

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

**A20100001554**

UNDER Section 58, Te Ture Whenua Māori Act  
1993

IN THE MATTER OF Whakapoungakau 24 (Tikitere Trust)

BETWEEN JILLIAN NAERA, ANAHA MOREHU,  
WARRICK MOREHU AND ERIC  
HODGE  
Appellants

AND PIRIHIRA FENWICK, WIREMU KINGI  
AND HIWINUI HEKE  
Respondents

Hearings: 13 July 2011  
(Heard at Rotorua)

Court: Chief Judge W W Isaac (Presiding)  
Judge C T Coxhead  
Judge S F Reeves

Counsel: Ms Aikman QC and Ms Van der Wal, for the Appellants  
Mr Hurd and Ms Jefferies, for the Respondents

Judgment: 5 August 2011

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Introduction

[1] The appellants appeal the lower Court's decisions of 10 September 2010<sup>1</sup> concerning an application for review of trust and of 30 June 2011<sup>2</sup> concerning an application for an injunction.

[2] We firstly deal with the appeal against the lower Court's decision of 10 September 2010 then at paragraphs [95] to [100] we consider the appeal of the lower Court's 30 June 2011 decision to decline the injunction application.

### Decision of 10 September 2010 – Application for the review of trust

[3] The background to this matter was outlined by the lower Court in detail in its decision of 10 September 2010 and updated in its recent decision of 30 June 2011. We see no need to repeat the factual background in full given it has been stated at length and is not disputed by the parties.

[4] In the original application for the review of trust the appellants also sought removal of the trustees. The application stemmed from the trustees' involvement in a scheme to develop the geothermal resource found underneath Whakapoungakau 24 block. This scheme is being undertaken together with companies set up by trustees of two neighbouring blocks. The lower Court explained how the trusts structured their partnership in its judgment of 10 September 2010 as follows:<sup>3</sup>

The trustees of Whakapoungakau 24, commonly known as the Tikitere Trust, through a subsidiary Tikitere Geothermal Power Limited ("TGL") entered into an agreement on 5 November 2008, the Tikitere Project Agreement, ("TPA") with the intention of establishing a geothermal power station, along with two other ahu whenua trusts, Paehinahina Mourea Trust and Manupirua Ahu Whenua Trust. The agreement refers to a term of 52 years. Several related arrangements relevant to the project were also entered into, including option and royalty agreements.

[5] TGL is wholly owned by the Whakapoungakau 24 Ahu Whenua Trust.

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<sup>1</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279).

<sup>2</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2011) 34 Waiariki MB 151 (34 WAR 151).

<sup>3</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [1].

[6] The lower Court did not order the removal of any of the trustees. However it did make a number of directions, including that an independent report on the TPA be obtained and a meeting of owners be convened to consider that report, variations of trust and to hold elections to replace a deceased trustee.

**Grounds of Appeal and relief**

[7] The matters before the Court have a long litigious history. A number of Court held conferences, 11 days of hearings and extensive evidence culminated in a lengthy decision. However, in our view the issues on appeal are clear.

[8] The appellants' five grounds of appeal are that the Māori Land Court was in error in:

- 1) Finding the trustees had the power to enter into a geothermal project without consulting owners and without sufficient support;
- 2) Finding the trustees did not need to comply with section 229 of Te Ture Whenua Māori Act 1993 (the Act);
- 3) Finding the trustees did not need to comply with section 244 of the Act;
- 4) Finding conflicts of interest did not invalidate a decision if there was a majority of un-conflicted trustees; and
- 5) Its decision to not remove the trustees despite numerous failures to comply with the law.

[9] The first three grounds of appeal are submitted to be straight errors of law. The success of grounds two and three rely to some extent on this Court agreeing with the appellants' interpretation of clause 3(a) of the trust order, which is central in the first ground of appeal.

[10] The fifth ground of appeal is inextricably linked to the errors of law contended in the first three grounds of appeal. It relies on this Court finding that the lower Court erred



in law. This then would allow this Court to interfere with the discretion exercised by the lower Court in deciding not to remove the trustees.<sup>4</sup>

[11] In terms of relief the appellants seek:

- 1) A declaration that the purported variations to the Trust Order dated 11 October 2004, 4 December 2006 and 3 April 2009 are invalid;
- 2) A declaration that the powers conferred under clause 3 of the Trust Order, as limited by the rest of the Order, Te Ture Whenua Māori Act and trust law in general do not permit the trustees to enter into the geothermal agreements without seeking the opinion of the owners and/or a valid variation of the Trust Order;
- 3) A declaration that the trustees were legally obliged to consult with the Trust's beneficial owners when making major decisions concerning the Trust's assets;
- 4) A declaration that a decision must be declared invalid if one or more trustees with a conflict of interest participates in the vote; and
- 5) An order for removal of the trustees under s 240 of the Act.

**Did the trustees have the power to enter into a geothermal project without consulting owners and without sufficient support?**

[12] The lower Court relied on the Māori Appellate Court's interpretation of clauses 3(a) and 3(b) in *Karena – Owahaoko C1, C2, C4, C5 and C7*. The lower Court found that:<sup>5</sup>

where a trust order provides trustees' with the powers of absolute owners, with the exception of alienation of the land – and I understand alienation of the land in this context to mean the permanent alienation of the corpus by way of sale, gift or exchange – the trustees are able to enter into arrangements like the agreement in the present case.

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<sup>4</sup> *Kacem v Bashir* [2010] NZSC 112 at [32].

<sup>5</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [100].

[13] The appellants submit that the lower Court misinterpreted clause 3(a) of the trust order. They contend that the lower Court's interpretation found that the trustees were empowered to 'do almost anything they liked' to the land as long as they did not sell the fee simple.

[14] The appellants reject this wide scope and also draw a distinction between a power and a duty, arguing that clause 3(a) is an ancillary provision to ensure that if a particular power is left out of the specific powers under clause 3(b), the trustees will be able to execute necessary documents. They argue it exists primarily so that third parties dealing with the trust cannot challenge the validity of contracts on the grounds of vires. The appellants submitted that all powers must relate to the objects of the Trust and are subject to trustees' duties.

[15] The respondents agree with Judge Harvey's interpretation of clause 3(a) of the trust order that clause 3(a) is the basic statement of the authority of the trustees.

[16] The respondents submit that, even if the appellants' submission regarding the interaction of duties and powers was correct, the objects of the trust are expressed in sufficiently broad terms that geothermal exploration and exploitation can easily come within its ambit, as accepted by the lower Court.<sup>6</sup>

### *Discussion*

[17] Clause 3(a) of the trust order states:

3 Powers

The Trustees are empowered:

a General

In furtherance of the objects of the 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 **PROVIDED HOWEVER** that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed

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<sup>6</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [110].

acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

(bold-face emphasis added)

[18] Clause 3(b) then provides a range of specific powers for trustees. Clause 3(b) of the operative trust order at the date of the signing of the TPA (5 November 2008) states:<sup>7</sup>

b Specific

Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the powers of the Trustees it is declared that the Trustees are empowered:

i To buy

To acquire any land or interest in land whether by way of lease purchase exchange or otherwise PROVIDED HOWEVER that no purchase or exchange shall be effected except through the agency of the Māori Trustee or by such other means as shall ensure that the land so acquired can be vested in the appropriate beneficiaries as Māori freehold land and be made subject to the trusts hereof.

ii To subdivide

To subdivide the land in any manner permitted by law into such subdivisions or parts as may seem expedient to them, and to bring applications before the Court for partition orders to allocate such allotments amongst the owners in accordance with their entitlement

...

xvi To operate as a Geothermal Tourism Park

To enable the trustees to develop the area to support the Geothermal Tourism Park concept.

xvii To represent owners

To prosecute from time to time in the appropriate tribunal such objection to zoning or proposed zoning such application for re-zoning of the said land, such application for specified departure from such zoning and such application for conditional use in any current zoning or otherwise howsoever the Trustees in their absolute discretion may determine, AND to represent the beneficial owners on any negotiations or questions of compensation for lands taken under the Public Works Act or other statutory authority with the Government or any local authority.

xviii To enter into joint ventures

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<sup>7</sup> *Whakapoungakau 24- Tikitere Trust* (2006) 305 Rotorua MB 76 (305 ROT 76).

To join with others and to undertake and form companies and enter into joint ventures with other Māori Authorities sited over the same field to investigate the possibility of establishing a Geothermal Power Station and to take advantage of the findings. To process any other product resulting from the venture to be processed upon trust property. Those joint ventures and companies shall not provide that the Trustees can receive income other than in their capacity as Trustees pursuant to the existing Trust order and the accounts for the joint ventures and the companies are to be shown as part of the accounts of this Trust. The fees of any independent Director be set by the shareholders.

[19] Clause 3(a) is not unique to this trust order. In fact it is a common clause found in many trust orders. Clause 3(b)(i)-(xv), which deal with a range of powers such as the power to employ, to borrow money and to lend money are also common in standard trust orders.

[20] The relationship between subclauses 3(a) and 3(b) has previously been considered by this Court in the case of *Karena – Owahaoko C1, C2, C4, C5 and C7*. While the facts of that case are different to the present case, the Court's interpretation is on point. The Māori Appellate Court held, in reference to clauses 3(a) and 3(b), that:<sup>8</sup>

Put simply, the trustees have the powers of absolute owners. They can do anything an absolute owner is entitled to do except sell the land. Subclauses 3(b)(i) - (xviii) provide an inclusive rather than exclusive list of powers "for emphasis and clarification." In other words, the inclusion of the phrase "without limiting the generality" and "to extend the powers" underscores the need for a broad interpretation.

[21] The lower Court adopted this interpretation and we see nothing in this case to enable us to distinguish the principle set out by the Māori Appellate Court in the *Karena – Owahaoko C1, C2, C4, C5 and C7* case.

[22] As stated by Counsel for the respondent, Clause 3(a) means exactly what it says. It gives the trustees the power to act as if they were absolute owners. Because clause 3(b) commences with the words "without limiting the generality of the foregoing" clause 3(a) is not limited by the specific provisions set out in clause 3(b).

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<sup>8</sup> *Karena – Owahaoko C1, C2, C4, C5 and C7* (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4) at 14.



[23] This power existed at the time the trustees entered into the TPA and the question is simply whether the trustees exercised this power in pursuance of the objects of the trust. These are the use and management of the land to the best advantage of the beneficial owners.

[24] Ms Aitkman submits that the power cannot have been exercised to the best advantage of the beneficial owners because the owners “have had no chance to decide for themselves...that this will be the way that they want to use their land.” Later she submits that “the owners need to be given an opportunity to consider the deal and give the trustees advice accordingly. Now at the end for the day it is the trustees’ decision.”

[25] Mr Hurd submits that using the land for the benefit of the owners, means using the benefits derived from the land. Thus, securing rights to the geothermal resource under the land is in pursuance of the objects of the trust.

[26] We agree that the trustees have the power to enter the TPA agreement and that the exercise of this power is in pursuance of the trust order.

[27] This land sits on a geothermal resource and using the land for the benefit of the owners must include using the benefits derived from it.

[28] The consultation and independent reports directed by Judge Harvey are important and will help address the appellants’ concern and as Ms Aitkman conceded, “at the end of the day it is the trustees’ decision”.

[29] As a result of this discussion we agree with the lower Court that the trustees had the power in terms of clause 3(a) to enter the TPA agreement. The first ground of appeal therefore fails.

**Did the trustees need to comply with section 244 of the Act?**

[30] The appellants claim that the variations to the trust order were unlawful, as neither the 2004 nor the 2009 amendments complied with the requirement of s 244(3) that the beneficiaries of the trust have sufficient notice of the application, time to discuss it, and that there is a sufficient degree of support for the proposal. They claim that there could not



have been either sufficient notice or support, as the meeting preceding the 2004 variation was attended by only 17 people, and no meeting was held before the 2009 variation was taken to the Court. The appellants submit that s 244 is couched in mandatory terms and non-compliance cannot be excused.

[31] In response, the respondents argue that the trustees had power to enter into the agreement under the trust order before any variations. They note that this question may well be irrelevant given the Court's direction for a meeting of owners to consider the nature and form of the trust. The respondents go on to note that s 244 does not prescribe the way in which owner notice must be given or support measured. They contend that the trustees acted at all times in good faith and in the belief that their actions were correct. Finally, they state that there was no need for Judge Harvey to examine the validity of the variations, as he had concluded the trustees had the power to enter into the agreement without them.

#### *Discussion*

[32] The issue of compliance with section 244 of the Act was dealt with extensively by the lower Court at paragraphs [25] to [28] and [59] to [75] of the 10 September 2010 decision.

[33] We first note that the variation to the trust ordered by the Court on 4 April 2009 is not relevant to this appeal because the TPA agreement was entered into on 5 November 2008.

[34] There were two variations to the trust ordered by the Court before the agreement was entered into. The first was on 11 October 2004. The following clause was added, which empowers the trustees to enter into joint ventures:

#### xviii To enter into joint ventures

To join with others and to undertake and form companies and enter into joint ventures with other Māori Authorities sited over the same field to investigate the possibility of establishing a Geothermal Power Station and to take advantage of the findings. To process any other product resulting from the venture to be processed upon trust property. Those joint ventures and companies shall not provide that the Trustees can receive income other than in their capacity as Trustees pursuant to the existing Trust order and the accounts of the joint venture and the companies are to

be shown as part of the accounts of the Trust. The fees of any independent Director be set by the shareholders.

[35] The second variation was ordered on 4 December 2006. This deleted a clause empowering the trustees to farm the land and replaced it with the following clause, which empowers the trustees:

xvi To operate as a Geothermal Tourism Park

To enable the trustees to develop the area to support the Geothermal Tourism Park concept.

[36] The trustees relied on the 2004 variation to enter the TPA agreement on 5 November 2008.

[37] The legal validity of the variations has not been challenged by way of appeal or rehearing application. At the time of entering into the TPA both the 2004 and 2006 variations to trust were operative. The variations had been ordered by the Court. The trustees were entitled to rely upon these.

[38] If the appellants had concerns about the legal validity of these variations, the appropriate action was to challenge those orders through an appeal within 2 months of the order. This cannot be raised now, more than four years later.

[39] The lower Court, in its decision of 10 September 2010, had no jurisdiction to set these orders aside and has not done so.

[40] Even if the variations were set aside, in our judgement that would not alter the trustee's power to enter into the TPA. Clause 3(a) gave the trustees powers to enter into the agreement with no need to obtain variations to the trust order.

[41] For the reasons given, this ground of appeal also fails.

**Did the trustees need to comply with section 229 of the Act?**

[42] The appellants submit that the geothermal project was so radically different from the objects of the Trust as set out in the trust order that the trustees needed to seek the permission of the Court or the owners in order to pursue it as it was either an 'extension of

the activities' of the trust under s 229 or would require a variation of the trust order under s 224.

*Discussion*

[43] Section 229 states:

Court may authorise new ventures

- 1) Subject to subsection (2) of this section, the Court may approve an extension of the activities of any trust constituted under this Part of this Act, whether by the trustees alone or in concert with any other person or body, and whether or not the proposed activities relate directly to the property of the trust.
- 2) The Court shall not exercise its powers under subsection (1) of this section unless it is 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.

[44] Section 229 is an optional section where trustees alone or with others may apply to the Court for direction or to sanction a new venture where no authority exists in the trust order for the type of venture contemplated.

[45] As stated above, our view is that clause 3(a) gave the trustees the power to enter into the TPA. We agree with the lower Court that the trustees had the requisite authority to enter into the agreement without the need to make application to the Court in terms of section 229.

[46] In any case, the 2004 variation, which specifically enabled the trustees to enter into joint ventures and therefore the TPA, nullified any need to file an application under section 229.

[47] Further we do not see the geothermal project as being a "new venture". There is significant geothermal activity on and under the lands vested in this trust. It is difficult to see how any reasonable person would not contemplate that this trust may in fact one day become involved in geothermal related ventures.

[48] For the above reasons this ground of appeal fails.

**Owners' consent and consultation**

[49] Throughout their submissions, the appellants contended that the trustees failed to consult with the owners.

[50] Counsel for the appellants submits that regardless of whether ss 229 or 244 or the common law is applicable, the trustees were under a legal obligation to refer this major transaction to the owners. It is argued the geothermal project was so radically different from the objects of the Trust as set out in the trust deed that the trustees needed to seek the permission of the Court or owners in order to pursue it.

[51] Finally, it is submitted that there was a general obligation to consult with the owners. We were referred to the Preamble, section 2 and section 17(2) of the Act which are outlined below.

[52] The Preamble states:

“Na te mea i riro na te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: a, na te mea e tika ana kia whakautia ano te wairua o te wa i riro atu ai te kawanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: a, na te mea e tika ana kia marama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, a, na tera he whakahau kia mau tonu taua whenua ki te iwi nona, ki o ratou whanau, hapu hoki, a, [a ki te whakangungu i nga wahi tapu] hei whakamama i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mo te hunga nona, mo o ratou whanau, hapu hoki: a, na te mea e tika ana kia tu tonu he [Te Kooti], a, kia whakatakototia he tikanga hei awahina i te iwi Māori kia taea ai enei kaupapa te whakatinana:

Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu[, and to protect wahi tapu]: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu : And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles:”

[53] Section 2 states:

- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.
- (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whanau, their hapu, and their descendants, [and that protects wahi tapu].
- (3) In the event of any conflict in meaning between the Māori and the English versions of the Preamble, the Māori version shall prevail.

[54] Section 17, which sets out the general objectives of the Court, states:

- (1) In exercising its jurisdiction and powers under this Act, the primary objective of the Court shall be to promote and assist in—
  - (a) The retention of Māori land and General land owned by Māori in the hands of the owners; and
  - (b) The effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori.
- (2) In applying subsection (1) of this section, the Court shall seek to achieve the following further objectives:
  - (a) To ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
  - (b) To provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
  - (c) To determine or facilitate the settlement of disputes and other matters among the owners of any land:
  - (d) To protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
  - (e) To ensure fairness in dealings with the owners of any land in multiple ownership:
  - (f) To promote practical solutions to problems arising in the use or management of any land.



[55] The respondents reject the contention that they were required to seek the consent of the owners before proceeding with the geothermal project. They submit that neither ss 229 nor 244 applies in this case. They submit that there is no such obligation at common law.<sup>9</sup> The respondents assert there is no requirement to consult under the trust order. They acknowledge Judge Harvey's comments that "a wise trustee will take careful account of what owners have to say, particularly where that owner's opinion is in the majority"<sup>10</sup> however they also point out, as His Honour noted, "owners also have some responsibility".<sup>11</sup> They submit that there is no evidence the appellants attended either the 2004 or 2008 meetings. They also claim that the appellants did not raise any concerns prior to filing the application in 2009.

#### *Discussion*

[56] We agree with the lower Court that in these circumstances there was no obligation for the trustees to consult with the beneficial owners. There is nothing in the trust order, the Act or common law to require such consultation.

[57] There are sections in the Act which require notice be given to owners of matters that require sufficient support of the owners before Court orders can be obtained.<sup>12</sup> None of those sections apply here. No general obligation of consultation with the beneficial owners exists in the Act.

[58] The Preamble, sections 2 and 17(2) do not impose an obligation of consultation on trustees. The Preamble, section 2 and section 17(2) imposes obligations on the Court.

[59] To require trustees to consult with owners and seek their opinion on every matter under consideration would make the position of trustee a pointless fiction. A trustee's role is to make the decisions around the management and improvement of the trust assets, relieving beneficiaries of that burden.

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<sup>9</sup> *Re Brockbank (deceased), Ward v Bates* [1948] 1 All ER 287.

<sup>10</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [58].

<sup>11</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [188].

<sup>12</sup> See for example sections 212, 215 and 216 (the creation of trusts), 221 (amalgamate trusts), 244 (vary trust), 245 (be declared charitable trust), 288 (partitions, amalgamations and or aggregations), among many others (e.g. s 133 [change of status from general land to Māori freehold land], 312, 317, 329, 332, note these are all less relevant for trusts).

[60] Best practice dictates that trustees should keep beneficial owners informed of developments and test their views on certain matters. However, this is not a requirement or a trustee's duty.

[61] As stated by the lower Court, a wise trustee will take careful account of what owners have to say, particularly where the owners' opinion is in the majority. That said, prudent trustees will take into consideration the views of all the owners, including the minority, before arriving at a decision – a decision that only the trustees can make under the terms of the current trust order. This was most clearly articulated in the case referred to in the lower Court decision - *Hemi v The Proprietors of Mangakino Township Inc – Pouakani No 2*.<sup>13</sup>

Some may argue for one man one vote and others for voting by shares. Both have only dubious validity in Māori tradition. They are both the logical consequence of individualisation of title and ownership by this Court. The very idea of voting and majority rule whether by number or shares has doubtful validity in Polynesian tradition. In a legal sense also, the voting is of doubtful use. Voting by beneficiaries is not orthodox in general trust law. It has been grafted onto the Trust system by this Court to make the structure conform to an extent with the Incorporation mode and to give owners the opportunity to have their say. The result however except in some very specific circumstances does not decide anything. Voting is a device for making the views and the strength of those views known to the Trustees and the Court. It gives the owners a venue and structure for discussion.

One only has to look at the Trust order in this particular case. There is provision for voting by show of hands and the use of proxies. The trust order is however silent as to what may be voted on and the effect of that vote. The Trustees must make the decisions of Trust business and cannot be dictated to by the owners. They cannot delegate their decision-making responsibility to a vote at a meeting of owners. This is particularly so in that there are unlikely to be all the owners at the meeting and the Trustees have a duty to all of the owners and not just those present at the meeting. In fact owners present at meetings of Trusts such as this rarely represent by share or number more than a very modest proportion. The same position pertains to the appointment of Trustees by the Court. While the Court is bound to appoint only those it considers qualified and broadly acceptable to the owners, it is the Court that must make the final decision and make the appointment. The voting is a method of indicating to the Court who might be broadly acceptable but in the end the law is the Court must make the decision.

[62] Accordingly, in reliance on previous Māori Appellate Court decisions, and well established trust law we agree with the lower Court's finding that the owners' consent or

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<sup>13</sup> *Hemi v The Proprietors of Mangakino Township Inc Pouakani No 2* (1999) 73 Taupō MB 30 (73 TPO 30) at [4].

support was not required for the trustees to enter into this agreement. The lower Court correctly stated that resolutions of beneficial owners cannot bind trustees unless the trust order makes appropriate provision for this.

[63] As a result this ground of appeal must also fail.

### **Conflicts of interest**

[64] The appellants submit that Judge Harvey, while finding that conflicts of interest existed in terms of Mr Eru and Mrs Fenwick, should have gone further and found that the consequences of that conflict were to invalidate the agreement. Another option open to Judge Harvey was to ask the trustees to stand down.

[65] Counsel for the appellants cites the recent *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*<sup>14</sup> case, in which a judge's undisclosed conflict of interest saw a decision entirely set aside, despite the fact that the other two judges sitting with him reached the same conclusion as he did. Counsel also cites *Wall v Karaitiana – Tauhara Middle 15 Trust*,<sup>15</sup> in which Judge Harvey removed the trustees of two related trusts, even when they had openly presented their position to a meeting of owners and the owners were prepared to waive that conflict.

[66] In terms of Mrs Fenwick's conflict of interest, the respondents note that Judge Harvey found an "appearance of conflict" but not so much that "such appearance has rendered the decision to enter into the TPA nugatory".<sup>16</sup>

[67] The respondents contend that, contrary to the appellants' submissions, s 227A does not only apply to trustees who are employees of a trust but extends to trustees who have an interest or concern in any contract made by the trust. They submit that the effect of the section is that the interest or concern does not disqualify the person from being a trustee, but they should not vote or participate in any decision making processes which affects any contract in which they have an interest or concern. Therefore Judge Harvey's criticisms of Ms Fenwick and Mr Eru are accepted by the respondents, as their landholdings in the other

<sup>14</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 76.

<sup>15</sup> *Wall v Karaitiana – Tauhara Middle 15 Trust* (2008) 87 Taupo MB 107 (87 TPO 107).

<sup>16</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [154].

trusts could have had the effect of disqualifying them under s 227A. Ms Fenwick's shareholdings were well known and she did not participate in the decision making process until the formal vote to enter the agreement.

[68] Despite these caveats, the respondents submit that Judge Harvey's finding that the decision was valid, should stand as it would have been reached with or without Ms Fenwick and Mr Eru's participation.

[69] In the respondents' view, *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*<sup>17</sup> is irrelevant as that case involved judicial decision-making. They submit that *Wall v Karaitiana - Tauhara Middle 15 Trust*<sup>18</sup> is easily distinguishable on the facts as the conflicted trustees in that case exercised deciding votes.

#### *Discussion*

[70] The lower Court gave extensive consideration to the issue of conflicts of interest.

[71] We agree with the lower Court that the conflicts of interest found did not invalidate the trust's decision to proceed with the project. We agree that, even without the involvement of the 'conflicted' trustees, the same decision would have been reached.

[72] We do not agree with the proposition put forward by the appellants that the participation of the conflicted parties meant the decision as a whole was invalid. *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*<sup>19</sup> dealt with judicial decision-making and thus an entirely different set of duties and obligations. We do not see it as being applicable to conflicts of interest with regards to trustees of statutory trusts formed under Te Ture Whenua Māori Act 1993.

[73] Therefore this ground of appeal fails.

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<sup>17</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 76.

<sup>18</sup> *Wall v Karaitiana - Tauhara Middle 15 Trust* (2008) 87 Taupo MB 107 (87 TPO 107).

<sup>19</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 76.

### Removal of trustees

[74] The appellants submit that Judge Harvey erred in law in his interpretation of clause 3(a) and his findings with regards to sections 229 and 244. The appellants agree that in order for us to interfere with a judicial discretion, as is the case with the decision of whether or not to remove a trustee, there must be an error of law which led to an error in the exercise of the discretion.

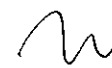
[75] The appellants submitted that the trustees should have been removed for the numerous breaches found by the Court. They also say that the Court did not test the trustees' conduct against the tests provided in the Trust order, the Act or the common law. Their submissions under each of these are outlined below.

[76] The appellants note that clause 8(b)(ii) of the Trust order provides that 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 appellants state that clause 7(c)(i) relates to a failure to file accounts and is a stand-alone reason for removal. We presume that this is based on clause 8(b)(i), which states that a sufficient cause for removal is that a Trustee has not complied with the provisions of clause 7(b), which requires trustees to report to the Court once required to with regards to trust administration or their performance as trustee and 7(c)(i), which deals with preparing annual reports and obtaining audits.

[77] The appellants note that s 240 of the Act provides that the Court can remove trustees if it is satisfied that the trustees have failed to carry out their duties satisfactorily.

[78] The appellants allege the trustees failed to adhere to the requirements under common law to be acquainted with the Trust's terms, to not delegate, to disclose conflicts of interest, to obtain independent advice, to keep proper accounts, respond to beneficiary requests for information and hold proper meetings of owners.

[79] The appellants conclude by stating that the trustees have not been guilty only of one or two minor omissions. Rather their omissions go to the very heart of their obligations as trustees. They submit that the trustees should be removed. Alternatively, they should be required to stand down and stand for re-election if they so choose.



[80] The respondents note that the appeal against the refusal to remove the trustees is an appeal against an exercise of discretion, and therefore the Court can only intervene if it believes that there has been an error of law or principle, that the decision has been made taking account of irrelevant considerations or not taking account of relevant ones, or that it is simply wrong.

[81] In their view the breaches relating to filing accounts were rectified, as noted by Judge Harvey,<sup>20</sup> the accusations of unfamiliarity with the trust were overstated (the severity alleged is not borne out by Judge Harvey's comments on the matter)<sup>21</sup> and the accusations of abandonment in favour of Mr Gray were rejected by His Honour.<sup>22</sup>

[82] While the accusations of failure to obtain independent advice were borne out by the decision, it did not result in such a seriously compromised position as to require removal,<sup>23</sup> and neither did the refusal to supply documents to beneficiaries, as the respondents believed themselves bound to act this way by the TPA. Further, the respondents submit that the appellants' reliance on *Wall v Karaitiana – Tauhara Middle 15 Trust*<sup>24</sup> is novel, given that, in that case an unsecured loan of over 50 percent of the Trust's cash resources to another Trust, contrary to advice received on at least two occasions, did not result in the trustees' removal. The respondents submit that the conduct in this case is far less serious than the behaviour of the Tauhara trustees.

[83] Finally, the respondents quoted the statement of then Chief Judge Williams in *Bramley v Hiruharama Ponui Inc* where he stated "we do not think that wholesale removal of Māori governance members is consistent with the principles of the Act or the intentions of the legislature".<sup>25</sup>

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<sup>20</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [192].

<sup>21</sup> *Ibid* at [178].

<sup>22</sup> *Ibid* at [179].

<sup>23</sup> *Ibid* at [220]-[221].

<sup>24</sup> (2008) 87 Taupo MB 107 (87 TPO 107).

<sup>25</sup> (2006) 11 Waiariki Appellate MB 144 (11 AP 144) at [9].

*Discussion*

[84] The Supreme Court recently addressed the issue of an appeal of a judicial discretion in *Kacem v Bashir*.<sup>26</sup> The Court held that, in line with established precedent, an appellate Court could only interfere with an exercise of judicial discretion if one of four 'essential elements' was present. They enunciated these as:<sup>27</sup>

- 1) There must be an error of law or principle;
- 2) The Court took into account an irrelevant consideration;
- 3) The Court failed to take account of a relevant consideration; or
- 4) The decision is plainly wrong.

[85] This Court endorsed the same principles as *Kacem v Bashir* in *Karena – Owhaoko C1, C2, C4, C5, C7*<sup>28</sup> in 2004, though in a slightly different form.

[86] As noted above we have found no error in law in either Judge Harvey's interpretation of clause 3(a) or his findings in regard to sections 229 and 244. We do not find that he took into account irrelevant considerations or failed to consider relevant considerations. Finally, we do not think that his decision was plainly wrong.

[87] Therefore, we have no justification for interfering with the exercise of the lower Court's discretion.

[88] Judge Harvey was entitled in his discretion to make the assessment he did. He considered and weighed all of the evidence in respect to the alleged breaches by the trustees in coming to his determination as to whether they had undertaken their duties as trustees satisfactorily. In agreement with much of what the appellants had submitted, he found that there were failures on the part of the trustees. He then correctly, balanced all the

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<sup>26</sup> *Kacem v Bashir* [2010] NZSC 112.

<sup>27</sup> *Kacem v Bashir* [2010] NZSC 112 at [32].

<sup>28</sup> *Karena – Owhaoko C1, C2, C4, C5, C7* (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4) at 12.



evidence and submissions before him and exercised his discretion that the trustees should not be removed.

[89] For those reason noted above this ground of appeal fails.

### **Decision**

[90] For the above reasons the appeal against Judge Harvey's decision of 10 September 2010 is dismissed.

[91] What does this mean for the trustees and the beneficial owners? The decision of Judge Harvey stands and the outstanding matters in terms of the directions he issued in his 10 September 2010 decision should now be complied with.<sup>29</sup> Those outstanding directions are:<sup>30</sup>

- (c) The trustees will procure within 60 days an independent expert report on the agreement, consider its contents and with the agreement of the parties to that document make any amendments to the agreement that may be necessary following the receipt of appropriate legal advice. A summary of that advice will be made available to the owners at a properly convened general meeting.
- (d) The Registrar will convene a meeting of owners within 60 days. That hui will consider the independent report obtained by the trustees. The meeting will also decide whether or not variations to the trust order are appropriate. Counsel for the applicants and second respondent may wish to liaise with the Registrar over what variations are sought to assist with preparation of the agenda for the meeting.
- (e) The meeting may consider suitable nominees for election as a trustee to replace the late Mrs Emery. An election will take place at the next general meeting and voting will be conducted by way of secret ballot. Nominees must be submitted to the Registrar at least three clear working days prior to the meeting. With the approval of the owners at the meeting nominees may be accepted at the hui. The Registrar will notify the meeting at least three weeks from the date of the hui in a local and national newspaper on two occasions seven days apart and on iwi radio.
- (f) The general meeting will be open to owners and their duly appointed attorneys and only owners will be permitted to vote. With the consent of the owners present, descendants of owners may speak at the meeting but cannot vote.

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<sup>29</sup> It is noted that some of the directions issued by Judge Harvey in his 10 September 2010 decision have been completed.

<sup>30</sup> *Naera v Fenwick – Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [233].



[92] We note Judge Harvey's finding in his decision of 30 June 2011 that he considered an independent report had still not been procured. There is still a need to procure a truly independent report.

[93] Much time has passed since the 10 September 2010 directions. It would seem that these matters should be progressed with haste.

[94] In his decision of 30 June 2011 Judge Harvey provided that a general meeting of beneficial owners was to be arranged within 60 days on the terms set out in the 10 September 2010 judgment.

[95] All parties have therefore been on notice with regards to this proposed meeting. We confirm those arrangements in the above directions in terms of the time given to procure an independent report and in which to convene a meeting of owners that is before the end of August 2011.

#### **Decision of 30 June 2011 – Application for an injunction**

[96] As outlined above this decision deals with two appeals. The appellants also appeal Judge Harvey's decision of 30 June 2011 where he declined their injunction application.

[97] The three grounds for appeal are that the Court was wrong in finding that:

- 1) The test for granting an injunction were met;
- 2) The Trust assets were comprised only of land; and
- 3) There was insufficient evidence to find the relationship between Messrs Gray, Carswell, Weton and Rabindran were conflicted.

[98] At hearing, Counsel for the appellants confirmed that the broader issues between the parties will in essence be dealt with by our decision with regards to Judge Harvey's decision of 10 September 2010. The concern was expressed that if a significant time lapse between the hearing and decision was anticipated then, in the appellants' view, a decision on the injunction matter would be required.



[99] This Court, in a teleconference on 7 July 2011, being cognisant of the appellants' concerns undertook to have this decision delivered within two weeks of the hearing date. This in effect negates the appellants' need to continue with the appeal of the 30 June 2011 decision.

[100] Counsel for the appellants confirmed that given the Court's indication of a timely decision there no longer seemed a need to pursue the injunction appeal.

[101] For the above reasons the appeal of Judge Harvey's decision of 30 June 2011 is also dismissed.

### Costs

[102] In terms of this appeal the respondents are funded from the Māori Land Court Special Aid fund. The appellants have belatedly orally applied for assistance from the Māori Land Court Special Aid fund and were asked to submit a written application.

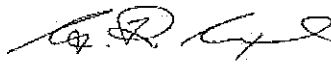
[103] As at the date of this decision a written application for aid from the Māori Land Court Special Aid fund has not been received. The issue of costs cannot be resolved. The appellants have 14 days from the date of this judgment to file an application for special aid.

[104] We anticipate that a further direction regarding costs may be necessary at a later date.

This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.



W W Isaac  
**CHIEF JUDGE**



C T Coxhead  
**JUDGE**



S F Reeves  
**JUDGE**