

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

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CIV-2021-470-000049
[2021] NZHC 3469**

UNDER the Trusts Act 2019 and Part 18 of the High Court Rules 2016

IN THE MATTER of an application under ss 130 and 131 of the Trusts Act 2019

BETWEEN WILLIAM BEAU HOLLAND, NATALIE ANNE BRIDGES, PETER JOHN BLACKWELL, PETER JOHN FARMER, MARK EDMOND ARUNDEL and TINA LYNN JENNEN as trustees of the TAURANGA ENERGY CONSUMER TRUST
First Plaintiffs

AND WILLIAM BEAU HOLLAND, NATALIE ANNE BRIDGES, PETER JOHN BLACKWELL, PETER JOHN FARMER, MARK EDMOND ARUNDEL and TINA LYNN JENNEN as trustees of the TECT CHARITABLE TRUST
Second Plaintiffs

AND WILLIAM HERMANUS EDUARD JONKERS
Defendant

Hearing: 15, 16, 17 November 2021

Appearances: J B M Smith QC and S E Quilliam-Mayne; and
M D Arthur and L C Bercovitch (by VMR) for plaintiffs
J F Anderson QC as Independent Counsel (by VMR)

Judgment: 16 December 2021

JUDGMENT OF DOOGUE J

This judgment was delivered by me on 16 December 2021 at
10:30am, pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar



Date:

16/12/21

STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand

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Introduction

[1] The first and second plaintiffs are the current trustees of the Tauranga Energy Consumer Trust (TECT) and the TECT Charitable Trust (the 2002 Charitable Trust) respectively (the Current Trustees).

[2] TECT was established in 1993 as a result of radical electricity reforms. The Tauranga Electric Power Board's operation was taken over by Trustpower Limited (Trustpower). Fifty per cent of the shares in Trustpower, representing the capital undertaking of the previous electric power board, were settled by that company on what was then called the Tauranga Power Trust, which has since become TECT. The purpose of TECT was to hold shares for the benefit of Trustpower's electricity consumers in the Tauranga and Western Bay of Plenty region (Consumers).¹

[3] From the establishment of TECT through to the end of March 2021, the TECT group has approved distribution of approximately \$471 million by way of annual rebates directly to the original and subsequent Consumers and \$129 million to community organisations and initiatives.

[4] TECT, via a holding company, has 26.8 per cent of the shares in Trustpower. Trustpower proposes to sell its retail business. That sale will have a profound effect on TECT.

[5] A sale by Trustpower would leave the Current Trustees unable to administer TECT in a way consistent with its terms and objectives. Those who currently qualify for benefits as Consumers under the TECT trust deed (TECT Deed) would no longer qualify. Those who could benefit from TECT would decrease from 47,000 Consumers to approximately 150 larger commercial and industrial electricity Consumers.

[6] The Current Trustees propose to restructure TECT to the following effect (the Proposed TECT Restructure):

¹ In some places in this decision "consumers" will refer to a defined class of beneficiaries in the various iterations of the TECT trust deed and in others it will be used in its plain meaning. When used for the former purpose it will be capitalised.

- (a) amending the TECT Deed so that TECT will exist for the sole purpose of paying pre-set rebates to a fixed class of beneficiaries, being existing retail, commercial and industrial Consumers for an anticipated 30-year period;
- (b) winding up TECT on 31 December 2050 (or earlier, following a Consumer Consultative Procedure (CCP) or exhaustion of the funds available);
- (c) creating a new charitable trust (the TECT Community Trust), which would hold and manage TECT's assets and provide grants and donations to charitable organisations in the Tauranga and Western Bay of Plenty region;
- (d) TECT selling 52 per cent of its TECT Holding Limited shares (through which TECT holds its Trustpower shares) to the TECT Community Trust funded by a 4.5 per cent interest-bearing vendor loan;
- (e) distributing the remainder of TECT's assets (including the balance of its shares in TECT Holdings Ltd) and the 2002 Charitable Trust's assets by way of capital distribution to the TECT Community Trust; and
- (f) paying future TECT rebates from repayments of the principal and interest derived from the vendor loan.

[7] The Current Trustees purport to achieve the Proposed TECT Restructure by:

- (a) winding up the 2002 Charitable Trust; and
- (b) varying the TECT Deed, including its winding up and amendment provisions.

[8] The Current Trustees now seek from the Court:

- (a) an order under s 133 of the Trusts Act 2019 (the Act) and/or the Court's inherent jurisdiction directing that it is proper and lawful for the Current Trustees to implement the Proposed TECT Restructure in relation to TECT;
- (b) in partial alternative to (a), an order under s 130 of the Act and/or the Court's inherent jurisdiction removing cl 9.3 and 13.3 from the TECT Deed; and
- (c) an order under s 133 of the Act and/or the Court's inherent jurisdiction directing that it is proper and lawful for the Current Trustees to implement the Proposed TECT Restructure in relation to the 2002 Charitable Trust.

[9] On 19 May 2021, Associate Judge Gardiner made directions as to service and advertisement of this proceeding. She directed that any person (Interested Party) wishing to be heard must file a notice of appearance or statement of defence. A number of Interested Parties, including some Consumers, oppose the proposed restructure. They say:

- (a) the Current Trustees do not have the express powers under the TECT Deed to effect the Proposed TECT Restructure;
- (b) the Proposed TECT Restructure does not benefit the existing 47,000 Consumers;
- (c) the consultative procedure undertaken prior to this application (CCP 2021) was inadequate;
- (d) the Current Trustees did not act in good faith as they had predetermined the matter prior to the CCP 2021; and
- (e) some, or all, of the Current Trustees have disqualifying conflicts of interest.

Issues for the Court to Determine

[10] In summary, the issues for the Court are:

- (a) what is permitted under the TECT Deed;
- (b) in the event the Proposed TECT Restructure is permitted under the TECT Deed whether it is nonetheless in breach of any duty owed by the Current Trustees to the Consumers;
- (c) whether the CCP 2021 complied with the requirements set out in the TECT Deed;
- (d) whether the Current Trustees were guilty of predetermination; and
- (e) whether some, or all, of the Current Trustees have disqualifying conflicts of interest.

Background

[11] It is important in this case to set out the relevant history of the electricity reforms, how TECT was established and the changes to TECT over time in order to provide the context for the Court's scrutiny of the Current Trustees' decision making.

[12] The settlor of TECT was Trustpower Limited, a company with Company Number 604040 (the settlor) incorporated on 29 October 1993. On 31 October 2016, the settlor and its group of companies underwent a demerger. Trustpower's group business then consisted of two listed entities:

- (a) Trustpower Limited (Company Number 565426) (Trustpower); and
- (b) Tilt Renewables Limited.

[13] The settlor was removed from the Companies Register on 7 July 2017 as a result of the implementation of the demerger.

Establishment of TECT and the 2002 Charitable Trust

1992 Electricity Reforms

[14] TECT was established in 1993, as part of the then electricity reforms under the Energy Companies Act 1992 (ECA) to hold a substantial shareholding in Trustpower for the benefit of current and future electricity Consumers in the TECT “District”, which was delineated in the TECT Deed. TECT has, since then, provided rebates to the original and subsequent Consumers and financial support for local initiatives, facilities and events in the Tauranga and Western Bay of Plenty region.

[15] Prior to the reforms, electricity in the region was supplied by the Tauranga Electric Power Board, an electricity supply authority.

[16] However, the reforms under ECA privatised the electricity supply authorities, replacing them with public companies, in an effort to introduce competition to the electricity market. The ECA left individual communities free to determine how the shares in the new energy companies would be held.

[17] The reforms required the Tauranga Electric Power Board to consult with the community and submit an establishment plan to the Minister of Energy by 31 December 1992.

[18] Initially, it was proposed that the new company would also include the assets of the Rotorua Electric Power Board; two new community trusts (Tauranga and Rotorua respectively) would hold 25 per cent of the shares. The draft establishment plan included a synopsis of the proposed trust deeds, which described the general purpose as “to make provision for charitable purposes or objects in the district”, in respect of the territory over which the Tauranga Electric Power Board and Rotorua Electric Power Board were authorised to supply electricity. The remaining shares would go to employees (1 per cent) and to the consumers (74 per cent), described as a “\$74 million share giveaway”. The initial plan was resisted by the public. In particular, “the major concerns of the public were loss of control by the community through the free issue of 75% of the equity capital to consumers”.

[19] The Board produced a revised draft establishment plan for further consultation. Merger with Rotorua was dropped, and the proposed trust would be allocated 50 per cent of the shares in the new company (the proposed company having net assets with a book value of \$60 million). The proposed trust was described as “a community trust to provide benefits for all consumers”, being the customers of the two boards at that time.

[20] One of the key recommendations following public consultation was to make the proposed charitable trust a community trust. The revised draft establishment plan gave TECT a consumer, rather than a wider charitable, focus.

[21] The revised draft establishment plan proposed forming a new company, the settlor, to take over the operations of the Tauranga Electric Power Board. Fifty per cent of the settlor’s shares would be held by a consumer trust, 49 per cent would be transferred to Consumers at the time and the balance would go to employees. The plan described the trust as, “a Consumer Trust to provide benefits for the consumers”. As the proposed trust was not an (incorporated) charitable trust, it had a finite maximum life of 80 years.

[22] The revised establishment plan was released for public consultation on 30 December 1992. After receiving a more positive response from the public, the Tauranga Electric Power Board unanimously endorsed the revised establishment plan on 19 February 1993.

[23] TECT was established by deed dated 21 December 1993. It was settled by the then Trustpower company. The initial trustees were the board members of the old power board. When it settled TECT, the settlor was a retailer and generator of electricity and the owner of the local distribution lines.

[24] At the time TECT was established, 100 per cent of the electricity consumers in the old Tauranga Electric Power Board supply area were beneficiaries. That did not include consumers of the Tauranga City Council electricity business.

Trustpower

[25] In 1997, the Tauranga City Council sold its electricity business to the settlor.

[26] Electricity market reforms continued throughout the 1990s. The Electricity Industry Reform Act 1998 required full ownership and separation of distribution (lines) businesses from supply (retail and generation) businesses. The settlor chose to focus on generation and retailing of electricity and to exit the distribution business. It sold its lines business and assets.

[27] Following the settlor's decision to focus on its generation and supply business, the original definition of "Consumer" in the TECT Deed, which referred to "... connection of premises situated in [the settlor's] distribution network", was redundant, given the settlor no longer had a distribution business. TECT elected to retain its links to the settlor (rather than restructuring itself as a trust owning a lines business). Following a consultation process, the definition of "Consumer" was amended to refer to those people situated in the Tauranga Electric Board supply area who purchased their electricity from the settlor.

[28] In 2002, TECT settled the 2002 Charitable Trust. The Current Trustees say the TECT Deed was amended to record a broad community object as part of the TECT Trustees' distributive powers. Those parties who have filed notices of opposition to the application before the Court explained that in their view the rationale behind creating the 2002 Charitable Trust was not to broaden the focus of TECT for wider community benefit; rather they say it was created for tax efficiency reasons.

[29] In 2003, after a consultation process, the definition of the TECT "District" in the TECT Deed was amended to include consumers of the former Tauranga City Council electricity business supply area. Thereafter, the TECT Consumer District was essentially all the Tauranga and Western Bay of Plenty region, and all the settlor's customers in it were Consumers and beneficiaries of TECT.

[30] The 2016 demerger of the settlor and its group companies did not affect TECT's functions. At that time, the definition of "company" in the TECT Deed was changed to include the new Trustpower company, and to exclude Tilt Renewables and

its subsidiaries. The effect of that change was that the definition of “Consumers” in the TECT Deed remained linked to electricity customers of the new Trustpower in the TECT Consumer District.

Current position

[31] As at the end of August 2021 there were approximately 47,000 Consumers, all of whom were eligible to receive benefits under the TECT Deed.

[32] TECT has a very significant portfolio and asset base. As reported in the audited consolidated financial statements to 31 March 2021, the overall portfolio across the TECT group (net of liabilities) was \$1,137,307,507. Approximately 60 per cent of TECT’s assets are the shares it holds in Trustpower through TECT Holdings Limited (TECT Holdings), a company wholly owned by TECT. TECT’s shareholding in Trustpower has changed over time but TECT currently holds 26.8 per cent of Trustpower’s shares, approximately \$690 million in value. The remaining portfolio of TECT’s asset base comprises \$456 million held in diversified investments and other assets.

[33] By far the majority of TECT’s income is presently distributed directly to Consumers through rebates. Approximately 80 per cent of TECT’s distributions go towards Consumers via the rebate, with the remaining 20 per cent being paid out through grants and donations to community organisations. Trustpower currently has a 58.3 per cent market share of retail customers in the Tauranga region.

[34] Accordingly, TECT’s income is used to provide benefits to Consumers through:

- (a) the TECT rebate sent to Consumers each year; and
- (b) grants and donations to community organisations throughout the TECT District as that term is defined in the TECT Deed.

History of TECT's distributions

[35] Prior to 2008, TECT's income distribution mix was agreed by the then trustees on an annual basis. In 2008, the then trustees formalised a policy whereby approximately 80 per cent of distributions were to be distributed directly to Consumers and the balance was to be distributed through the grants scheme to eligible community groups.

[36] In 2009, the then trustees conducted a non-binding poll of Consumers on whether they wanted 100 per cent of funds to be distributed to individual beneficiaries, with no grants at all to community groups. Consumers overwhelmingly voted against that proposal.

[37] In 2018, the then trustees (who included some of the Current Trustees) again consulted Consumers; this time on a proposal to end the payment of rebates and transfer the remaining TECT assets to a new charitable trust, with the focus of providing funds to community and charitable groups (the 2018 proposal). The 2018 proposal involved paying all Consumers a one-off \$2,500 payment and five years of rebates, before ending the rebates and winding up TECT in 2023.

[38] TECT received 21,000 written submissions and 130 oral submissions on the 2018 proposal, the majority of which were in opposition.

[39] On 21 March 2018, the then trustees announced they were not proceeding with the 2018 proposal.

[40] It is clear a considerable number of Consumers think the rebates are very important. Others, including some of the Interested Parties in this case, question their value, arguing that they have an anticompetitive effect on electricity prices in their region.

Sale of Trustpower

[41] On 28 January 2021, Trustpower announced it was undertaking a strategic review of its retail business. One of the potential outcomes was the sale of Trustpower's retail business.

[42] Trustpower had confidentially briefed the Current Trustees well in advance of that announcement. This earlier engagement enabled the Current Trustees to consider the implications of a sale of Trustpower's retail business and develop a proposal in response. By the time of Trustpower's announcement, extensive work had been done by the Current Trustees. Various accounting and legal advice had been obtained and a draft 2021 proposal was well advanced.

[43] The Current Trustees appreciated that a sale by Trustpower of its retail business would mean TECT could no longer be administered in a way that was consistent with its terms and objectives. Those liable to pay Trustpower (i.e. the "Company" in terms of the definitions in the TECT Deed) and who were thus Consumers in terms of the Trust Deed would, on the sale of the retail business, cease to be Consumers. The number of beneficiaries would significantly decrease. TECT's very substantial asset base would then be held for only approximately 150 commercial and industrial Consumers.

[44] TECT announced on the same day, 28 January 2021, they were "well advanced in developing a proposal that outlines the changes to TECT's structure". It appears by this time a set of documents for consultation, including the amended and new trust deeds and explanatory memorandum, were ready to be released. At the trustees' meeting on 29 January 2021, the Current Trustees agreed to approve the proposed restructure for consultation and commenced the CCP 2021 on 18 February 2021.

[45] In August 2021, Mercury New Zealand Ltd applied to the Commerce Commission for clearance to acquire Trustpower's retail business. It subsequently obtained clearance.

[46] As at the end of August 2021, there were approximately 47,000 Consumers, all of whom are eligible to receive benefits under the TECT Deed. Those Consumers

own approximately 53,000 installation contact points (ICPs) in the TECT Consumer District and comprise approximately 59 per cent of electricity consumers in the TECT District.

The Proposed TECT Restructure

[47] On 29 January 2021, the Current Trustees formally agreed on a preferred restructuring approach and to put that preferred restructuring approach to Consumers for consultation (the Consultation Proposal). This included, but was more expansive than, the process prescribed in the TECT Deed (cl 11 and Schedule 3).

[48] In summary, the Consultation Proposal envisaged:

- (a) TECT would continue, but the TECT Deed would be substantially amended to provide that TECT would exist for the sole purpose of paying rebates to existing Consumers under the TECT Deed (and not any new customers) for up to 30 years;
- (b) a new charitable trust would be established, which would be the primary vehicle to hold and manage TECT's assets and benefit the local community in Tauranga and the Western Bay of Plenty through, primarily, donations and grants; and
- (c) the 2002 Charitable Trust would be wound up.

Consumer consultative procedure (CCP 2021)

[49] The TECT Deed required the Current Trustees to follow the CCP set out in the TECT Deed, followed by (if the Current Trustees decided to proceed with that or a revised proposal after consultation) a unanimous resolution by them to approve the restructure.

[50] On 29 January 2021, the Current Trustees held a meeting and unanimously approved the Consultation Proposal and resolved it should be put to Consumers.

[51] On 18 February 2021, the Current Trustees gave notice of the Consultation Proposal to Consumers by publishing a Notice of Proposal and a Consumer Information Memorandum (CIM) titled “The Future of TECT” on the Consultation Proposal.

[52] The Current Trustees made copies of the Notice of Proposal and the CIM available for inspection at TECT’s offices, published copies on TECT’s website and mailed copies to every Consumer.

[53] Additionally, the Current Trustees emailed details of the Consultation Proposal to every Consumer for whom TECT had a current email address. The Current Trustees also emailed updates to those Consumers during the consultation process.

[54] On 20 February 2021 and 26 February 2021 respectively, the Current Trustees advertised the Consultation Proposal in the *Bay of Plenty Times* and the *Weekend Sun*.

[55] The Notice and TECT’s website explained Consumers could make written submissions on the Consultation Proposal until 4.00 pm on 22 March 2021, and that a hearing of Consumers’ oral submissions would be held on 25 and 26 March 2021.

[56] The Current Trustees made available for inspection at TECT’s office and on its website various additional information about the Consultation Proposal:

- (a) the current versions of the TECT Deed and 2002 Charitable Trust Deed;
- (b) the proposed TECT Consumer Trust Deed in clean and marked-up versions;
- (c) a summary of the proposed changes to the TECT Deed;
- (d) the proposed TECT Community Trust Deed;
- (e) a memorandum from Chapman Tripp to the Consumers with information on the Consultation Proposal and the application for directions under the Act; and

- (f) a letter from Trustpower confirming that it supported the Consultation Proposal.

[57] The Current Trustees held three consumer information meetings throughout Tauranga and the Western Bay of Plenty on 3, 4 and 7 March 2021 to explain the CCP 2021 to Consumers. The Current Trustees all attended and ran through a presentation about the Consultation Proposal at each of those meetings. This step was not required by the TECT Deed.

[58] There were 791 written submissions; of those 780 submissions were received by the closing date and 11 further submissions were received late. Written submissions were received mainly from Consumers. Five non-Consumers made submissions. All submissions made were provided to all the Current Trustees, including the 11 submissions that were received late and the five from non-Consumers.

[59] TECT's management collated all the written submissions (verbatim) and provided them to the Current Trustees. A schedule identified which submissions were from Consumers and which were from non-Consumers.

[60] The written submissions, as at 22 March 2021, were published on TECT's website and made publicly available at TECT's offices.

[61] Oral submissions were heard on 25 March 2021. Only one day was required. Thirty-two Consumers made oral submissions. No non-Consumer sought to make an oral submission. All the Current Trustees were present. Every Consumer who wished to make an oral submission was given the opportunity to do so.

[62] TECT management produced a written summary of the oral submissions. On that hearing day some Consumers also handed up supplementary material to their written submissions. That supplementary written material was provided to all the Current Trustees and was added to the collation document of written submissions, as at 29 March 2021, which was published on TECT's website and made available at TECT's offices.

[63] Initially, due to an error, two written submission documents handed up during the hearing were omitted from the submissions document on TECT's website. That was brought to TECT's attention on 25 June 2021, and a new set was uploaded on the website which included the missing submissions. That error was limited to the website only. All the written submissions were included in the material provided to the Current Trustees and were considered by them.

[64] The upshot of this extensive process was that each of the Current Trustees heard every oral submission and was provided with a complete copy of every written submission. They received and considered all these submissions prior to making the decisions to enter into the Proposed TECT Restructure.

The Current Trustees' decisions

[65] The Current Trustees, being all the trustees of TECT and the 2002 Charitable Trust, met on 30 March, 15 April and 22 April 2021 and considered Consumer (and some non-Consumer) feedback on the Consultation Proposal. At the 22 April meeting, the Current Trustees unanimously resolved to proceed with the Proposed TECT Restructure, subject to obtaining the orders sought from the Court.

[66] On 21 June 2021, Trustpower announced the conditional sale of its gas, telecommunications and retail electricity supply business to Mercury NZ Ltd for \$441 million. The key conditions of sale are:

- (a) Commerce Commission approval;
- (b) Trustpower shareholder approval; and
- (c) approval by this court of the Proposed TECT Restructure.

[67] On 31 August 2021, the Current Trustees held meetings of both TECT and the 2002 Charitable Trust to consider some aspects of the implementation of the Proposed TECT Restructure.

[68] At a meeting on 22 September 2021, Trustpower's shareholders approved the sale. By its decision of 27 September 2021, the Commerce Commission gave clearance to the sale.

[69] Finally, on 18 October 2021, the Current Trustees met (as trustees of both TECT and the 2002 Charitable Trust) to consider whether any of the information received by them since their April decisions altered their view of the proposed restructure. The Current Trustees considered evidence filed by the Interested Parties, Trustpower's sale to Mercury, its shareholders' approval and the clearance by the Commerce Commission. The Trustees agreed the Proposed TECT Restructure should proceed, subject to approval from the Court.

Opposition to the Proposed TECT Restructure

[70] Ms Andersen QC was appointed Independent Counsel to assist the Court. Her role included providing relevant information and arguments in opposition to the directions sought by the Current Trustees. It was not her role to act for the beneficiaries. However, she very helpfully liaised with them and reported to the Court as to the themes that arose from her analysis of the submissions and communications she received from various Consumers in the District and from Interested Parties.

[71] The Interested Parties are:

- (a) Mr Willian Jonkers, retired;
- (b) Ms Rosemary Balu, flower grower;
- (c) Mr Robert Paterson, retired;
- (d) Mr Bruce Cronin, retired;
- (e) Ms Amy Steele, retired teacher;
- (f) Ms Melanie Palmer, nurse;

- (g) Mr Lloyd Christie, retired;
- (h) Mr Raymond Anderson, retired;
- (i) Mr Brian Conning, bus driver;
- (j) Mr Graeme Purches, retired;
- (k) Mr Stuart Gooch, salesperson; and
- (l) Mr Norman Mayo, retired.²

[72] There is also the Attorney-General.

[73] Mr Michael Cooney, retired, swore an affidavit considered in this proceeding and filed a written submission as part of the CCP 2021. He was a trustee of TECT for 16 years and its chairperson for 13 years, until 2014. He did not file a notice of appearance, although I consider his submission and evidence alongside that of the other Interested Parties (and, for clarity, include him in that defined term).

[74] It is fair to say the proposed restructure has ignited trenchant opposition and concern in some quarters. To give that opposition its very best characterisation I shall give examples and quote from some of the submissions the Court has received from Interested Parties. A considerable number of the submissions were on all fours with each other, identifying the themes Ms Anderson QC has summarised below at [80].

[75] Mr Cronin was a TECT Trustee for five consecutive four-year terms from 1996 until deciding not to stand again in 2016. During that 20-year period he served briefly as Deputy Chair and plainly has a good understanding of the Current Trustees' roles and responsibilities. In his submission he said:

In essence, the TECT trustees, elected into the fiduciary role of acting in their beneficiaries' best interests are in fact acting 100% against them by proposing to strip them of their assets held in trust. ...

² This order represents the order in which the Interested Parties filed their notices of opposition.

[76] I quote from Mr Paterson's submission:

TECT Trustees need to be open accountable and transparent with Consumer Beneficiaries who have been loyal to Trustpower and TECT helping to create the dividends despite high pricing and if it was not for them these entities would have struggled to perform as well as they have long ago.

[77] I quote from Ms Palmer's submission:

Trustees' Plan Control By Manipulation

The Trustees have premeditated for years without conscience on the idea and intention of removing the Trust's assets to use for another purpose, in another trust.

With full awareness they have planned the proposal knowing that this is harming this Trust and that it would deprive the consumer beneficiaries irreversibly.

[78] I quote from one of Mr Purches' submissions:

I submit to the Court, that clear issues of predetermination, and the subsequent lack of any credible consultation and subsequent decision making by TECTS Trustees, was behaviour that at best can be described as careless, but at worst as being in reckless disregard of Trustees fiducial obligations to Consumer Beneficiaries.

[79] Ms Anderson QC and some Interested Parties submitted that as a result of the proposed restructure TECT is effectively transformed from being an active discretionary trust benefiting Consumers with a dynamic asset base into a fixed trust, holding a chose in action in the form of a loan to the TECT Charitable Trust which will pay fixed sums to a decreasing number of Consumer beneficiaries.

Ms Anderson QC's summary

[80] Having read all the submissions to identify and summarise the key themes in opposition to the proposed restructure, Ms Anderson provided the following precis, the accuracy of which I confirm from my own evaluation of the material:

- (a) The proposed changes are viewed by many as a longstanding agenda by the present Trustees that assets of TECT be held for charitable purposes rather than for the benefit of Consumers, therefore giving the Trustees greater powers to distribute funds for various projects. Submitters point to the present proposals as having their genesis in a withdrawn initiative that went to Consumer consultation in 2018 to distribute TECT's assets to the 2002 Charitable Trust and wind up

TECT after a one-off \$2,500 to Consumers plus five more years of rebates.

- (b) In transferring the assets of TECT to a trust for charitable purposes, many consider the Trustees are “disenfranchising”/not acting in the interests of the beneficiary Consumers for whose benefit the Trust was created. The very substantial changes being made are viewed as being contrary to the purposes or objectives of TECT.
- (c) The steps being taken by the Trustees are seen as tantamount to a winding up of TECT but in a way that circumvents the winding up provisions.
- (d) It is said that Trustpower’s strategic review was not a valid platform for initiating the wholesale amendments/restructure that was proposed and that initiating those changes was premature before a purchaser for Trustpower’s retail business was found, at which time more limited changes could have been secured.
- (e) There is a view that the TECT rebate does not in fact benefit customers, is ... detrimental to competitive pricing in the TECT District, and also [is] not rational, because Consumers (effectively) fund the rebate through higher pricing.
- (f) There is significant dissatisfaction with the consultation process as being inadequate for a range of reasons, including in the way responses were elicited, the way the proposal was described, the fact only one option was proposed, and the way alternatives were characterised.
- (g) There is a concern that some or all of the Trustees have disqualifying conflicts of interest and/or that the Trustees are too close to the objectives being pursued.
- (h) The summary analysis of the outcome of the consultation process is viewed as inaccurate or flawed, and hence unreliable as giving the Trustees any mandate to proceed.
- (i) There is concern that continuing the rebate for 30 years unfairly disadvantages older beneficiaries who are not likely to receive the rebate for the entire period.

Key aspects of opposition to the Proposed TECT Restructure

[81] In summary, as identified by Ms Anderson QC, there are six key aspects to the opposition to the Proposed TECT Restructure as follows:

- (a) the Current Trustees do not have the express power to restructure TECT and the 2002 Charitable Trust in the manner proposed;

- (b) the Current Trustees failed to take into account all relevant considerations, focusing particularly on the deliberation of the Current Trustees on the impact of the TECT rebate on electricity prices;
- (c) the Current Trustees predetermined their decision to approve the TECT Restructure;
- (d) the CCP 2021 was inadequate;
- (e) the Current Trustees mischaracterised the outcome of the CCP; and
- (f) whether the partial relief should be granted.

[82] I will deal with these issues as follows by:

- (a) identifying the jurisdiction of the Court;
- (b) interpreting cl 4 of the TECT Deed to identify the objects and purpose/s of TECT;
- (c) interpreting the remaining relevant clauses of the TECT Deed;
- (d) examining the interrelationship between the powers of variation and the purpose of the trust;
- (e) reviewing whether the Current Trustees have the express powers under the Trust Deeds to effect the Proposed TECT Restructure in the manner proposed;
- (f) reviewing whether the Current Trustees have fulfilled their duties and obligations under the TECT and CT Trust Deeds; and finally
- (g) deciding whether or not I shall make the orders sought as set out in [8].

Jurisdiction

[83] The Current Trustees seek an order under s 133 of the Act and/or the Court's inherent jurisdiction in respect of their exercise of powers under the TECT Deed.

[84] The Current Trustees also bring a partial alternative cause of action removing certain provisions of the TECT Deed under s 130 of the Act and/or the Court's inherent jurisdiction.

[85] The Current Trustees seek an order under s 133 of the Act, and/or the Court's inherent jurisdiction, in respect of their exercise of powers under the 2002 Charitable Trust Deed.

[86] The orders are sought because the Current Trustees' decisions to implement the Proposed TECT Restructure are "particularly momentous" for TECT and the 2002 Charitable Trust.³

Section 133 of the Act – directions to trustees

[87] Section 133 of the Act provides:

133 Trustee may apply to court for directions

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

³ *Re Honoris Trust* [2017] NZHC 2957, [2018] 3 NZLR 160 at [54].

[88] A trustee acting under any direction of the Court is protected pursuant to s 134 of the Act.

[89] The text of s 133 is substantially similar to its predecessor s 66 of the Trustee Act 1956. Existing case law continues to inform the interpretation of s 133.⁴

Principles in trustees' directions applications

[90] In *New Zealand Maori Council v Foulkes*, Kós J stated s 66 of the Trustee Act 1956 can be used to resolve any live question of interpretation of a trust deed, in addition to “any uncertainty as to the exercise of a power”.⁵ It allows (without limitation) trustees to obtain directions when they are in doubt about how to exercise their discretion. Kós J also said that “the existence of a dispute, or at least a doubt, is essential” for s 66 to be engaged.⁶

[91] In *Foulkes*, Kós J did not look at the way the jurisdiction arises in the same depth as Fitzgerald J did in *In Re Honoris Trust*.⁷ In that case the Court held there was no need for a “genuine doubt” to exist to allow consideration of an application under s 66.⁸ In applying relevant United Kingdom jurisprudence, Fitzgerald J confirmed four categories of cases where the Courts could give directions to trustees:⁹

- (a) where the issue is whether a proposed action is within the trustees' powers;
- (b) where the issue is a whether a proposed course of action is a proper exercise of the trustees' powers, the trustees having little doubt that the action is within their powers but seeking the Court's confirmation because the decision is “particularly momentous”;

⁴ *Re The Hugh Green Trust and the Hugh Green Property Trust* [2021] NZHC 2184 at [30]; *Re McMillan* [2021] NZHC 1497 at [7].

⁵ *New Zealand Maori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [46].

⁶ At [47].

⁷ *Re Honoris Trust*, above n 3.

⁸ At [40].

⁹ At [42] citing *Public Trustee v Cooper* [2001] WTLR 901 at 922–924; approved in *Re The Hugh Green Trust and the Hugh Green Property Trust*, above n 4, at [31].

- (c) where trustees surrender their discretion to the Court because they are deadlocked or disabled; and
- (d) where the trustees have already taken a course of action and seek directions as to whether it was a proper exercise of their powers.

[92] In that case it was held that the decision was “particularly momentous”, so the trustees were entitled to apply under s 66 for the Court’s blessing of the proposed action.

[93] No exception has been taken in this case either to the fact the Proposed TECT Restructure is “particularly momentous” or that the Court can and should assume jurisdiction on the basis set out by Fitzgerald J in *In Re Honoris Trust*. Having said that, however, it is worth observing that, given there is a genuine dispute in this case, jurisdiction can also be assumed on the basis of Kós J’s observations in *Foulkes*.

[94] Having established that the matter fell into a category in which directions could properly be given, Fitzgerald J then assessed the application in four steps:¹⁰

- (a) whether the trustee in fact genuinely formed the opinion that the Court is asked to confirm. This step is a preliminary question. It is answered by evidence that the trustees made the decision for which the Court’s approval is sought;¹¹
- (b) whether the trustee’s decision was lawful, i.e. whether the requisite powers exist;¹²
- (c) whether the decision is a proper one for the trustee to make, i.e. whether it “infringes on [the trustee’s] duty to act as a reasonable and prudent trustee” and whether it is a decision made consistent with the trustee’s duties;¹³ and

¹⁰ *Re Honoris Trust*, above n 3, at [56].

¹¹ At [62]; *Public Trustee v Cooper*, above n 9, at 925.

¹² *Re Honoris Trust*, above n 3, at [61].

¹³ At [62]-[64].

- (d) whether the opinion is vitiated by any conflict of interest under which any of the trustees might have been labouring.¹⁴

Summary of the approach under s 133

[95] In this case therefore, provided the Court is satisfied as to the genuineness of the Current Trustees' decisions, the Court is required to determine:

- (a) whether the decision to implement the Proposed TECT Restructure is “lawful” in that it is:
 - (i) within the Current Trustees' express powers under the TECT and 2002 Charitable Trust Deeds; and
 - (ii) not fettered by the context and objectives of the relevant Trust;
- (b) whether the Current Trustees made their decisions properly and in accordance with their duties, including compliance with the CCP set out in the TECT Deed; and
- (c) whether any conflicts of interest exist which would prevent the Court from approving the decisions.

[96] Importantly, it does not matter whether the Proposed TECT Restructure would have been the step the Court itself would have taken if it had stood in the shoes of the Current Trustees. The Court's task is instead to determine whether trustees could properly form the view which they have.¹⁵ Unless the Court concludes trustees lacked the power to take the steps they propose, or have exercised a power in some way improperly, the Court should not disturb trustee decisions.¹⁶

[97] To this end, while alternative options to the Proposed TECT Restructure are relevant matters for the Current Trustees to have considered in making their decisions,

¹⁴ At [65].

¹⁵ At [58].

¹⁶ See, for example, *Darlow v Raymond* [2016] NZHC 269, [2017] 3 NZLR 353 at [194].

the Court is relieved of any necessity to consider whether, in its own view, any one option might have been preferable to another. It is not for the Court to substitute a lawful and proper decision with what the Court considers to be a better available restructuring option or to decline the application because in its view a superior option may have existed.¹⁷

Court's inherent jurisdiction

[98] The Court has an inherent supervisory jurisdiction over trusts which is complementary to the statutory jurisdiction conferred by the Act.

[99] Section 5(8) of the Act provides:

5 Application, and relationship of Act with trust terms, common law and equity, and other enactments

...

(8) This Act—

- (a) is not an exhaustive code of the law relating to express trusts; and
- (b) is intended to be complemented by the rules of the common law and equity relating to trusts (except where otherwise indicated or where those rules are inconsistent with the provisions of this Act).

[100] Section 8 of the Act provides:

8 Inherent jurisdiction of court not affected

- (1) The inherent jurisdiction of a court to supervise and intervene in the administration of a trust is not affected by this Act, except to the extent that this Act provides otherwise.
- (2) Despite subsection (1), a court must have regard to the purpose and the principles of this Act when exercising its inherent jurisdiction.

[101] It follows that trustees may apply for the Court's direction on matters concerning the administration of trusts as a matter of inherent jurisdiction, in addition to the statutory jurisdiction created by the Act but confined to matters not proscribed by the Act.

¹⁷ *Re Honoris Trust*, above n 3, at [62].

[102] In *Foulkes*, Kós J examined the relationship between the Court’s statutory jurisdiction under s 66 and the Court’s inherent jurisdiction in the specific context of applications for Court approval of trustee decisions.¹⁸ He confirmed s 66 was “a robust, parallel source of jurisdiction to resolve any substantial question of law concerning the meaning or administration of a trust”.¹⁹ He noted that the Court’s inherent jurisdiction may be the more appropriate jurisdiction for proceedings which could affect persons not party to the s 66 proceedings, or where disputed issues of fact needed to be resolved by cross-examination.²⁰

[103] No-one sought to cross-examine any witness or party on any disputed issues of fact. Independent Counsel has been appointed to represent the interests of the Consumers. I conclude, in these circumstances, the Current Trustees’ application may be decided under s 133 as set out above or under the Court’s inherent jurisdiction where any matter is not proscribed by the Act.

[104] In respect of the Current Trustees’ partial alternative cause of action under s 130 to vary the terms of the TECT Deed, the Court’s inherent jurisdiction may also be used to vary the administrative terms of a trust deed or to vary trustee powers which do not vary the trust itself.²¹

[105] In accordance with the *Re Honoris Trust* criteria,²² citing *Public Trustee v Cooper*,²³ the central question is whether the decision is one a reasonable body of trustees, properly informed as to the meaning of the relevant provisions of the trust deed, could have arrived at.²⁴ That requires a focus on the provisions of the trust deed.

¹⁸ *New Zealand Maori Council v Foulkes*, above n 5.

¹⁹ At [46].

²⁰ At [48], [55]-[56]. Similarly, in *Re Setter (as trustees of Central Hawkes Bay Consumers Power Trust)* [2021] NZHC 1603, where the Court did not have the benefit of argument as to the scope of s 130 because the trustees’ application was unopposed, Isac J preferred to decide the issue under the Court’s inherent jurisdiction (at [31]).

²¹ *Re Setter (as trustees of Central Hawkes Bay Consumers Power Trust)*, above n 20, at [34]-[35].

²² *Re Honoris Trust*, above n 3, at [56].

²³ *Public Trustee v Cooper*, above n 9, at 925.

²⁴ *Lynton Tucker, Nicholas de Poidevin and James Brightwell, Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [39-095].

[106] Whilst there is significant controversy concerning the Current Trustees' powers under the TECT Deed, I note there is no real controversy in relation to their powers to vary and to wind up the 2002 Charitable Trust Deed.

[107] In this next section I set out the principles of interpretation to apply to trust deeds and then interpret the relevant provisions of the TECT Deed and the 2002 Charitable Trust Deed.

The principles of interpretation to apply to trust deeds

[108] The express provisions of a trust deed are considered in accordance with the principles of interpretation of trust deeds as to meaning. The principles were not contested.

[109] I adopt Mr Smith QC's economical exposition of the relevant principles for the interpretation of trust deeds (with which Ms Anderson QC took no issue). The principles are as follows:

- (a) In general, trust deeds are construed as per the ordinary rules of contractual interpretation.²⁵
- (b) More specifically, deeds are to be interpreted from a standpoint that is practical and purposive, rather than detached and literal.²⁶ The factual matrix within which the relevant trust was formed is relevant.²⁷ Trust deed provisions are to be interpreted objectively in the context of the whole document, relevant statutory background and factual matrix.²⁸
- (c) A Court, when interpreting a trust deed, is required to construe each provision according to its natural meaning and give provisions "ample operation" rather than approach interpretation in a narrow way or limited by reference to historical presumption.²⁹

²⁵ *New Zealand Maori Council v Foulkes*, above n 5, at [71].

²⁶ *Re Courage Group's Pension Scheme* [1987] 1 All ER 528, [1987] 1 WLR 495.

²⁷ *Harrison v Harrison* [2015] NZHC 2935, (2015) 4 NZTR 25-029.

²⁸ *Pryor v Bulley* [2013] NZCA 559, [2015] NZAR 518.

²⁹ *Kearns v Hill* (1990) 21 NSWLR 107.

- (d) The test of what is intended by the settlor or in the reasonable contemplation of the parties is an objective question, to be answered by ascertaining the actual meaning of words used in their context.³⁰ The search for intention in relation to trusts, as with contracts, is for the intention as revealed in the words used by the parties. The expressed intention of the parties is to be found in the answer to the question, “what is the meaning of what the parties have said?”, not to the question, “what did the parties mean to say?”³¹
- (e) Interpretation of trust deeds should be tailored having regard to the type of trust involved. In particular, interpretation should reflect the modern commercial context of many trusts.³² Energy trusts have been recognised as having a commercial aspect that is relevant to matters of interpretation.³³

Interpretation of the Trust Deeds

[110] I shall now examine the TECT and 2002 Charitable Trust Deeds to identify the Current Trustees’ powers.

TECT

What are TECT’s purposes and objects?

[111] Recital E provides:

The benefits which the Trustees derive through their ownership of the assets of the Trust Fund will be made available directly or indirectly as the Trustees in their discretion decide to Consumers.

[112] The purpose of TECT is set out in cl 4 as follows:

4. PURPOSE OF THE TRUST

The purposes and objects for which the Trust is established are:

³⁰ *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch).

³¹ *Mercanti v Mercanti* (2016) 117 ASCR 222, [2016] WASCA 206 at [73].

³² *Harrison v Harrison*, above n 27.

³³ *Re Andrews* (2002) 1 NZTR 12-003 at [26].

- 4.1 On Vesting Date, to receive Shares vested in the Trustees by order in council made in accordance with section 47 of the Act.
- 4.2 If the Trustees so elect to subscribe for, purchase or otherwise acquire Other Securities in the capital of the Company.
- 4.3 To retain and hold the Shares and Other Securities until such time as the Shares or Other Securities, as the case may be, are sold, transferred or disposed of.
- 4.4 In the event of any sale, transfer or other disposition of Shares or Other Securities to hold the proceeds of any such sale, transfer or other disposition upon the trust for capital in accordance with clause 6.1.
- 4.5 To receive Dividends and to distribute, pay, apply or appropriate the Dividends and other income of the Trust Fund which the Trustees do not resolve to accumulate to or for the benefit of the Consumers in the manner provided in clause 5 of this Deed.
- 4.6 Following the Termination Date to pay, apply and appropriate the capital of the Trust in the manner provided in clause 6.2.

[113] As the clause is a specific provision outlining TECT's purposes and objects it is the necessary starting point for any consideration of the purposes and objects of TECT. However, cl 4 also needs to be considered in light of the TECT Deed as a whole and, in particular cls 5, 6 and 13. I shall deal firstly with the interrelationship of cls 4, 5 and 6 in this section and secondly with the interrelationship between cls 4 and 13 at [205]-[212].

[114] Clause 5 deals with income:

5. TRUSTS OF INCOME UNTIL DISTRIBUTION DATE

The Trustees shall until the Termination Date stand possessed of the income arising from the Trust Fund upon the following trusts and with and subject to the following powers:

- 5.1 The Trustees shall from the net annual income derived by the Trust Fund first pay all the fees, costs and disbursements of and incidental to administering the Trust including remuneration and allowances payable to Trustees as hereinafter provided and costs incurred in pursuance of their duties and may in addition set aside reserves of income to provide for any payments or liabilities which the Trustees have power to pay pursuant to this clause 5.
- 5.2 The Trustees shall have power in their absolute discretion to accumulate so much of the income of the Trust Fund as they think fit by investing the same so that all such accumulations shall be added to and form part of the capital of the Trust Fund and be held by the Trustees upon the same trusts and with the powers herein declared in

respect of such capital but provided that the Trustees may at any time or times resort to such accumulations and pay, apply or appropriate the whole or any part thereof as if the same were income of the Trust Fund arising in the Financial Year in which the same are resorted to.

5.3 The Trustees shall distribute the balance of the current net annual income by paying applying or appropriating the same in such manner and in such proportions as the Trustees in their absolute and unfettered discretion shall think proper for the benefit of the Consumers and where such distributions comprise Dividends the Trustees may have regard to any report of Directors given pursuant to clause 5.4 AND IT IS DECLARED that distributions of income for the benefit of Consumers may be made in any one or more of the following ways and no such distribution shall be called into question by any Consumer:

- (a) By payment in cash to any one or more of the Consumers to the exclusion of other Consumers in such manner and in such shares and proportions as the Trustees in their absolute and unfettered discretion shall think proper;
- (b) By the provision of goods or services or an entitlement to goods and services to any Consumer or Consumers and generally in such form and at such value as the Trustees shall determine including the giving of an entitlement by voucher or some other form of entitlement (which may be transferable or not transferable as the Trustees decide) to goods and services which the Trustees may have purchased or provided for out of the income of the Trust Fund;
- (c) By carrying out or causing to be carried out works which in the opinion of the Trustees will benefit Consumers such as:
 - (i) Improvements to the safety of Consumers by removing road and overhead hazards caused by above ground electricity supply support systems in the District;
 - (ii) Avoiding, remedying or mitigating any adverse effects of energy related activities on the Environment;
 - (iii) Promoting research into more efficient ways of producing and distributing electrical energy for the benefit of Consumers in the District including the awarding of research scholarships or prizes and the funding of research and development projects;
 - (iv) Subsidising the installation of the means of supply of energy to Consumers which would otherwise be uneconomic;
- (d) By carrying out or causing to be carried out or funding in whole or in part (whether by way of Consumer distribution, loan, investment, the underwriting of project liabilities, the

giving of financial support or otherwise) the carrying out of projects or other community initiatives which in the opinion of the Trustees will benefit Consumers.

- 5.4 The Trustees may request the Directors to produce a report in respect of each Dividend received by the Trustees which report recommends an appropriate allocation of the Dividend amongst the classes of Consumer based on the contribution made by each class of Consumer to the earning of that Dividend and in such report the Directors may classify Consumers in any manner they see fit.
- 5.5 Any of the Consumers to whom or in respect of which income is paid, applied or appropriated by the Trustees pursuant to clause 5.3, shall, subject to clause 5.8, as from the date of such payment, application or appropriation take an absolute and indefeasibly vested interest in such income.
- 5.6 The foregoing provisions as to vesting of income shall not operate to vest any part of the corpus of the Trust Fund in any of the Consumers.
- 5.7 Each Trustee who is also a Consumer shall notwithstanding the provisions of this Deed or any applicable rule of law or equity, be entitled to receive any benefits as a Consumer which may be distributed to Consumers in accordance with clause 5.3.
- 5.8 All payments made to Consumers or entitlements of Consumers to goods and services unclaimed for one year after having been sent (or attempted to be so sent) or notified to any Consumer may be invested or otherwise made use of by or being an entitlement to goods and services disposed of by the Trustees for the benefit of the Trust Fund until claimed and the Trustees shall be entitled to mingle the amounts of any unclaimed payments or money from entitlements with other moneys forming part of the Trust Fund and to credit any income arising in any Financial Year from the investment of such unclaimed payments to the Trust Fund. Any amounts unclaimed on the earlier of the Termination Date or one year after that amount was sent (or attempted to be so sent) or notified to any Consumer shall thereupon be deemed to form part of the Trust Fund.

[115] Clause 6 deals with capital:

6. TRUSTS OF CAPITAL

- 6.1 The Shares and Other Securities or the proceeds of sale or other disposition of the Shares and Other Securities and investments representing the same (the corpus of the Trust Fund) shall be held by the Trustees upon trust to pay, apply or allocate the same, on or before the Termination Date for the benefit of the Consumers in such manner and in such shares as the Trustees in their absolute and unfettered discretion consider fair and equitable PROVIDED THAT the Trustees may at any time or times prior to the Termination Date pay, apply or allocate the corpus of the Trust Fund or any part of parts thereof as the Trustees think fit for the benefit of the Consumers in any of the ways set out in clause 5.3 of this Deed as if the provisions of clause 5.3 and

clause 9.3 with any necessary changes were reproduced in this clause 6.1.

- 6.2 From and after the Termination Date the Trustees shall stand possessed of the corpus of the Trust Fund and the income thereof and any income previously derived by the Trustees that has not been paid, applied or appropriated in accordance with clause 6.1 of this Deed, upon trust to pay, apply or appropriate the same to or for or otherwise howsoever for the benefit of the Consumers in such manner and in such shares (including if permitted by law, by establishing a further trust for the benefit of Consumers to be on the same terms mutatis mutandis as this Trust) as the Trustees shall in their absolute and unfettered discretion consider fair and equitable provided however that if the Trustees have not so paid, applied or appropriated any or all of such Trust Fund and income on the day before the first anniversary of the Termination Date the amount so remaining shall be paid in equal shares to each Consumer as at the first anniversary of the Termination Date.

Interested Parties' and Ms Anderson QC's interpretation of cl 4

[116] Ms Anderson QC relied on the following for her contention that TECT's objects and purposes are to benefit Consumers exclusively:

- (a) the wording of Recital E, cls 4 and 5 and, in particular, cl 5.3;
- (b) the original trust deed; and
- (c) the factual matrix surrounding the establishment of the original trust.

[117] Ms Anderson QC's starting point for her contention that TECT's objects and purposes are to benefit Consumers exclusively is cl 4.5 and the words "[t]o receive Dividends and to distribute, pay, apply or appropriate the Dividends and other income of the Trust Fund ... to or for the benefit of the Consumers".

[118] She then turned to the chapeau of cl 5.3:

The Trustees shall distribute the balance of the current net annual income by paying applying or appropriating the same in such manner and in such proportions as the Trustees in their absolute and unfettered discretion shall think proper for the benefit of the Consumers ...

[119] Ms Anderson QC submitted those words are to be read down and limited by the words:

... **AND IT IS DECLARED** that distributions of income for the benefit of Consumers may be made by any one of more of the following ways ...

[120] Her submission is that the “following ways” set out in cls 5(a) to (d) are all to be read as being of benefit to the Consumer but, more importantly, that they fetter the trustees’ discretion to make distributions of income in any other “ways”.

[121] Ms Anderson QC premised her analysis of this clause and TECT’s purpose primarily by reference to the original trust deed and extrinsic material (including evidence of precontractual negotiations) that predated the establishment of the original trust. She relied on the authority in *Re Ball’s Settlement* as authority for the principle that the touchstone is the original trust.³⁴

[122] In this regard, Ms Anderson QC noted that TECT was established to hold shares in the settlor for the benefit of Consumers in the Tauranga and Western Bay of Plenty region. She referred to the fact the original trust deed allowed the then trustees to pay, apply or appropriate the trust fund for three broad purposes: direct payments to electricity Consumers; the provision of goods or services to Consumers; and carrying out or causing to carry out energy-related works or projects in the region.

[123] Further, she relied upon *Bulley v Attorney General* for the proposition that the factual matrix surrounding TECT’s formation is relevant to determining TECT’s purposes and objects.³⁵

[124] She referred to documentation, including the proposed establishment plan prior to and at the time of the establishment of TECT, in support of the contention that if the intent behind TECT had been to fund a community and charitable trust the trust deed would have included provisions that allowed the fund to be used to fund wider community projects from the outset. Finally, she relied on the fact TECT is called a consumer trust for very good reason, namely that it was a “design choice” from inception.

³⁴ *Re Ball’s Settlement* [1968] 2 All ER 438 (Ch D) at 442.

³⁵ *Bulley v Attorney-General* [2012] NZHC 615.

[125] Ms Anderson QC also submitted the 2002 amendments to the TECT Deed creating the 2002 Charitable Trust did not alter the focus or purpose of TECT to encompass a wider charitable and community focus, because that trust was set up for tax efficiency purposes. She referred to the fact Consumers were reportedly told at the time the 2002 Charitable Trust “was not intended to be a vehicle for increased distributions to charitable organisations”. Ms Anderson QC pointed to the fact that recipients of grants made prior to the establishment of the 2002 Charitable Trust were Consumers exclusively.

The Current Trustees’ interpretation

[126] Mr Smith QC contended that the trust’s purposes and objects are to not only to benefit Consumers directly and indirectly but also to benefit the community by reference to:

- (a) Recital E and the wording of cl 4;
- (b) the current TECT Deed (as it incorporates the subsequent variation to cl 5.3 to incorporate cl 5.3(d)); and
- (c) some limited factual matrix.

[127] Mr Smith QC submitted the phrase in cl 4 relied upon by the Interested Parties as the purpose, namely “distributing, paying, applying or appropriating funds for the benefit of Consumers”, is not determinative in and of itself of TECT’s purposes and objects because cl 4 imports cls 5 and 6. Also, for the purpose of establishing the ambit of TECT’s purposes, cls 5 and 13 are relevant.

[128] First, dealing with cl 5, he argued cl 5.3 should be read disjunctively and interpreted as follows:

- (a) the chapeau allows any distributions of income “for the benefit of the Consumers” which may be made by the trustees in their “absolute and unfettered discretion”;

- (b) the clause then sets out categories of distribution which may be made and that are declared to be distributions of a type which, if made, are beyond challenge: "... shall [not] be called into question by any Consumer"; and
- (c) the types of distribution which are particularly described do not comprise an exhaustive list of those which may be made, they merely prescribe distributions for or in respect of which no Consumer may mount a challenge.

[129] Mr Smith QC submitted Ms Anderson QC's interpretation, whereby the chapeau of the clause is limited by cls 5.3(a) to (d), cannot be correct because it would require exceedingly clear language in the balance of the clause to fetter what is conferred in the chapeau. He submitted any such language is notably absent from the clause.

[130] He submitted *Re Ball's Settlement* is not authority for treating only the original trust as the relevant trust where there have been one or more intervening variations.³⁶ In fact, intervention had been made in that case apart from the variation under active consideration, or if there were prior variations they were not referred to in the judgment.

[131] The term "original trust" at the two points where it is used at page 442 of *Ball's Settlement* simply refers to the status quo, i.e. the form of the trust at the time of the application for approval, however it had been arrived at.

[132] Further, Mr Smith QC submitted the evidence referred to by Ms Anderson QC concerning public consultation regarding the first draft establishment plan is analogous to evidence of prior negotiations. Evidence of prior negotiations (subject to exceptions, none of which are relevant here) is not generally admissible for the purposes of contractual interpretation. Prior negotiations may be admitted if they

³⁶ *Re Ball's Settlement*, above n 34, at 442.

show the meaning of terms (for example that both parties used a word or a phrase in a particular sense) but not to prove subjective intentions.³⁷

[133] As to the matrix or background or surrounding circumstances, Mr Smith QC submitted, by and large, in this case the TECT Deed is capable of interpretation on its own terms and the Court can only derive limited assistance from evidence of surrounding circumstances.

[134] Nonetheless, he did refer to some of the related history in support of his submission. First, the asset at the heart of TECT on its establishment was a generation, retail and lines electricity operation in the District that had been created and supported by the community and was there to serve it. Once that asset was no longer owned by the community, the purpose of TECT was to keep a stake in that asset for the benefit of the community that had created the asset in the first place.

[135] Second, at the time of TECT's establishment, every Consumer in the District was connected to the settlor (the then Trustpower) and so, by benefiting Consumers, the Consumers' households and the wider community benefitted commensurately. In other words, the trust property was a community asset but "Consumers" as defined were a proxy or analogue for the community. The plaintiffs submitted it might be said that they were the community.

Discussion

[136] I prefer the Current Trustees' approach to the interpretation of cl 4 (and its importation of cls 5 and 6) as to the objects and purposes of TECT for the following reasons:

- (a) I consider the purpose is to be examined by reference to both the original and current TECT Deeds and not the original deed exclusively;

³⁷ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [44]-[45]; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [25], [26] and [31]-[36]; *Bathurst Resources Ltd v L & M Coal Ltd* [2021] NZSC 85 at [77].

- (b) I do not consider the interpretation of the words of the TECT Deed undertaken by Ms Anderson QC is sustainable on the plain meaning of the words of the clause; and
- (c) because of the surrounding factual matrix (excluding evidence of prior contractual negotiation).

[137] I consider that the examination of purpose is not confined to the original TECT Deed and the basic purpose of a trust may undergo a gradual change over the course of a trust's lifetime. The validity of any proposed variation is to be assessed with reference to matters as they stood immediately before the proposed amendment as opposed to the date of settlement of the trust.³⁸ That must include the establishment of the 2002 Charitable Trust and the amendment to the original TECT Deed to incorporate cl 5.3(d). I now use that approach to interpret the clauses.

[138] I consider that Recital E, the language of cl 4 itself and its importation of reference to cls 5 and 6 cumulatively do not constrain the Current Trustees to administer and make distributions exclusively for the direct benefit of Consumers.

[139] Language such as "provided however the power to distribute shall be limited in the following ways" would have had to be employed if cls 5.3(a) to (d) were designed to limit the Current Trustee's discretion as submitted by Ms Anderson QC.

[140] It is significant in my view that cl 5.3 uses the phrase "AND IT IS DECLARED that distributions of income for the benefit of Consumers *may* [my emphasis] be made". That is not the sort of language usually adopted to fetter a general power. The verb "to declare" means no more than to publicly announce. Here, what the clause is announcing is that the Current Trustees "may" make certain distributions with immunity. It then sets out examples of how that power may be exercised. It is not a fetter on their "unfettered" discretion.

³⁸ *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association* [2003] UKPC 58 at [19]–[21], [2004] 1 NZLR 577, cited in *Lynton Tucker, Nicholas de Poidevin and James Brightwell*, above n 24, at 33-079.

[141] I agree with Mr Smith QC that on a proper interpretation, even considering direct payments in the form of rebates (cl 5.3(a)), the definition of “Consumers” contains an intrinsic or implied breadth beyond its literal terms. Its express terms are that Consumers are those liable to pay the “Company” in the “District”.

[142] While Consumers are beneficiaries and they are defined as the customer liable to pay the company (i.e. the person named on the bill or invoice), that was a means by which benefits would originally flow more widely than to Consumers solely and in person or, more accurately, it would be to the benefit of Consumers that those associated with them in their households would also be benefited by the rebates.

[143] Further, the original trust deed envisages distributions of the type described in cls 5.3(c)(i), (ii) and (iii), each of which benefits Consumers (but not solely Consumers). For instance, removal of road and overhead hazards stemming from aboveground infrastructure (cl 5.3(c)(i)) must benefit all road users irrespective of whether they are Consumers, ever have been or will be and, indeed, even if they are not associated in any way with any Consumer. They could, for instance, be a neighbour who buys their electricity from another provider.

[144] After the amendment in 2002 and the addition of cl 5.3 that wider focus was significantly broadened, given the express inclusion of non-energy-related community benefits in cl 5(3)(d). The clause allows benefits to be conferred on Consumers via “projects or other community initiatives”. This may involve payments or distributions to non-Consumers as long as they will, in the opinion of the Current Trustees, benefit Consumers. There is no requirement that the benefit will be garnered by Consumers exclusively.

[145] Indeed, it is of benefit to Consumers to live in a community where every member of that community has an enhanced sense of wellbeing derived from those community projects or initiatives. For instance, the wellbeing of Consumers, those who live in the same household as a Consumer or in the same community as a Consumer will be enhanced by initiatives such as the provision of education sponsorship, construction of sports facilities or subsidisation of search and rescue agencies, as but three examples.

[146] In addition, reverting to cl 4 itself, the purposes are intrinsically broad in other ways. Clause 4.4 envisages sale of the shares in which case they are held on the trust of capital (cl 6.1). The trust of capital envisages the proceeds may be held on trust to apply or allocate the proceeds for the benefit of Consumers in such manner as the trustees in their “absolute and unfettered discretion consider fair and equitable”. This is a power of advancement entirely delinked to the electricity industry.

Conclusion on the objects and purposes of the TECT Deed

[147] For the reasons set out above and by reference to Recital E and cls 4, 5 and 6, I find the purposes and objects of TECT are an amalgam of direct benefits to Consumers (e.g. the rebate) and benefits to non-Consumers through the carrying out of projects or other community initiatives so long as they will, in the opinion of the Current Trustees, benefit Consumers.

Clause 5

[148] As discussed above at [114] and [143]-[144], cl 5 contains the power to make distributions of income.

Clause 6

[149] Clause 6 sets out the power of the Current Trustees to pay, apply or allocate the capital of TECT “for the benefit of the Consumers” in such manner and in such shares as the Current Trustees in their absolute and unfettered discretion consider fair and equitable. Clause 6 imports the authority for the varied methods of distribution contemplated in cl 5.3.

Clause 9 and Schedule II

[150] There is an express power of sale in cl 9 and Schedule II to the TECT Deed. That power is subject to cl 9.3 in relation to disposition of Trustpower shares, requiring a special resolution following compliance with the requirements of the CCP. A special resolution requires approval by at least 75 per cent of the Current Trustees.

[151] Clause 9 and Schedule II also permit the creation of a vendor loan in any sale (in particular Schedule II, cl (b)).

[152] Apart from these dispositive powers' express wording, the powers must be examined in the context of the history of TECT. The relevant history includes:

- (a) having regard to those matters referred to in [145] and [146], the intention was for TECT to benefit the whole of the community for the duration of the trust, through TECT's ownership stake in Trustpower;
- (b) the historic dispositive powers in cls 5 and 6 reiterate TECT's purpose to benefit the wider community. For example, cl 5.3(c) refers to trustees' distributions to benefit Consumers through improving Consumer safety by removing road and overhead hazards caused by aboveground electricity supply support systems in the TECT Consumer District (cl 5.3(c)(i)) and avoiding, remedying or mitigating any adverse effects of energy-related activities on the environment (cl 5.3(c)(ii)). There is a clear benefit to the community within the District through the use of these powers;
- (c) since 1999 the dispositive powers have also been used to distribute to non-Consumers; and
- (d) the addition of cl 5.3(d) and the establishment of the 2002 Charitable Trust further cements that position.

[153] It is clear that cls 5, 6 and 9 provide the Current Trustees with the necessary powers to effect the dispositions contemplated in the restructuring.

Clause 13

[154] Clause 13 contains the Current Trustees' powers to alter or amend the trust deed as follows:

13. VARIATION TO TRUST DEED

- 13.1 The Trustees shall have the power by Special Resolution (of which notice to propose that Special Resolution shall have been given in the notice convening the meeting) to alter or amend the terms of this Deed other than clause 13.2 and the provisions set out in clause 13.2 which shall only be capable of being altered or amended in the manner set out in clause 13.2.
- 13.2 The Trustees shall have power on a unanimous resolution of all the Trustees after the Trustees have implemented a Consumer Consultative Procedure in respect of such proposal to alter or amend:
- (a) the definition of "Consumers" or "District"; and
 - (b) clauses 4, 5, 6, 9.3 or 14.
- 13.3 Notwithstanding clauses 13.1 and 13.2, no alteration or amendment may be made to this Deed that has the effect of limiting or restricting the obligations or powers of the Trustees under this Deed to:
- (a) review proposals and available options for the ownership of the Shares; or
 - (b) sell, transfer or dispose of the Shares in accordance with clause 9.3.

[155] In relation to clause 13.1, Ms Anderson QC submitted the words “alter or amend” imply some restriction on the extent of the changes to be made. I do not agree. First, as an example, legislation is frequently amended to introduce wholesale change that fundamentally reshapes, or even replaces, the statutory scheme. Second, the language “alter or amend” is in fact the language to use in this context. It is difficult to conceive of sensible drafting that would either restrict or widen the scope of the power.

[156] As an aside, I find it difficult to reconcile cl 13.3 with cls 13.1 and 13.2 but for reasons I give later nothing of significance arises in respect of this difficulty.

[157] I deal with the contested implications of cl 13 in particular later when I consider whether, in the Proposed TECT Restructure, the Current Trustees are using the express powers in the clause in a manner that conflicts with the context, objectives and purposes of TECT or in ways that exceed its limits.

The 2002 Charitable Trust Deed

[158] In the Proposed TECT Restructure, the Current Trustees will be using their powers to vary and to wind up the 2002 Charitable Trust.

[159] The variation was approved by the Current Trustees in their capacity as trustees of the 2002 Charitable Trust at meetings on 31 August 2021. The variation is a small change to the winding up provisions to facilitate the proposed winding up of the trust in accordance with cl 12 of the 2002 Charitable Trust Deed.

[160] Clause 12.2, as amended, will provide that upon winding up of the 2002 Charitable Trust the surplus assets and funds of the trust shall be paid, applied or appropriated to or for the benefit of charitable consumers, and/or to or for the benefit of any other charitable body for application for the charitable purposes thereof.

[161] Clause 11 sets out the powers of variation, revocation or addition to the 2002 Charitable Trust Deed. Subject to the prior written approval of TECT, the Current Trustees have the power by special resolution to alter or amend the terms of the 2002 Charitable Trust Deed. They may not make changes to the deed which permit the trust fund to be applied for any purpose that is not charitable.

[162] The cl 11 power of variation is broad. It permits the amendment to the 2002 Charitable Trust Deed to facilitate its winding up.

[163] Clause 12.1 of the deed provides that the Current Trustees shall wind up the 2002 Charitable Trust if at any time:

- (a) a resolution that the 2002 Charitable Trust be wound up has been passed and has come into effect;
- (b) the objectives of the 2002 Charitable Trust shall fail, if;
- (c) for any other reason the purposes of the 2002 Charitable Trust become frustrated and incapable of being carried out;

- (d) or TECT ceases to exist, or a resolution that TECT be wound up in accordance with the TECT Deed has been passed and comes into effect.

[164] The effect is to give the Current Trustees the express power to decide to wind up the 2002 Charitable Trust.

Section 21 of the Act - guiding principle in performing duties

[165] Section 21 of the Act provides that in performing the mandatory duties set out in ss 23 to 27 and (except to the extent modified or excluded by the terms of the trust) the default duties set out in ss 29 to 38, a trustee must have regard to the context and objectives of the trust.

[166] The trustees must therefore not exercise their powers in a manner which conflicts with the context and objectives of the trust or which exceeds the limits of the trust. Such exercises may constitute an attack on what is known as the “substratum” of the trust. Substratum is a metaphorical concept, equating to the trust’s underlying purposes, objects and substance.

[167] Section 8 of Act provides that, unless indicated otherwise, the Act is intended to complement the inherent jurisdiction of the Court to supervise and influence in the administration of a trust. Similarly, s 7(1)(c) provides the Act may be interpreted having regard to the common law and equity where not inconsistent with the Act. This means the common law rule that a trustee cannot use their power of variation to alter the substratum of a trust continues to apply.

[168] In addition, s 21 of the Act reinforces and arguably gives some statutory force to the substratum principle. Mandatory duties include:

- (a) a duty to know the terms of the trust (s 23);
- (b) a duty to act in accordance with the terms of the trust (s 24);
- (c) a duty to act honestly and in good faith (s 25);

- (d) a duty to act for the benefit of the beneficiaries or to further the permitted purpose of the trust (s 26); and
- (e) a duty to exercise powers for a proper purpose (s 27).

[169] It follows that if the Current Trustees were to exercise their power to vary the TECT Deed in a way that is inconsistent with the underlying purposes of TECT, they would not be following the guiding principle under s 21 which requires them to have regard to the context and objectives of the Trust.

Proposed variations to the TECT Deed

[170] The Current Trustees propose the following variations to the TECT Deed:

- (a) changing the name of the trust to the TECT Consumer Trust;
- (b) updating the purposes of TECT as currently in cl 4, by removing reference to the holding of shares in Trustpower and receiving Trustpower dividends;
- (c) amending the definitions of “Consumer” and “District”;
- (d) amending the distributive powers so that distributions by the TECT Consumer Trust may be made to Consumers only, and for Consumers to continue to receive rebates on a codified basis for a period of up to 30 years;
- (e) removing cl 6, including 6.2 which required surplus assets to be applied “for the benefit of Consumers”, and replacing it with a provision that on the winding up of the trust any surplus assets will be paid not “for the benefit of Consumers” but rather to the TECT Community Trust;
- (f) removing the requirement to undertake a CCP on the sale of any Trustpower shares;

- (g) changing the governance structure of TECT, such that the trustees are those people elected as trustees of the TECT Community Trust;
- (h) removing cl 9.3 which related to the Trust's disposal of its shares in Trustpower; and
- (i) changing the winding up clause.

Do the proposed variations to the TECT Deed do impermissible damage to the substratum?

[171] Mr Smith QC submitted, as a matter of interpretation, the cl 13 variation powers in the TECT Deed are broad express powers that permit the Proposed TECT Restructure because they expressly allow amendments, including of trusts of income and of capital under cls 5 and 6 and, in addition, to the definitions of Consumer and District.

[172] Ms Anderson QC submitted that, under the Proposed TECT Restructure, the Current Trustees propose exercising their powers of variation impermissibly. In short, she argued the proposed restructure altered the objects and purposes of TECT from a trust for the exclusive benefit of Consumers to a trust that would ultimately be wound up depriving Consumers of any benefits. Her submissions are framed by reference to the "substratum" approach. Reference to the substratum is reference to the underlying purpose of a trust having regard to its context, objects and principles. She submitted the Proposed TECT Restructure is an impermissible attack on the substratum.

[173] Mr Smith QC countered that in cases involving an analysis of trustees' express powers of variation there has been a general interpretative movement away from the substratum approach in favour of contractual interpretation of the trust deed.³⁹ However, he conceded earlier New Zealand energy trust cases⁴⁰ (along with other recent cases concerning charitable trust trustees' applications under s 66)⁴¹ analysed

³⁹ *Grand View Private Trust Co Ltd v Wong* [2021] 2 LRCI; *Re Rysaffe Fiduciaries Sarl* [2021] JRC 230; and *Mercanti v Mercanti*, above n 31.

⁴⁰ *Re Hutt Mana Energy Trust* (2001) 1 NZTR 11-010 (HC); *Re Hennessy* (2006) 2 NZCCLR 1210 (HC); and *Re Andrews*, above n 33.

⁴¹ *Re Hibiscus Hospice Charitable Trust and Hibiscus Hospice Development Trust* [2021] NZHC 279; *Re Ronald McDonald House Wellington Trust Board* [2015] NZHC 2073.

the substratum approach as a consideration in determining whether proposed trust variations are valid. He was content for present purposes to utilise the “metaphorical” substratum approach.⁴²

[174] I shall therefore adopt that approach myself as I am not being asked here to reconcile the “different” approaches. The Court’s task is to assess whether the proposed use of the powers of variation is excessive having regard to the underlying objects, purposes and substance of TECT (which includes the variation powers themselves).

[175] Before I review the relevant authorities, I need to say something about counsels’ approach to the issue of the permissibility or impermissibility of the powers of variation. Ms Anderson QC treats the Proposed TECT Restructure as a whole as a variation. Mr Smith QC treats the Proposed TECT Restructure as requiring the Current Trustees to exercise a range of powers including, but not limited to, variation. On his approach, the first is the power of sale of assets which is permitted under cl 9. The second is the distribution of trust assets of capital, which is permitted under cl 6. The third is the power to vary the terms of the trust from a discretionary trust which can be used to pay rebates in an amount to be fixed every year to a changing population of Consumers from time to time to a trust that provides for a fixed rebate to a fixed population of Consumers (being those at the Record Date). The rebate for each of that fixed population of Consumers would be dependent on that person continuing to remain a customer of the business being sold by Trustpower.

[176] The substratum approach is an examination of whether the variations sought are permissible having regard to the underlying substance of the trust. It is not an examination of whether powers that have already been conferred are being used excessively or not. The exercise of other powers is more appropriately considered in the light of s 21 of the Act and the trustees’ duty to have regard to context and objectives. That said, I will adopt Mr Smith QC’s approach.

⁴² *Grand View Private Trust Co Ltd v Wong*, above n 39, at [185].

Relevant authorities

[177] The starting point in determining whether a variation is limited by the context and objectives of a trust is the statement by Megarry J in *Re Ball's Settlement* that:⁴³

If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.

[178] Trustees must therefore not exercise their powers in a manner which conflicts with the context, objects and purposes of the trust or which exceeds the limits of the trust. Important to this case is the principle that a wide power of variation does not necessarily confer power to alter the purpose of a trust.⁴⁴

[179] I observe, as the following discussion will demonstrate, that trust deeds are so infinite in the construction of their context, objects and purposes and the powers of variation vested in the trustees that in most cases, beyond a repetition of the substratum principle, limited assistance can be gleaned from particularisation of case examples.

[180] I shall start with the cases in the energy trust context. The issue requires consideration in the wider context of energy trusts and the role of trusts in relation to reform of the energy sector. The cases which follow are accordingly useful, subject to not overlooking the express terms of the TECT Deed, particularly where they are materially different from those of the trusts under consideration in these cases.

[181] The first energy trust case is *Re Hutt Mana Energy Trust* where beneficiaries of the Energy Direct Community Trust challenged a range of trustees' decisions, including the establishment of a charitable trust.⁴⁵ The trust was a community trust whose purpose was to return the benefits of ownership "to customers and to the community within the District".⁴⁶ The principal purpose of the trust from the outset,

⁴³ *Re Ball's Settlement*, above n 34.

⁴⁴ *Re Dyer* [1935] VLR 273.

⁴⁵ *Re Hutt Mana Energy Trust*, above n 40, at [24].

⁴⁶ At [19].

as recorded in the establishment plan, was to confer benefits to the community.⁴⁷ Therefore, the Court was satisfied the trustees could establish a new charitable trust. The purposes of the charitable trust, whose principal object was to undertake customer-related activities for the benefit of customers and the community within the District, were “reconcilable with, or encompassed by, those of the Trust”.⁴⁸ The variation was permissible.

[182] Whether proposed amendments to the Hutt Mana Energy Trust Deed altered the substratum of that trust arose again in 2009 in *Macaskill v Ogden*.⁴⁹

[183] In *Macaskill*, the trustees of the Hutt Mana Energy Trust resolved to amend the trust deed, wind up the trust and distribute the majority of the trust funds to customers. These decisions were challenged by some customers on the basis they breached the trustees’ fiduciary obligations because Wild J had previously found the purpose of the trust was to confer benefits on the community.

[184] Wild J stated:⁵⁰

... The plaintiffs in this proceeding assume, mistakenly, that this indicates that the underlying object of the Energy Trust was wholly (or at least substantially) charitable. While the charitable focus created by the 2000 amendments to the trust deed was one valid purpose of the Energy Trust, its substratum is broader, extending to the community as a whole. This encompasses all classes of beneficiary within that community, including customers.

[185] Relevantly, Wild J held that customers and the community were “discrete and separate classes of beneficiary”, both of which were expressly recognised in the purpose clauses.⁵¹

[186] *Macaskill* is also helpful because of the observations Wild J made about the various developments in the New Zealand energy industry, which could not have been foreseen when the trust was executed on 6 April 1993. The legislation that had enabled the trust was superseded by the further reforms of the energy industry effected by the

⁴⁷ At [24].

⁴⁸ At [30]-[31].

⁴⁹ *Macaskill v Ogden* [2009] NZAR 111 (HC).

⁵⁰ At [50].

⁵¹ At [52].

Electricity Industry Reform Act 1998. He adopted dicta from Harrison J in *Re Taranaki Electricity Trust* concerning the powers of amendment the trustees had in that case.⁵² The dicta commented on those powers as follows:⁵³

...designed to allow [the trustees] a degree of flexibility necessary to amend the deed in response to what its drafter must have foreseen would have been constantly changing circumstances over the trust's then expected life span of 80 years.

[187] In *Re Andrews* the trustees of the South Canterbury Power Trust sought a declaratory judgment confirming they could validly use their express power of variation to extend the duration of the trust from 15 to 80 years.⁵⁴ The trustees were opposed by the Timaru District Council, the other substantial shareholder in Alpine Energy Limited. The variation provisions in the South Canterbury Power Trust deed generally permitted variations subject to public consultation and trustee unanimity requirements, while certain variations were prohibited.

[188] The Timaru District Council argued the variation would change the trust's substratum because it concerned a core obligation of the trust. However, the Court held that the variation power itself (by imposing limitations on the scope of the power of variation) expressed the trust's substratum. That is, the substratum was identified and protected against the power of variation by the limitations expressed in that power. It is worth noting the limitations ensured the trustees could not vary a clause that required them to undertake a triennial review of available options for future ownership of the shares. In the event the trust had a discernible substratum, the Court held that it centred on the concept of review and consultation (presumably that contained in the clause that it could not be varied) and was not affected by the proposed extension to the trust's duration.

[189] In *Re Andrews*, Panckhurst J noted:⁵⁵

... Second, I am not persuaded that the potential for prolonged extension in the life of the Trust is at odds with a core concept of the trust deed. To my mind if there is a discernible substratum it is one more centred upon the concept of review and consultation, whereby the ultimate life of the Trust will

⁵² At [55], citing *Re Taranaki Electricity Trust* (2002) 1 NZTR 12-005.

⁵³ At [33].

⁵⁴ *Re Andrews*, above n 33.

⁵⁵ At [61].

be determined as circumstances and ultimately the will of the consumers dictates.

[190] In *Re Hennessey* the trust deed contained a different power of variation.⁵⁶ The deed allowed the trustees to wind up the trust and deal with surplus assets at their discretion. The trustees proposed to use the latter powers to resettle the trust assets on a new trust. The trust deed for the proposed new trust, in contrast to the original deed, contained a wider power of variation. The issue was whether the proposed resettlement was outside the purposes of the trust.

[191] The Court said that, generally, establishment of a new trust would not exceed the purposes of the trust so long as the substratum was not affected. *Re Hutt Mana Energy Trust*⁵⁷ and *Re Andrews*⁵⁸ were distinguished because in those cases the trustees had ample power to vary or resettle the trust and the issue was whether the exercise of the power was within the trust's purpose.

[192] In *Hennessey*, the issue was whether there was any power at all. It was held the proposal conflicted with the narrow power of variation and also the use of the power to wind up or resettle in order to gain a new wide power of variation would be an attack on the substratum. The variation clause in that case cannot be compared to the far more expansive variation clause in this case so it is readily distinguishable at this point.

[193] I observe that none of this limited number of energy cases nor their relevant trust deeds are directly analogous to the present application. There do not appear to be any other energy trust cases to inform the correct approach to the substratum analysis.

[194] A helpful approach to interpreting trust-like structures can be found in *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association*.⁵⁹ This was a New Zealand case in the Privy Council.

⁵⁶ *Re Hennessey*, above n 40.

⁵⁷ *Re Hutt Mana Energy Trust*, above n 40.

⁵⁸ *Re Andrews*, above n 33.

⁵⁹ *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association*, above n 38.

[195] The Privy Council was dealing with a long-term pension scheme and discussed the way in which the Court should approach applications for amendments in relation to pension schemes, clubs and other trust-like structures. Their Lordships acknowledged the differences between pension schemes and other trust-like structures but found core principles that can be applied to all such structures.

[196] The relevant paragraphs start at [19] where Lord Walker said:

Formulated in that way, the general principle tends to beg the question. How is the Court to discern the limits of the proper purposes and scope of a power of amendment?

Then he cited *Re Courage Group's Pension Schemes; Ryan v Imperial Brewing & Leisure Ltd*, a first instance decision of Millett J, where Millett J stated:⁶⁰

It is trite law that a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose. [We all understand that, of course]. The rule-amending power is given for the purpose of promoting the purposes of the scheme, not altering them.

Before I consider this question, I should make some general observations on the approach which I conceive ought to be adopted by the court to the construction of the trust deed and rules of a pension scheme. First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. ...

Secondly, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees.

[197] Lord Walker then referred to Millett J's conclusion:⁶¹

So the main purpose of a club or pension scheme may be enlarged by appropriate amendments to the rules; and, once it becomes too late to

⁶⁰ *Re Courage Group's Pension Schemes*, above n 26.

⁶¹ At [19], citing *Re Courage Group's Pension Schemes*, above n 26, at 506.

challenge the amendments, the enlarged purposes become the new basis by reference to which any further proposed changes must be considered.

[198] At [20], Lord Walker cited *Re UEB Industries Ltd Pension Plan*, a New Zealand Court of Appeal decision, to the same effect, noting in that case there was an express fetter on the power concerned, which I do not find exists here.⁶²

[199] In that paragraph Lord Walker found:⁶³

Counsel for the bank submitted that Their Lordships should be cautious about equating the rules of a pension scheme with those of a members' clubs or other unincorporated association. There are significant points of difference, including the relative contributions of contractual and equitable obligations ... But one common feature is that in each case the objects clause will be (as Fisher J put it) the first port of call. The objects clause will not however always be decisive.

[200] And, finally, at [21]:

An illustration of a situation in which the objects clause will not be decisive is where there have been changes in the organisation of an enterprise, through a process of natural development, making it necessary or expedient for the objects to be restated. ...

[201] Thus, there is clear authority that long-term trusts (which will inevitably experience significant changes in commercial life during the period of their existence) should not be subject to unnecessary fetters in the exercise of powers to secure their purpose.

[202] I revert to *Andrews* in the light of *Bank of New Zealand*. The point I derive from *Andrews* is that the amendment was allowed when the variation clause was less permissive than in this case. It is also authority for the proposition that the variation clause informs the purposes and objects clause, particularly where the variation clause allows trustees to change the purposes and objects.

⁶² *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294 (CA) at 296 and 307-308.

⁶³ *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association*, above n 38, at [20].

First issue: whether the Current Trustees use of their express powers of variation is permissible or not

[203] In light of the interpretation of the TECT Deed undertaken above, I consider each of the proposed variations listed in [170] in turn to decide whether the Current Trustees use of their express powers of variation is permissible or not.

Name change

[204] A name change is obviously significant and symbolic but nothing, insofar as the underlying substance of the trust is concerned, is affected by the proposed name change.

Purpose

[205] The powers of variation are broad and permissive and most significantly cl 13.2 expressly provides for variation of the purpose. These expansive powers themselves form part of the substratum.⁶⁴

[206] TECT has a long lifespan, until the Termination Date of 2118, over which time change in the circumstances relating to all aspects of it can be expected. Not only is the likelihood of change over such a period high but, as Mr Smith QC submitted, its magnitude and frequency is “entirely at large”. Significant change is therefore easily foreseeable as a general likelihood. Thus, it could be readily anticipated that variations to duration and beneficiaries may be contemplated over the life of the trust.

[207] One of the existing purposes of TECT is to continue paying rebates to Consumers. That would still continue, albeit on a different basis as set out above. As these changes facilitate a cash distribution to a particular set of Consumers, they cannot be said to offend cl 5, which forms part of the substratum of the trust as I have defined it.

[208] The proposed new TECT Community Trust is a charitable trust for the benefit of “members of the community within the District”. This is little different from what

⁶⁴ *Re Andrews*, above n 33, at [56]; *Grand View Private Trust Co Ltd v Wong*, above n 38; and *Re Rysaffe*, above n 39.

is mandated under the amended Trust Deed. It does not do damage to the purposes as I have found them to be.

[209] Ms Anderson QC submitted *Re Dyer* supported the Interested Parties' case because the power to vary in that case was wider than in this case and the variation was ruled impermissible as an affront to the substratum.⁶⁵ That submission overlooks that the purposes in *Re Dyer* were far more rigidly identified and proscribed by numerous qualifying elements. Variation of any one or more of these elements would have been destructive of all the substratum. It is thus not an appropriate case for comparison. That demonstrates my observation in [193].

[210] Ms Anderson QC argued that the principal purpose of TECT is to confer benefits on Consumers, not the wider community. In other words, it is a trust with a narrower purpose than the trust in *Re Hutt Mana Energy Trust*.⁶⁶

[211] What that submission overlooks is that the purposes and objects of the TECT Deed are an amalgam of direct benefits to Consumers, and benefits to non-Consumers who include a wider group or persons, through the carrying out of projects or other community initiatives which in the opinion of the trustees will benefit Consumers.

[212] It also overlooks that the power of variation in that case was decidedly less express than in this case. It did not give the trustees the power to make changes to the objects of the trust as the TECT Deed does.

Replacing the requirement in cl 6 to pay out any surplus assets on winding up for the "benefit of Consumers" with the requirement these be paid to the TECT Community Trust

[213] It is more likely than not that over the next 30 years the number of Consumers will be seriously reduced, if not extinguished, by natural attrition or some other commercial circumstance such as that to which the Current Trustees must react within the present case.

⁶⁵ *Re Dyer*, above n 44.

⁶⁶ *Re Hutt Mana Energy Trust*, above n 40.

[214] Given I have found TECT's purposes include benefits to the wider community (namely non-Consumers through the carrying out of projects or other community initiatives so long as those will, in the opinion of the Trustees, be of benefit to Consumers), it is clear the underlying purpose of TECT is not confined to providing solely for the benefit of Consumers alone.

[215] Ms Anderson QC relied on *Macaskill*⁶⁷ and *Andrews*⁶⁸ to submit this proposed variation is impermissible. Given my interpretation of the purposes of TECT both those cases in fact support the Current Trustees' proposed variations.

[216] The combination of the proposed changes to the distributive powers of TECT do not appear to cross the necessary threshold so as to be seen as offending against the substratum.

[217] That conclusion will be a disappointment to the Interested Parties, but it needs to be seen in context. When the original trust was established the Consumers were the entire community, hence the historic dispositive powers in cls 5.3(a) to (c) inclusive. Further, within a relatively short period of time in the life of TECT, even greater recognition was given to the notion of Consumers being the community by the variation introduced in 5.3(d). With the proposed variations, the benefits will after a reasonable period of time (so as not to upset the expectations of the decreasing number of those who remain Consumers) be distributed back into the community in the region, so as to benefit Consumers as part of that community.

Changes to the definitions of "Consumer" and "District"

[218] Next in turn are the proposed amendments to the definitions of "Consumer" and "District". Currently a Consumer is defined as:

- (i) a person who is named in the records of the Company as being liable to pay the Company any amount for electrical energy supplied or to be supplied to premises situate in the District [comprising the Tauranga City and Western Bay of Plenty District];
- (ii) the TECT Charitable Trust as constituted pursuant to a deed of trust dated 27 March 2002; or

⁶⁷ *Macaskill v Ogden*, above 49.

⁶⁸ *Re Andrews*, above n 34.

- (iii) any other entity wholly owned and/or controlled by TECT and whose beneficiaries and objectives are substantially the same as TECT's;

[219] Under the proposed variations, Consumer would be limited to:

... each person who is named in the records of Trustpower as being liable to pay Trustpower any amount for electrical energy supplied ... in the District as at 9am on [28 January 2021] provided that such person:

- (a) retains an obligation to pay Trustpower [or a third party purchaser] ... in accordance with [the Rebate Policy]; and
- (b) otherwise ... satisfies the Eligibility Criteria set out in ... the rebate Policy.

[220] It would not include any consumer who ceases to be an electricity consumer of Trustpower (or purchaser of the retail business) after 28 January 2021 (subject to limited exceptions), any existing customer of a purchaser of the retail business, and any new customers acquired by a purchaser of the retail business after 28 January 2021.

[221] The proposed amendment to the definition of Consumer is, in part, to ensure existing Consumers do not cease to become Consumers under the TECT Deed following Trustpower's sale. The amendment is plainly to the benefit of existing Consumers in those circumstances and is permissible in any event having regard to the express terms of cl 13.2.

[222] The definition of District could be changed from:

- (i) the territory over which the Board was authorised to supply electricity immediately prior to the Vesting Date pursuant to the Tauranga Electric Power Board Supply Licence granted to the Board under section 20 of the Electricity Act 1968; and
- (ii) the territory over which Tauranga Electricity Limited was authorised to supply electricity immediately prior to its merger with [Trustpower] and includes ... that area comprising the Tauranga City peninsula north of the centreline of 17th Avenue, Tauranga.

to:

- (i) the territory over which the Tauranga Electric Power Board constituted by the Electric Power Boards Act 1925 was authorised to supply electricity pursuant to a licence granted under section 20 of the Electricity Act 1968 immediately prior to the vesting of that Board's

undertaking in the predecessor to Trustpower, and the vesting of the shares therein in the Trustees;

- (ii) the territory over which Tauranga Electricity Limited was authorised to supply electricity immediately prior to its merger with the legal predecessor to Trustpower in 1997 and includes, for the avoidance of doubt, that area comprising the Tauranga City peninsula north of the centreline of 17th Avenue, Tauranga,

...

[223] Ms Anderson QC criticised the proposed amendment of the definition of District. She relied on *Re Ronald McDonald Wellington Trust Board*, where the trustees sought directions allowing them to merge three independent Ronald McDonald charitable trusts into one single national trust.⁶⁹ However, the purpose of the trust under the trust deed was restricted to the “Central Region” and to activities in Wellington. Williams J held that the regional focus of the trust was inherent in its substratum.⁷⁰ The trustees could not rely on a wide power of variation to transfer the assets of the Wellington trust to a new trust whose purposes overlapped only to a limited extent with those of the Wellington trust.⁷¹

[224] In this case there is also a geographical aspect to purpose because Consumer’s must “situate in the District”. The proposed changes to the definition of “District” are nowhere near as wide ranging as those in the *Ronald McDonald* case. The proposed changes in that case amounted to nationalisation which did fundamentally alter that trust’s purposes. That case is of limited assistance in the circumstances, other than being another example of the principle.

[225] There is nothing in the proposed variation of the definition of District that would engage the relevant question here. It is simply in the nature of a natural alignment exercise. It does not significantly alter the geographical prescription in the Trust Deed. It still retains its specific regional character, being tied to the City of Tauranga and the surrounding region. It is more in the nature of addressing anomalies and does not affect the substratum, as it was found to have in the *Ronald McDonald* case.

⁶⁹ *Re Ronald McDonald House Wellington Trust Board*, above n 41.

⁷⁰ At [24].

⁷¹ At [34].

Amendments to the distributive powers

[226] The revised TECT Deed would commit TECT to paying rebates to the retail Consumers who were Consumers on 28 January 2021 in accordance with the new definition of Consumer.

[227] It is clear cl 13.2 permits the Current Trustees to alter or amend trusts of income and capital.

Amendments to the winding up provision

[228] There is express power given to the Current Trustees to make this amendment, having regard to cl 13.2.

Changing the governance structure of TECT, such that the Current Trustees are those people elected as trustees of the TECT Community Trust

[229] Through cls 13.1 and 13.2 the Current Trustees have express power to make these amendments.

Removal of entrenched cls 9.3 and 13.3

[230] The next proposed amendment is the removal of the requirement to undertake a CCP on the sale of the Trustpower shares (cl 9.3). The Current Trustees say they have the power to remove this clause and if the Court does not agree then the Court should use s 130 of the Act or its inherent jurisdiction to give them the power to do so.

[231] The Current Trustees' primary position is that the broad cl 13 powers of variation permit them to remove cls 9.3 and 13.3 from the TECT Deed in circumstances where they can no longer have any practical effect (i.e. where all Trustpower shares have been alienated by TECT). Thus, in this case what is sought is a "good order" amendment.

[232] Further, they say there is a strong commercial reason to remove the redundant cls 9.3 and 13.3 from the TECT Deed. The TECT Deed, as amended, will continue until 31 December 2050. Given the trust would last for another 30 years, it would be unhelpful for the trust deed to include redundant provisions which, if not removed,

could cause practical or even legal difficulties for users of the deed over those many years.

[233] Clause 13.3 is an entrenchment provision. It amounts to a fetter on any variation to cl 9.3 of the TECT Deed. Pursuant to cl 13.3, amendments that have the effect of limiting or restricting the obligations or powers of the trustees under the TECT Deed to sell, transfer or otherwise dispose of the shares in accordance with cl 9.3 are prohibited.

[234] In accordance with cl 9.3, TECT's shares in Trustpower cannot be disposed of (above a certain base level) without first undertaking a CCP.

[235] The Current Trustees have complied with the cl 9.3 requirement that a CCP be undertaken before TECT's Trustpower shares are transferred to the TECT Community Trust. Therefore, they say cls 9.3 and 13.3 thereafter would have no relevance and they have the power to remove them from the TECT Deed.

[236] I agree that if, under the TECT Deed, the Current Trustees are validly able to exercise distributive powers of capital and income which result in shares no longer being owned by the trust there cannot be a logical pretext for the entrenchment provisions.

[237] The Current Trustees are not seeking to override any entrenchment, they are only trying to remove the entrenchment provisions after their entire effect has been spent. Such an amendment in those circumstances does not affect any beneficiaries' interest under the trust. Their removal is in the character of a good order amendment.

[238] Relying on the Court's supervisory jurisdiction in relation to trusts generally, I find those clauses should be removed as no longer having any validity to any interest under TECT.

2002 Charitable Trust Deed

[239] There is no controversy about proposed variations to the 2002 Charitable Trust deed. In short, the Current Trustees have the express power to decide to wind up this Trust.

Conclusion on first issue

[240] TECT's purposes, even outside of the variation powers and duration, are broad. That said, the ambit of TECT's purposes is not as restrictive as Ms Anderson QC and the Interested Parties contend. The purpose clause (cl 4) expressly incorporates by reference the trusts of income and capital clauses.

[241] Clause 5.3(d) allows for distributions to non-Consumers as long as there will be, in the opinion of the trustees, benefit to Consumers.

[242] The variation powers are very broad, far broader than in *Andrews*.⁷² They permit variation of the purposes and the trusts themselves.

[243] Taking in to account these factors, the Proposed TECT Restructure is consistent with TECT's purpose, context and objectives as provided for in the purpose clause (cl 4) and as that clause is interpreted in the context of the TECT Deed as a whole and the background and surrounding circumstances:

- (a) the shares were received (cls 4.1 and 4.2); and
- (b) they were held pending any sale or disposal (cl 4.3, with the sale or disposal being also expressly mandated by cls 6, 8, and 9 and Schedule II); and
- (c) following the application of the dividends for the duration of TECT in accordance with its provisions, namely cl 5 (see cl 4.5), it is proposed the shares be sold/disposed of in accordance with cl 4.4; where

⁷² *Re Andrews*, above n 34.

- (d) pursuant to the broad express powers of variation the transferee will be a new trust (the TECT Community Trust) with comparable purposes to TECT, namely benefitting community groups and organisations (including non-Consumers) in the Tauranga Western Bay of Plenty District; while
- (e) rebates, being within the defined purposes of the TECT Deed, continue in respect of a lessening Consumer base so that the specific means of addressing one of TECT's purposes is perpetuated for as long as reasonably manageable; and
- (f) for the proper administration of the TECT property (cls 9.3 and 13.3) become redundant, they therefore do not affect beneficiaries' interests under TECT and are removed to provide clarity for the remaining term of TECT.

[244] In summary, I find the Current Trustees' decisions to implement the Proposed TECT Restructure are lawful and proper in that (save for the removal of cls 9.3 and 13.3) they are within the relevant powers held by the trustees of TECT and the 2002 Charitable Trust.

Second issue: did the Current Trustees make their decisions properly in accordance with their duties under the Act?

[245] To test whether the decision making was conducted properly, it is helpful to review the most relevant specific duties. To some extent they overlap.

[246] The Act sets out trustee duties, categorising them into "mandatory" and "default" duties.

[247] Although there is no hierarchy of duties, the duties which are regarded as mandatory in the Act reflect the duties which are most commonly regarded by trustees and their legal advisers as important. The mandatory duties recognised by the Act are the duties:

- (a) to know the terms of the trust;
- (b) to adhere to the terms of the trust;
- (c) to act honestly and in good faith;
- (d) to act for the benefit of beneficiaries or to further the permitted purpose of the trust; and
- (e) to exercise powers for a proper purpose.

[248] The default duties include:

- (a) to exercise care and skill that is reasonable in the administration of a trust;
- (b) not to exercise a power for the trustee's own benefit;
- (c) to consider actively and regularly the exercise of a power;
- (d) to avoid a conflict of interest;
- (e) to act impartially in relation to the beneficiaries, and not be unfairly partial to one beneficiary or group of beneficiaries to the detriment of the others; and
- (f) to act unanimously.

[249] The Interested Parties challenge significant aspects of the Current Trustees' decision making. These challenges were not expressed in relation to the relevant duties, but I have applied and considered them in that context. Naturally, the Current Trustees reject the challenges.

[250] The duties are:

- (a) to know the terms of the trust (s 23);
- (b) to adhere to the terms of the trust (s 24);
- (c) to act honestly and in good faith (s 25);
- (d) to act for the benefit of the beneficiaries (s 26);
- (e) to exercise powers for a proper purpose (s 27); and
- (f) to avoid conflicts of interest (s 34).

Know the terms of TECT – s 23 of the Act

[251] There is no suggestion in this case the Current Trustees do not know the terms of the TECT Deed.

Adherence to the terms of TECT – s 24 of the Act

[252] The TECT Deed required the Current Trustees to engage in a CCP because it includes:

- (a) the transfer (to the new TECT Community Trust) of all TECT's shares in Trustpower, triggering the requirement for a CCP found in cl 9.3 of the TECT Deed; and
- (b) variations to the TECT Deed, including by varying the definitions of "Consumer" and "District" and by varying cls 4, 5, 6, 9.3 and 14, triggering the requirement for a CCP found in cl 13.2 of the TECT Deed.

[253] These provisions represent an express restriction on the Current Trustees' powers in respect of certain decision making. They prescribe a process which must be followed before the Current Trustees can exercise some of their powers under the TECT Deed.

[254] The CCP is set out in cl 11 and Schedule III of the TECT Deed. The Current Trustees had to:

- (a) place a notice of the proposal before a meeting of the Current Trustees;
- (b) give notice of the proposal to Consumers in accordance with cl 11 of the TECT Deed (available for inspection and advertised);
- (c) in every notice given under (b), specify a period within which Consumers may make submissions (at least one month but not more than three);
- (d) allow Consumers a reasonable opportunity to be heard by the Current Trustees at meetings open to Consumers; and
- (e) make all written submissions on the proposal available to Consumers.

[255] I have already set out in detail the lengths the Current Trustees went to in order to comply with the CCP at [49]-[64].

[256] Some of the Interested Parties and Ms Anderson QC criticise aspects of the TECT Consultation Process, specifically information provided in the CIM. The primary criticisms of the CIM are:

- (a) information given to the Consumers downplayed the importance of consultation, in particular through the phrase “you do not need to do anything further” and not referencing Consumer consultation at the start of the document;
- (b) it failed to identify the proportion of the funds that would be given direct to Consumers under the Proposed TECT Restructure and that TECT’s funds are applied to a wider group;
- (c) there were inconsistencies in it. For example, references to an expanding base that means trust funds are applied to a wider group,

compared with references to the advantage of the restructure being that TECT became available to everybody in the community;

- (d) the Current Trustees took steps to discourage participation from Consumers, including by the use of the three phrases referred to in (a) to (c) above;
- (e) the CIM did not properly explain the position on rebates, or why the alternative restructuring options were inappropriate;
- (f) the Consumers did not have the opportunity to obtain independent legal advice;
- (g) Consumers should have a vote on their preferred restructuring option;
- (h) the Current Trustees lacked the mandate to decide on the Proposed TECT Restructure as only 1 per cent of Consumers were in support of the proposal; and
- (i) in any event, the CCP is outdated. In this regard Ms Balu submitted the Current Trustees should have notified Consumers of the consultation on the envelope enclosing the CIM and Notice of Proposal.

[257] Ms Anderson QC submitted (a) to (c) inclusive may have contributed to the lower response rate from Consumers on the consultation. The consultation appears to have received far less interest than previous consultations. For instance, for the proposed reform in 2018 TECT received 21,000 submissions, roughly 43 per cent of all Consumers at the time. TECT received 780 submissions in its consultation on the proposed restructure, roughly 1.5 per cent of all Consumers.

[258] The Current Trustees deny any aspect of the consultation process was misleading, lacked good faith or was inadequate. They say the consultation process did meet the legal requirements.

The law

[259] The leading authority on what is required for proper consultation is *Port Louis Corporation v Attorney -General of Mauritius* where Lord Morris said:⁷³

... the nature and the object of consultation must be related to the circumstances which call for it. ... If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problems that may be likely to arise in the event of there being an alteration of boundaries. The local authority must be told what alterations of boundaries are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or declined to express any views. The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.

[260] Although *Port Louis* was decided in the context of public law proceedings, counsel were agreed that the same considerations apply in this case particularly given the public character of TECT.

Discussion

[261] The CIM must be read in context. It was sent to Consumers together with the Notice of Proposal. It set out clearly why TECT needed to review its structure in the light of Trustpower's strategic review and explained the proposal being consulted upon. The documents clearly advised how Consumers could provide feedback.

[262] Complaints about particular phrases in the CIM are not borne out when reviewing both it and the Notice of Proposal as a whole and in context. For example, there was adequate explanation of rebates to Consumers and detail on the alternative

⁷³ *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111, [1965] 3 WLR 67 at 1124.

proposals that had been considered and not regarded as acceptable. Reasons for that conclusion were provided in the documentation.

[263] Accusations that the CIM was misleading cannot be substantiated. While it is true the document did not refer to consultation at its very outset, it was framed as a “proposal” not a decision.

[264] The Notice of Proposal clearly stated that the document was formal notice of a proposal under the TECT Deed, disclosed in accordance with the CCP. Both the Notice and the CIM explained the process for Consumers to give feedback.

[265] In addition, a very helpful graphic entitled “The Consultation Process” showed clearly how the process worked.

[266] I refer now to the criticisms of the phrase “Trustpower is changing, so TECT must change too”. The information immediately following this heading puts the phrase into context by reference to Trustpower’s strategic review and the need for TECT to change its structure if a sale does take place.

[267] I refer to the criticisms of the phrase “[a]s a beneficiary you do not need to do anything further”. Again, the context of the Notice of Proposal and CIM (and the information in them) made it abundantly clear the documents constituted formal notice of a proposal for Consumers to consult on. The feedback process was clearly set out for those beneficiaries who did wish to provide their views.

[268] In addition, there was an email update to Consumers which exhorted them to provide their views to the Current Trustees. This email update was sent to every Consumer for whom TECT had a current email address, about 37,600 Consumers. Amongst other statements it said, “we encourage you to read the Notice of Proposal and to give us your feedback”.

[269] TECT also sent follow-up email communications and placed public advertisements, the theme of all of which was to encourage engagement with the ongoing CCP.

[270] I now deal with the criticism of the sentence, “The TECT rebate is protected under the proposed new structure for approximately 30 years”. The CIM was very clear about the Current Trustees’ intentions to continue paying rebates up to the end of 2050. In particular, the CIM advised:

... there is no guarantee that rebates will be paid out until the end of 2050, but that is the current projection based on financial modelling. If the trust fund has been paid out in full earlier, TECT will end and rebates will end.

[271] The Interested Parties submitted the CCP was required to be of such a standard that ensured all TECT’s 47,000 beneficiaries were active in their response and supportive of the Consultation Proposal. That is not the requisite standard. The requisite standard is that mandated by the TECT Deed.

[272] The TECT Deed’s requirements for a CCP are that the trustees give notice of a “proposal” to Consumers. The proposal must be one the trustees consider to be the best course of action in the light of relevant considerations. This decision is then tested as a “proposal” by the CCP and the Court approval process. Presenting additional options to Consumers is not required. It seems simplicity is the key when dealing with such a wide-ranging demographic. Presenting a clear and unambiguous proposal could be said to increase the quality and coherence of the feedback.

[273] Further, the presentation of one option did not preclude Consumers from providing submissions in support of a wide range of alternative options. The range of options raised in the Consumers’ submissions demonstrates that.

[274] The Current Trustees were not obliged to present multiple choices or options to the Consumers. The Trust Deed specifies in Schedule III that the trustees shall place notice of “the proposal” before a meeting of the trustees.

[275] It is not a prerequisite of the proposal that it presents a number of options for consideration. A single option is thus permissible.

[276] Mr Smith QC submitted there was benefit in presenting a single option, as presenting numerous options could be confusing or overwhelming for Consumers. That submission ignores the collective intelligence of a community such as this. It is

patently clear from the submissions of the Interested Parties they do understand the issues presented by the sale of Trustpower.

[277] The Consumers should not have expected a vote on the Consultation Proposal. That was communicated to Consumers in the CIM where it said:

Why don't beneficiaries get to vote on the proposed changes to TECT?

Trustees have been advised they cannot delegate their decision-making responsibility to beneficiaries. The process requires a consumer consultation, a Trustee decision on the final proposal, and then Trustees must take an application to the High Court.

[278] The Current Trustees have the mandate under the TECT Deed to proceed with the Proposed TECT Restructure, following consultation and unanimous vote (see cl 13 of the TECT Deed).

[279] The assertion that the lack of response is because of the process employed by the Current Trustees is entirely speculative. That assertion neglects the fact that the significant response to the 2018 CCP was driven by the proposed removal of the rebate and Trustpower's strong opposition. It could be that the comparatively small number of submissions this time around is in fact indicative of more support for the current proposal. As there is no evidence either way, I place little or no weight on these factors.

[280] In addition, the Current Trustees took steps beyond the consultation requirements of the TECT Deed. They held three public meetings which presented an opportunity for Consumers to seek information about the Consultation Proposal. Significant additional information about the Consultation Proposal was made available.

[281] Ms Anderson QC and Mr Jonkers also criticised the content of the TECT management report of submissions for potentially giving the Current Trustees greater confidence in their mandate from Consumers for the Proposed TECT Restructure than was warranted.

[282] I can deal with this in short order. The Current Trustees did not place reliance on incorrect information. Each of the Current Trustees heard every oral submission

and each was provided with a complete copy of every written submission. The Current Trustees considered all the submissions they received before making their decisions. The management report was simply a summary document of those submissions that the Current Trustees had considered.

[283] For all the reasons set out at [261]-[283], I find the Current Trustees did adhere to the terms of the TECT Deed. The Consumers had more than adequate information available to them to enable them to make intelligent and useful responses. I have no doubt that had the Consumer responses been as numerous and as strident as they were on the previous occasion it would have been back to the drawing board for the Trustees.

The 2002 Charitable Trust

[284] Nothing in the Proposed TECT Restructure in relation to the 2002 Charitable Trust requires a CCP to be completed under that deed. Notwithstanding the absence of such a requirement, the winding up of the 2002 Charitable Trust and the transfer of its assets to the TECT Community Trust was expressly set out as part of the CCP.

Duty to act for the benefit of beneficiaries – s 26 of the Act

[285] Here the Interested Parties are alleging, first, the ultimate winding up of TECT is not for the benefit of Consumers and, second, the Current Trustees did not adequately ascertain whether the rebate was in fact for the benefit of Consumers.

[286] Section 26 of the Act relevantly provides:

26 Duty to act for benefit of beneficiaries or to further permitted purpose of trust

A trustee must hold or deal with trust property and otherwise act—

- (a) for the benefit of the beneficiaries, in accordance with the terms of the trust:
- (b) in the case of a trust for a permitted purpose, to further the permitted purpose of the trust, in accordance with the terms of the trust.

[287] It is well established that trustees of a trust have a duty to act in the interests of the beneficiaries of the trust. This is another way of expressing the trustees' duty of

loyalty. They must act in the beneficiaries' interests, not in the interests of some other person.

[288] The TECT Deed does not directly name or define "beneficiaries". However, its purposes incorporate the trusts of income and capital which in turn include payments, distributions and other measures for the direct and indirect "benefit of Consumers".

[289] As discussed earlier at [136] to [147], TECT's purpose is to benefit a wider group than just the nominal Consumers.

[290] Also, beneficiaries, as a conceptual class, is forward looking. It anticipates future Consumers, and TECT has been operating on that basis over the whole of its three-decade history.

[291] First, it is to the benefit of Consumers and non-Consumers alike that some form of restructure occurs so present Consumers do not cease to become Consumers under the TECT Deed following Trustpower's sale, otherwise the benefits currently enjoyed by some 47,000 individual Consumers will be narrowed to only 150 business and industrial Consumers.

[292] Second, the Proposed TECT Restructure is to the benefit of Consumers because of the monetary and community benefits that accrue to them under the restructure, principally:

- (a) rebates will be paid to a defined set of consumers by TECT over a 30-year period, and \$369 million (plus interest on that amount at 4.5 per cent per annum) is in effect set aside for that purpose; and
- (b) TECT's remaining funds of more than \$700 million will be available through the new charitable trust for purposes that will benefit the community and therefore the present and future beneficiaries.

[293] There is insufficient evidence before the Court for it to embark upon any enquiry to determine whether or not the rebate is in fact of benefit to the Consumers

and whether or not it has an anticompetitive effect so far as electricity pricing is concerned. Therefore, for good reason, I shall not venture into that enquiry. However, I will take it into account when I examine whether the Current Trustees took all relevant considerations into account.

To act honestly and in good faith – s 25 of the Act

[294] A theme from the Interested Parties was that the Current Trustees approached the CCP 2021 with a closed mind, favouring the Proposed TECT Restructure and not genuinely or adequately considering other perspectives. A number of the Interested Parties are concerned that the Proposed TECT Restructure is the culmination of an ongoing agenda the Current Trustees have had to replace the rebate and the Consumer focus of TECT with a wider community and charitable focus.

[295] The Current Trustees reject this proposition. They say the matters advanced by Ms Anderson QC and the Interested Parties do not meet the high threshold required to establish predetermination.

The law

[296] The leading case on predetermination is the Court of Appeal decision in *CREEDNZ Inc v Governor-General*.⁷⁴ It must be established:⁷⁵

[O]n the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions.

[297] The threshold for predetermination is high. In particular:

- (a) the Courts do not expect “lofty detachment”: decision makers will often have pre-existing views (indeed, it would be “surprising if they did not”);⁷⁶
- (b) it is not fatal to have “favoured” an approach from an early stage;⁷⁷ and

⁷⁴ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

⁷⁵ At 194 per Richardson J.

⁷⁶ At 214 per McMullan J.

⁷⁷ At 179 per Richardson J.

- (c) that a position is put forward and is rejected is not evidence of a closed mind.⁷⁸

[298] Evidence that a decision maker has held meetings to discuss issues, requested further information, and spent time reviewing the documents is inconsistent with a closed mind and suggests against predetermination.⁷⁹

Specific allegations of predetermination

[299] The case mounted by the Interested Parties is that there is predetermination in this decision making, and that it is:

- (a) largely driven by Mr Holland and arises out of his desire to benefit other organisations with which he is associated; and
- (b) because the Proposed Trustees have always wanted to replace paying rebates to Consumers with making payments to recipient organisations who have no direct link to Consumers and energy-related objectives.

[300] They say this is evidenced by:

- (a) the shift in the late 1990s when TECT started giving funding “to Consumer community organisations”;
- (b) the establishment of the 2002 Charitable Trust and the cl 5.3(d) amendment to the TECT Deed;
- (c) an increased proportion of funding being allocated to Consumer community organisations to 20 per cent in 2008;
- (d) the 2018 proposal; and
- (e) the current Proposed TECT Restructure.

⁷⁸ *Universal Education Group Limited v New Zealand Qualifications Authority* [2017] NZHC 3245.

⁷⁹ *Rangatira Developments Ltd v Sage* [2020] NZHC 1503 at [37]-[41].

[301] Mr Jonkers put it this way:

6. ... The Trustees, the Plaintiffs do not have the will to carry on TECT as has been done over the 30 years of its life. **The Trustees do not have that will.** The Trustees have a predisposition, a mind set and an agenda to turn TECT from a Consumer Trust into a charitable trust. **That and only that single problem causes this case to be heard...**
7. The Trustees have demonstrated that mind-set clearly with the similar proposal in 2018, which was turned down by strong opposition from the beneficiaries, and now again... They have demonstrated this predisposition also by already pre-emptively shifting substantial asset values from the Consumer trust into the TECT Charitable trust. In accordance with the Trust Deed of TECT Charitable trust these capital values of about \$150 million at winding up can only be distributed to charitable bodies, for charitable purposes. In doing so they shifted these asset values away from rightful beneficiaries, who will never have any benefit out of it again.

[302] In his affidavit, Norman Mayo, who was a member of the Tauranga Electric Power Board for 10 years and one of the original Trustees of TECT, noted:

TECT was never conceived as a charitable trust. I have noticed with concern over the years a drift away from the original intent of the Trust as a Consumer trust. It seems money is flowing to all sorts of organisations far different from the original intent. Giving money to all sorts of things may have a “feel good” factor to those giving, and those receiving, but I do not consider it to be consistent with the basis of the Trust.

[303] Ms Anderson submitted this shift was particularly evident in 2018, when the then trustees consulted with Consumers on the 2018 Proposal. The 2018 Proposal had been developed by the then trustees at the time for around one year before being released for consultation in January 2018. The 2018 Proposal involved ending the payment of rebates. Consumers would be provided with a lump sum payment and five more years of rebate payments, after which TECT would cease giving any rebates to Consumers. TECT’s remaining assets would be transferred to a charitable trust focused on benefiting local and community projects and organisations.

[304] In a 2018 interview, Mr Holland explained the rationale behind the 2018 Proposal as follows:

Uncertainty in the electricity sector is one of the driving factors behind a decision by Tauranga Energy Consumer Trust trustees to propose an end to issuing of the TECT cheque.

Speaking to *SunLive*, TECT chair Bill Holland says he and his fellow trustees have been discussing the matter for over a year.

He says it was his idea to move the trust towards a 100 per cent focus on charitable contributions. “I’ve been unhappy and concerned with the situation we’re in. As a trustee I think we have a responsibility to look at the big picture. When I spoke to the other trustees they all agreed something needs to change.

[305] In an article dated 25 January 2018 Mr Holland was recorded as stating the trust was no longer an appropriate structure for residents of the region. He said further:

I cannot understand why you’d have a standalone trust giving financial support to the customers of a particular company and not to other companies
...

I don’t think they’d thought through the idea that we get to now where only 70% of Consumers in Tauranga are Trustpower Consumers.

... I think it was ill-conceived. It needs to be corrected and how do we correct it? Well – this is our proposal.

[306] Mr Holland was quoted as expressing similar opinions in an article in the *Bay of Plenty Times* dated 11 February 2018 which said, “Bill Holland has said the trust was a bad idea in the first place”.

[307] There was substantial public consultation on the 2018 Proposal. After TECT received 21,000 written submissions, the then trustees announced that they were withdrawing it.

[308] At the time, Mr Holland noted:

The debate became a philosophical one between those who want to keep the status quo where individuals receive a cheque and those who wanted to take the compensation offered and see the trust evolve into one that could help Tauranga and Western Bay of Plenty communities for generations to come.

[309] The main difference between the 2018 Proposal and the proposed restructure is that rebates will continue for 30 years. However, the end point and philosophical underpinning of the two proposals is largely the same, the majority of TECT funds will be used to fund charitable initiatives and TECT funds will be transferred to a new community trust for that purpose.

[310] As such, the Interested Parties say the evidence suggests that the Current Trustees did not go into consultation on the Proposed TECT Restructure with an open mind. Rather, Mr Holland and the other Current Trustees arguably saw the strategic review of Trustpower as creating the opportunity to advance again previous objectives of those who were trustees of TECT in 2018. The issue for the Court is whether that backdrop undermines the consultation process, resulting in an inability by the Current Trustees to have genuine receptiveness to Consumer submissions.

[311] Mr Holland has been a trustee of TECT since first being elected in 2012. It is clear he has long held views that TECT's assets should be utilised for the benefit of the wider community. However, that is not determinative of this issue and must be put in context as I have found at the time of the establishment of TECT the Consumers were tantamount to the community.

[312] The variation to the TECT Deed to include distributions to non-Consumers delinked to the use of electricity occurred in 2002. Significantly, it occurred after a CCP. This change and the policy formulised in 2008 whereby 80 per cent of distributions went to Consumers and 20 per cent to community projects and initiatives both occurred long before Mr Holland became a trustee.

[313] While Mr Holland may have expressed his views openly to the media at times, it is evident he has an open mind because when faced with the opposition to the 2018 Proposal he, along with the other then trustees, chose not to proceed with it. The Proposed TECT Restructure is also significantly different, given the extended period that rebates will be paid to an ever-decreasing number of Consumers. This, in my view, indicates the Current Trustees were responsive to the feedback given in 2018 and approached the proposal with an open mind.

[314] In addition, the focus on Mr Holland as Chair is ill founded, given the Current Trustees voted unanimously on the proposal and three of the six Current Trustees were elected after the 2018 consultation. Their decision making cannot be impugned by reference to earlier proposals.

[315] Even if I were to accept the Current Trustees had a pre-existing view on the direction of TECT, this would be insufficient to establish predetermination. The Courts accept, even expect, that decision makers may have pre-existing views. That is not an issue as long as decision makers approach the question with an open mind, bona fide prepared to consider any contrary views on their merits.

[316] Consequently, the focus for the Court should be on the CCP 2021, rather than earlier proposals or trustee involvement in community projects.

[317] The evidence illustrates the extensive steps the Current Trustees took to consult on the Proposed TECT Restructure, including to understand the issues, seek further advice, and consider Consumer submissions before making their decisions. While there is evidence some of the Current Trustees may have held a pre-existing view, there is no evidence of predetermination on the part of any of the Current Trustees.

[318] The selection by the Current Trustees of a preferred option after procuring advice, reviewing all options and debating points where necessary is not evidence of predetermination. It is trustees undertaking their role. In a Consumer population of around 47,000 it is inevitable that some will have differing views of the best way forward, but that fact alone does not render the decision inappropriate.

Duty to act for proper purpose – s 27 of the Act

[319] Trustees are subject to a duty to act for proper purposes. The duty requires trustees not to act on ulterior motives, to take relevant considerations into account and to refrain from giving weight to irrelevant considerations.⁸⁰

[320] The Interested Parties say in developing the Proposed TECT Restructure the potential for the rebate to distort prices and have an anticompetitive influence on electricity prices was not given due attention by the Current Trustees. Further, they say alternatives (such as winding up TECT or expanding the beneficiary class to all Consumers in the District) were not considered with this in focus.

⁸⁰ *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589, at [18]-[19].

[321] When exercising fiduciary powers,⁸¹ trustees must take into account relevant considerations and ignore irrelevant ones.⁸² In *Pitt v Holt*, Lord Walker in the UK Supreme Court observed:⁸³

The first strand of legal doctrine starts with the entirely familiar proposition that trustees, in the exercise of their fiduciary discretions, are under constraints which do not apply to adult individuals disposing of their own property. I made some uncontroversial observations about this in *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705:

“Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is, however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts. This sometimes creates real difficulties, especially when lay trustees have to digest and assess expert advice on a highly technical matter (to take merely one instance, the disposal of actuarial surplus in a superannuation fund).”

[322] Failure to consider all relevant circumstances (or “inadequate deliberation” as Lord Walker put it in *Pitt v Holt*)⁸⁴ bears on the Court’s assessment of whether the trustees have acted in a reasonable and prudent manner.⁸⁵

[323] The Court must be satisfied that the unconsidered relevant consideration would or might have affected the trustees’ decision.⁸⁶ It must be a sufficiently serious:⁸⁷

Failure to consider, or to give adequate weight to, some relevant but nonetheless marginal consideration should not constitute a breach of trust and render a trustee’s action open to challenge. The unconsidered relevant factor must surely have a crucial or particularly material significance. The central question, therefore, should be expanded so as to read: what is it of critical significance that a trustee ought to take into account when exercising a power or discretion?

⁸¹ *Pitt v Holt* [2013] 2 AC 108 at [73].

⁸² *Lynton Tucker, Nicholas de Poidevin and James Brightwell*, above n 24, at [29-042].

⁸³ *Pitt v Holt*, above n 81, at [10].

⁸⁴ At [60].

⁸⁵ *Re Honoris Trust*, above n 3, at [62].

⁸⁶ *Pitt v Holt*, above n 81, at [39], citing *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 at [21].

⁸⁷ *Pitt v Holt*, above n 81, at [68]; Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Wiltshire, 2012) at [10.107].

[324] In assessing what amounts to a relevant consideration, the Court will look at all the circumstances, including the terms of the trust deed, the nature of the relevant power, the context/type of trust and the purpose for which the power was conferred.⁸⁸

[325] Here it is said, in developing the Proposed TECT Restructure and assessing alternative proposals, the Current Trustees:

- (a) do not appear to have carried out or commissioned investigation, assessment, or examination of evidence, pointing to the potential for the rebate to distort prices or to lead to consumer behaviour that is contrary to the interests of Consumers; and
- (b) nor does it appear that alternatives before the Current Trustees (such as the winding up of TECT or the expansion of the beneficiary class to all Consumers in the District) were evaluated with this issue in focus.

[326] There is no admissible evidence before the Court proving any price distortion is caused by the rebate nor that receiving the rebate is in other ways contrary to Consumers' interests as beneficiaries. Having said that, it is clear on the evidence the Current Trustees were aware of the assertions to that effect in any event and did take them into account in their deliberations.

[327] The Current Trustees considered expert advice in making their decisions on the Proposed TECT Restructure. Mr Holland's affidavit of 9 November 2021 annexes a July 2020 New Zealand Institute of Economic Research (NZIER) report to the Current Trustees which sets out an economic analysis of the benefits derived from TECT's distributions.

[328] In his third affidavit, dated 18 October 2021, Mr Holland said at [9]:

In deciding to approve the TECT Restructure, the Trustees were aware of the interest that the Commerce Commission had taken in the TECT rebate. While we were confident that the rebate does not breach the Commerce Act, we were mindful of the various concerns that had been raised about the rebate in that regard, including claims that it led to higher prices. On the other hand, we had heard very clearly, from feedback in 2018 especially, that a great many

⁸⁸ Thomas, above n 87, at [10.110].

Consumers valued receiving "the TECT cheque". We were also conscious that an abrupt withdrawal of the rebate could negatively impact Trustpower's share price and therefore the value of TECT's considerable investment in Trustpower. We endeavoured to balance all of those concerns (and the other matters I have explained elsewhere in my evidence) in reaching our decision.

[329] Mr Holland's evidence (set out above) refers to the Current Trustees being "mindful" of the various concerns that had been raised including "claims that it leads to higher prices" but having weighed this with the fact that "a great many Consumers appear to value receiving 'the TECT cheque'" and "abrupt withdrawal of the rebate could negatively impact Trustpower's share price", and therefore TECT's investment, they considered there were good reasons to continue to make the rebate distributions. It is clear the Current Trustees had endeavoured to balance all those concerns in reaching their decision, including considering the July 2020 NZIER report.

[330] The Current Trustees were also required to be mindful of the strong indication from the majority of Consumers that the rebate was important to them. I note there are Interested Parties who currently argue for the retention of the distribution of the rebate. I conclude this issue was not overlooked nor inadequately considered by the Current Trustees. I note also it is but one factor, and the Current Trustees had to weigh it with the other factors referred to by Mr Holland.

[331] Thus, I conclude there is no breach of this duty.

Duty to avoid a conflict of interest - s 34 of the Act

[332] Some of the Interested Parties have suggested Mr Holland is driven by and has a conflict of interest due to his involvement in other charitable organisations.

[333] I cannot find any basis for the assertion Mr Holland, or any other Current Trustee for that matter, has a conflict of interest arising out of their community service to a range of charitable and community-based organisations.

[334] The allegations do not come close to establishing "real sensible possibility" of a conflict of interest as the Courts require.⁸⁹

⁸⁹ *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at [74], citing *Boardman v Phipps* [1967] 2 AC 46 (HL) at 124.

[335] The allegation that Mr Holland is pushing the trust in a direction aligned with his background is tenuous and, as Mr Smith QC submitted, is a moderately severe allegation which has been put forward based on a degree of surmise as to motivation and also without cross-examination. It is, in any event, answered on the evidence set out at [300]-[319].

[336] The Current Trustees have not been impaired by any conflict of interest in deciding to implement the Proposed TECT Restructure.

[337] Each Current Trustee is a beneficiary of TECT. Indeed, a person can only become a trustee if they are a beneficiary. That, in itself, does not constitute any conflict of interest.

[338] Mr Holland confirmed that, as Chair, he followed the conflict of interest protocols in accordance with the relevant TECT policy. He was satisfied no Current Trustee had a conflict of interest in the matter. At each Current Trustees' meeting that considered the Proposed TECT Restructure all Current Trustees were asked to declare any relevant interest. None were declared.

[339] Some of the evidence for the interested parties suggests that various Current Trustees' history of or interest in community service creates some form of conflict of interest. No basis for any such assertion is made out in that evidence.

[340] As Mr Holland notes in his affidavit of 10 September 2021, he has been elected by Consumers three times and on each occasion was the highest polling candidate. Historically most trustees of TECT who are elected are known for their community service. Indeed, community service is an important feature of TECT. As I have said earlier, TECT trustees have, over the its history, approved some \$129 million of distributions to community organisations.

[341] I do not consider the Current Trustees have failed to fulfil their duty under s 34.

Duty to act with impartiality as between the beneficiaries – s 26 of the Act

[342] This duty requires the Current Trustees to treat the beneficiaries with even-handedness and fairly. This duty does not require, in the exercise of a discretionary dispositive power, equal distributions to beneficiaries.

[343] The Current Trustees have treated all beneficiaries fairly. In particular, and without prejudice to the generality of that observation, existing Consumers as at 28 January 2021 will continue to receive rebates, as set out in the Proposed TECT Restructure.

[344] The TECT Deed is clear that the Current Trustees can use their discretion to determine how the trust fund should be divided and enjoyed. For example, cl 5.3(a) contemplates that the trustees can make cash payments “to any one or more of the Consumers to the exclusion of other Consumers” in such manner and in such shares and proportions as the trustees in their absolute and unfettered discretion shall think proper. This same provision is imported into cl 6.

[345] That the trustees have full discretion in all dispositive decisions is repeated throughout cls 5 and 6.

[346] In summary, I find no evidence to suggest the Current Trustees have failed to fulfil this duty

Conclusion on second issue

[347] The process that led to the Current Trustees’ decision to proceed with the Proposed TECT Restructure concluded with the 22 April 2021 formal resolutions to proceed with the Proposed TECT Restructure, subject to obtaining orders from this Court approving that decision.

[348] The Current Trustees’ decision-making process was robust. They were assisted by various advisers. They considered all the Consumer submissions and feedback. The development and consideration of the proposal took place over an extended period and over a number of meetings.

[349] The Current Trustees considered numerous alternative restructuring options before alighting on the Proposed TECT Restructure, including:

- (a) TECT seeking to prevent Trustpower undertaking the strategic review of its retail business, or preventing a sale occurring;
- (b) waiting until a sale actually occurs;
- (c) making the “Company” under the TECT Deed refer to any buyer of Trustpower’s retail business so that customers of any such buyer, in the TECT Consumer District, would remain “Consumers”;
- (d) winding up TECT and distributing its assets to the current Consumers;
- (e) winding up TECT and distributing its assets to a new community trust;
- (f) splitting TECT’s capital along the same lines as the distribution mix adopted in recent years for TECT income, i.e. 80 per cent to fund rebates and 20 per cent to fund community works;
- (g) TECT paying a lump sum capital payment to existing beneficiaries, as well as ongoing rebates, or TECT paying some of the proposed rebate stream as a lump sum with a reduced rebate stream for 30 years;
- (h) TECT continuing, with changes to pay rebates to eligible Consumers but only for a short period of time;
- (i) TECT allowing Consumers to change electricity company after the restructuring so that they are not tied to the purchaser of the Trustpower retail business; and
- (j) TECT being restructured so as to provide rebates to every energy consumer in the TECT Consumer District, regardless of which retailer the consumer contracted with.

[350] The particulars of the Proposed TECT Restructure have been set out. They are (and will be when implemented) a reasonable and prudent exercise of the Current Trustees' powers. That is because:

- (a) as noted earlier, on a sale of Trustpower's business, the number of Consumers drops from approximately 47,000 to 150, rendering TECT unable to satisfy its purpose and objectives, and leaving a billion-dollar trust fund for the principal benefit of only 150 Consumers;
- (b) although TECT has Consumers, as defined, as its beneficiaries, the terms of the TECT Deed make it clear that many people and entities besides those who are Consumers are intended to benefit. This occurs by distributions to Consumers and also distributions which indirectly benefit Consumers. Both types of distribution also benefit others, principally, but not limited to, those associated with Consumers;
- (c) the Proposed TECT Restructure is consistent with the long-term nature and community focus of TECT;
- (d) the Proposed TECT Restructure reinstates or protects the benefits for Consumers and the associated persons in the community using different but similar means and with comparable outcomes;
- (e) there are, doubtless, many other alternatives which could have been considered and the submissions containing reference to a number of them were all considered. However, the Proposed TECT Restructure is the best and most suitable in the unanimous opinion of the Current Trustees, and, irrespective of whether it is empirically the best option (which need not be shown), it is a reasonable and rational one;
- (f) the Current Trustees have made their decisions acting in the interests of the beneficiaries, and not acting in any other person's interests; and, finally

- (g) there are no ulterior motives here.

[351] The Proposed TECT Restructure also addresses the following structural concerns:

- (a) the number of Consumers has been reducing over time (even absent the sale to Mercury). When TECT was formed, it served 100 per cent of consumers connected to the electricity lines then within its district, by May 2021 that figure was 58 per cent;
- (b) there is a tension between the making of grants and the declining numbers of Consumers;
- (c) there is ongoing interest from the Commerce Commission and some Consumers in the relationship between TECT and Trustpower and the impact of rebates on electricity pricing;
- (d) the Current Trustees need to balance the current and future beneficiaries of TECT. As a consequence of the Act coming into force, TECT now has a total life of 125 years which arguably places more emphasis on future beneficiaries;
- (e) winding up TECT and payment out to all the current Consumers of the capital and accumulated income would deliver to those who happen to be Consumers now, notwithstanding that a good many of the recent Consumers have had little to do with the creation, support and maintenance of this asset over the long term; and
- (f) as the number of Consumers drops (or almost disappears) the benefits to them as Consumers and to associated persons and entities in the community who are otherwise advantaged through benefits to Consumers will lessen and virtually cease.

[352] Furthermore, s 32 of the Act requires the Current Trustees to consider actively and regularly whether they should be exercising one or more of their powers. Faced

with that duty, there is a clear need for a restructure of TECT in the light of Trustpower's strategic review.

[353] I revert, in summary, to the answer to the *Honoris* four steps as set out in [94]:⁹⁰

- (a) there is no issue that the Current Trustees did genuinely form the opinion that the Court is asked to confirm;
- (b) the Current Trustees' decisions are lawful as the requisite express powers exist in both the TECT and 2002 Charitable Trust Deeds;
- (c) the decisions were proper ones for the Current Trustees to make because they have acted in a reasonable and prudent manner; and
- (d) their opinion is not vitiated by any conflict of interest.

Result

[354] The application for an order under s 133 of the Act and the Court's inherent jurisdiction directing that it is proper and lawful for the Current Trustees to implement the Proposed TECT Restructure is granted (this includes confirming the power to remove cls 9.3 and 13.3).

[355] The application for an order under s 133 of the Act and directing that it is proper and lawful for the 2002 Charitable Trust Trustees to implement the Proposed TECT Restructure is granted.

⁹⁰ *Re Honoris Trust*, above n 3.

[356] Costs are reserved.

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Doogue J