I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE TAITOKERAU
In the Māori Land Court of New Zealand
Taitokerau District

A20210009250
A20190006088

WĀHANGA *Under*	Sections 19 and 231, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Kohewhata 27C2A and others
I WAENGA I A *Between*	RACHEL WITANA and TAOKO WIHONGI Ngā kaitono *Applicants*
ME *And*	BRUCE CUTFORTH and COLLEEN BERMINGHAM-BROWN Ngā kaiurupare *Respondents*

Nohoanga: *Hearing*	10 September 2021 (Heard at Whangārei)
Kanohi kitea: *Appearances*	A Irwin for R Witana J Burley for B Cutforth and C Bermingham-Brown
Whakataunga: *Judgment date*	6 October 2021

TE WHAKATAUNGA Ā KAIWHAKAWĀ M P ARMSTRONG
Judgment of Judge M P Armstrong

Hei tīmatanga kōrero
Introduction

[1] The Omapere Taraire E and Rangihamama X3A Ahu Whenua Trust ("ORT") is a large and commercially successful trust in Te Taitokerau. I have previously issued a number of decisions concerning this trust. The most recent determined applications filed by the trustees against each other.[1] Two of the trustees were removed. Despite those orders, the division between the remaining trustees has continued, resulting in fresh applications concerning trustee conduct.

[2] This decision determines two interlocutory issues outlined below.

He aha te horopaki o ēnei tono?
What are these applications about?

[3] ORT had four trustees, Dr Robust, Mr Cutforth, Ms Bermingham-Brown and Ms Witana. Dr Robust resigned as a trustee on 14 June 2021. I granted an order removing him as a trustee on 4 August 2021.

[4] Before Dr Robust's resignation, ORT entered into the Ngā Whenua Kaikohe Project ("project"). Under this project, $1.5m has been granted from the government's provincial growth fund to develop vineyards on various blocks of Māori freehold land. This includes land owned by ORT, and other trusts within the local area.

[5] One of the other blocks to be developed under this project is Tahuna 47. This block is owned by the Eru Moka and Te Owai Pou Whānau Trust ("whanau trust"). Dr Robust is a trustee (chairperson) and beneficiary of the whānau trust. At the relevant time he was also a trustee and beneficiary of ORT.

[6] Ms Witana contends that Dr Robust participated in discussions and decisions on behalf of ORT concerning this project. She argues that in doing so Dr Robust breached the provisions of the trust order and failed to avoid a conflict of interest. One of the decisions Dr Robust participated in appointed Ms Bermingham-Brown as the project leader for this project. The trustees who passed that resolution were Dr Robust, Mr Cutforth and Ms

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1 *Witana v Tau - Omapere Taraire E* (2019) 191 Taitokerau MB 1 (191 TTK 1).

Birmingham-Brown. Ms Witana argues that as Dr Robust was conflicted the trustees did not have a sufficient majority to pass this resolution.

[7] In addition to this, a question has arisen as to whether Dr Robust was entitled to participate in trustee decisions between the date of his resignation and the date he was removed.

[8] A number of substantive applications have been filed by both sides. This decision determines two interlocutory matters:

(a) Whether I should grant an interim injunction restraining the trustees concerning this project; and

(b) Was Dr Robust entitled to participate in trustee decisions between the date of his resignation and the date of his removal.

[9] Ms Witana seeks to amend the interim injunction application. I address this issue first.

Ka āhei a Ms Witana ki tāpiri atu ki te tono whakatāpu?
*Can Ms Witana amend the interim injunction application***?**

[10] Ms Witana originally sought an interim injunction prohibiting Dr Robust and Ms Bermingham-Brown from taking any further steps concerning this project. As Dr Robust resigned and has been removed, an order against him is no longer necessary. On the day this application was heard, Ms Witana sought to amend the interim injunction to restrain all of the trustees concerning this project.

[11] Generally, an applicant is entitled to amend pleadings at any time. However, they must seek leave to do so where the application has been set down for hearing.[2] In deciding whether to grant leave, I have to take into account whether the amendment is in the interests of justice, whether it would cause significant prejudice to the respondent, and whether it will cause significant delay.[3]

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2 *Shanton Apparel Ltd* v *Thornton Hall Manufacturing Ltd* [1989] 3 NZLR 304 (CA) and *Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528 (CA).

3 *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216; [1958] 3 All ER 540 (CA).

[12] It is not in the interests of justice to amend this application. When considering the interests of justice, the conduct of the parties will always be relevant. Ms Witana sought to amend this application on the day of the hearing. There was no prior notice to the respondent or the Court. There was no proper basis or explanation for seeking to amend the application at such late notice.

[13] Mr Irwin, for Ms Witana, argued that the application had to be reframed given Dr Robust's resignation and removal. That may be so, but it does not justify seeking to amend the application on the day of the hearing. Dr Robust resigned on 14 June 2021. I held a teleconference with counsel on 4 August 2021 where we discussed Dr Robust's resignation. I granted an order that day removing him as a trustee. At that teleconference I also timetabled the application seeking an interim injunction for hearing. At no time did Mr Irwin raise that the application had to be amended.

[14] The application was heard on 10 September 2021. At no time leading up to that hearing did Mr Irwin advise the respondent, or the Court, that an amendment was required. This was not raised until the day of the hearing. Ms Witana's conduct, and failure to raise this earlier, goes against granting leave to amend at such late notice.

[15] It is also not necessary to amend the application. The current application seeks to restrain Ms Bermingham-Brown concerning the project.[4] If that is granted, only Ms Witana and Mr Cutforth can make decisions concerning the project while the interim injunction is in place. The trustees have to act by majority. This means that no further steps could be taken without Ms Witana's consent. That sufficiently protects her position and an amendment to the injunction restraining all trustees is not necessary. There is no need to consider the other factors relevant to granting leave.

[16] I do not grant leave to amend the application.

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[4] An order against Dr Robust is no longer necessary as he is not a trustee.

Should I grant the interim injunction?
Ka whakamana ahau i te tono mō te whakatāpu?

[17] The principles concerning the grant of an interim injunction are settled. The applicant must demonstrate that:[5]

(a) There is a serious question to be tried;

(b) The balance of convenience is in favour of an injunction; and

(c) It is in the interests of justice to grant an injunction.

[18] I consider these in turn.

Is there a serious question to be tried?

[19] In determining whether there is a serious question to be tried, it is necessary to consider the allegations before the Court, the applicable law, and whether there is a tenable combination of resolution of the issues of law and fact on which the applicant could succeed.[6]

[20] Mr Irwin submits that there are two serious questions in this case:

(a) That Dr Robust participated in the decision approving the project in breach of trust due to a conflict of interest; and

(b) As a result, the trustees were inquorate when making that decision.

Was there a conflict of interest?

[21] It is accepted that Dr Robust is a trustee and beneficiary on ORT and the whānau trust. It is also accepted that both trusts are parties to the project.

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5 *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129; *Bowkett v Action Finance Limited* [1992] 1 NZLR 449; and *Lomax v Apatu – Awarua o Hinemanu Trust* (2013) 22 Takitimu MB 282 (22 TKT 282).

6 *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 and *Sutton v The House of Running Ltd* [1979] 2 NZLR 750 at 753.

[22] Part 5.4 of the ORT trust order addresses conflicts of interest. This provides:

> 5.4 **Conflict of interest**
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> 5.4.1 Notwithstanding any rule of law to the contrary and subject to clauses 5.4.2 and 5.4.3 no trustee shall be disqualified from being appointed or holding office as trustee by reason only of a conflict of interest.
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> 5.4.2 Where a trustee has a conflict of interest:
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> (a) That trustee shall disclose the nature and extent of the conflict of interest to the other trustees;
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> (b) That trustees shall not take part in any of the discussions or decisions relating to the conflict of interest and must absent himself or herself from any such meeting of trustees and shall be disregarded for the purpose of forming the quorum of any such meeting;
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> (c) The other trustees may apply to the Court for directions where they consider that the conflict of interest may compromise the operation of the trust and the Court may make any such directions or orders that it thinks fit including the removal of the trustee.
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> 5.4.3 A trustees is deemed to have a conflict of interest in respect of a matter or a transaction where the trustee:
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> (a) Or the trustee's spouse or partner is employed or engaged as an employee or contractor of the trust;
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> (b) Is a party to, or will derive a financial benefit from, the matter or the transaction; or
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> (c) Has a financial interest in any other party to the matter or the transaction; or
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> (d) Is a director, shareholder, member, official, partner or trustee of another party to, or person who will or may derive a financial benefit from, the matter or transaction (not being a party that is wholly owned by the trust or by any subsidiary of the trust); or
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> (e) Is the parent, child, spouse or partner or another party to, or person who will or may derive a financial benefit from, the matter or transaction; or
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> (f) Is otherwise directly or indirectly interested in the matter or transaction.

[23] As a trustee and beneficiary of the whānau trust there is a tenable argument that Dr Robust:

> (a) Is a party to or will derive a financial benefit from the project;

(b) Has a financial interest in another party to the project; and

(c) Is a trustee of another party who will or may derive a financial benefit from the project.

[24] On the face of it, this gives rise to a conflict of interest. In those circumstances, Dr Robust should not have participated in any discussions or decisions concerning the project. He should have left the room and let the other trustees do so in his absence. This did not occur. The minutes of trustee meetings filed in support of the application demonstrate that Dr Robust participated in discussions and decisions concerning this project. This includes the key decision on 11 June 2020 authorising Ms Bermingham-Brown to sign the contract on behalf of the trust. That resolution tacitly approved the project itself.

[25] However, the duty to avoid a conflict of interest derives from the duty of loyalty. A trustee must not place him or herself in a position where their obligation to the trust and their personal obligations (or in this case his obligations to or interests in the whānau trust) conflict. This project is not a conventional contract such as the two trusts entering into a lease. In those circumstances the interests of the two parties may compete on issues such as setting rent. In the present case, it is not clear that the interests of ORT and the whānau trust conflict. Mr Burley, for Ms Bermingham-Brown and Mr Cutforth contend that their interests are aligned and so there is no conflict, or if there is, any such conflict is 'de minimis'.

[26] In response, Mr Irwin submits that while the interests of ORT and the whānau trust may be aligned, an actual conflict still arises as questions will remain as to whether Dr Robust approved the project in the best interests of ORT or the whānau trust. Mr Irwin further argues that per cl 5.4.3 of the trust order if one of the specified categories apply, this is deemed to be a conflict of interest even if no actual conflict arises.

[27] Whether there is an actual or deemed conflict in this case is a matter for the substantive application. I am satisfied that Ms Witana has a tenable argument and so there is a serious question on this issue.

Were the trustees inquorate?

[28] The resolution to enter into the project was passed by Dr Robust, Mr Cutforth and Ms Bermingham-Brown. Ms Witana did not attend the meeting.

[29] Clause 5.2.1 of the trust order requires three trustees present throughout the meeting to constitute a quorum. Clause 5.2.5 provides that the trustees may exercise their powers by majority. There were four trustees in office at that time. Mr Irwin contends that as Dr Robust was conflicted he could not be counted in the quorum and so only two trustees validly voted in favour of the resolution. This is not a majority.

[30] Mr Burley disputes any actual conflict. He further argued that as the trust order only requires three trustees to constitute a quorum, the trustees' powers could be exercised by a majority of trustees present at the meeting. In this case, as only three trustees attended, two were entitled to make the decision and so even if there was a conflict the resolution was properly passed.

[31] Even at an interlocutory stage, I have great difficulty with Mr Burley's argument that the trust order allows a decision to be made by a majority of trustees present at a meeting. The general convention for Māori land trusts is that decisions have to be made by at least a majority of trustees in office. This is consistent with s 227 of Te Ture Whenua Māori Act 1993. Clause 5.2.5 of the trust order provides that the trustees' powers may be exercised at a meeting of trustees by a majority of trustees. It does not say that it can be exercised by a majority of trustees at the meeting. Mr Burley's approach would mean that two of four trustees could validly make decisions on behalf of the trust. While I am not making any final decisions about that argument, I am certainly not attracted to it.

[32] There is merit to Mr Irwin's argument that if Dr Robust was conflicted then he cannot be included in the quorum and his vote cannot be counted. This would mean that only two trustees voted in favour of the resolution which is not a majority in office.

[33] While the question remains open as to whether there was an actual conflict in this case, I am satisfied there is a serious question as to whether the trustees were inquorate.

Where does the balance of convenience lie?

[34] The balance of convenience requires balancing the injustice that will be caused to the applicant if an interim injunction is refused and the applicant's case ultimately succeeds against the injustice to the respondent that will result if the injunction is made but then discharged in the substantive judgment.[7]

[35] The contract entered into for the project provides that the parties intend to establish a new entity (the NWK entity) to manage the project. Once NWK has been established, ORT and the Ministry will novate the existing project agreement and NWK will assume the obligations under the agreement.

[36] Mr Irwin submits that once NWK is established, ORT will be bypassed and control of the project will be handed over to NWK. He contends that if I do not grant an interim injunction, by the time I hear the substantive applications, NWK will have control of the project and "there would be nothing Ms Witana or the Court could do to unpick the decisions she challenges".

[37] I remain unclear about this submission. It is difficult to determine the impact of the new entity at this early interlocutory stage. I also accept that the interests of third parties (including NWK) may be relevant when deciding whether to exercise my jurisdiction in the substantive applications. Despite that, it is clear that: no activity can be undertaken on trust land without trustee consent; and I have the most extensive supervisory powers concerning trusts.

[38] On this basis it is difficult to see how the establishment of a new entity would somehow oust my jurisdiction to determine whether the trustees acted properly or whether NWK has authority to carry out the project on trust land.

[39] In addition to this, Ms Witana contends that:

(a) ORT was used as a vehicle to apply for funding to benefit other land-owners;

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[7] *Wellington International Airport Ltd v Air New Zealand Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008 and *Cayne v Global Natural Resources Plc* [1984] 1 All ER 225 (CA).

(b) The project cherrypicked the group of land-owners;

(c) There was no open and transparent process;

(d) The other trustees were aware of Dr Robust's conflict and permitted him to participate; and

(e) The trustees are not making the best decisions for the beneficiaries on issues that include this project.

[40] These matters were not pleaded as grounds relied on in the application seeking an interim injunction. The allegations in paragraphs (d) and (e) above were pleaded in relation to the application seeking a review of trust. There is a question as to whether Ms Witana is entitled to rely on grounds not pleaded in the application itself. Mr Irwin submitted that not all matters need to be pleaded as these are questions of law. I disagree. These are clearly questions of fact.

[41] Even putting that to one side there is a more significant hurdle concerning the pleadings.

[42] The purpose of an interim injunction is to preserve the applicant's position pending the determination of the substantive proceeding. The balance of convenience requires balancing the injustice that will be caused to the applicant if an interim injunction is refused and the applicant's case ultimately succeeds. Ms Witana confirmed that:

(a) She is not asking the trust to pull out of the project; and

(b) She is not seeking an order to set aside the contract.

[43] Mr Irwin confirmed there is no relief sought in the substantive proceeding concerning the project.[8] On this basis, there can be no prejudice to Ms Witana if an interim injunction

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[8] The only relief which did so was the application seeking a permanent injunction. However, that sought an injunction prohibiting Dr Robust from taking any further steps in relation to the project. As he has resigned, that application falls away. The substantive application otherwise does not seek any relief concerning the project

is refused as this will not affect the relief she is seeking in the substantive application. This is fatal to the application as it negates the very purpose of an interim injunction.

[44] Mr Irwin argues that although there is no express relief sought concerning the project the pleadings do seek "such other orders as this Court thinks fit". This does not rescue the application.

[45] The onus is on Ms Witana to demonstrate that the injunction should be granted. This is inextricably linked to the relief sought in the substantive proceeding. A general pleading such as this does not discharge this burden.

[46] The balance of convenience does not support the grant of an injunction.

Where do the interests of justice lie?

[47] Having assessed whether there is a serious question, and the balance of convenience, I must stand back and consider where the overall justice lies. As noted, it is fatal that the interim injunction is not required to preserve the relief Ms Witana is seeking in the substantive application.

[48] Mr Irwin contends that trustees acting in conflict, and making decisions while inquorate, are serious issues. He submits I should be concerned about the administration of this trust and an interim injunction should be granted despite other shortcomings in the application.

[49] Trustees following proper decision-making processes is clearly an important issue. In the right circumstances this may justify the grant of an interim injunction. In particular, if the evidence demonstrated that funds had been misappropriated or the trust's assets were at risk, I may well intervene despite deficiencies in the pleadings and the application itself. There is no such evidence here.

[50] In fact, Ms Witana appears to support the project. She participated in the early stages of the project and indicated her desire to be appointed as the project leader. She is not asking the trust to pull out of the project nor is she seeking an order to set aside the contract. Her issue is with her fellow trustees who she alleges failed to follow proper process.

[51] Ms Witana is also a trustee. She can continue to participate in the administration of the trust, and this project, over this intervening period. Mr Irwin submits that at trustee meetings she is continually outvoted by the other trustees and her concerns are not upheld. Even if that is so, I cannot grant an interim injunction because Ms Witana has been outvoted by a majority. That is a conventional and orthodox outcome in trustee decision making. This is not a case where the circumstances are so compelling that I should grant an injunction of my volition to protect the trust's assets.

[52] It is not in the interests of justice to grant the interim injunction.

Decision

[53] The application seeking an urgent interim injunction is dismissed.

E tika ana a Dr Robust ki te mahi tonu i ngā whakataunga o ngā kaitaratī, i muri i tōna wehenga?
Was Dr Robust entitled to participate in trustee decisions after he resigned?

[54] In *Ngamoki-Cameron v Koopu – The Proprietors of Mangaroa & other blocks*, Judge Harvey found that a valid resignation from a committee of management member could only be withdrawn with the consent of the remaining members.[9] I took a similar approach with ORT in *Witana v Tau - Omapere Taraire E,* where I held that:[10]

(a) A trustee of an ahu whenua trust may retire by giving notice to that effect to the Court or to his or her co-trustees;

(b) The resignation can be tendered in writing, or orally, provided that there is clear evidence of the resignation itself;

(c) A resignation is a unilateral act. It does not require acceptance by the co-trustees or the Court;

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9 Ngamoki-Cameron v Koopu - The Proprietors of Mangaroa and other blocks incorporated (2014) 91 Waiariki MB 279 (91 WAR 279).
10 *Witana v Tau - Omapere Taraire E* (2019) 191 Taitokerau MB 1 (191 TTK 1) at [86].

(d) Whether there is clear evidence of a resignation is a question of fact to be decided on a case by case basis;

(e) Once the trustee has effected his or her resignation, it can only be withdrawn with the consent of the recipient.

[55] In the present case there is no dispute that Dr Robust resigned 'with immediate effect'. The question is whether he was entitled to participate in trustee decisions between the date his resignation took effect and the date he was removed as a trustee by Court order.

[56] In *Taueki v Horowhenua 11 Part Reservation Trust - Horowhenua 11 (Lake) Block,* the trust order provided that the trustees of that trust had a 3 year term in office. Judge Harvey had to consider whether the trustees could continue to act as trustees beyond the expiration of that term. He found:[11]

> [56] It is generally accepted-in the absence of specific provisions in the trust order-that trustees of Māori land remain in office at the expiry of a specified term of appointment until further order of the Court. Accordingly, although the current trustees were appointed for three years, they did not automatically cease to be trustees once that time passed. If that were the case, the trust would be left in the unsatisfactory position of being without trustees and unable to conduct its business affairs for an indefinite period.
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> …
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> [59] I consider that, despite their term of office being exceeded, the trustees could continue to act in that office, pending the outcome of an election that would need to take place within a reasonable timeframe. This conclusion is based on the current reality that, as mentioned, appointments are made by Court order. Moreover, there is no express provision in the trust order that declares that the positions fall vacant on the expiry of three years. It is also not uncommon for individuals appointed for certain terms to governance bodies to remain in office until their replacement have been appointed.

[57] Mr Burley argues the same approach applies here. That although Dr Robust resigned on 14 June, he could continue to act as a trustee until he was removed by Court order on 4 August.

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[11] *Taueki v Horowhenua 11 Part Reservation Trust - Horowhenua 11* (Lake) Block (2016) 347 Aotea MB 269 (347 AOT 269) at [56]–[59].

[58] Mr Irwin argues that the decision in *Taueki* can be distinguished as it concerned a fixed term of office per the trust order, in contrast to Dr Robust who voluntarily resigned. Mr Irwin further contends that in *Taueki* if the trustees could not act beyond the fixed term there would be no trustees in office, leaving the trust assets vulnerable. That does not apply here as following Dr Robust's resignation, three trustees remained to administer the trust. Mr Irwin submits that whether a trustee can continue to act between the date of resignation and date of removal must be considered on a case by case basis.

[59] I do not agree with Mr Irwin's argument. Whether a trustee has resigned is a question of fact. That must be considered on a case by case basis. Whether a trustee can continue to act between the date of resignation and removal, is a question of law. A principled, and consistent, approach must apply.

[60] Māori land trusts operate in a very different statutory context to other common law trusts or commercial entities. Trustees are appointed and removed by the Court. They are vested with the trust land, and the associated powers to administer that land, by Court order. That order remains in force until that trustee is removed, also by Court order.

[61] This is significant for Māori land trusts as the order not only vests powers in the trustee, it imposes (either expressly or implicitly) obligations on him or her concerning the administration of the trust. The powers and obligations of a trustee are intertwined. One cannot exist without the other. If a trustee cannot exercise trustee powers following a valid resignation (but before removal) then he or she cannot owe trustee obligations during that period either. Mr Irwin accepted this in response to my questions.

[62] This Court has the most extensive supervisory powers concerning trusts. A trustee tendering a valid resignation would not oust the Court's jurisdiction to hold that trustee to account for any loss suffered by the trust following that resignation being tendered. An obvious example would be where all trustees (or a sole trustee) resigned leaving the trust without an administrator. Despite the resignation, the trustee would remain accountable for failing to protect the trust's assets pending the appointment of new trustees.

[63] The same would apply for an individual trustee who resigned even if other trustees remained in office. If a trustee resigned in a situation where there was foreseeable risk to

the trust's assets, the retiring trustee could still be held to account if they failed to act reasonably and prudently to protect the trust's assets pending their removal from office by the Court.

[64] If a valid resignation does not discharge the trustee's obligations, then it cannot discharge their powers, otherwise the trustee would be left in a situation of owing obligations to the beneficiaries but having no power to discharge those obligations.

[65] Where a trustee has tendered a valid resignation, then he or she remains a trustee until removed by Court order. He or she cannot withdraw that resignation unless the withdrawal is accepted by the remaining trustees (or the Court). If there is a loss to the trust following a valid resignation, it will be for the Court to consider whether the trustee acted reasonably and prudently following his or her resignation and whether the trustee should be held to account. That is a proper and principled approach as part of the Court exercising its discretion in its supervisory function. The case by case approach cannot be applied to determine *whether* the trustee owes obligations (or has powers) following his or her resignation as argued by Mr Irwin.

[66] For these reasons, Dr Robust was entitled to act as a trustee following his resignation on 14 June up until he was removed as a trustee by Court order on 4 August 2021.

I whakapuaki i te 9:00am i Te Taitokerau te 6th o ngā rā o Whiringa-ā-nuku te tau 2021.

M P Armstrong
JUDGE