

**IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY**

**CIV-2009-441-000515
CIV-2007-441-000823**

BETWEEN	ASHLEY KANARA APATU
AND	WINIPERA EVA MAUGER Plaintiffs
AND	KENNETH TAMA TE KAPUA APATU First Defendant
AND	NATHAN WIRIHANA APATU
AND	KATHERINE LOUISE BATES Second Defendants

Hearing: 19-30 April 2010

Counsel: J E McLennan for Plaintiffs
M A Courtney for First Defendant
M E MacFarlane for Second Defendants

Judgment: 10 May 2011

JUDGMENT OF JOSEPH WILLIAMS J

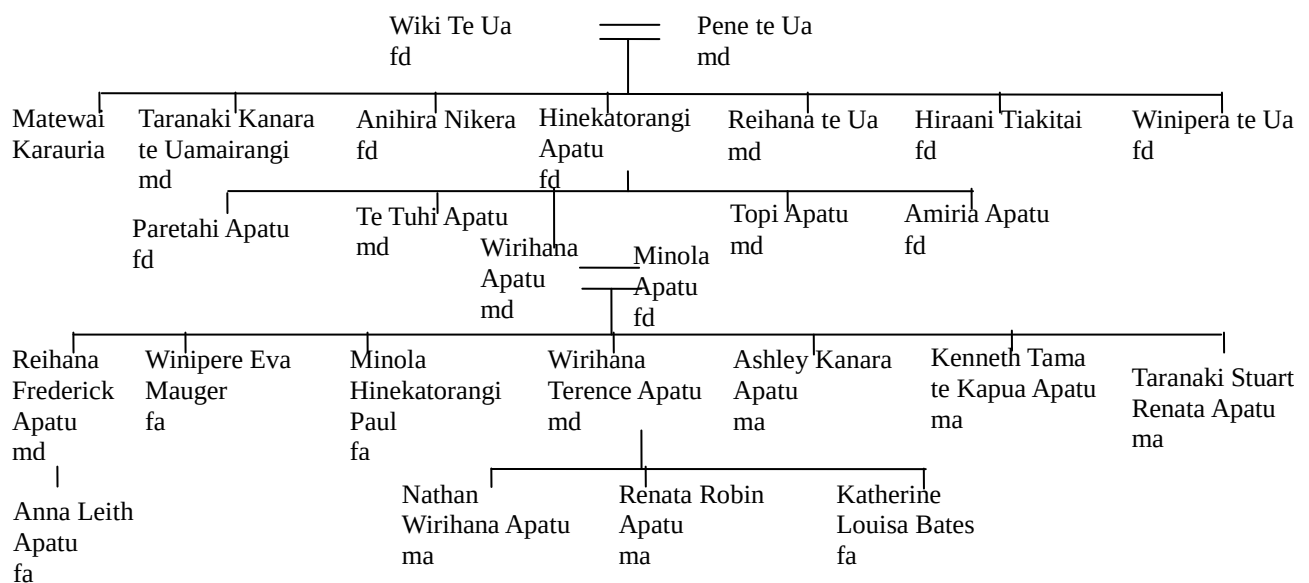
In accordance with r 11.5, I direct the Registrar to endorse this judgment
with the delivery time of 12:00 noon on the 10th May 2011.

Background

[1] The Apatu whānau belong to the Ngāti Hinemanu hapū of Ngāti Kahungunu. Their marae is situated at Omahu in the centre of the rich Heretaunga Plains and on the northern bank of the Ngaruroro River.

[2] This litigation concerns a series of disputes that have arisen between the children of Wirihana and Minola Apatu. Wirihana died in 1970 and Minola in 2003. The disputes relate generally to the administration of the estates of Wirihana; his mother, Hinekatorangi Apatu; and Hinekatorangi's brother, Taranaki Kanara Te Uamairangi. Hinekatorangi and Taranaki (as I will refer to them) were thus the grandmother and great-uncle respectively of the parties in this case. Both were noted leaders of Ngāti Hinemanu and the wider Ngāti Kahungunu in their time. In 1922 for example, Taranaki stood against the great Apirana Ngata in the Eastern Māori seat as an independent Ratana candidate. He appears to have polled well although not sufficiently well to unseat Ngata. Both Taranaki and Hinekatorangi were noted experts in tikanga Māori and were active both as advocates and witnesses for their hapū in the Native Land Court (as it then was). They were both also independently wealthy, by the standards of the day, and left substantial estates.

[3] The whānau were consequently large owners of Māori land when the mantle of leadership fell to Wirihana's generation. The relevant whakapapa is as follows:



[4] As can be seen, Wirihana and Minola had seven children altogether. From oldest to youngest, they are Reihana Frederick Apatu (who died in 2008), Winipere Eva Mauger, Minola Hinekatorangi Paul, Wirihana Terrence Apatu (who died in 2005), Ashley Kanara Apatu, Kenneth Tama te Kapua Apatu, and Taranaki Stuart Renata Apatu. For ease of reference I will refer to the children of Wirihana and Minola using their first names commonly employed within the whānau. The only exception will be Minola the younger whom I will refer to as Minola Paul to distinguish her from her mother who I will refer to as Minola Apatu.

[5] Wirihana executed his last will on 2 March 1970. He appointed Ken and Terry as his trustees and executors. Minola Apatu was given a life interest in Wirihana's estate. Specific bequests were made to Minola Apatu and any debts owed by Rei, Terry or Ken to their father were forgiven. The residue was divided equally between Ashley, Stuart, Wini and Minola Paul, as tenants in common. Wirihana explained in the will that Rei, Terry and Ken had received sufficient from him while he was still alive and so would not receive a share in the residue.

[6] Wirihana died two months later on 11 May 1970.

[7] Two and a half years after Wirihana's death, the family met and agreed to rationalise certain interests in the estate. The meeting took place at the family

homestead at Lawn Road in Mangateretere on 3 August 1972. Deeds of family arrangement were entered into and notices of assignment executed by which it was agreed that Wini would buy out the interests of her mother, Ashley, Minola Paul and Stuart in a section at Te Awanga and three Rakautatahi blocks.¹ A second deed of family arrangement was also executed by which Minola Apatu and the four siblings just mentioned agreed to transfer a block called Ohiti Waitio 3A to Terry.

[8] These proceedings are brought by Ashley and Wini against their older brothers Ken and Terry as executors of Wirihana's estate. Terry passed away in 2005 so the plaintiffs have seen fit to join Terry's children Nathan, Renata, and Kate as the executors of their father's estate. The first general claim relates to the overall administration of Wirihana's estate by Terry (when he was alive) and Ken. Ashley and Wini say the trustees have failed to inform them of, or to account for, the way in which they have administered the estate over the years. They seek orders under s 44 of the Administration Act 1969 requiring the trustees to account for their administration.

[9] Further claims relate to specific estate, or claimed estate, assets and allege breach of trust or fiduciary duty as follows:

- (a) Ashley and Wini say the trustees have failed to obtain succession in the Māori Land Court for their rightful shares in a block of Māori land called Owhaoko C2.
- (b) They say that Terry fraudulently obtained title to the Ohiti Waitio 3A block, when it should have formed part of Wirihana's residuary estate and been available to them as beneficiaries.
- (c) They say that two original Lindauer paintings formerly hanging in the family home at Lawn Road have been wrongly acquired by Terry and Rei. Ashley says that they should be in a museum.
- (d) They say that certain taonga are or were wrongly held by the trustees of Wirihana's estate. These taonga comprise:

¹ That is Rakautatahi 1B2A1A, 1B2A1B, and 1E5.

- a greenstone pendant inserted in a gold bracelet;
 - photographs of Taranaki Te Uamairangi and other members of his immediate family;
 - a greenstone mere; and
 - huia feathers.
- (e) They say that the family homestead and surrounding 10 acre block at Lawn Road was treated by Ken and Terry as if it belonged to Wirihana's estate when in fact it belonged to Wirihana's mother, Hinekatorangi, and should have been administered accordingly. They say that after Wirihana died, the Trustees paid their mother income from cropping on the block when she had no right to it.
- (f) Ashley says that in around 1973, he was entitled to a cash payment of about \$14,000 from Taranaki Te Uamairangi's estate. Ashley says he never received that payment.
- (g) The plaintiffs claim that Terry placed fertiliser on the Rakautatahi IE5 block and recorded the cost of that fertiliser as a debt against Wini in the estate when she never agreed to that.
- (h) Wini claims that Terry collected rent for Tapairu 7B, in which she was an owner, but did not pay her share to her.

[10] It is simplest to address the various specific claims for breach of trust or fiduciary obligation first before turning to the wider challenge to trustee administration and accountability.

Owhaoko C2

[11] Owhaoko C2 is a block of Māori land comprising almost 3,000 hectares located in the central North Island east of the central plateau. Before going further, it is necessary to explain the rather complicated story of the way in which various of the siblings succeeded to their respective Owhaoko C2 shareholdings.

Successions and entitlements

[12] Wiki Te Ua, the mother of Hinekatorangi and Taranaki, held an undivided quarter share in one of the 14 original shares in the block.² Hinekatorangi succeeded to five thirty seconds, or 0.15625 of her mother's share, and Taranaki three thirty seconds, or 0.09375 of a share, either through their mother or through siblings who pre-deceased them.³ Both Hinekatorangi⁴ and Taranaki⁵ bequeathed shares in that land to Wirihana and his children.

[13] When Hinekatorangi died she gave an equal life interest in her 0.15625 share with the remainder to their respective children. When Wirihana died, all of the seven children received a one-seventh share, or 0.0056 shares accordingly.

[14] Taranaki's 0.09375 shares were given to Hinekatorangi for her life, and the remainder was to be divided between Hinekatorangi's children (or 0.01875 shares).⁶ On 12 October 1942 four of these children, including Wirihana, entered into a deed of family arrangement. That deed provided for each to receive the benefit of the shares for life and for the remainder to be appointed to such of their children as each of the four remaining children should respectively appoint in their wills. In Wirihana's case, he appointed Ashley, Stuart, Wini and Minola Paul in clause 6 of his will. Those children were thus to receive an additional 0.0046875 shares each.

[15] On 14 July 1988,⁷ the Māori Land Court vested 0.0056 shares in each of Rei, Terry and Ken (ie their share due from Hinekatorangi) and 0.0103 shares in each of Wini, Minola Paul, Ashley and Stuart (ie their shares due from both Hinekatorangi and Taranaki).

[16] Meanwhile Wirihana received further Owahaoko C2 shares from elsewhere. On 27 February 1975, Wirihana also succeeded posthumously to a 0.1111 share in

² 3 Aotea MB 104. She received that share from one Taimona Te Arai who was awarded one share in the block.

³ 117 Napier MB 165.

⁴ 117 Napier MB 165.

⁵ 112 Napier MB 348.

⁶ Interestingly the deed refers to Hinekatorangi having five children. The fifth child Amelia Nepe Apatu seems to have pre-deceased Hinekatorangi but despite this the four living siblings are only given a 1/5th share each. It is not necessary for me to unravel this particular mystery but I note the apparent inconsistency here.

⁷ 3 Aotea MB 104.

the block from one Takurua Hakiwai Takurua.⁸ On 21 November 1975 those shares were vested in Terry and Ken as administrators of the estate.⁹ On 10 October 2003, one-quarter of those 0.1111 shares was vested in each of Wini, Minola Paul, Ashley and Stuart in accordance with the residuary clause of Wirihana's will.¹⁰

Analysis

[17] Thus the only interest that Rei and Terry's respective estates, and Ken hold in Owahaoko C2 is the 0.0056 share which they each received from Hinekatorangi in the 1988 Māori Land Court succession order. The plaintiffs say that Wirihana, by his will, did not want this to happen. They say that clause 9 of the will requires Rei, Terry and Ken to transfer any share that they hold in the land to the residuary beneficiaries. Clause 9 of the will provides:

9. I RECORD the arrangement that has been agreed to by all my children that my children will permit my said wife to have the free personal use occupation and enjoyment of the residence and appurtenances on the property known as Mangateretere East B1 Block [the Lawn Road property] of which I am the life tenant and they are the remaindermen under the Will of my late mother HINEKATORANGI NEPE APATU. Further that my said sons Reihana Frederick Apatu, Wirihana Terence Apatu and Kenneth Tama Te Kapua Apatu are to transfer to the remainder of my children all their interests as remaindermen under the Will of my late mother as I have already made ample provision for them during my lifetime.

[18] I accept that clause 9 records what Wirihana saw as an agreement between him and those of his children who were not to be the residuary beneficiaries. The effect of the arrangement was that Rei, Terry and Ken would give up any interests they held as remaindermen in Hinekatorangi's estate. Clause 9 refers to all such interests and not just those contained in the Lawn Road property. Accordingly, Owahaoko C2 shares were clearly intended to be included in this description. Indeed, Ken, in cross-examination said he never expected to receive any shares in Owahaoko C2.¹¹

⁸ 54 Tokaanu MB 43.

⁹ See Māori Land Court minute book reference 1 Tokaanu Registrar's MB 130.

¹⁰ See Māori Land Court minute book reference 12 Tokaanu Registrar's MB 130.

¹¹ T548/11.

[19] Having said that, I do not see how I am in any position to enforce the arrangement. There is no pleading that this arrangement was an independent contract for good consideration between Wirihana and the three relevant sons. There is no evidence of the arrangement at all beyond the simple words of clause 9 and they alone are not enough. There is no evidence that Rei, Terry and Ken had been given any consideration in exchange for such a promise, and in the absence of such evidence it seems to me that the arrangement can only be binding on the conscience of the three brothers. The reference in the will to the three being forgiven their debts is not expressed as connected in any way to the arrangement referred to in clause 9 so cannot be treated as implied consideration for it. Nor, as far as I can see, can the equitable doctrine of election apply because that only applies where the beneficiaries are given a choice to accept a benefit on terms.¹²

[20] After all this time, the best that can be said is that the children of Rei and Terry, and Ken himself may care to transfer their Owhaoko C2 shares to Wini, Ashley, Minola Paul, and Stuart but that must be entirely for them as I have no power to order it. As matters stand therefore the residuary beneficiaries have all of the Owhaoko C2 shares to which they have a legal entitlement and this aspect of the claims must be dismissed.

Ohiti Waitio 3A block

[21] The Ohiti Waitio 3A block is located a few kilometres north west of Hastings. It is a 14 hectare block comprising mostly a section of the larger Runanga Lake bed. The lake was a duck shooting spot for the Apatu whānau. Wirihana shot there as a child with his father and later took his own children there for the same purpose. The block was held by several Māori owners in 5,574 undivided shares.

Share purchase

[22] In 1967 Wirihana and/or Terry (just who is a matter of debate) set about buying the other owners out. At that stage Wirihana owned a fifth of those shares or

¹² See *Halsbury's Laws of England* (5th ed, reissue, 2008) 16(2) Equity at [724]; *Laws of New Zealand* Equity at [167]-[168].

1,274.057 shares in his own right. A letter of 13 December 1967 from Peter Bloomer (who was Wirihana's solicitor at the time) to Terry demonstrates their joint intent. That letter records:

We are also endeavouring to buy one other big share on your behalf and if this eventuates you and your father between you should be able to get the whole ownership in the block.

[23] Terry managed to acquire a further 289.645 shares in three separate transactions before writing to the Māori Trustee in Palmerston North on 23 February 1968:

Could you inform me if it is possible for my father Wirihana Tipene Apatu and myself to acquire ownership of [Ohiti-Waito 3A].

[24] On 24 June 1968 Terry wrote to Christie, Craigmingle, Tizard & Dickson (CCTD) solicitors, based in Whanganui requesting that they act on his behalf to acquire ownership of the block. On 2 July 1968 CCTD responded seeking (among other things) clarification as to whether the purchaser was Terry or Wirihana. On 9 July 1968, Terry replied to CCTD with the following:

In reply to your letter dated 2nd July, it is the wish of my father and myself that this block be purchased in my name.

[25] Meanwhile on 3 July 1968 CCTD wrote to the Māori Trustee in Palmerston North, enquiring whether he would be prepared to acquire ownership of Ohiti Waitio 3A and on-sell the land to Terry.

[26] It appears that the remaining shares in the block were so fragmented that they were deemed by Part 12 of the Maori Affairs Act 1953 to be "uneconomic".¹³ This meant they could be acquired compulsorily by the Māori Trustee at a valuation set by the Māori Land Court. Since the Māori Trustee had the power of compulsory acquisition, this was by far the simplest mechanism for a purchaser to acquire all of the smaller shares in a block of this type. Before the Māori Trustee would move however, the title needed to be consolidated to be sure that the ownership list was as

¹³ This is explained in a subsequent letter from the Māori Trustee to Terry dated 3 September 1969.

up to date as possible, and that the shareholding balanced. The court proceeded with this preliminary step.

[27] On 5 February 1969, the Registrar of the Māori Land Court at Palmerston North wrote to Terry advising him of the cost of acquiring the remaining shares and asking whether he wished to proceed. Terry replied (the date of the letter is illegible) noting that he wished to proceed and enclosed the requested fee. The fee of \$8.00 was received on 11 February 1969 and on 20 February 1970 the Māori Trustee receipted \$297.01 from Terry on account for Ohiti Waitio 3A.

[28] On 5 March 1970 the Māori Trustee certified that he had:

sold all ... of his estate in fee simple in [Ohiti Waitio 3A] being an undivided interest amounting to 4299.943 shares out of a total of 5574.000 shares to Wirihana Tipene Apatu of P.O. Box 25 Waipukurau for the sum of ... \$297.01.

[29] Thus, for reasons which I explore below the court vested the shares in Wirihana, not Terry. On 11 May 1970, as I have said, Wirihana died.

Deed of arrangement

[30] On 4 August 1970, Terry wrote to Marcus Poole, Wirihana's solicitor. That letter recorded:

It was my Father's intention to Gift me the entire [Ohiti Waitio 3A] Block. This arose from my interest in acquiring the other shares and that I had paid all expenses and costs. The capital value as at 1st January, 1970, was \$350.00. **I paid the Māori Trustee \$297.01 for the shares not owned by my father.**

When you consider the time is appropriate I would like the Block ownership rectified. I have spoken to some Members of the family who are aware of the position and they are agreeable to me having ownership. (my emphasis)

[31] On 22 October 1971 the shares in Ohiti Waitio 3A, along with shares in three other blocks, were vested in Terry and Ken as administrators of Wirihana's estate.

[32] As I have said, on 3 August 1972 the family meeting was held at Lawn Road and the Apatu siblings agreed to rationalise various of their respective entitlements in Wirihana's estate. The fate of Ohiti Waitio 3A was one of the issues for discussion and agreement. A deed was circulated so that Wini, Minola Paul, Ashley and Stuart (the residuary beneficiaries), Minola Apatu (as the life tenant), and Ken and Terry (as trustees) could indicate their consent to Terry taking sole title to the block. It also provided that the non-trustee parties to the deed agreed to indemnify the trustees in relation to the transfer.

[33] Everyone except Ashley signed each page of the three page deed – Minola Paul's proxy was held by Terry and he signed on her behalf. Ashley signed the first page but did not sign the second execution page. The trustees signed the third page and Marcus Poole witnessed all signatures as estate solicitor.

Arguments

[34] Ashley and Wini now say Terry obtained title to Ohiti Waitio 3A unlawfully. They make three arguments:

- Ashley did not properly execute the deed and never agreed to it;
- Terry fraudulently induced the residuary beneficiaries to sign the deed by:
 - (a) telling them that the Māori Trustee had made a mistake in transferring the shares he purchased to Wirihana rather than to Terry; and
 - (b) misrepresenting the identity of the block.
- Wirihana never agreed that the Ohiti Waitio shares were to go to Terry.

Incomplete deed

[35] On the first ground, Ashley says the reason he did not properly execute the deed is that Terry snatched the document out of his hands. Ashley said that Terry did this because he (Ashley) asked Terry to produce receipts as proof that it was Terry (and not Wirihana) who had actually paid for the shares acquired after 1967.

[36] Wini said she remembered Terry and Ashley tussling over the deed. The scene stuck in her mind, she said, because they were both left-handed and it seemed comical to watch two left-handers trying to grapple with the deed at the same time. She put this down to them “just playing silly fools”.¹⁴ She remembered one of the two brothers saying “oh no you don’t”, presumably to the other but she could not recollect who said it.¹⁵ She described the overall family scene at the lounge in Lawn Road as involving a lot of “movement and motion” with “a lot of activity in the room”. Family were, she said, “scattered around and, you know, laughing and joking, saying hi – de – ho and, cos we hadn’t been together for some time.”¹⁶

[37] For a number of reasons, I do not accept that the lack of Ashley’s signature on page 2 of the deed is either fatal to the deed or evidence that Ashley did not agree to it at the time.

[38] First, as Mr MacFarlane points out, there was no requirement in 1972 that a party sign a deed at the end of its substantive clauses even if that was and remains the custom. Nor is the attestation clause required to be next to that of the party to be bound, though again that was and remains the custom. Rather, s 4(1) of the Property Law Act 1952 (the law then in force) provided:

Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness, and, if the deed is executed in New Zealand, the witness shall add to his signature his place of abode and calling or description, but no particular form of words shall be requisite for the attestation.

¹⁴ T475/1.

¹⁵ T475/19.

¹⁶ T474/1-3.

[39] The fact is Ashley did sign the deed and it was attested by Marcus Poole.

[40] Second, quite apart from any question of laches, Ashley took no steps at the time to challenge the deed's efficacy. Nor did he question the subsequent minutes of the meeting which record the family's agreement to transfer the block to Terry. Terry's daughter Kate Bates mentioned in her evidence that at some point in the past Ashley had registered a caveat against the title but he had allowed this to lapse and had taken no steps to enforce his claim until these proceedings 30 years later. By his inaction over the years, Ashley has certainly not corroborated his claim.

[41] Third, the description given by Wini is of a family meeting with good humour and a sense of busy action in which Marcus Poole and Terry are walking around a noisy and happy room handing out and retrieving papers for signature. Ashley signed two deeds – one relating to Ohiti Waitio 3A and one relating to the Rakautatahi and Te Awanga blocks. He also signed a notice of assignment and (it seems) a memorandum of agreement. There was a lot of paper passing among those in the room who were, at the same time, enjoying each other's company having not seen one another for a relatively extended period. As Wini said, the meeting was not a long one, indicating that discussions were not particularly controversial or conflictual.¹⁷

[42] The far more likely explanation for the missing signature on page 2 of the Ohiti Waitio 3A deed is that it was simply overlooked in the hub-bub of the meeting. I have no doubt that Ashley joked to Terry about the lack of a receipt showing payment for the block and that the brothers played the fool over it as Wini said. I also suspect, without making any finding, that Terry said to Ashley "oh no you don't", to indicate that he was not going to let Ashley back out of the family agreement. But there is no evidence at all that the tenor of that discussion at the time was one of fundamental disagreement between these brothers. Rather, as Wini describes it, this was playful sibling rivalry – brothers joking around.

¹⁷ T475/23.

[43] I do not accept that there is evidence on the balance of probabilities that Ashley refused to sign the deed and did not agree to the transfer. On the contrary, the evidence is that he did agree and showed that by signing it. Ashley's subsequent inaction confirms this.

Fraud by Terry

[44] The second ground advanced by the plaintiffs alleged that Terry fraudulently misrepresented to the beneficiaries the true ownership position in relation to Ohiti Waitio 3A. Ashley says Terry lied when he told them that Wirihana had always intended to give his own personal shares to Terry. Ashley also says Terry lied when he told them that he (Terry) had bought and paid for the uneconomic shares purchased by the Māori Trustee as middleman.

[45] Wini mounts a separate argument. She says that Terry somehow wrongly described the land for transfer or fudged the land's entity. She says if she had known it was the lake block, she would not have signed the deed.

[46] I will deal with Ashley's allegations first. Establishing the truth about who paid for the uneconomic shares is made more difficult because Terry has passed away, and of course there is ambiguity necessarily created by the fact that Wirihana and Terry have the same initials. But there is still ample evidence to demonstrate that the shares were paid for by Terry and intended to be bought in his name.

[47] There is the letter of 13 December 1967 in which Wirihana's own solicitor confirms that the result of the planned purchases would be that title would be shared by Wirihana and Terry; there is the letter of 23 February 1968 from Terry to the Māori Trustee indicating that Terry and Wirihana wished to "acquire ownership of the block"; the letter of 3 July 1968 from Terry's solicitors indicating that it was "Mr Apatu Junior" who would make the purchase; and there is Terry's letter of 9 July 1968 indicating that the purchase would be in Terry's own name.

[48] I see no attempt by Terry or his solicitors to fudge the identity of the purchaser.

[49] Progress in completing the purchase was inordinately slow and on 5 December 1968 Terry took back direct control of the file from CCTD. He wrote to the Māori Trust Office in February and March 1969 asking for advice of the progress and then to the Māori Land Court in July. He paid the purchase price of \$297.01 on 20 February 1970. And he made follow-up phone calls to the Māori Trust Office on 1 and 8 May 1970 just a few days before Wirihana's death.

[50] It seems to me most likely that the Māori Land Court vested title in Wirihana rather than Terry because:

- (a) their initials were the same leading court staff to assume Wirihana was the purchaser;
- (b) the letter from Terry's former solicitors clarifying who would make the purchase was by that stage two years old and was, in any event, to the Māori Trustee not the court;
- (c) it was the practice of the court in those days to encourage any existing large shareholders to increase and consolidate their interests through the Māori Trustee's compulsory purchase mechanism. It would probably have been assumed that the purchaser was the owner W T Apatu because that was the way these things were usually done;
- (d) Terry had dispensed with the assistance of his solicitors at the crucial time creating a risk that technical mistakes would be made; and
- (e) all the later correspondence to the court was signed by Terry as "W T Apatu".

[51] In other words, I am satisfied on the evidence available, that the shares were transferred to Wirihana as a result of an innocent and understandable mistake on the part of the court staff who processed the vesting order. There is certainly no evidence to suggest that Terry had perpetrated a fraud on his siblings by dishonestly taking advantage of his father's death and pretending the purchase had been made by him when it had not. The paper trail is quite inconsistent with that scenario.

[52] That brings me to the question of Wirihana's own personal 20 per cent shareholding in the block. I do not think there is sufficient evidence to suggest that Terry lied about his father's intention to gift this shareholding to Terry. It is true that Wirihana does not give Ohiti Waitio 3A to Terry in his will of 2 March 1970, but Terry's perspective (as can be seen from his letter to his new solicitor Marcus Poole dated 4 August 1974) was, as I have set out above, that his father's intention was to gift his shares in the block.

[53] In other words, he expected that once the Māori Trust Office purchase was completed, Wirihana's 20 per cent would be gifted. It appears simply that Wirihana died before the purchase was completed and before the gift could be made. This problem was exacerbated by the fact that the Māori Land Court mistakenly also vested the new shares in Wirihana as well.

[54] Significantly, all the other siblings signed the 2 August 1972 deed signifying their agreement with Terry's stance over the block. In addition, Wini's complaint as now articulated does not allege that Terry lied about the gift.

[55] No-one other than Ashley and Wini remembers there being any disagreement at the meeting over Wirihana's intention to gift his shares in the block to Terry.

[56] Equally significantly, given the fact that these allegations relate to events from a very long time ago, Ashley and Wini signed the deed, did not challenge the minutes of the meeting at the time, and (apart from Ashley registering a caveat which he then allowed to lapse) took no steps until this proceeding.

[57] Finally, given my finding that it was Terry who paid for the uneconomic shares purchased from the Māori Trustee, Terry's story that once he completed purchase of the rest of the block, Wirihana would gift his 20 per cent just makes more sense than Ashley's conspiracy theory.

[58] On balance as I have said, the evidence falls well short of demonstrating Terry lied about his father's intentions and defrauded his siblings over the block. On the contrary, the evidence, such as it is after all this time, is consistent with Terry's version of events.

[59] Wini's argument is two-fold. First, she says Wirihana promised her that she would always have a right to shoot at the lake. In her words:¹⁸

During a discussion about duck shooting that morning, my father stated, "you will always have a place to shoot when you go back home". I later found out he meant Ohiti Waitio 3A.

[60] Wini says that if she knew the land covered in the deed of 3 August 1972 was Ohiti Waitio 3A she would not have signed it. She said (supported in this by Ashley) that Marcus Poole, in collusion with Terry, described the block to them as a useless piece of land. This description, she said, threw her off the scent as it were.

[61] Once again I do not accept that the evidence taken together is sufficient to disrupt an arrangement that had been in place for 35 years before proceedings were commenced. I certainly do not accept that Marcus Poole was a co-conspirator in any alleged fraud. In fact he was quite right to describe the block as useless from a productivity and profitability point of view even if it was very valuable as a duck shooting site. I see nothing sinister at all in Mr Poole's description, still less when neither Marcus Poole nor Terry are available to give evidence about what else they may have said at the meeting.

¹⁸ Statement of Evidence, [4].

Lindauer paintings

Background

[62] Clause 3 of the will provides:

3. I GIVE AND BEQUEATH unto my wife MINOLA EVA APATU all my furniture furnishings and articles of household domestic or personal use or ornament of which I may be possessed or in which I may have any share (including any motor car) free of all duty.

[63] Ken and Terry proceeded as if this clause governed the disposition of two beautiful paintings by Gottfreid Lindauer.

[64] The first painting is said to be of a kuia named Atareta Kaingakore – a relative of Hinekatorangi and Taranaki, and, interestingly one of the original grantees in the Ohiti Waitio 3A block. At least as far back as anyone alive can remember, this painting had originally hung at Omahu Marae. It had become damaged there and Wirihana took it away for repairs. It was never returned to the marae and it has remained with the Apatu whānau ever since.

[65] The second painting is of the sister of Hinekatorangi and Taranaki. Her name was Matewai Karauria Te Uamairangi. This painting hung in Taranaki's own home in the early days according to Ashley. No-one in the whānau who gave evidence disagreed with that.

[66] Both paintings were hung at Lawn Road when Wirihana was alive, and they remained there when Stuart and his first wife moved in to take care of Minola Apatu after Wirihana's death. When Stuart and his wife parted they left Lawn Road. Minola Apatu (relying no doubt on clause 3 of Wirihana's will) decided that Matewai should go to Terry and Atareta to Rei. Ashley did not agree and tried to defeat Minola Apatu's plan by uplifting the paintings before Terry and Rei could take custody, and deposited them with the Hawkes Bay museum. Needless to say Minola, assuming she owned them, had the museum return both paintings.

[67] In her will, Minola Apatu bequeathed the paintings to Terry and Rei respectively as originally proposed. Rei, acknowledging no doubt that Atareta originally belonged to the marae, met with Ngāti Hinemanu kaumātua to discuss ongoing custody. It was agreed according to the evidence of Rei's daughter, Ana Apatu, that the painting should stay with Rei for five years and then be returned. Kaumātua were obviously concerned about security and care given the monetary, artistic and cultural value of the painting. It was considered that five years would give the hāpu time to make appropriate arrangements. Rei gave Atareta to his daughter Ana for safekeeping. When Rei died, the whānau resolved to return Atareta to the marae but the kaumātua asked that Ana continue to care for her until the marae was in a better position to do so. Thus Atareta remains with Ana today.

[68] Matewai is still in the care of Terry's children. If I remember the evidence correctly, it is held by Kate, but I am not absolutely certain about that and, in any event, it does not matter in terms of the issue I must resolve.

[69] On 23 April 2002 Ashley applied to the Māori Land Court for an order determining ownership of the paintings. The matter came before Deputy Chief Judge Isaac on 31 May 2002. His Honour adjourned the proceedings to determine whether he had jurisdiction to hear the matter. It appears that by 13 June 2002 His Honour heard no more from the parties and accordingly dismissed the application.

Analysis

[70] It is evident from this factual overview that Wirihana made no claim to Atareta. She, it seems to be accepted, belongs to Ngāti Hinemanu of Omahu and her care and custody is a matter for the kaumātua of that marae. It also seems that the kaumātua have expressed their interim views on that question to the Apatu whānau. There is certainly no basis for any claim in this respect against Ken and Terry.

[71] As to Matewai, the evidence tends somewhat to suggest that she belongs to the estate of Taranaki but it is impossible to be definitive because the evidence was

very limited. In any event it is both unnecessary and unwise for me to make any ruling on the matter. Whether Terry is the correct custodian for her is an interesting question, but it is not one of which I am seized. The present action is primarily against Ken and Terry as executors of Wirihana's estate. It is the executors of Taranaki's estate or the relevant beneficiaries who are best placed to pose this question in proceedings brought on a proper footing. This case does not raise that question.

[72] The cause of action in respect of Atareta and Matewai must fail accordingly.

Ngā Taonga Māori

[73] The "Māori artefacts" as pleaded in the statement of claim appear to comprise:

- (a) a greenstone pendant inserted in a gold bracelet;
- (b) photographs of Taranaki Kanara Te Uamairangi and other Te Uamairangi members;
- (c) a greenstone patu; and
- (d) huia feathers.

[74] As with the paintings, the plaintiffs claim that Wirihana did not have any proprietary interest in the paintings, rather they are part of Taranaki's estate and legal title could not have been passed to Minola Apatu. If these items did form the part of Taranaki's estate then this assertion is correct. The defendants appear to accept this – indeed they raise it as a defence in this proceeding.

[75] Assuming that to be the position, it is clear, as with the Matewai painting, that this is not an issue that I am able to deal with in the context of the proceeding against Ken and Terry as administrators of Wirihana's estate. The cause of action must therefore also be dismissed accordingly.

Lawn Road

Background

[76] The property in Lawn Road was the home in which Wirihana and Minola Apatu lived and raised their family. It comprised a home and 10 acres of land. Of those 10 acres, eight were cropping land. Both the land and homestead in fact belonged to Wirihana's mother Hinekatorangi and formed a part of her estate. I was told that she set aside land and built a new home for each of her children. Lawn Road was Wirihana's allocation.

[77] Wirihana only received a life interest in that property from Hinekatorangi, with the remainder to go to all of Wirihana's children equally. On 16 August 1971 the property was vested in each of the seven children equally as tenants in common. It will be remembered that by clause 9 of the will (see [17] above) Wirihana recorded the inter vivos arrangement that Rei, Terry and Ken would transfer their interest in the property to the residuary beneficiaries. On 23 January 1973 Rei, Terry and Ken duly transferred their shares in the Lawn Road property to Minola Paul, Wini, Ashley and Stuart, the residuary beneficiaries.

[78] Shortly after Wirihana's death, Ashley and Wini suggested that as the residuary beneficiaries were to share Wirihana's interests in the residue of his estate evenly it might be better for each to take a larger interest in fewer blocks of land in order to avoid fragmenting their shares. This it seems was an extension of the 1972 family wide agreement. It was agreed that Stuart and Minola Paul would share Lawn Road. Accordingly, on 23 February 1973 Wini transferred her share in the property to Stuart and on 9 March 1973 Ashley did the same leaving Stuart three-quarters and Minola Paul one-quarter of the title.

[79] While that was the legal position, it appears that all of the family members actually treated Lawn Road as a part of Wirihana's estate. Ken and Terry certainly did. Accordingly, as per clause 7 of Wirihana's will, Minola Apatu was thought to

be entitled to the net annual income from that property. The trustees accordingly used the estate's income for the upkeep of Lawn Road.

[80] Stuart lived at Lawn Road with his wife and Minola Apatu until he moved out in 1987. Minola Apatu moved into a retirement village seven years later in November 1994. Between 1994 and 1999 Lawn Road was rented and the rent paid, mistakenly, to Wirihana's estate. Minola Apatu then returned to Lawn Road in 1999 along with Stuart and his partner and lived there again for a short period before moving to a different rest home where she remained until her death in 2003. Stuart has lived at Lawn Road ever since.

[81] It appears that one Stuart Agnew leased the croppable portion of Lawn Road soon after Wirihana died, during the short time in which Ashley and Wini retained their respective interests in the property. According to Stuart, Mr Agnew paid rent direct to Minola Apatu,¹⁹ but no figures are available as to the quantum of rent paid.

Arguments

[82] In this respect the plaintiffs make two claims. First, they say that they are entitled to any rent paid for the cropping land between the date on which the property was vested in them and the date on which they transferred the property to Stuart. This is rent for a period of two years seven months in Wini's case, and 10 months in Ashley's case.

[83] Second, they say Ken and Terry had no right to pay for the upkeep of Lawson Road out of estate funds because Lawn Road was not estate property.

[84] The defendants argue that any claim pursuant to the first argument is statute barred as the plaintiffs were well aware of those transactions when they transferred their interest in the property to Stuart in 1973. They say the second argument must also fail because the money was paid out of Minola Apatu's income.

¹⁹ Stuart's Statement of evidence at para 20.

Income claims

[85] With regard to the first claim, both Ashley and Wini were entitled to rent for Lawn Road for the period that they held a legal interest in the property. However, for two reasons I do not consider that the plaintiffs can recover from the defendants any rent due.

[86] First, generally, where money is received in error, the recipient will usually hold it on trust for its rightful owner. But to create a trust obligation, there must be something acting on the mind of the recipient that would render it unconscionable for that recipient to assert beneficial title to the money. The House of Lords decision in *Westdeutsche Bank v Islington LBC* is instructive.²⁰ At 705 Lord Browne-Wilkinson set out five “relevant principles of trust law”. Those are:

- (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).
- (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.
- (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.
- (iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

²⁰ [1996] AC 669.

[87] Here, I am not satisfied that Terry and Ken actually knew that Wirihana's estate was not entitled to that money. Given the arrangement that Minola Apatu would have a personal right to occupy, use and enjoy the residence and appurtenances'' at Lawn Road for life, it is not surprising that everyone just treated her as a full life tenant. Ken and Terry lacked the necessary knowledge to be treated as constructive trustees and no constructive trust can arise in the present case.

[88] Second, even if a constructive trust did arise at the time, I am satisfied that this claim is time barred under s 21(2) of the Limitation Act 1950, in that it must be brought within six years from the date on which the right of action accrued and it was not.

Outgoing claims

[89] The plaintiffs' second argument is that money from Wirihana's estate was wrongly used on the upkeep of the Lawn Road property with the effect of diminishing their rights as residuary beneficiaries. In his statement of evidence Ashley records that the estate paid for the cost of the property's upkeep even after Minola Apatu had moved out. This resulted in the position of two beneficiaries, Stuart and Minola Paul, being advanced over that of Ashley and Wini residuary beneficiaries.

[90] The defendants say that that money was forwarded to benefit Minola Apatu, who had a life interest in the estate. The defendants argue that the payments for the upkeep and outgoings of the Lawn Road property were for Minola Apatu's benefit and so that money came out of *her* entitlement (ie the net income).

[91] Stuart Apatu confirmed what the funds were spent on. In evidence, Stuart noted at t579/24-580/12:

- A. I've painted and re-roofed the car shed, which he didn't pay. I paid. Um, there was a pump that had to be installed because the other one collapsed. Two sheets of iron had to be replaced in the roof because they rusted a hole though and the house was painted. That's to my knowledge.

- Q. And so those were all, bar the re-roofing of the car shed, they were all paid for by the estate?
- A. Yes. To my knowledge it was their share of looking after their mother, their family.
- Q. Their share being?
- A. Wini, Minola, Ashley.
- Q. Do you know if Ashley and/or Wini approved of the estate making those payments?
- A. But at that stage it wasn't theirs, as I've just found out. So what was the problem?
- Q. But are you aware, because the estate made the payments I'm just asking are you aware of if Ashley and/or Wini approved or authorised or if they were consulted about the estate making those payments.
- A. No they weren't.
- Q. Now whilst your mother was alive and living at Lawn Road, who was paying the rates and insurance on the property?
- A. The estate, out of rent money that they were collecting, which wasn't theirs.

[92] Minola Apatu died on 24 April 2003. Wirihana's statement of accounts record outgoings of rates in every year between 1994 and 2003 (where the rates paid drop from over \$1,000 to \$183 I infer that the rates from Lawn Road are no longer being paid by the estate), and insurance in every year between 1995 and 2002 (between 1989 and 1992 outgoings are recorded of around \$2,000-\$3,000 against the category of "House Expenses"). None of these figures are expressly noted, however, as being for the Lawn Road property. I consider it a sensible inference that the money was put towards Lawn Road as there is no suggestion that insurance or rates were being paid for other land. The financial statements also record considerable rent received, however it was the evidence of John Bark (Terry's accountant) that itemising where the rent came from was not standard practice and so was not done.²¹ It was accepted, however, that not all rents received were from the Lawn Road property.

²¹ T632/16.

Analysis

[93] Under the will, the trustees were directed to stand possessed of the residue upon trust:

To pay to my said wife the net annual income to arise from my residuary estate during her lifetime.

[94] Clause 9 of the will records the family's agreement that Minola Apatu should be able to continue to live at Lawn Road, but there is no express power for the trustees to contribute to the upkeep of Lawn Road. Minola Apatu was only entitled to enjoy the income arising out of Wirihana's estate of which Lawn Road never formed any part. Still less would Ken and Terry be acting within their powers if the estate paid for upkeep at Lawn Road if Minola Apatu did not want that.

[95] But Minola Apatu could dispose of the estate income as she saw fit. It was hers while she was alive. If she wanted the ongoing costs of the property to be met from her income then she was perfectly entitled to require that. If that was not Minola Apatu's wish then trustee expenditure for that purpose would amount to a fraud on the power.

[96] I cannot say either way whether Minola Apatu did give her express or implied consent to Ken and Terry using her income this way. What is clear however is that they were trusted sons who had been appointed to administer both Wirihana's and her estate; that she lived at Lawn Road for 24 of the 33 years of her widowhood; that she was becoming increasingly frail; and that even when in a rest home her costs were met by the estate. An additional factor is that although the authorities do not support a right to set off the advantages to the estate from expenditure for maintenance,²² this is a different situation. Minola Apatu had the right to occupy, use and enjoy Lawn Road for her life. Even when she was in a rest home the income from the estate was increased for her benefit through renting Lawn Road. Expenditure on maintenance enhanced Lawn Road's rental value.

²² *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 538.

[97] In those circumstances, I am not prepared to find, on the balance of probabilities, that the trustees were not acting pursuant to Minola Apatu's express or implied authority when spending estate income on maintenance for Lawn Road. Significantly, there is no evidence at all that Minola Apatu did not want her income spent on the house. I think it equally likely that Minola Apatu wanted estate income spent on the upkeep of the family homestead. In the absence of direct evidence one way or the other I am not prepared to assume she did not. I am not satisfied, therefore, that the trustees committed a fraud on the power as argued for the plaintiffs. This cause of action must therefore be dismissed.

[98] For completeness, I note that in the plaintiffs' fourth amended statement of claim, relief is pleaded for \$4,895.00 for the cost of installing a well in the Lawn Road property by Ken. However, this claim was abandoned by the plaintiffs before me.

Payment from Taranaki Kanara Te Uamairangi's estate

Background and arguments

[99] In about August 1973 Wirihana's estate received its final payment from the estate of Taranaki. As I noted, Taranaki left a life interest in his estate to Wirihana, with the remainder to the residuary beneficiaries. Following that payment each of Minola Paul, Wini and Stuart were credited in Wirihana's estate accounts with \$14,436.07 apparently wholly or partly in cash.²³ Ashley claims that he was also entitled to an equal payment, but that he never received any such payment. Importantly, Wini makes no such claim in this proceeding.

[100] An account was prepared for Wirihana Apatu's estate on 9 August 1973. It records:

²³ At T103/5 and 208/5 notes that Minola Paul received the credited amount. At T575/1 Stuart notes that he is not sure.

By	advances ex Taranaki Te Ua estate as under:		
	3/5/72	4,000	
	10/7/72	12,000	
	24/5/73	1,000	17,000.00
	advances A.K. Apatu for purchase of properties		19,403.80
	advance ex Estate Account for credit Mrs W.E. Mauger		2,500.00
	interest debited to beneficiaries		1,267.74
	advance ex Taranaki Te Ua estate 9/7/73		20,(unreadable)
	advance made Mrs W.E. Mauger	2,500.00	
	Dorrington & Poole – costs re administration (1971-72)	674.60	
	our costs and disbursements re negotiations and settlement re Taranaki Te Ua estate as per Bill of Costs herewith	156.68	
	one-fourth share due Mrs M.H. Paul	14,436.07	
	one-fourth share due Mrs W.E. Mauger	14,436.07	
	one-fourth share due Mr A.K. Apatu	14,436.06	
	one-fourth share due Mr S.R. Apatu	14,436.06	
		\$57,744.26	\$57,(unreadable).26

[101] This confirms that Ashley was due \$14,436.06 along with the other residuary beneficiaries. The question is did he actually get it?

[102] In evidence Ashley said that when he chased the issue up with Marcus Poole who told him he gave the money to Terry and Terry said he had put the money into Ashley's ANZ bank account. Ashley says that he never had such an account.²⁴

[103] Ashley purchased Ohiti Waitio 1E3B block from Taranaki's estate. That purchase is recorded in the Taranaki estate ledger book maintained by its trustees.²⁵

²⁴ T207/26-207/29.

The ledger records “A Apatu” under “Sundry Debtors Land” as owing \$17,472.30. Ashley accepted that that was the correct purchase price for Ohiti Waitio IE3B.²⁶ Ashley also confirmed that he had to purchase the leases associated with that land.²⁷ Those leases are likely to have been valued at \$1,931.50 (\$19,403.80-\$17,472.30). I say this because the account of 9 August 1973 for Wirihana’s estate set out above at [107] records advances to Ashley of \$19,403.80.

[104] It was Ashley’s evidence that he funded the \$19,403.80 purchase price for the land and leases via his overdraft with the National Bank.²⁸ He said the story that \$19,403.80 was advanced by the estate to him was fraudulently concocted by Terry and Marcus Poole between them as were the accounts themselves. He said the advance could never have been set off against his property purchase because he paid out of his own pocket.

[105] The defendants’ first defence is that this bequest was from the estate of Taranaki, and it had nothing to do with the estate of Wirihana. I do not think that argument provides an effective defence. Any funds received by Wirihana’s estate for the residuary beneficiaries were automatically subject to the same trust obligations as those attaching to funds already in the estate.

[106] More importantly, the defendants say that while the accounts are not crystal clear, it is very likely that the money received from Taranaki’s estate for Ashley’s benefit were set off by the estate against advances made for the purchase of Taranaki’s estate. In short, it appears that Terry used the Taranaki bequest to pay a debt Ashley accepts he owed to Taranaki’s estate.

Analysis

[107] I do not believe Ashley funded those purchases out of his overdraft at the National Bank. I certainly do not believe that Terry and Marcus Poole colluded to

²⁵ See first defendant’s bundle of documents at 93.

²⁶ T212/17.

²⁷ T345/21.

²⁸ T346-347.

defraud Ashley. Once again the evidence available to me after all this time simply does not support such a grave allegation.

[108] Having seen Ashley give evidence at length and having heard from him of his extensive and successful cropping business before things went bad for him, it beggars belief that he would not have complained loud, long and in writing at the time if he had known that the other residuary beneficiaries had been paid such a substantial sum (in 1973 dollars) and he had not.

[109] Instead, the first time the issue is raised, at least in written form, is 21 years later by way of a letter from Wadsworth Norton solicitors of December 1994, and even then there is no direct allegation that Ashley was not paid his share of Taranaki's estate. Rather, there is a general request for more information. The reply from Dorrington Poole (DP) solicitors on 2 March 1995 is vague. Marcus Poole advised he could not be sure whether the entitlements under the estate were paid by his firm or by the estate accountants. The implication is that it was too long ago, even back then. Significantly the letter says that the \$45,000 value in the estate for distribution to the residuary beneficiaries:

... would include the Ohiti Waitio [1E3B] block purchased by Ashley from the estate and funded by himself and his three co-beneficiaries ...

[110] Mr Poole appears to suggest that Ashley had overdrawn his entitlement at the expense of his siblings, but his recollection is clear that the Ohiti Waitio purchases were partly paid from Taranaki estate funds held for Ashley's benefit. This view is consistent with the 1973 accounts for Wirihana's estate set out above.

[111] I am aware that Ashley says he called Terry about these things at the time but Terry would not reply to his requests for information or his demands. And Ashley says Terry told him the money had been deposited in an ANZ account that Ashley claims did not exist.²⁹ I have no way of verifying any of that, since Terry is no longer with us. But I reiterate I would have expected Ashley, a (then) successful

²⁹ T206/30-33.

businessman, to have put things down in writing quickly if phone calls to family produced no results. There is just no evidence of that.

[112] I am aware also that the relevant events occurred nearly 40 years ago (that in itself of course presents a considerable obstacle to Ashley in proving his claims), but I would have expected, in light of the documentary record, Ashley to have provided some proof that he paid the purchase price for the relevant properties from his own funds. No such proof was provided. Nor did he attempt to explain the failure to provide this material. Ashley's failure in this respect was exactly the same as Terry's alleged failure to prove his claim to have paid for Ohiti Waitio 3A about which Ashley complained so strongly. And as I have said, neither Terry nor Marcus Poole are with us to refute Ashley's allegations or to clarify the facts from their perspective.

[113] I am left therefore with the obvious inference on the evidence available to me that Terry did in fact set off the bequest from Taranaki to Ashley against the latter's debt to the estate, and that Ashley's recollection is mistaken at best.

[114] Even if my analysis of the evidence is wrong, I am satisfied that this claim is statute barred anyway. It is, properly, an action in respect of trust property, trust including, in this context, constructive trust.³⁰ Therefore, the claim must be brought within six years.³¹ Entitlement to any interest in possession in that money arose in 1973, therefore this claim is well out of time.

Rakautatahi 1E5

Background

[115] The plaintiffs claim against Terry alone for breach of fiduciary duty in relation to the Rakautatahi 1E5 block, situated in Takapau. The claim relates to the cost of fertiliser Terry put on the block when he was personally farming it. The plaintiffs say Terry wrongly recouped that cost from estate funds held in Wini's

³⁰ See Limitation Act 1950, s 2 and Trustee Act 1956, s 2.

³¹ Limitation Act 1950, s 21(2).

name and without her consent even though the fertiliser was intended to be for his benefit.

[116] The facts are as follows. In 1995 Wini got into a little financial trouble – she frankly admitted in evidence that this was neither the first nor the last time. As the Rakautatahi block was to be given to Wini and Minola Paul on the death of Minola Apatu, Wini asked Terry to approach Minola Apatu for permission to sell the property, Minola Apatu being, of course, the life tenant. Minola Apatu agreed, and signed a deed of disclaimer on 6 October 1995. Terry was not entirely happy with the sale as for some years he had farmed cattle on that and an adjoining block. The effect of the sale was, according to Terry’s son Renata, to make uneconomic his operation there. Notwithstanding the obvious inconvenience to him, Terry took it upon himself to find a buyer on Wini’s behalf. The block was eventually sold to Waihi Farms Limited for \$203,000.

[117] A few weeks prior to the arrangement between Wini, Ken, Terry and their mother, Terry had placed \$2,060 worth of fertiliser on the land.³² Terry paid for the fertiliser himself but as the land was now to be sold, he would receive none of the benefit from that investment. Instead Wini would receive the benefit by way of increased land value.

[118] Wini claims that Terry deducted the value of the fertiliser without her permission or agreement. She seeks compensation accordingly.

[119] The defendants claim that it was arranged that Wini would reimburse Terry that \$2,060. However, as Wini did not have such funds available, \$2,060 was paid out of the estate and debited to Wini.

[120] The plaintiffs say that no such arrangement was ever made. It was Wini’s evidence that she had no idea about any arrangement regarding the fertiliser until a

³² This was pleaded as \$5,560 during the proceedings, but Wini accepted at the hearing that \$2,060 was the correct amount.

debit showed up in the trust account against her name.³³ The plaintiffs therefore claim that Terry used his position as trustee in order to profit from the trust.

Analysis

[121] Once again the evidence in this matter, 10 years on from the relevant events, is unfortunately one-sided. Terry is not here to explain matters from his point of view. What is clear however is that, against his own interests, he arranged for his mother to surrender her life estate in the land and then he arranged its sale. Terry was a highly successful farm advisor and businessman. He was described by John Bark (it will be remembered Bark was his accountant) as "... a top guy and one of the straightest taxpayers and businessman I knew." Bark had known him from boyhood and had been his accountant from 1984.

[122] My overall impression is of a man who was prepared to spend considerable time and effort in administering the affairs of this family at no benefit to himself, and in this particular case, at considerable disadvantage. Against that, is only Wini's word that she had no idea about the fertiliser issue at the time of the sale.

[123] I find it hard to believe that Terry would not have agreed to do his sister this favour subject to recouping his own out of pocket expenses. I think it far more likely that a discussion and agreement did take place but that Wini has forgotten about it. There is no argument from Wini that the fertiliser was not purchased and applied by Terry. I am certainly not satisfied on the balance of probabilities that there was no agreement between Terry and Wini and that Terry simply took it upon himself to recoup his loss.

[124] Even if I am wrong in that, this would have been an appropriate situation to invoke s 73 of the Trustee Act 1956. The steps Terry took to help Wini out were the reasonable actions of a loyal brother and honest trustee. It was equally reasonable and honest to deduct any particular costs to him. In my view, frankly, Wini should have been grateful for her brother's assistance and any loss due to the deduction of

³³ T397/12.

the cost of fertiliser must necessarily have been made up by the increase in the land's value. I would have made an order relieving him of any personal liability accordingly.

[125] I would dismiss this claim.

Tapairu 7B

Background

[126] This claim is the only brought in relation to proceeding CIV-2009-441-515, by Wini against Terry personally rather than as trustee. The claim relates to shares which Wini has held since 1973 in the Tapairu 7B block. Shares in the block are held by Wirihana's estate (75%), Wini (16.6%) and Waru Allan (8.4%). Wini says that she left management of that land in the hands of Terry to collect any rent due for the land and pay to Wini her proportion. No evidence is given of this arrangement. Indeed, in evidence Wini admitted that there was no express agreement between herself and Terry about it.³⁴

[127] In 1982 Bruce Maulder began leasing the Tapairu 7B land. All his dealings were with Terry. At some stage a written lease was drawn up but that document was not produced. Between 1983 and 2004 a total of \$14,775 was collected from Mr Maulder, by Terry, in rent.

[128] Mr Maulder's evidence was that he thought that the land was owned by the family and that the money was going to Minola Apatu's "comfort fund".³⁵ Mr Maulder noted that he did not know that there were other owners of the land until 1996 when Mr Allan approached him asking for rent.³⁶ Mr Maulder said that he called Terry who said that there was another owner but that "he doesn't collect for

³⁴ T456/5.

³⁵ T352/15.

³⁶ T358/20.

them”.³⁷ Mr Maulder said that he then started giving Mr Allan some money and attempted to contact Wini but was never successful.³⁸

[129] Wini claims that Terry was obliged to collect monies payable for her share as her agent. That relationship of agency arises out of the fact that the land was co-owned, and one co-owner holds an obligation to another co-owner to ensure collection of rent. The plaintiff relies on s 234A of the Maori Affairs Act 1953 to support the argument that any rent collected from a lessee of Māori land must be for all the owners of the land.

[130] The defendants say that Terry did manage the land, but that was for the estate not the other separate owners even where one of them was his sister. Terry leased the portion of the land to Mr Maulder that the estate held.

Analysis

[131] Where land is owned as co-owners, the co-owners constitute a single owner. As such, there is unity of possession in respect of the co-owned land.³⁹ Therefore, Terry could not lease part of the land to be grazed as being “his part to lease” to Mr Maulder. But, he could lease the estate’s share in the land to Mr Maulder.⁴⁰ Even then the partial lessor will still be liable to account to his or her co-owners for any profits gained.⁴¹ Those profits must be, therefore, held on trust for co-owners.

[132] Having said that in some circumstances Terry might be liable to share some of the rent income with his co-owners, it is clear for the reasons I have already discussed above, that this claim is must also be statute barred. As it is for the recovery of trust property, an action will be barred after six years.⁴² These proceedings were brought on 7 August 2009. Therefore, any amount due to Wini before August 2003 is statute barred. Minola Apatu died on 24 April 2003 and Terry

³⁷ T358/31.

³⁸ T358/12-20.

³⁹ See Bennion and others *New Zealand Land Law* (2nd ed, Thompson Reuters, Wellington, 2009) at [6.6.01].

⁴⁰ *U-Needa-Laundry Ltd v Hill* [2000] 2 NZLR 308 (HC).

⁴¹ *Burfitt v Johansen and Others* [1958] NZLR 506 (SC) at 509.

⁴² Limitation Act 1950, s 21(2).

ceased collection of rent at that time. There is therefore no evidence to show that any money should have been or was collected by Terry that falls within the relevant six years.

[133] This course of action must therefore be dismissed accordingly.

Breach of s 44 of the Administration Act 1969 and failure to account

[134] The plaintiffs made two claims under this category. The first is for an order under s 44 of the Administration Act 1969 for the trustees to provide an inventory of trust property. The second alleges that the trustees have breached a common law equitable duty to account for property held on trust. The plaintiffs raise two separate substantive concerns: first, that the accounts kept by the trustees were insufficient; and second, the plaintiffs repeatedly asked the trustees to provide accounts and financial records but these requests have not been complied with.

[135] The first defendant says that there is no basis for these concerns. In short that is because the allegations regarding failure to provide information are not made out and because the basic financial accounts prepared for Ken and Terry were entirely appropriate for an estate of this size and income.

[136] The documentary background to these issues is contained in 10 separate correspondence trails between Ashley or his solicitors on the one hand, and the trustees, DP or the estate's accountants Brown Webb Richardson (BWR) on the other. The correspondence contains requests for various documents relating to the estate, general requests for documents, and general directions to their recipients. Given the nature of the allegations it is necessary for me to unpick each of these trails at some length. Before I do so however, I will briefly outline the applicable legal principles.

The principles

[137] Is clear that every beneficiary of a trust is entitled to see the trust accounts⁴³ but only when properly requested by the beneficiary.⁴⁴ This obligation does not depend on showing a prior breach of trust⁴⁵ but, a beneficiary requesting trust accounts may be liable to pay the cost of supplying them.⁴⁶ There is no right of access to all trust documents or information, but the court has a discretion to order further disclosure if that is appropriate in light of the nature of the beneficial interest in issue.⁴⁷ In determining whether the court ought to require certain documents to be disclosed, it will consider:⁴⁸

- (a) whether there are issues of personal or commercial confidentiality;
- (b) the nature of the interests held by the beneficiaries seeking access;
- (c) the impact on the trustees, other beneficiaries and third parties;
- (d) whether some or all of the documents can be withheld in full or redacted form;
- (e) whether safeguards can be imposed on the use of the trust documentation (for example, undertakings, professional inspection etc) to limit any use of the documentation beyond that which is legitimate; and
- (f) whether (in the case of a family trust) disclosure would be likely to embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole.

⁴³ *Armitage v Nurse* [1998] Ch 241 at 255.

⁴⁴ *Re Lewis* [1904] 2 Ch 656.

⁴⁵ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2009) at [10.3.3].

⁴⁶ *Ottley v Gilby* (1845) 8 Beav 602; 50 ER 237.

⁴⁷ *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 at [67]; *Foreman v Kingstone* [2004] 1 NZLR 841 (HC).

⁴⁸ *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 adopted by *Foreman v Kingstone* [2004] 1 NZLR 841 (HC) at [91].

[138] Potter J in *Foreman v Kingstone* neatly set out (if I may say so) the competing principles in this area of law in the following passage:⁴⁹

Approached as a matter of principle, the entitlement of beneficiaries to disclosure of trust documents pursuant to the trustees' fundamental obligation to be accountable to beneficiaries, must be measured against another fundamental principle that the autonomy of trustees in the exercise of their discretions under the trust instrument must be ensured. Hence, trustees are not obliged to disclose to beneficiaries their *reasons* for exercising their discretionary power (*Re Londonderry's Settlement* [[1965] CH 918]).

[139] With those general common law principles in mind, I turn now to mention s 44 of the Administration Act 1969, the statutory provision invoked by the plaintiffs. Section 44 provides:

44 Administrator may be required to exhibit inventory

Every administrator shall, when required by the court so to do, exhibit on oath in the court a true and perfect inventory and account of the estate of the deceased; and the court shall have power as heretofore to require administrators to bring in inventories.

[140] There appears to be no modern authority on the application of this section.⁵⁰ The purpose of the section is to ensure both the proper administration of estates and accountability therefore and, where appropriate, to assist in the exercise of the court's broader powers of supervision. A necessary implication of that section is that administrators must maintain proper estate accounts. I will turn to the sufficiency of accounts first before considering the trustees' and their agents' responses to requests for information.

Were the accounts kept by the trustees sufficient for the purposes of their duty to account?

[141] The plaintiffs' claim first that this estate's affairs were in such disarray that no income tax returns had been filed for the estate, and second, that the accounts that were made available to beneficiaries were insufficiently detailed.

⁴⁹ [2004] 1 NZLR 841 (HC) at [89].

⁵⁰ *Harrison v Harrison* HC Auckland CIV-2006-404-2003, 6 August 2008 at [10].

[142] The responsible partner for the estate within BWR was John Bark. That firm took over as accountants at some point between 1970 and 1992. The previous accountants were Henderson and Borrie but that firm no longer exists. BWR's practice was to destroy records after 10 years and that appears to explain the lack of certainty in the date at which the firm began acting for the estate. A further result of that practice is that there are few accounts available prior to 1991/1992. The 1991/1992 accounts provide evidence of tax returns back to 1989.

[143] As to the alleged failure to file tax returns, Ashley said that in 1994 he went to IRD and found that no income tax returns at all had been filed for the estate.⁵¹ Mr McLennan put that to Mr Bark who replied at t637/29:

We always found that they got rid of their records fairly quickly, like certainly within seven years, certainly from memory, even four years.

[144] And at t638/11-15:

Well they definitely, there is no way the returns could not have been filed for that estate, and then started filing them. I mean we have got copies of returns back to 1992, we have got a notice of assessment for 1991, but that's the limit of our records. But I can guarantee, files would have, returns would have been filed before that.

[145] And further, in response to a question from me with regard to whether returns would have to have been filed prior to 1992:⁵²

A. We would have – somebody would have been answering to IRD as you would see from time to time in cases. There's no way that we could have started filing returns in '91 without being asked what had happened –

...

Q. Quite. So your point is the absence of a paper trail from IRD after 1992 about the prior returns satisfies you that there were prior returns?

A. Exactly.

⁵¹ T226/5-11.

⁵² T649/28-31.

[146] There is no reason to doubt that position. I am accordingly satisfied that tax returns were prepared in years prior to 1991 but it is no longer possible or sensible to trace them.

[147] With regard to the plaintiffs' more substantive claim that the accounts themselves were not sufficiently detailed, I note that at the suggestion of Mr Bark, more detailed accounts were produced from 1994. As to the reason for Mr Bark's suggestion that more detailed accounts be produced, Mr Bark recalled:⁵³

... it may have been something that triggered it, I'm not sure, but we suggested it to Terry that we should be preparing a statement that showed the movement of funds, which he accepted but wasn't interested in, um, having a full set of accounts and the relevant costs involved.

[148] Given that this is around the time that Ashley's solicitors sent their first request for information, it is possible that the more detailed accounts were triggered by that step Ashley took.

[149] The second defendant's bundle contained financial statements in substantially similar format for the years ending May 1994 to May 2006. In each case the largest item of income was rents. The figure clearly included rental income from the eight acres of cropping land at Lawn Road. This was in error given, as I have said, that the land did not form part of Wirihana's estate at any stage. The income also seems to have included the Tapairu 7B block rented to Mr Maulder and Rakautatahi 1E5 at least until 1995 when it was sold to Waihi Farms Limited. None of the accounts particularises the rental source.

[150] Income levels are modest with rents peaking at nearly \$22,000 in 1996 (this might have been Terry's back-rent for Rakautatahi 1E5), but otherwise being around \$15,000-\$17,000 in the first five years and tailing off to around \$10,000 after the turn of the century. The accounts also record major estate assets as well as the state of beneficiary current accounts as at balance date. They are lean but informative.

⁵³ T629/30-630/2.

[151] It is well settled that a trustee in these circumstances owes a duty of due diligence and care to the standard of an ordinary prudent person.⁵⁴ I can certainly see why the trustees were trying to keep the accounts as simple and inexpensive as possible. The income stream was largely passive and clearly insufficient to warrant detailed accounts. Nonetheless it would probably have been prudent to separately itemise rental streams for better accountability and transparency. That would have been particularly so after the death of the life tenant in 2003.

[152] I would have been minded therefore to require better accounts going forward if the estate was still active. I am not however prepared to order a retrospective accounting for these separate rental streams. I say this for two reasons. First, the estate has effectively been wound up with all of its assets distributed. Therefore, there are no funds to pay for such an exercise. Second and more importantly, neither plaintiff makes any accusation about the adequacy of rents charged. There is no allegation that the trustees failed in their duty to derive income from the trust lands pending distribution, or that the trustees themselves wrongly appropriated the land to their own use in the meantime. Thus, although there is what I would call a technical breach of the standard, the plaintiffs have suffered no prejudice.

[153] As to pre 1994 accounts, they are not available because the accountants have not retained whatever records they may have had. I am not therefore able to make any judgment on their adequacy even if, after all this time, such a course was appropriate.

[154] Alternatively, even if I was minded to grant some form of relief, I would have been satisfied, in accordance with s 73 of the Trustee Act 1956, that the trustees should be excused from any personal liability in respect of the shortcomings in the accounts to the extent that they breached the prudent trustee standard because in all respects they acted honestly and reasonably and ought fairly to be excused therefore.

⁵⁴ See for example, *Re Mulligan* (deceased) [1998] 1 NZLR 481 (HC) at 500 and the extensive authorities cited there.

Were the plaintiff's requests for information complied with?

[155] As for whether requests for information were complied with, the plaintiff alleges that both oral and written requests were made and were not complied with. As for the oral requests, I cannot be satisfied on the evidence as I have it of the nature and detail of any requests. There is no corroborating evidence to support either the fact of or detail of such requests and so I do not feel able to take that issue further. As for the written requests for information relating to administration of the estate, the plaintiffs, in their fourth amended statement of claim provide a list of several communications between, separately the estate's solicitors, accountants and trustees and the plaintiffs. I turn therefore to deal with these.

[156] Between May 2003 and June 2007, I have identified three categories of correspondence. The first is between DP and Ashley. The second is between the trustees and Ashley. The third is between BWR and Ashley. Within each category are several correspondence trails: between DP and Ashley there are four distinct trails initiated by either DP or Ashley between May 2003 and June 2007; one letter sent by Ashley to Terry in May 2003; and five trails initiated by either BWR or Ashley between May 2003 and November 2006. I propose now to go through each trail in each category to determine how Ashley's requests have been dealt with.

(a) Correspondence between DP and Ashley

[157] The first trail in this category began with a letter from Ashley to DP, dated 2 May 2003 which advised DP that Minola Apatu had died and asked DP to ensure that the estate's records were kept in good order in preparation for Ashley to uplift those files. DP responded on 20 May 2003 to "the beneficiaries of the estate of Minola Apatu" enclosing a copy of Minola Apatu's will and noted that the trustees "will carry out their duties according to law, and in accordance with your mother's Will". That request was, therefore, responded to.

[158] The second began with a letter from DP to "the trustees and beneficiaries" of both Wirihana's estate and Minola Apatu's estate dated 6 August 2003. That letter

enclosed a schedule of Minola Apatu's estate's interests in land. Ashley replied to that letter on 29 August 2003. In his reply, Ashley requested a copy of the lease of Lawn Road. Ashley also commented that the schedule of beneficiary's assets is "somewhat incomplete". He saw this as "GROSS NEGLIGENCE", to use his words and type. On 4 September 2003 DP replied. The reply noted that the estate had no involvement in the lease of Lawn Road. In cross-examination, Ashley accepted that DP's 4 September 2003 letter answered his concerns.

[159] The third trail began with a letter written on 9 March 2004 by DP to the trustees and beneficiaries of Minola Apatu's estate. With regard to Wirihana's estate, the letter noted that the accounts show that both Wini's and Ashley's accounts were overdrawn. The letter requests that the sums due to the pair from Minola Apatu's estate be put towards those debts. On 30 March 2004 Ashley replied. In that letter, Ashley requested an "itemised copy" of the accounts showing the debt owed by Ashley and Wini. On 16 April 2004, DP replied to Ashley's 30 March letter. That letter advised that Mr Poole had no details of the figures contained in the accounts and suggested that Ashley contact BWR or Terry. In cross-examination, Ashley accepted that DP's 16 April letter answered his concerns. It appears that that matter was not taken further with Terry. On 6 December 2004, Ashley wrote to DP. In that letter, Ashley advised that until the issue of a debt owed by Ashley to the estate is resolved, all payments due to him are to be paid to him directly. That 6 December letter does not request any further information so I am satisfied that the information supplied in the exchange adequately addressed Ashley's request.

[160] The fourth series began with a letter from Ashley's solicitors, Holmden Horrocks (HH), to DP dated 16 April 2004. That letter requested a copy of all "records, correspondence and documents held by [DP] relating to the administration" of Wirihana and Minola Apatu's estates. On 20 April 2004, DP responded. That letter noted three things. First, requesting assistance as to the particular field of concern where documents are required; second, pointing out that Wirihana died nearly 34 years ago and there would be few documents over 10 years old; third it suggested a different course of action for HH. That course was to request documents held by Terry and financial statements held by BWR; for DP to provide trust account

print outs of rents received by them; and third, that HH should indicate any specific items of administration for which copies were required.

[161] On 30 April DP wrote to HH again advising that the trustees authorised access to the estate's annual accounts held by BWR. DP advised that once specific items of administration were specified, DP would provide them. Finally, DP referred to payment of a \$1,200 cheque to Ashley which was in error.

[162] On 26 October 2006, HH replied again requesting advice as to the release of documentation requested on 16 April 2004 and adding that "it is difficult to specifically identify what material our clients may wish us to obtain copies of, beyond a general request" without having seen the documentation. On 10 November 2006, HH sent a facsimile to DP requesting a response to its 26 October 2006 letter.

[163] On 13 November 2006, DP responded, acknowledging receipt of HH's 26 October letter. The letter advised that inspection of files may only occur with the express written authority of the executors of the estate. On 12 June 2007, HH requested that documents be available for inspection within seven days. The letter noted that HH will take responsibility for any costs to be incurred and that DP was required to request the consent of the executors as soon as possible. At that point the plaintiffs filed proceedings in this court and the parties followed the more formal track of discovery pursuant to the High Court Rules.

[164] As I said in my outline of the law above, a beneficiary is entitled to see the estate's accounts. However, that is not what was requested from DP. Rather, the beneficiaries through their solicitors wanted access to all estate documentation. There is no right of access on this scale as I have said. Rather such access is a matter of trustee discretion, over which discretion the court retains some power.

(b) Correspondence between Terry and Ashley

[165] This category comprised a letter from Ashley to Terry dated 5 May 2003. That letter advised Terry to keep the estate's documents in good order and requested

a copy of Minola Apatu's will. No response is recorded by Terry to Ashley, however, DP sent a copy of Minola's will to Ashley 15 days later, in its 20 May 2003 letter. I treat that letter as a response accordingly.

(c) *Correspondence between BWR and Ashley*

[166] The first correspondence trail in this category was initiated by a letter from Ashley to BWR dated 2 May 2003 advising BWR to keep the estate's records in good condition. There was no response to that letter, though none was needed.

[167] The second trail was initiated by a letter from Ashley to BWR dated 15 May 2003. That letter identified several "matters of concern" which have been brought to the trustees' notice and sought BWR's comments. Those matters were:

- (a) No tax returns received by IRD;
- (b) No yearly statement of account was issued prior to 1994; and
- (c) Statement of account is misleading as no trust properties are mentioned.

[168] The letter also requested a complete list of all property, shares etc which itemises all income and outgoings and asked whether the following were estate interests:

- (a) The Mangateretere Homestead Block (Lawn Road); and
- (b) Ohiti Waitio 1E3A.

[169] On 20 May 2003 BWR responded advising they were awaiting the trustees' instructions. Ashley replied on 15 July 2003 following up on his 15 May request. On 16 July BWR advised that it was still awaiting the trustees' instructions. Ashley fairly noted in his evidence that he is still waiting for a reply.

[170] The third trail was initiated by a letter from HH to BWR dated 16 April 2004. Like the request to DP dated the same day, it requested a copy of all “records, correspondence and documents held by [BWR] relating to the administration” of Wirihana and Minola Apatu’s estates. On 17 May 2004 HH wrote to BWR again advising that DP had confirmed the trustees’ authorisation for HH to approach BWR for access to the annual estate accounts. On 1 June 2004 HH again wrote to BWR following up its 16 April and 17 May letters.

[171] BWR responded on 25 May 2004. That letter noted that BWR had never been instructed to prepare full financial statements for the estate, but that the firm has prepared annual income and funds position statements and has copies back to May 1994. BWR advised that copies of those statements were distributed annually to the trustees and the beneficiaries when requested and that they would retrieve and despatch copies of the statements following confirmation that HH wanted them and it was willing to reimburse BWR for costs incurred.

[172] HH responded on 5 July 2004 requesting an estimation of costs involved in supplying clients with the requested information. BWR replied on 14 July 2004 advising that costs should not exceed \$150. On 29 July 2004, BWR wrote to HH enclosing copies of financial reports prepared for the trustees of the estate and also a note of fees.

[173] HH acknowledged receipt of that letter on 30 August 2004, noting that Ashley had not received that information previously and taking issue with the fee rendered in light of earlier advice that fees would not exceed \$150. I treat all requests in that trail as having been answered.

[174] The fourth trail began with a letter from Ashley to BWR dated 6 December 2004. In that letter Ashley requested an itemised account of the monies he owed to the estate in order to settle those matters. On 7 January 2005 Ashley sent a further letter following up his 6 December letter. On 23 March 2005 BWR responded advising as to the amounts owed by Ashley and Wini Mauger to the estate. That request was, accordingly, adequately responded to.

[175] The fifth, and final trial, was initiated by letter dated 26 October 2006 by HH to BWR. That letter requested financial statements for the estate for 2004, 2005 and 2006 and financial statements for Minola Apatu's estate from 2003 onwards. On 7 November 2006 BWR responded enclosing financial statements for the estate for 2004-2006 and further noted that no financial statements had been prepared for Minola Apatu's estate. That was also an adequate response.

[176] As I have noted, beneficiaries have a right to see estate accounts. Beyond that there is trustee discretion. In the end Ashley's solicitors wanted to see all documents relevant to the estate in order to determine whether causes of action were available to them. There is no formless duty to supply such comprehensive information, but in any event, the litigation itself superseded these issues and all relevant documents in the possession of the defendants were in fact provided pursuant to discovery.

[177] By and large I am satisfied that the requests by Ashley or his solicitors for information from Terry, BWR or DP were adequately responded to. The single exception relates to the request contained in Ashley's letter to BWR dated 2 May 2003 in which he asks what exactly is in the estate, why there are no tax returns and why accounts were so lacking in detail. In the event all of these issues have been addressed in this litigation and any further order in respect of that request is now quite unnecessary.

[178] Once again, to the extent that this failure represented a breach of trustee standards, it is appropriate that this breach be excused under s 73 of the Trustee Act 1956, the trustees having acted honestly and reasonably throughout.

[179] In light of the foregoing I would decline to make any order under s 44 of the Administration Act 1969.

Conclusion

[180] The plaintiffs accordingly fail in all respects in this proceeding.

[181] Memoranda as to costs may be filed accordingly if agreement cannot be reached.

Joseph Williams J

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