Brian and Keith in the transfer of the original farm to the two sons;

(b) to ensure appropriate and fair provision is made for Derene – which both brothers now accept means Derene should receive about one third of the value of the Trust assets.

I do not regard it as necessary, therefore, to undertake an exact accounting of the value of all previous distributions.

Previous distributions

[113] Counsel for each beneficiary put considerable effort into downplaying the value of distributions received by their clients and building up the value of distributions received by the other beneficiaries. Concerning the previous distributions:

(a) I see no justification in trying to ascribe value to:

(i) The guarantee provided to Brian to enable him to purchase his own farm. While a guarantee has a value, it was never called on and did not entail or result in any distribution of family property.

(ii) The sections Keith subdivided out of his own land after he had received the farm from his father. I agree with Mr Stringer that to ascribe a separate value to those sections as well as to the farm itself amounts to double counting. Moreover, the value derived from the subdivisions was due to Keith's own efforts.

(b) I question whether it is appropriate to try to ascribe present-day land values to land that Brian and Derene received as subdivisions from the Ponga Road Title and sold over 20 years ago. They were neither responsible for nor beneficiaries of the subsequent increase in the values of those sections. If those distributions are to be taken into account, the present value of the money received upon disposing of those sections would seem a more appropriate benchmark of value.

Available options for the Trustees

[114] The Trustees would be justified in concluding that any solution based on a subdivision of parts of the land is not likely to be an achievable solution. The costs and planning issues associated with implementation of Plan 2922 and Brian's modified proposal have been shown to be significant and likely to entail further delay. To the extent such proposals require cooperation between Brian and Keith, the history of this dispute shows that is almost certain not to be offered. There are, however, other options, consistent with the Trust's purposes that can be considered, including a transfer of some if not all of the land directly to the beneficiaries.

[115] The Trustees' considered and rejected one such proposal – that put forward by Keith under which Keith would have received the farm title with the greater value even if Brian would have received the greater land area. It was opposed by Derene and was not favoured by Brian.

[116] Ms Bruton put forward another proposal in her closing submissions. Since that was the subject of comment from counsel for all parties, albeit comment prepared within a short timeframe, I offer the following observations on that proposed distribution:

(a) Distribution of the Ponga Road Title to Brian has an obvious logic. It ensures Brian gets some land and that the land is kept in the family, which is consistent with the Trust's objectives. It also gives Brian the more valuable of the two farm titles, notwithstanding its smaller land area as compared with the Northern Title. Apart from the Pink Block, it is land Brian has farmed for the last 40 odd years and which was intended to go to Brian under the last three Memoranda of Wishes. However, distribution of the whole Ponga Road title to Brian would be at the expense of Keith who had grazed the Pink Block and had expected to receive that land.

(b) The distribution of the Home Block to Derene also has an obvious logic. It keeps that land in the family and it was land that was intended to go to Derene under the last Memorandum of Wishes and she has been living there. Both Keith and Brian have previously accepted that distribution of the Home Block to Derene is appropriate.

(c) Selling the Northern Title may be a necessary minimum to achieve some form of resolution. Apart from the Orange Block it was land intended to go to Brian under the last three Memoranda of Wishes. However, because of the animosity between the brothers, Brian's use of the land has been constrained by lack of access to the woolshed, yards, and farm equipment. Sale of the whole Title would be at the expense of both Brian and Keith, who farmed the Blue Block and Orange Block respectively.

(d) The proposal to distribute $400,000 of the sale price to Keith would compensate Keith for the loss of the Orange and Pink Blocks at full value of that land in the Marsh & Irwin valuation, when the land is valued on the basis it was to be transferred to Keith under the last two Memoranda of Wishes and Survey Plan 2922.

Mr Stinger criticised the use of that valuation because it did not recognise the values Marsh & Irwin ascribed to that land if subdivided

into their own titles. Ms Robertson joined in that criticism. I do not consider those criticisms appropriate:

(i) The Orange and Pink Blocks were not intended to be transferred to Keith as separately titled land. As shown by the proposed covenant on Plan 2922, the intention was that the Orange and Pink Blocks should be held with the land Keith had already received. He had also used those Blocks as extensions of his own land for many years.

(ii) To assert this land should be valued on the basis it can be subdivided into separate titles without taking into account the costs of achieving that subdivision is surprising to say the least given that Keith's opposition to the implementation of both Plan 2922 and Brian's modified proposal was because of the costs of those proposals.

The evidence in relation to Brian's modified proposal was that it would cost approximately $400,000 to extend Gillespie Road to provide road access to the Orange Block. That was a condition imposed on a boundary adjustment that did not result in the creation of a new building site. It has to be assumed that a similar condition would be imposed as a minimum if a separate title, with building site, were sought for the Orange Block.

If a similar condition were imposed, as would seem likely, as a condition for a separate title to the Pink Block, the costs would likely be considerably greater given the additional distance involved in getting access to that land. The Marsh & Irwin valuation attached to Mr Stinger's closing submissions warned of the costs of providing access and power to the Pink Block.

When those costs are factored in, offering a value of $400,000 for the two Blocks might even be considered generous.

(e) It is would be for the Trustees to decide how to distribute any funds remaining after payment of Trust costs and costs incurred in maintaining Trust property (for example, rates payments). Ms Bruton's suggestion of a three-fifths share to Brian and one-fifth share each to Derene and Keith seems aggressive if Brian had received the most valuable land title. While Brian might still consider himself a net loser given Keith's earlier receipt of 160 acres / 65 hectares, there is no way of righting that imbalance, not least because of the behaviour of both brothers. Keith has had to accept the loss of the Home Block which had long been promised to him. The fact that Derene has had to incur significant cost because of the brothers' inability to agree is also a factor for consideration.

[117] Despite the evidence and submissions on the behaviour of Brian and Keith, I have deliberately not made adverse findings about that behaviour or based my conclusions or observations on assumptions of fault on the part of either. The task for the Trustees and for this Court is to ensure that the Trustees take into account all relevant matters, including the Trust's purposes. It is not to make decisions based on presumed fault on the part of any of the beneficiaries.

Result

[118] I order that:

(a) The Trustees' decision to sell the Trust assets and their decision in principle to distribute the net proceeds of sale equally among the three Final beneficiaries be set aside;

(b) The Trustees' reconsider their decision on the disposal of the Trust assets having regard to the purposes of the Trust and the intentions of the Settlors as explained in this decision.

[119] I grant leave to seek further directions if required.

Costs

[120] Costs are reserved. My preliminary view is that they shall follow the event on a 2B basis. If the parties cannot agree to costs, they may file memoranda no more than five pages in length. I note the submission from Mr Woods that Derene's costs should be met from the proceeds of the sale of trust assets, assuming such a sale takes place. I invite other counsel to comment on this submission if they file memoranda.

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van Bohemen J