

**IN THE MAORI APPELLATE COURT
OF NEW ZEALAND
WAIARIKI DISTRICT**

UNDER Sections 231, 239 and 240, Te Ture Whenua Maori Act 1993

IN THE MATTER OF Whakapoungakau 24 Trust

BETWEEN **JILLIAN NAERA
KEREAMA PENE
ANAHA MOREHU
WARRICK MOREHU
ERIC HODGE**
Appellants

AND **PIRIHIRA FENWICK
WIREMU KINGI
HIWINUI HEKE**
**(as trustees of Whakapoungakau 24
Trust)**

Respondents

SUBMISSIONS OF APPELLANTS

Introduction

1. This is an appeal against the decision of the Maori Land Court (MLC) at Rotorua on 10 September 2010, which held that, despite numerous defaults on the part of the trustees, they would not be removed; that the trustees had the power to enter into a 52 year geothermal commitment without consulting owners and without sufficient support. The Court held that the trustees did not need to comply with ss 229 or 244, that conflicts of interest did not invalidate a transaction if there was a majority of unconflicted trustees and the lack of prior independent advice did not invalidate the transaction or provide grounds for removal.
2. There are five grounds of appeal; namely that the MLC judgment was wrong in law in finding that the trustees had the power to enter into a geothermal project without consulting owners and without sufficient support, that the trustees did not need to

- comply with ss 229 or 244, and that a conflict of interest did not invalidate a decision if there was a majority of unconflicted trustees. The decision not to remove the trustees despite numerous failures to comply with the law is also appealed.
3. As the Maori Appellate Court (MAC) has recognised, the correct approach to appeals is as set out in the *Austin Nicholls* case.¹ In addition, the recent Supreme Court decision of *Kacem v Bashir*² clarifies the approach in relation to the appeal from the exercise of a discretion. In such cases, there must be an error of law or principle, the taking account of irrelevant considerations or failure to take into account relevant considerations or a decision that is plainly wrong.
 4. In this case, it is submitted that the first four grounds of appeal are straight errors of law. The fifth ground, that the trustees should have been removed, is inextricably linked to the previous errors of law and also inconsistent with previous decisions of this Court as to the standard of conduct expected of trustees.

Background

5. The Whakapoungakau Trust (the Trust) was formed in 1999.
6. The respondents are three of the trustees of the Trust. One of the trustees, Winnie Emery, has died since these proceedings were first issued. The former chair of the Trust, Tai Eru, was not named as a respondent as he took a different position from the other trustees. Jim Gray has served as secretary to the Trust since its formation.

Applications for Variations of Trust

7. In 2004 the trustees applied for a variation of Trust to allow the Trust to investigate the establishment and possibly build a geothermal power station [CA p422]
8. The application was adjourned to an AGM of the Trust, which was attended by some 17 people (it is not clear if this number included the trustees or not). This was well short of the 10% of the beneficiaries (some 1,222).

¹ *Austin, Nichols & Co v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at [16], cited in *Wall v Karaitiana* (2008) 87 Taupo MB 107

² [2010] NZSC 112 at [32]

9. The inquorate meeting gave qualified approval to proceed although there is doubt as to what the actual resolution was, as the secretary of the Trust produced several different versions of the minutes.
10. It became evident only at the hearing that Mr Gray had prepared 3 different versions of the minutes of this meeting. The version discovered to the appellants [CA p450] stated that a motion had been passed by the meeting "That the variation take place and if the evidence stacks up to proceed with the erection of a geothermal power station, either on Trust property or adjourning [sic] property". He also recorded under Matters Arising "unequivocal support to proceed with a variation of the trust order and to proceed with the erection of a geothermal power station if that be the case. This version of the minutes was not signed.
11. However, the version of the minutes that was signed by the Chairman made no mention of support by owners under Matters Arising and the motion read simply "that the variation take place" [CA p448]. This was the version presented to the Court in 2004, the one which is on the Court file and which the Court relied upon.
12. A third version, initialled by someone unknown but not signed, even adds a new motion not present in either of the previous ones "that the beneficial owners authorise the trustees to negotiate and enter into agreements with appropriate parties for the development of the geothermal resource[CA p453].
13. Mr Gray was unable to explain the three radically different minutes and why or when he had added the additional comments. It does however indicate that, even if this meeting had been quorate, no regard can be taken for the validity of any of the sets of minutes from that meeting.
14. At the subsequent MLC hearing, Mr Gray requested a variation "to allow the Trust to enter into joint ventures and form companies". The resulting amended Trust order allowed the Trust to "investigate the possibility of establishing a geothermal power station and to *take advantage of the findings*" (emphasis added) [CA p429].
15. In November 2008, another application to vary the Trust order was made, this time without any reference to a general meeting or other form of notice to the owners. It

sought a variation to allow a 20% investment in Tatou Holdings Ltd [CA p405]. Mr Gray told the Court the Trust recognised that this was exposing the Trust to considerable risk. No independent due diligence report had been sought.

16. The Court ordered no variation was required but added “whether that investment is prudent or reasonable is a separate matter altogether” [CA p407]. The Trust however passed a resolution to invest \$1.5 million in the Waiora Spa business owned principally by Graham and Sunisa Hughes [Judgment [3]]. In the event that investment has not proceeded, but a loan of \$339,963 was made to Sunisa Hughes as a Director of Tatou Holdings, again without any notice to the owners.³ Even some of the trustees appeared to know little about the loan.⁴
17. In April 2009 yet another application for variation was made to set up a special purpose company to isolate the trustees from any liability. Again this application was made without any reference to or knowledge by the owners. However when asked by the Court, Mr Gray on behalf of the trustees, assured the Court the owners supported the proposal. The Court issued the variation as requested [CA p403].

Geothermal Proposal

18. The Trust began developing its geothermal proposal in 2004 with the establishment of Tikitere Geothermal Power Ltd (TGPL).
19. On 5 November 2008 the trustees entered into a project agreement with two neighbouring trusts, Paehinahina Mourea Trust (PMT) and Manupiria Baths Trust (MBT) as well as TGPL to extract the geothermal resource under the Trust’s land for a term of 52 years. The Trust and TGPL also entered into a series of related agreements, including a management contract between TGPL and Green Energy Ltd (a company owned and controlled by Bruce Carswell, the Trust’s geothermal advisor).
20. These agreements were signed without the trustees having informed the owners of their intentions and without the trustees seeking any independent advice as to whether this proposal was in the best interests of the Trust and the beneficiaries. Instead they relied on the self-interested advice of Mr Carswell. Although the viability of the proposed

³ It appears that the loan has since been repaid.

⁴ CA p230-231

project is not the subject of these proceedings, it is this action and other defaults on the part of the trustees which form the basis of this appeal.

21. Shortly **after** the project agreement was signed, on 30 November, the trustees called an AGM. The meeting was attended by the trustees and eleven (11) owners, once again well below a quorum of 10% (it was less than 1%). The meeting had been advertised in the local paper but for 2 different dates [CA 456-458] thus creating considerable confusion among owners.
22. Although a presentation on the geothermal proposal was given, it was too late to question it. The trustees therefore made no attempt to honour their obligations under Te Ture Whenua Maori Act to consult with owners under ss 229 or 244(3) or the general principles of the Act under s 17(2).
23. As a result of the present proceedings, however, the MLC did order that another meeting be held under an independent chairperson. This occurred on 6 December 2009, and had a quorum [Judgment 24]. A vote to approve the geothermal development was resoundingly defeated (89 votes to 39).
24. Details of all documents relating to the geothermal project were kept confidential and only released to counsel for the applicants in December 2009 on the order of the Court. All requests by the applicants for access to the documents were denied, despite the respondents later arguing that there was an onus on the beneficiaries to seek out information, and that the trustees tried to keep interested owners informed [Judgment 89].

Other Defaults

25. In addition the trustees failed to comply with their obligations under the Trust order in the following ways:
 - a. Failure to file audited accounts (cl 7(c)(i)). Unaudited accounts for the years 2007-8 and 2008-9 were only filed after being requested by the appellant's counsel and ordered by the Court.

- b. Despite a requirement to hold general meetings a year after formation and at least every 5 years thereafter and to have a quorum of 10% (cl 7(a)), no meetings which anywhere near met the quorum requirements were held. Nor were any attempts made to contact owners about meetings or to keep the beneficiary rolls up to date. By contrast, two meetings of the Trust which the Ngati Rangiteorere Claims Committee (NRCC) helped organise to discuss the same geothermal proposal (on 12 August 2009 and 6 December 2009), the 10% threshold was reached.
26. The trustees also failed to comply with TTWMA, the Trustee Act and the common law in several other ways:
- a. At least two of the trustees had significant conflicts of interest as they had holdings in the neighbouring trusts. Although one of them did not take actual part in the decision, she took no steps to let the owners know of her conflict of interest and the major benefit that would accrue to her family as a result;
 - b. The trustees failed to get independent advice before committing the Trust to a major geothermal development;
 - c. The trustees failed to keep the owners informed of developments and actively tried to prevent any proper information being made available.

Maori Land Court judgment

27. On September 2010, Judge Harvey issued his reserved decision. He found that:
- a. Clause 3(a) allowed the trustees to proceed with the geothermal development without reference either to the owners or the Court;
 - b. although there had been no compliance with s 244, this was unnecessary given cl 3;
 - c. this was not a new venture in terms of s 229;
 - d. although two of the trustees had conflicts of interest, there was a majority of trustees who were not conflicted;
 - e. the trustees had failed to get independent advice as the advice of the Trust's geothermal advisor, Mr Carswell, was not independent;
 - f. despite this the trustees should not be removed or suffer other sanctions.
28. He also made directions that:
- a. Mr Heke confirm his ongoing ability to act.

- b. The trustees obtain an independent expert report on the geothermal agreements and that a summary of that advice be made available to owners at a properly convened meeting.
 - c. A meeting of owners be convened by the Registrar within 60 days to consider the report and consider any variations to the Trust order, and to elect a trustee to replace Mrs Emery.
29. The appellants do not know if a report has been sought or what if any arrangements Mr Heke has made. However no meeting has been called by the Court, despite there being no stay against such a meeting.

First Ground of Appeal – Misinterpretation of Clause 3(a) of Trust Order

30. Clause 3(a) of the Trust order provides:

The trustees are empowered *...in furtherance of the objects of this Trust ...and except as hereinafter may be limited*, to do all or any of the things which they would be entitled to do if they were the absolute owners of the land [except alienate the land etc] (emphasis added)

31. The MLC held at [100] and [101] that by virtue of cl 3, the trustees were able to enter into the geothermal arrangements. In effect, the MLC found that the Trust order (which states that the objects of the Trust are to provide for the “use management and alienation of the land” (cl 2)) allowed the trustees to do almost anything they liked in relation to the land as long as they did not sell the fee simple. The Court held that the fact the trustees did not think they had the power without a variation was irrelevant.
32. It is submitted that this wide interpretation is not consistent with the Act or the duties of trustees. The finding also misconstrues the scope of a **power**, which enables the trustees to do certain things as part of their **duties** as trustees. Clause 3(a) is essentially an ancillary, machinery provision, which ensures that if a particular power is left out of the specific powers under cl 3(b) (as occurred in the *Karena v Apatu* case⁵), the trustees will still be able to execute the necessary documents. It exists primarily so that third parties dealing with the trust cannot challenge the validity of contracts on the grounds of *vires*. All powers must however relate to the **objects** of the Trust and are subject to the **duties** of the trustees. This is also made clear from s 226(2) of the Act.

⁵

(2004) 14 Takitimu Appellate MB 4

33. Had the trustees carried out their **duty** to consult the owners, arguably the trustees would have had the **power** to enter into the arrangements as long as a sufficient majority of the owners had supported the venture. In this case, however, this condition precedent was not met. The trustees therefore did not have the power in this case.
34. There are, however, questions whether the geothermal project is sufficiently connected with the objects of the Trust to allow the trustees to proceed without getting the sanction of the owners or the Court. Geothermal steam is not “land or an interest in land”; the commercial exploitation of this resource is nowhere contemplated in the Trust order. Instead, as the trustees themselves recognised when they sought to amend the Trust order to a geothermal park in 2006 (but without first complying with s 244 so the variation was invalid); the object of the Trust was primarily to farm the land and possibly allow owners to live on the land. All of the specific powers are directed to this and to assisting the owners. Any general powers must be construed in light of these objects and powers.
35. It is submitted that the geothermal proposal was so radically different from what was contemplated in the Trust order as to require either compliance with s 229 or a variation under s 244. Section 229 of the Act provides that the Court may approve an extension of the activities of a Trust but must first be satisfied “that the beneficial owners have had sufficient opportunity to consider the proposal and that there is a sufficient degree of support among the owners.” It is obviously designed for new ventures which do not require a formal variation of the trust order under s 244.
36. The MLC held that the trustees need not avail themselves of s 229 if they already have the necessary authority [104]. That, however, begs the question whether they do have the requisite authority. If correct, this would mean that it does not matter how speculative a venture the trustees decide upon, they can proceed without informing the owners or gaining sufficient support, just as long as the venture has some remote connection with the Trust land.
37. It is submitted that this venture is very different from the example of a forestry lease the Judge refers to [CA p32], in particular if the land is already used for forestry – where there is a direct connection to the land. The broad interpretation favoured by the Court below means in effect there will often be no sanction against irresponsible or misguided

trustees until it is too late. The owners will be the ones to suffer without ever being given a chance to approve or not to approve the venture. There are already many examples of trustees who have embarked on such ventures which have ended in disaster. The requirement to get owner and court approval for new ventures is some protection for the owners against such disasters. It is also fundamental to the principles of the Act requiring owner involvement. It is, after all, their assets at risk, not the trustees.

38. It is also a fundamental rule of statutory interpretation that general words such as those found in cl 3(a) cannot override specific requirements such as s 229.⁶ In addition, anything in a trust order is subordinate to legislation and the general law. It is a truism to state as have the authors of Garrow and Kelly *Law of Trusts and Trustees*:⁷

Besides the duties expressly imposed by the terms of the Trust instrument, a trustee is subject to many general duties which are implied by law and which for the most part been established by case law.

39. They add:⁸

In the case of duties, the trustee is bound to do the thing prescribed, whether in his or her view it is wise to do it or not. If the trustee fails to perform a duty, the Court will compel the trustee to do it, or do it itself. In the case of powers, the trustee is bound to exercise judgment actively and honestly, as to whether to refrain from doing something, and then act honestly.

40. Trust orders are made under Te Ture Whenua Maori Act (s 219) and must comply with the Act. They may give trustees certain powers not spelt out in the Act but they cannot contradict the Act in any way. The Trust order must therefore be read as being subject to s 229 and all other provisions relating to such trusts. This is also consistent with s 5(1) of the Interpretation Act 1999.

41. The Court did not address any of the limitations on their powers present in either the Trust order itself, the Act, the Trustee Act or the common law, all of which apply to the powers of trustees. Nor is there anything in the *Karena v Apatu*⁹ that suggests otherwise. In that case the trustees already had the power to lease the land for that purpose. Although there was no specific power to grant a lesser interest (a licence), this was implicit and covered by the same cl 3(a). However, in that case there had been a

⁶ See Burrows *Statute Law in New Zealand* (3rd ed) 307, 317 and the maxim *generalia specialibus non derogant*

⁷ 6th ed (2005) 503

⁸ 19.2.3

⁹ (2004) 14 Takitimu Appellate MB 4

- meeting of owners which supported the move. The Court was therefore dealing with a technical objection by a rival contender for the licence.
42. In this case the “absolute” powers of the trustees must be read subject to the limitations in the Trust order and the Act. These include following the objects of the Trust (cl 2), holding a (quorate) AGM at least every 5 years (cl 7(a)), and filing audited annual returns (cl 7(b)(i)) both of which they failed to do. They are also bound by the requirements of the Act to carry out the functions of the trust in s 223 and keep accounts (s 230) as well as the requirements of ss 229 and 244.
43. In addition, the common law duties of a trustee include:¹⁰
- a. To be acquainted with the Trust’s terms;
 - b. To adhere to the Trust’s terms;
 - c. To act impartially;
 - d. To act in the beneficiaries best interests;
 - e. Not to profit from trusteeship;
 - f. Not to delegate;
 - g. To be active;
 - h. To keep proper accounts and give information to beneficiaries as required.
44. These are all matters which distinguish trustees from absolute owners of land, so their powers must be read as being subject to the performance of these duties. The trustees cannot act as they like in relation to the land. Although they are the “legal” owners, they must exercise that ownership on behalf of the beneficial owners, not their own self-interest or uninformed views of what would be good for the beneficiaries.
45. It is submitted that the trustees in this case have failed to carry out many of these duties and that in failing to consider the trustees’ overall performance of their statutory and common law fiduciary duties, the MLC has made an error of law. In this case, where the trustees’ action amounts to alienation, not of land but the potentially more valuable geothermal resource, for 52 years, the Court should have looked very closely at the trustees conduct. This was not a transaction in the ordinary course of business but a major transaction requiring careful scrutiny and owner participation.

¹⁰Butler (2nd ed) 5.3.1

Second Ground of Appeal – Non Compliance with s 244

46. Section 244(3) provides that before the Court may vary a Trust deed it must be satisfied that the beneficiaries of the Trust have had sufficient notice of the application and sufficient opportunity to discuss the proposal, and that there is a sufficient degree of support among the beneficiaries.
47. In this case the order was purportedly varied in 2004 after a meeting of only 17 people, and in 2009 after no meeting at all. There was therefore clearly a failure to comply with s 244.
48. The Maori Land Court correctly noted at [65] that the Court of Appeal in *Pukeroa Oruawhata v Mitchell*¹¹ had held “underscored the importance of strict adherence to s 244 whenever the Court’s discretion to vary a Trust order was invoked.” He added that this involved a 3 step process of notice, sufficient opportunity to discuss the proposal and evidence of a sufficient degree of support.
49. Given those tests he held “the four applications for variation in 2004, 2006, 2008 and 2009 could be subject to challenge” [69].¹² At [74 and [75], the Judge added “applications for variation can only be made by the trustees once the proposed variations have been considered by the beneficiaries at a properly notified meeting” and that as noted by the MAC in *Pukeroa Oruawhata*, the Court could no longer vary orders of its own motion. “Careful adherence to s 244 remains essential on any *future* applications for variation.” [emphasis added]
50. The Judge did not formally set aside the existing unlawful variations. Instead he stated that at the next meeting of beneficiaries a more detailed review of the Trust order will be appropriate [70]. It is submitted that in dodging the issue of the validity of the variations, the MLC has acted contrary to its own findings and to the law. As it had already found, s 244 is couched in mandatory terms. The three steps must be taken **before** the variation, and it is not appropriate for such a complete non-compliance to be

¹¹ [2008] NZCA 518

¹² The 2006 variation related to declaring the land a geothermal park. As this was a reflection of reality, no particular issue is taken with the substance of the amendment, but once again there was no attempt to comply with s 244.

excused. This is particularly the case when the respondents have claimed it is too late to go back on the geothermal deal.

51. Section 244 is designed as a protection for the landowners and is a means by which the objects of the Act, in particular s 17(2)(a) are achieved. The Court in this case in 2008 was falsely and deliberately told by the trustees' agent, the Trust secretary, that the beneficiaries supported the action when in fact no meeting had been held, and in 2004 the meeting consisted of 17 people. In view of the total failure to comply with the requirements of s 244, the variations should be quashed.

Third Ground of Appeal – Requirement to seek views of owners

52. It is submitted that whether ss 229 or 244 or the common law is applied, the trustees were under a legal obligation to refer this major transaction to the owners.
53. The Court correctly held at [54] to [58] that trustees are not required to get the **consent** of the owners, unless the Trust order so provides, but added at [58] "Even so, a wise trustee will take careful account of what the owners have to say, particularly where that owner opinion is the majority."
54. In this case, the trustees took no account of the views of owners before signing up to a 52 year lease, because they did ask or inform them. The only time a few of them were informed at all was back in 2004 when some 17 of the 1022 owners gave them provisional approval to investigate the geothermal possibilities. Whether they also agreed to the trustees taking "advantage of the findings" is highly doubtful given the signed minutes that were originally presented to the Court. Even then, these words are not specific and the caution expressed by the few owners who were consulted in 2004 indicates that there was no way they were authorising the trustees to sign them up for a 52 year deal without any further reference to them as owners.
55. The trustees also had a common law obligation to act prudently and to get proper advice. As the Judge stated, wise or prudent trustees would have taken careful account of the owners' views. They would have also sought independent advice rather than rely on the interested views of Mr Carswell.

Fourth Ground of Appeal – Conflict of Interest

56. The MLC found that two of the trustees had significant conflicts of interest in entering into the project agreement as they owned shares in more than one trust involved [CA p319-325]. In addition, evidence given in the Court below showed that the secretary of the Trust, Mr Gray, had personal interests in the Waioira chain of companies, yet the trustees relied on his advice in deciding to invest in that group of companies without obtaining independent advice.
57. However, the Court found that although they should have stepped aside from the decision, this conflict did not invalidate the Trust's decision to proceed with the geothermal project because the remaining trustees were not conflicted.
58. It is submitted that the proper effect of a decision made by a body where some members have an undeclared conflict of interest is that the decision as a whole is invalid.
59. A recent example of this was the *Saxmere* case¹³ where, because one of the three judges had an undeclared conflict of interest, the whole decision was set aside.¹⁴ It was not enough that the other two non-conflicted judges had reached the same decision.
60. In the case of Maori land, there are often overlapping land holdings. TTWMA excuses trustees who are also employees of the Trust as long as they do not participate in the decision (s 227A), but does not directly address overlapping trusts. In *Wall v Karaitiana*¹⁵ the Court however made trustees involved in both trusts stand down and face re-election, even when they had openly presented their position to a meeting of owners and the owners were prepared to waive that conflict. In this case the Judge has proposed no sanction against trustees who have not even divulged their competing interests.
61. It is submitted that the latitude shown in the case before the Court is inconsistent with the Judge's decision in *Wall v Karaitiana* and is wrong in law. Had the conflicted trustees

¹³ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 76

¹⁴ See also *R v Bow Street Metropolitan Stipendiary Magistrate exp Pinochet Ugarte (no 2)* [2000] 1 AC 119

¹⁵ *Re Tauhara Middle 15* (2008) 87 Taupo MB 107

called a quorate meeting of owners and disclosed their interest, the owners could have decided whether or not they wished to proceed with the proposal in the full knowledge of the facts.

62. As this was not done, the conflict of interest should be a reason for invalidating the decision to proceed with the geothermal project, and any subsequent decision to proceed or not should only be taken once the current trustees have been stood down.

Fifth Ground of Appeal – Removal of Trustees

63. Although the MLC found numerous defaults on the part of the trustees, it did not remove them. Despite the application for removal, the Court did not test their conduct against the tests provided in the Trust order, the Act or the common law.
64. Section 240 of TTWMA provides for the removal of trustees if the Court is satisfied that the trustees have failed to carry out their duties satisfactorily (s 240(a)). This is echoed in cl 8(b)(ii) of the Trust order.
65. In particular cl 8(b)(ii) of the Trust order provides “in addition to the grounds upon which a trustee might be removed by the court, it shall be sufficient cause for removal that a trustee has not complied with the provisions of clause 7(b) and 7(c)(i)”. The latter relates to a failure to file accounts and is a stand-alone reason for removal.
66. The evidence in this case showed that most of the trustees had only the vaguest idea of their obligations as trustees and the details of the Trust and its finances. Tested against the common law duties of trustees, they failed on a significant number of fronts. Instead, most things were left to the Secretary, Mr Gray, to deal with. Their actions were therefore clearly contrary to the requirement to be acquainted with the Trust’s terms and to be active and not to delegate.
67. As at least two of the trustees had major interests in other trusts which stood to benefit significantly from the geothermal project, but this interest was not declared to the owners, the trustees failed to act impartially. Mrs Fenwick in particular, stood to profit from the transaction. The trustees also failed to get any independent advice on the transaction.

68. The trustees failed to keep proper accounts, leaving this to their secretary who “forgot” to file them for 2 years. Then when the beneficiaries sought information about the geothermal project, the trustees refused to reveal anything, claiming commercial sensitivity over the entire transaction (other than some glossy self-serving overheads presented to the AGM after the deal was signed). In the event, only very small portions of the documents were held by the court to be confidential and could have easily been redacted at the outset. This and the trustees’ failure to hold proper meetings of the owners was a major breach of their duty to inform beneficiaries.
69. It is submitted that the numerous failures on the part of these trustees amounted to a failure to carry out their duties satisfactorily and that they should have been removed. In the alternative, the Court could have adopted the approach it used in *Wall v Karaitiana* to require the trustees to stand down and face a new election at a properly convened and quorate AGM or court-convened meeting of owners.
70. The MLC noted that in *Bramley v Hiruharama Ponui Inc*¹⁶ the MAC had stated that “not every unsatisfactory act or omission should lead to removal but those that go the principles of the Act”. The MLC also notes at [84] that “a breach of Trust need not have occurred for a trustee to be removed since the test under s 240 of the Act is broader than that under the common law or the Trustee Act 1956”.
71. While it is accepted these are correct statements of the law, it is submitted that the MLC fails to go on to apply these tests. The trustees have not been guilty of one or two minor omissions but have committed the Trust to a major development without any independent advice and without consulting with the owners. Their omissions go to the very heart of their obligations as trustees. At best they should be removed; at very least they should be required to stand down and face a new election at a meeting to be called promptly.

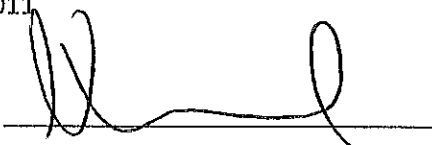
¹⁶

(2006) 11 Waiariki Appellate MB 144 (11 AP 144) [9] quoted at [80] of judgment. . In that case there had been significant owner support for the actions of the committee of management, even though it had failed to comply with several legal obligations. The members were put on probation and an audit called for, and although they were not actually removed, there were strong indications that they should all stand down at the next meeting.

Conclusion

72. The appellants therefore seek declarations that:
- a. Clause 3(a) did not authorise the trustees to enter into geothermal contract without first calling a properly notified meeting of owners, presenting the proposal fairly to a quorate meeting (with adequate opportunity for discussion) and getting from the owners a sufficient degree of support;
 - b. The current trustees be removed or required to stand down and a meeting of owners elect five new trustees;
 - c. Any trustees with potential conflicts of interest be required to disclose these fully to the meeting of owners before proceeding with any geothermal proposal.
73. In addition, a meeting of the Trust has not been called within 60 days of the MLC judgment as ordered, despite there being no stay of the judgment. It is submitted that a meeting should be held forthwith, but that in addition to the matters which the MLC has already placed on the agenda, an election should be held for all trustee positions, not just any vacant positions.
74. The current trustees should be prevented from taking any actions until that meeting and new trustees have been appointed. The new trustees must have the chance to familiarise themselves with the transactions and take appropriate legal and professional advice on the contracts entered into by the Trust or its subsidiaries to consult with the beneficiaries before further steps are taken.

Dated on 28 March 2011



Helen Aikman/Natasha van der Wal

Counsel for the Appellants