IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA650/2024
[2026] NZCA 17

BETWEEN	GILLIAN JANE GATFIELD First Appellant
	EMMA JACQUELINE PEARSON Second Appellant
AND	ANNE ELIZABETH HINTON AS EXECUTOR AND TRUSTEE OF THE ESTATES OF JACQUELINE MARY GATFIELD AND KENNETH MILES GATFIELD Respondent

Hearing:	12 November 2025 (further information received 5 February 2026)
Court:	Cooke, Harland and Cull JJ
Counsel:	M K Mahuika, M A Jeffries and R M Shasha for Appellants A S Butler KC for Respondent A H Waalkens KC for Judith Mary Allen and Robin Margaret Gatfield as Interested Parties A E Kirk, S P Pope and N L Walker for the Arbitrators' and Mediators' Institute of New Zealand Inc as Intervener
Judgment:	12 February 2026 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay one set of costs for a standard appeal on a band B basis to the respondent, and one set of costs for a standard appeal on a

band B basis to the interested parties, in each case with usual disbursements.

REASONS OF THE COURT

(Given by Cooke J)

Table of Contents

[1] Ms Gillian Gatfield and her niece, Ms Emma Pearson, appeal from a decision of the High Court directing that a dispute they have raised in proceedings be subject to mediation and arbitration pursuant to s 145 of the Trusts Act 2019 (the Act).[1] By judgment dated 10 September 2024, leave to appeal these orders was granted pursuant to s 56(3) of the Senior Courts Act 2016.[2]

[2] The appeal is opposed by Ms Anne Hinton, as well as her other sisters Ms Judith Allen and Ms Robin Gatfield, who are the owners of the family bach that is at the centre of the dispute and who are interested parties to this appeal. The Arbitrators' and Mediators' Institute of New Zealand Inc | Te Mana Kaiwhakatau, Takawaenga o Aotearoa (AMINZ) also participates as an intervener, following leave

---

1 *Gatfield v Hinton* [2024] NZHC 1712 [judgment under appeal].
2 *Gatfield v Hinton* [2024] NZHC 2603.

being granted by this Court, given that the appeal raised the question of the scope of compulsory alternative dispute resolution (ADR) processes under the Act.

Background

[3] The parties are the four surviving daughters and a granddaughter of Mr Kenneth Gatfield and Mrs Jacqueline Gatfield.

[4] Mr Gatfield died in 2012. The respondent, Ms Anne Hinton is the sole executor and trustee of his estate.[3] Ms Gillian Gatfield disagrees with the decisions made by Ms Hinton as executor in relation to the bach that formed part of the estate, and she is joined in her challenge by Ms Emma Pearson, who is the only child of the late Ms Kaye Gatfield, who was the fifth sister.

[5] Mr Gatfield's estate was left equally to the five sisters. The bach at Lake Rotomā formed part of the estate, owned through a company. Ms Anne Hinton sold the rights to the bach to Ms Judith Allen and Ms Robin Gatfield in 2022, who duly paid a purchase price of $331,000.

[6] Ms Gillian Gatfield and Ms Emma Pearson object to this transaction. They say that as long ago as 2013 Ms Hinton promised to transfer her share in the bach to them, and that they had paid outgoings in relation to the bach as if they were owners of her share as a consequence. They brought proceedings in the High Court advancing a number of causes of action over a lengthy statement of claim. As we will address in further detail below, Ms Judith Allen and Ms Robin Gatfield were not named as defendants to this claim, and this has meant that they have only participated in these proceedings as interested parties.

[7] By interlocutory application dated 15 March 2024, Ms Hinton applied for orders that the disputes raised by the proceeding be transferred to mediation, and if mediation was unsuccessful, to arbitration, in accordance with s 145 of the Act, which provides:

> **145 Power of court to order ADR process for internal matter**

[3] Ms Hinton has also been a High Court Judge and Acting Judge of this Court.

(1) The court may, at the request of a trustee or a beneficiary or on its own motion,—

(a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or

(b) otherwise submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention).

(2) In exercising the power, the court may make any of the following orders:

(a) an order requiring each party to the matter, or specified parties, to participate in the ADR process in person or by a representative:

(b) an order that the costs of the ADR process, or a specified portion of those costs, be paid out of the trust property:

(c) an order appointing a particular person to act as a mediator, an arbitrator, or any other facilitator of the ADR process.

(3) This section applies in relation to internal matters only.

[8] That application was granted by Associate Judge Lester,[4] and this decision is now challenged on appeal. After addressing a number of more technical or legal issues that are also now advanced on appeal, the Judge said:

> [96] [The] submissions are summed up as follows, that Gillian and Emma:
>
> > … see no benefits, mainly imbalances detriment to them, should orders be made diverting these proceedings behind closed doors, presided over by persons who are or were also the defendant's professional colleagues, to make decisions in private.
>
> [97] I do not consider this ground of opposition, which captures the tenor of the opposition generally, is a dispassionate assessment of the situation. In my view, Gillian and Emma underestimate the abilities of an experienced mediator and the robustness of an arbitration here proposed to be conducted by a senior Kings Counsel. Both mediator and arbitrator will be alert to the potential of a power imbalance. Gillian and Emma are represented by experienced counsel. Anne, Robin and Judith are represented by senior counsel who have explained to this Court their clients wish to attend ADR with an open mind and with a view to settlement. Such an indication should be welcomed, not rejected.
>
> [98] By rejecting ADR, Gillian and Emma are saying they prefer approximately two years of complicated and expensive litigation. A mediator and arbitrator will be aware of Anne's position and background and will expect and require her to act in a professional manner and in the spirit of someone who has sought mediation.

---

4 Judgment under appeal, above n 1, at [100].

> [99] In my view, the great majority of factors in this case support the application being granted. To decline to grant the application because Gillian and Emma say they do not believe the matter is capable of settlement would be to undermine s 145 of the Act as it would mean such pessimism need only be recited to block ADR. That cannot have been intended.

[9] By the time of the hearing in this Court, the mediation has proceeded before the mediator appointed by the High Court, and it has been unsuccessful. The issue now remains whether arbitration should proceed before the arbitrator appointed by the High Court, Mr Tom Weston KC.

[10] The appeal raises the following issues:

(a) whether it was within the jurisdiction of an Associate Judge to make orders under s 145 of the Act;

(b) whether this appeal is an appeal from a discretionary decision in accordance with the principles of *May v May*, or an evaluative decision in accordance with the approach described in *Kacem v Bashir* and *Austin, Nichols & Co Inc v Stichting Lodestar*;[5]

(c) whether the dispute raised in the proceedings concerns "internal matters" which may be referred to ADR under s 145, or involves matters that may not be so referred;

(d) whether, on its correct interpretation, s 145 of the Act authorises compulsory arbitration in the absence of the agreement of the parties; and

(e) if s 145 does authorise compulsory arbitration in the absence of agreement, whether the order was appropriate in the present case.

---

5 *May v May* (1982) 1 NZFLR 165 (CA) at 169–170; *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32]; and *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16].

Did the Associate Judge have jurisdiction to make the orders?

[11] Associate Judges of the High Court only have the jurisdiction bestowed on them. In this case, the Judge considered he had jurisdiction to make the orders under r 2.1 of the High Court Rules 2016 and the definition of interlocutory application in s 4(1) of the Senior Courts Act which effectively give the jurisdiction to make orders on an interlocutory application heard in chambers.[6]

[12] An interlocutory application is defined in s 4(1) of the Senior Courts Act in the following terms:

> **interlocutory application—**
>
> (a) means any application to the High Court in any civil proceedings or criminal proceedings, or intended civil proceedings or intended criminal proceedings, for—
>
> (i) an order or a direction relating to a matter of procedure; or
>
> (ii) in the case of civil proceedings, for some relief ancillary to that claimed in a pleading; and
>
> (b) includes an application to review an order made, or a direction given, on any application to which paragraph (a) applies

[13] For the appellants, Mr Mahuika argues that an order under s 145 did not involve a matter of procedure, or involve any ancillary relief. High Court judges retained the inherent supervisory jurisdiction in relation to trust matters. The application should have been addressed by a separate originating proceeding under pt 18 of the High Court Rules, which is engaged when the High Court exercises its special statutory powers of relief under the Act. The observation of Venning J in *Wright v Pitfield* suggesting otherwise was incorrect.[7] The position was similar to *Boult v Crux Publishing Ltd* where this Court found an Associate Judge did not have the power to make orders under the rules relating to access to court documents.[8]

[14] We do not accept these submissions. The order made here was made after the respondent made an interlocutory application dated 15 March 2024 for orders in the

---

6 Judgment under appeal, above n 1, at [43]–[48]. See also Senior Courts Act 2016, s 22(1); and High Court Rules 2016, r 7.34.

7 Citing *Wright v Pitfield* [2022] NZHC 385, (2022) 34 FRNZ 418 at [14].

8 Citing *Boult v Crux Publishing Ltd* [2022] NZCA 473 at [15].

proceeding that was before the High Court. The application did not seek the substantive relief claimed in the proceeding.[9] The application sought orders that were ancillary to the substantive claims, requiring the substantive claims to be addressed by ADR. We do not accept that it was procedurally inappropriate to seek the order by way of interlocutory application. When there are existing proceedings in which the relevant disputes potentially covered by s 145 are raised, it makes sense to seek the order to be made by way of interlocutory application. When that happens, an Associate Judge has jurisdiction.

[15] We do not accept that a party is obliged to bring separate proceedings under pt 18 to obtain such an order. Whilst separate proceedings are usually appropriate in trust matters when there is a Beddoe application, the need for separate proceedings arises in that scenario only because of the need to keep separate the matters covered by that application and the proceedings to which the application is made. Beddoe applications accordingly have their own prescribed procedure under pt 19 of the High Court Rules.[10] We consider the suggestion that a party otherwise be forced to initiate separate proceedings under pts 18 or 19 seeking an order under s 145 of the Act would be inconsistent with the overriding objective of the High Court Rules outlined in r 1.2.[11]

[16] We also do not accept that the subject matter of the application made it inherently inappropriate for determination by an Associate Judge. The issues arising from an application for orders under s 145, which concern the appropriate procedure to be adopted for resolving issues of the kind involved in the Act, are well within the knowledge and experience of Associate Judges. We note in that respect that for proceedings that do not involve trust matters, an application to stay a proceeding on the basis that it should be referred to arbitration would likely be brought by interlocutory application for an order under r 7.80 of the High Court Rules, and that the power to appoint an arbitrator is expressly given to Associate Judges under s 20(2)(a) of the Senior Courts Act.

---

9 *Trotter v Telfer Electrical Nelson Ltd* [2018] NZCA 231, [2019] NZAR 476 at [22].

10 See High Court Rules, rr 19.4(f) and 19.4A. Such orders have also been granted on an interlocutory application, however: see *Wallace v Green* [2022] NZHC 512 at [45]–[49].

11 This objective has now been extended by amendment with effect from 1 January 2026 under the High Court (Improved Access to Civil Justice) Amendment Rules 2025.

[17] We agree that when there are no existing proceedings, a party would be required to bring proceedings under pt 18, or with leave of the Court under pt 19.[12] When that occurs, the Associate Judge would likely only have relevant jurisdiction to make orders under s 20(2)(a) of the Senior Courts Act. But the sometimes arbitrary limits on the Associate Judge's jurisdiction in other circumstances do not justify creating such complications in cases such as the present.

What is the test on appeal?

[18] The second issue relates to the approach that this Court should adopt on appeal, and raises the question whether a decision under s 145 of the Act involves the exercise of a discretion, or an evaluative assessment. If it involves the exercise of a discretion, the approach of the appellate court is limited to assessing whether the lower court erred in law or principle, failed to take into account relevant matters, considered irrelevant matters, or made a decision that was plainly wrong.[13] If it involves an evaluative assessment, the appellant must identify an error, but it is for the appellate court to reach its own conclusion on the merits.[14]

[19] The appellants argued that the decision of the Associate Judge was evaluative in nature, and the respondent argued that it was the exercise of a discretion. The difference between the approaches was described by the Supreme Court in the following way in relation to decisions under the Care of Children Act 2004:[15]

> [32] … The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court.

[20] A discretion will exist when there is more than one decision open to the decision-maker as a matter of law. That does not arise simply because the statute

---

12 Under High Court Rules, r 19.5. Part 19 may be more appropriate given the confined issue to be addressed, and that there would be no need for cross-examination or a full defended hearing, although the differences between pt 18 and pt 19 are no longer as significant as they once were.

13 *Kacem v Bashir*, above n 5, at [32], citing *May v May*, above n 5, at 170.

14 *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 5, at [5] and [16].

15 *Kacem v Bashir*, above n 5.

expresses the power in discretionary terms through the use of words such as "may". It is a matter of assessing whether, on the facts that exist, the statute contemplates that the decision-maker has the freedom to decide a matter as they wish. Apparently discretionary decision-making has been found to be evaluative on a closer examination of the statutory scheme. Bail decisions[16] and decisions regarding non-publication orders[17] have been held to be evaluative and not discretionary. This Court said in *Peter T Rex LLC v NZME Publishing Ltd* that "the classes of case properly classified as discretionary are dwindling".[18] It may be that the focus should be more on identifying the relevant requirements associated with the exercise of the power, rather than the more abstract question associated with a binary classification of the nature of the appeal.[19]

[21] In any event, we consider the decision in the present context is evaluative rather than discretionary. Whilst s 145 creates a power expressed in discretionary terms, the proper exercise of that power involves deciding upon the appropriate dispute resolution processes in light of the facts of the case, the principles of the Act and access to justice considerations. It involves assessing the procedure that will best resolve the dispute in accordance with these principles. The court would be required to consider what is in the best interests of the parties and any other affected beneficiaries given the disputes that have been raised. It is not a completely discretionary decision. We consider that appellants are entitled to an assessment by the appellate court of the correctness of the decision in the court below.

[22] We accordingly approach the appeal on that basis.

---

16 *Taipeti v R* [2018] NZCA 56, [2018] 3 NZLR 308 at [51].

17 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZCA 469 at [47]. Whether the second stage of the name suppression analysis under the Criminal Procedure Act 2011 is truly discretionary has recently been questioned by the Supreme Court: see *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [47].

18 *Peter T Rex LLC v NZME Publishing Ltd*, above n 17, at [45].

19 See discussion of possible indicia of discretion in *Taipeti v R*, above n 16, at [49].

Was the dispute in relation to an internal matter?

[23] Only "internal matters" can be referred to ADR under s 145 in accordance with s 145(3). The Act provides the following relevant definitions in s 142:

> **external matter** means a matter to which the parties are a trustee and 1 or more third parties
>
> **internal matter** means a matter to which the parties are a trustee and 1 or more beneficiaries, or a trustee and 1 or more other trustees, of the trust
>
> **matter**—
>
> (a) means—
>
> (i) a legal proceeding brought by or against a trustee in relation to the trust; or
>
> (ii) a dispute in relation to the trust between a trustee and a beneficiary, or between a trustee and a third party, or between 2 or more trustees, that may give rise to a legal proceeding; but
>
> (b) does not include a legal proceeding or a dispute about the validity of all or part of a trust.

[24] The appellants argued that their proceedings concerned a dispute "about the validity of all or part" of the existence of a trust in relation to the bach under the proviso in paragraph (b) of the definition of "matter". Mr Mahuika argued that "validity" was intended to be a reference to whether a trust existed or had been validly constituted. He argued that the proceedings that had been brought by the appellants concerned new arrangements and trusts in relation to the bach which were additional to, and very different from, those that had been established under the will of Mr Gatfield. The Judge should have recognised the heart of the dispute was the alleged existence of express or constructive trusts as a consequence of communications by Ms Hinton with the appellants, and that this was precisely the kind of dispute intended to be caught by the carveout in s 142, which should have remained before the High Court.

[25] It is accepted that the dispute is solely between the trustee and beneficiaries, and that it falls within the definition of "internal matter" for that reason. This is not a case of proceedings taken against a party external to the trust, for example a claim that a trustee has disposed of trust property improperly and proceedings are brought against

a third party to recover the property.[20] The dispute is purely internal. The issue is whether the dispute falls within the exclusion contemplated by para (b) of the definition of "matter".

[26] We consider the exclusion of disputes about the validity of trusts is directed to narrower matters than argued by the appellants. The word "validity" is directed to formal requirements for trusts. The Act includes a number of provisions that identify when an express trust is properly established. Characteristics are set out in s 13, a limitation is set out in s 14, and there is an additional requirement in s 15. A challenge based on these requirements goes to the validity of the trust.[21] There may be other challenges that go to the core requirements of a trust in this way. But we consider that this is the focus of the exclusion — the question of whether a trust has satisfied formal requirements. This is preserved to be determined by the court in its supervisory jurisdiction. Challenges to trustee decisions, however, whether or not accompanied by particular remedies, do not fall within the exclusion in our view.

[27] We see this dispute as one that classically falls within the definition of "internal matter". It is an argument that a trustee has preferred some beneficiaries over others by transferring trust property to some beneficiaries. If the remedy sought by a dissatisfied beneficiary includes a claim that a beneficiary return property, we do not consider that that means that the dispute is no longer an internal one, or that it concerns the validity of a trust. The claim simply involves an additional remedy arising out of the internal dispute. It is artificial to contend that this excludes the availability of the ADR processes under s 145.

[28] There is a final aspect of this argument. At present the appellants' statement of claim does not advance claims against Ms Judith Allen and Ms Robin Gatfield, the present owners of the bach, that they hold the bach on constructive trust. So we do not consider that there is a claim of constructive trust, remedial or institutional, in respect to their ownership of the bach. Although Mr Mahuika referred to the potential for the statement of claim to be amended to advance such claims, and that some of the

---

20 See, for example, *Khan v New Zealand Muslim Association* [2025] NZCA 109.

21 See Andrew Butler "Arbitration of trusts disputes under the Trusts Act 2019" [2021] NZLJ 106 at 107–108.

paragraphs of the statement of claim could be read to include such allegations, we consider this submission somewhat artificial, and a little opportunistic. It must have been a deliberate decision of the appellants not to bring their proceedings against their sisters/aunts. The statement of claim is lengthy and detailed. The appellants' focus is plainly on the respondent's conduct. To now argue that the other family members should be treated as defendants to a constructive trust claim in support of an argument that ADR is not available under s 145 is unattractive to us.[22]

[29] For these reasons, we accept that the matter raised as identified in the proceedings brought in the High Court could be referred to ADR under s 145.

Can s 145 be used to order arbitration without agreement?

[30] The appellants raise a further argument that an order under s 145 is not available as a matter of jurisdiction. Section 145(1)(b) refers to the court having the power to "submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention)". ADR process is defined in s 142 in the following terms:

> **ADR process** means an alternative dispute resolution process (for example, mediation or arbitration) designed to facilitate the resolution of a matter

[31] Section 145(1) allows the court to make an order requiring an ADR process, not only when the terms of the trust require it, but also when there are no such terms. Section 145(2)(c) then empowers the court to appoint both mediators and arbitrators.

Appellants' argument

[32] The appellants argue that it was not contemplated that there would be an order requiring arbitration under s 145(1) in the absence of an agreement to arbitrate. Agreement is a necessary element of all arbitrations, and this principle was not squarely overruled by s 145. There was a lack of a clear legislative intent, or test, that would allow arbitration to be ordered in the absence of an agreement to arbitrate. None of the cases where s 145 orders had been made or applied for involved proposed

---

[22] Following the hearing, by memorandum dated 22 December 2025, the appellants sought directions in relation to the filing and service of an amended statement of claim. By memorandum dated 5 February 2026 this was opposed by the respondent and interested parties. Given the Court's conclusions we consider that any such amendment is a matter to be addressed with the arbitrator.

arbitration when there was no agreement to arbitrate.[23] Making such orders in the absence of agreement involved loss of access to the court (including a public trial), the right to negotiate and agree an arbitration agreement, appeal rights under s 56 of the Senior Courts Act, and the ability to determine the identity of the arbitrator.

Assessment

[33] We accept that ordering arbitration when there was no agreement to arbitrate by the parties to the dispute does not appear to have been focused upon in the processes that led to the enactment of the Act. It was not specifically addressed by the Law Commission | Te Aka Matua o te Ture in its reports leading to the Act.[24] The clauses of the Trusts Bill as originally proposed in an exposure draft did not include arbitration as part of the contemplated ADR processes — the definition of "ADR process" at that stage only referred to mediation. References to arbitration were then added prior to the introduction of the Bill.[25] In addition, as AMINZ explained in their helpful submissions, there was an existing issue concerning the arbitration of trusts matters arising from the fact that not all beneficiaries of a trust may have agreed to arbitration.[26] That issue was being addressed by a proposed amendment to the Arbitration Act 1996 by the Arbitration Amendment Bill.[27] At the Ministry of Justice's suggestion, it was agreed that this issue would be transferred to be addressed in the proposed Trusts Bill rather than by amendment to the Arbitration Act.[28]

[34] It is apparent that some of the provisions so incorporated into the Act addressed the issue arising from the difficulty in securing consent of all relevant beneficiaries. In particular, s 144(1) requires the court to appoint representatives for beneficiaries

---

23 Citing *S v N* [2021] NZHC 2860, [2021] NZFLR 756; *Terry v Terry* [2023] NZHC 884, (2023) 6 NZTR ¶33-019; *Innes v Darlow* [2024] NZHC 2614, (2024) 6 NZTR ¶34-019; *Wiggins v Wiggins* [2024] NZHC 863; *Doney v Adlam (No 2)* [2023] NZHC 363, [2023] 2 NZLR 521; *Wright v Pitfield*, above n 7; and *Addleman v Lambie Trustee Ltd* [2024] NZHC 1790, (2024) 6 NZTR ¶34-008.

24 See, for example, Law Commission | Te Aka Matua o te Ture *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at ch 14.

25 Trusts Bill 2017 (290-1), cl 137 definition of "ADR process".

26 See David A R Williams and Anna Kirk "Balancing Party Autonomy, Jurisdiction and the Integrity of Arbitration: Where to Draw the Line?" in Neil Kaplan and Michael Moser (eds) *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Kluwer Law International, The Netherlands, 2018) 87 at 91.

27 Arbitration Amendment Bill 2017 (245-1), cl 4.

28 Ministry of Justice *Departmental Report for the Justice Committee: Arbitration Amendment Bill* (2018) at [41]–[47].

who are unascertained or lack capacity, and those representatives are authorised to agree to arbitration or an ADR settlement. The ADR settlement is then required to be approved by the court. Mr Jeffries argued for the appellants that these provisions were not consistent with the court having the power to order arbitration when there was no agreement to arbitrate by the parties to the dispute. He argued that the reference to the appointment of an arbitrator in s 145(2)(c) should accordingly be limited to the circumstances where the terms of the trust contemplated arbitration in the manner contemplated by s 145(1)(a). On this approach, the power in s 145(1)(b) to direct an ADR process when there were no such terms should not be read to include a power to order arbitration when there was no such agreement.

[35] We consider that the provisions as introduced cannot be limited in this way, however. On the plain wording of s 145(1)(b), there is power to require an arbitration without an arbitration agreement. That power is only limited if terms of the trust "indicate a contrary intention", which we consider contemplates terms that show an intention to exclude the relevant ADR processes. Other specific provisions then address the required mechanics of an arbitration when there has been no prior agreement. Section 148 provides:

> **148 Application of Arbitration Act 1996**
>
> If arbitration is the ADR process to which a matter is referred under this Act or under the terms of the trust, the Arbitration Act 1996 applies to the arbitration.

[36] This section contemplates an arbitration either under the terms of the trust, or alternatively under the Act — that is, when there is no arbitration clause. The Arbitration Act itself then provides:

> **9 Arbitration under other Acts**
>
> (1) Where a provision of this Act is inconsistent with a provision of any other enactment, that other enactment shall, to the extent of the inconsistency, prevail.
>
> (2) Subject to subsection (1), where a provision of this Act applies to an arbitration under any other enactment, the provisions of that other enactment shall be read as if it were an arbitration agreement.

[37] These provisions specify what is to be treated as the arbitration agreement when there is no such agreement. So it is plain that the court is given power to require binding arbitration in the absence of such an agreement. Moreover, the position is not unique, or even unusual. Other legislative provisions contemplate arbitration under the Arbitration Act when there is no such agreement.[29] We do not consider that the plain terms of the legislation should be read down as unusual or unexpected.

[38] We accept that the lack of agreement will be a factor when the court considers whether to make an order under s 145. Requiring mediation to take place still leaves it in the hands of the parties whether to settle, but an arbitration is binding notwithstanding the absence of any such agreement. That is a matter that the court can address in deciding whether to make the order.

[39] We do not accept, however, that the provision involves an unjustified limit on the right of access to the court.[30] There are clear requirements before such an order can be made. An order can only be made in relation to an internal dispute. If the internal dispute concerns the questions of validity associated with the trust, no order may be made. If an order can be made, the court is required to consider whether it is appropriate in the particular case. The court then can decide who to appoint as arbitrator. There is then a right of appeal to the High Court from the decision of the arbitrator on questions of law under cl 5 of sch 2 of the Arbitration Act. The court accordingly maintains overall supervision of the internal trust dispute in question.

[40] For these reasons, we consider that the court has power to order that an arbitration take place and to appoint an arbitrator, even when there is no agreement to arbitrate. We also consider there is nothing inherently inappropriate in doing so.

Was the Court's order appropriate here?

[41] The final issue is whether the High Court was correct in ordering there should be ADR involving mediation and then arbitration in the present case. As we have said

---

29 Biosecurity Act 1993, s 100I(4); Animal Products Act 1999, s 118(3)(f); Building Research Levy Act 1969, ss 5–6; Commerce Act 1986, ss 53G–53J; Companies Act 1993, s 112A; and Building Societies Act 1965, s 109.

30 See *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, [2024] 1 WLR 3827; and *Van Leeuwen Group Ltd v Attorney-General* [2020] NZHC 215, [2020] 2 NZLR 502.

in relation to the test to be applied on appeal, we address this question on the basis that it is our function to decide whether we agree with the order made by the Judge.

Appellants' argument

[42] For the appellants, Mr Mahuika argued that of the factors identified by the High Court, the only relevant ones were confidentiality and cost. But, he says, there was nothing commercially sensitive or overly private that could not be managed by the usual tools available in proceeding before the Court. There was nothing remarkable about the family matters requiring confidentiality. The suggestion that the case involved modest sums was largely speculative, and not a compelling factor. The High Court proceedings could also be addressed speedily, so this was not a significant factor, and the respondent's judicial status was not a matter that was appropriately invoked. The composite mediation/arbitration orders made by the Court were the first such tethered orders in the Commonwealth, and such orders were contrary to the obligations of the Court to promote the interests of justice and supervise trusts for the welfare of the beneficiaries. It removed agency, choice and involved a diminution of appeal rights. The Court should not abdicate its unique equitable jurisdiction, developed over centuries, to supervise trusts in this case.

[43] A series of other factors were also said to be strongly in favour of the order not being made, including:

(a) The order was contrary to the wishes of the appellants, which was inconsistent with the essential basis for arbitration, and the appropriateness of mediation.

(b) The wellbeing of the parties was relevant, especially given that the respondent had a history of imposing her will on the appellants.

(c) The orders removed the dispute from the supervisory jurisdiction of the Court, which added to the appellants' safety concerns.

(d) The respondent had rebuffed earlier attempts at ADR raised by the appellants in good faith, and the respondent had then sold the bach. It

was inappropriate for her now to seek to compel ADR when that had been previously rejected.

(e) There was not a strong likelihood of success, particularly in relation to mediation, and this order was unlikely to resolve the dispute (as had proved to be the case).

(f) There was a disadvantage to the appellants in mediation, and an imbalance of power between the parties. That was particularly so given that the Court also appointed Mr Rhys Harrison KC, a former judicial colleague of the respondent, to conduct the mediation.

[44] For the respondent and the interested parties, Mr Butler KC and Mr Waalkens KC supported the reasoning of the Judge.

Assessment

[45] We consider it is unnecessary to explicitly address all the matters that have been raised in argument. We agree with the decision made by the High Court.

[46] The benefit of ADR processes for resolving internal disputes between trustees and beneficiaries is clear. They were summarised by the Law Commission when recommending a provision be included in the Act:[31]

> **Facilitating the use of alternative dispute resolution**
>
> 14.2 The benefits of using ADR to resolve disputes are well accepted. When compared with a court hearing, these include lower costs, quicker resolution, achieving finality, maintaining confidentiality and privacy, and being less adversarial. ADR techniques, such as mediation, conciliation and arbitration, are used in some trust disputes. However, ADR is not available in all trusts and where it is available, the nature of trusts can prevent the use of ADR because there can be unascertained and incapacitated beneficiaries who are not able to give consent to the use of ADR or to any agreement reached under ADR.

[31] Law Commission, above n 24.

[47] These views are consistent with the decisions of the High Court under s 145 to date, including Wylie J's observations in *S v N*.[32] These factors are particularly significant when the disputes involve family trust matters. We see the current dispute as an obvious example of an internal dispute where both mediation and arbitration are appropriate. The ADR process is not inconsistent with the terms of the trust. It is a dispute involving four surviving sisters, and the child of the fifth, over who should be entitled to the family bach formerly owned by their parents, and then held on trust following their parents' death. It is not a dispute based on financial matters, but on feelings associated with the personal history at the bach, described as a family taonga. It also involves strongly felt personal allegations. When there is a highly emotive family dispute of this kind, the deployment of confidential processes has real advantages. The use of an experienced mediator seeking to find a way through the disputes with the parties is obviously beneficial, and if such a mediation fails (as it has), it is also appropriate to have an adjudicative process in a private environment, where the sometimes acrimonious disputes can be properly addressed without the glare of publicity that would likely accompany this proceeding if it proceeded before the Court. The parties will have greater control of the timing and speed of the adjudication, and the decision is more likely to be a final one. It will also assist in resolving the disputes in a manner that avoids unnecessary cost and complexity, consistently with ss 3(c) and 4 of the Act.

[48] There are no issues that are part of the dispute that are not within the ADR jurisdiction, or which are most appropriately addressed by the Court. We do not accept that the appellants are placed in any position of disadvantage, or reduced perceptions of personal safety. Those issues can be fully addressed by the arbitrator and counsel. Neither is there any loss in terms of the adjudicative authority by the appointment of the arbitrator. Mr Tom Weston is a well-known and experienced arbitrator. He is also the former Chief Justice of the Cook Islands. As arbitrator, he exercises all the powers of a High Court judge, including those arising from the inherent jurisdiction.[33] There also remain appeal rights to the High Court if there are any errors of law made in the course of the arbitration.

---

32 *S v N*, above n 23, at [29].
33 Arbitration Act 1996, s 12.

[49] We also consider that the combined mediation/arbitration order was appropriate here. The parties proceeded to mediation knowing that an adjudicative process would be required if mediation failed. The mediation has proceeded before the mediator and this has been unsuccessful. But we consider it appropriate that settlement was attempted prior to arbitration. We are satisfied that this order best met the interests of justice in this case.

[50] The parties advanced submissions before us on the relevance of the respondent's recent status as a High Court Judge, and Acting Judge of this Court.[34] In the end we do not consider it is a factor that affects the outcome of the application, or this appeal, and none of the parties suggested that it should in their oral submissions before us. We have reached a decision on the appropriateness of the s 145 order because of the nature of the disputes. This case is appropriate for the ADR processes contemplated by s 145 irrespective of the respondent's status as a judicial officer, and now former judicial officer. That status does not affect the appropriate outcome of the application, or the appeal.

Costs

[51] The respondent is awarded costs for a standard appeal on a band B basis with usual disbursements. We also consider that the interested parties are appropriately treated as a respondent to the appeal notwithstanding that they were not so named, especially as they are the present owners of the bach, and the process to be followed for the resolution of the disputes clearly directly affect them, and that it was appropriate that they be separately represented. They are also awarded costs for a standard appeal on a band B basis with the usual disbursements.

Conclusion

[52] For the above reasons, the appeal is dismissed.

---

[34] She has now reached the age of retirement in accordance with ss 116 and 133 of the Senior Courts Act.

[53] The appellants must pay one set of costs for a standard appeal on a band B basis to the respondent, and one set of costs for a standard appeal on a band B basis to the interested parties, in each case with usual disbursements.

Solicitors:
Mark Jeffries, Auckland for Appellants
Simpson Grierson, Auckland for Respondent
Simpson Grierson, Auckland for Interested Parties
Russell McVeagh, Wellington for Intervener