

IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20110012933

UNDER Sections 231, 239 and 244 Te Ture Whenua
Māori Act 1993

IN THE MATTER OF Whakapoungakau 24

AND PIRIHIRA FENWICK, WIREMU
KINGI, HIWINUI HEKE AND
TAIWHANA KE ERU
Applicants

Hearing: 45 Waiariki MB 162-180, dated 20 December 2011
(Heard at Rotorua)

Appearances: Mr D Dowthwaite, for the Trustees
Mr G Kingi, for Jillian Naera & Ors
Mr C Bidois, for Ruihi Bidois

Judgment: 23 December 2011

RESERVED JUDGMENT OF JUDGE L R HARVEY

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Introduction

[1] The trustees have filed an application for the appointment of George Habib as a responsible trustee for Whakapoungakau 24 to replace the late Winnie Emery. Dr Habib was elected at a meeting of owners convened at the Court's direction held on 5 November 2011. That direction was contained in my substantive decision issued on 10 September 2010.¹ That judgment was unsuccessfully appealed to the Māori Appellate Court.² I understand a further appeal has now been filed in the Court of Appeal.

[2] Ruihi Bidois has also applied, by memorandum received on the date of the hearing, for the appointment of Tamarapa Lloyd as a responsible trustee. Mr Lloyd was the second highest polling candidate from the election held at the meeting of owners. The trustees support the appointment of Mr Lloyd. The owners represented by Mr Kīngi made submissions in opposition.

[3] Mr Kīngi filed a memorandum on 19 December 2011 raising several other issues concerning the minutes of the meeting of owners, the report by the independent expert Pat Brown, and the matter of variations to the trust order.

[4] This decision considers the appointment application of the trustees and the proposal to appoint Mr Lloyd as an additional trustee. The record of the meeting and the report prepared by Mr Pat Brown are also considered. The points raised surrounding the variation to the trust order will be dealt with in the new year by way of separate judgment.

Submissions for the Trustees

[5] Mr Dowthwaite submitted that the application had been filed as a consequence of the outcome of the owners' meeting. The trustees considered it their responsibility to make application to the Court for the appointment of the successful nominee Dr Habib.

[6] Mr Dowthwaite submitted that whether or not any other nominees should be appointed was a matter for the Court. Subsequently, Mr Bidois made a submission that the

¹ *Naera v Fenwick - Whakapoungakau 24 block* (2010) 15 Waiariki MB 279 (15 WAR 279)

² *Naera v Fenwick - Whakapoungakau 24 (Tikitere Trust)* (2011) 2011 Maori Appellate Court MB 316 (2011 APPEAL 316)

trustees supported the appointment of Mr Lloyd. Mr Dowthwaite did not contradict this submission.

Submissions for Ms Naera and others

[7] Mr Kīngi submitted that the Court should appoint Dr Habib as the successful candidate following the election process. Counsel also submitted that his clients were opposed to the appointment of any other persons as responsible or advisory trustees on the basis that there was insufficient notice and that the owners needed to discuss any such proposals further.

[8] Counsel argued that regarding the expert report, Mr Brown was not independent as he had worked for Ormat Industries Limited, one of the parties to the Project Agreement concerning Whakapoungakau 24.

[9] In addition, Mr Kīngi submitted that the summary of the minutes of the owners' meeting were inaccurate and contended further that these concerns had been conveyed to the independent chairperson of the meeting, Mr Shane Gibbons. A particular point, counsel submitted, was that the minutes recorded that the meeting had received and approved the report of Mr Brown when in fact the hui had only resolved to receive the report.

Submissions for Ms Bidois

[10] Mr Bidois submitted that the Court was not bound by the wishes of the meeting of owners and could appoint a nominee who had the necessary experience and expertise. In addition, counsel contended that Mr Lloyd, while having extensive commercial experience, also brought important personal qualities to the role. Counsel further submitted that in considering the general objectives as set out in s17 of Te Ture Whenua Māori Act 1993 the Court could have regard to those objectives when contemplating an appointment of trustees.

[11] Mr Bidois laid particular emphasis on the use of powers of attorney submitting that they should be given lesser weight than the views of owners present at the meeting. This was on the basis, he argued, that those owners who had granted a power of attorney could not have considered or been satisfied with the extent of the proposed nominees' experience and expertise before making a decision. He also argued that owners who had bothered to attend the meeting should have greater weight given to their votes than those who had signed

a power of attorney. Counsel noted further that the use of powers of attorney had been a requirement of the Court in its earlier decisions.

[12] Following discussion with the trustees, Mr Bidois later submitted that they were in support of the appointment of Mr Lloyd as a responsible trustee. Mr Bidois also argued that in appointing Mr Lloyd the position of the owners represented by Mr Kīngi would not be prejudiced in any way. Counsel submitted that Mr Lloyd fulfilled the requirements of s222 of the Act and should therefore be appointed along with Dr Habib.

Discussion

The Law

[13] The relevant statutory provision for the appointment of trustees is s222:

Appointment of trustees

(1) Subject to subsections (2) and (3) of this section, the Court may appoint as trustee of any trust constituted under this Part of this Act—

- (a) An individual; or
- (b) A Maori Trust Board constituted under the Maori Trust Boards Act 1955 or any other enactment, or any body corporate constituted by or under any enactment; or
- (c) A Maori incorporation; or
- (d) The Maori Trustee; or
- (e) Public Trust; or
- (f) A trustee company within the meaning of the Trustee Companies Act 1967.

(2) The Court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part of this Act,—

- (a) Shall have regard to the ability, experience, and knowledge of the individual or body; and
- (b) Shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

(3) The Court shall not appoint any individual or body to be a trustee of any trust constituted under this Part of this Act unless it is satisfied that the proposed appointee consents to the appointment.

(4) Subject to subsection (5) of this section, the Court may appoint any such individual or body as a responsible trustee, or an advisory trustee, or a custodian trustee.

(5) For every trust constituted under this Part of this Act the Court shall appoint 1 or more responsible trustees, and may appoint 1 or more advisory trustees and 1 or more custodian trustees.

[14] The Court of Appeal recently considered the application of s222 of the Act in *Clarke v Karaitiana*.³

[51] The touchstone is section 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by section 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person would be broadly acceptable to the beneficiaries.

[15] On the discretion to appoint trustees, the Court of Appeal stated that ordinarily the Court would give substantial weight to the views of the owners:

[52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint the leading candidates as elected by the owners, it must still be satisfied the requirements of section 222(2)(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

[53] It will be plain from these observations that the discretion of the Court is not broad an unfettered. Of course, the Court may take into account such other matters as it thinks fit but the exercise of its discretion will be primarily guided by section 222(2). The importance ordinarily attaching to the views of the owners highlights the need to design meeting procedures which are likely to secure the widest possible input from the owners. Given the inconvenience of travelling long distances to attend meetings, and a number of beneficiaries involved in a trust such as this, the use of voting under powers of attorney may well be desirable.

³ *Clarke v Karaitiana* [2011] NZCA 154 at [51]-[53]

Dr Habib

[16] I understand from the Deputy Registrar that Dr Habib was supported overwhelmingly by the owners with 92 votes cast in his favour. I also understand that the majority of votes exercised on his behalf were by holders of powers of attorney.

[17] As foreshadowed, Mr Bidois submitted that owners represented by holders of powers of attorney could not have made an informed decision on which candidate to support given their absence from the meeting. In addition, he contended that the Court should give less weight to the views of those owners represented by attorneys. He also argued that the votes of owners who attended in person should carry more weight since they would have been able to assess the quality of the candidates for themselves.

[18] As the Court of Appeal has recently noted, the use of powers of attorney are often a useful means by which the Court can assess whether or not nominees are broadly acceptable to the beneficiaries. I am not persuaded that Mr Bidois arguments are sustainable. The votes of owners expressed through holders of powers of attorney are to be considered by the Court as if those owners were present in person. It will be remembered that such owners have entrusted their vote to the holder of the power of attorney and should have conferred that responsibility by taking into account all relevant considerations. Given the background to this long running proceeding, it would be surprising to suggest that the owners were not aware of the relevant issues.

[19] I accept that submissions that Dr Habib's application for appointment satisfies the criteria set out in s222 of the Act. When I called for objections to his appointment in open Court none were voice apart from Mr Bidois' submission that the Court should appoint both Dr Habib and Mr Lloyd. Dr Habib is accordingly appointed a responsible trustee per s239 of the Act.

Mr Lloyd

[20] The owners represented by My Kīngi object to the appointment of Mr Lloyd as either a responsible or advisory trustee primarily on the basis that the owners have not had any notice to consider such a proposal. The Court is not bound to accept the decisions of the owners regarding the appointment of trustees and, as mentioned, the Court of Appeal has affirmed this principle in *Clarke v Karaitiana*. While Dr Habib did poll the highest number of votes, that did not guarantee he would be appointed. The Court retains a discretion to

consider the ability, experience and knowledge of Dr Habib for the role of responsible trustee. Other considerations might also be relevant including conflicts of interest and the range of skills available to the trust.⁴

[21] In short, as is customary in this Court, beneficial owners will often be asked their views on the acceptability or otherwise of proposed nominees. Where such nominees receive near unanimous support and satisfy the criteria set out in s222, in the absence of compelling reasons otherwise, the Court will invariably make an appointment.

[22] One suggestion made by a beneficial owner, Ms Matthews, was that Mr Lloyd could be appointed a replacement responsible trustee for one of the existing office holders. She contended that in this way the owners would have the benefit of Mr Lloyd's particular expertise and experience while enabling one of the existing trustees who had occupied the position of trustee for some time the ability to stand down and retire from office.

[23] From the submissions made, there is no doubt that Mr Lloyd has extensive experience and expertise that would assist the present trustees in their governance of the land. The notice for the meeting was, however, unequivocal. A single nominee would be required to replace the late Mrs Emery, consistent with paragraph [233] (d) and (e) of my judgment dated 10 September 2010. It would be contrary to the notice of the meeting to now entertain the appointment of additional responsible trustees given the express terms of the notice and taking into account the long history to the present proceedings. Beneficial owners could correctly argue that, had they known that the Court would contemplate appointing an additional responsible trustee, then they would have ensured additional nominees were available at the meeting for the owners to consider.

[24] In the present circumstances, I am persuaded that, given the terms of the notice of the meeting, it would be unfair to include a further responsible trustee without giving the owners proper notice and opportunity to consider alternatives. If the trust was in need of immediate remedial and corrective measures then urgency will always require equally prompt responses from the Court which may include the appointment of interim trustees without the benefit of an election.⁵ However, there is no evidence before the Court that such urgent steps are required.

⁴ Ibid, at [52]

⁵ *Hall v Biel - Opepe Farm Trust* (2009) 90 Taupō MB 189

[25] Mr Kīngi also submitted that his clients were opposed to the appointment of Mr Lloyd as an advisory trustee. When pressed as to the prejudice his clients would suffer if Mr Lloyd were appointed, Mr Kīngi referred again to a lack of notice and, I infer, as a consequence, the ability of his clients and the wider ownership group to put forward other nominees.

[26] Where suggestions are made at hearing following a meeting of owners for the appointment of additional trustees, responsible or otherwise, the Court will invariably canvass the owners present for their views and ask for objections. Where there are no objections of any merit the Court will often accede to the wishes of those owners present to make an appointment especially where the number present has exceeded those who attended the meeting of owners.

[27] In this case however, considerable opposition has been taken to the appointment of further trustees primarily on the grounds of a lack of notice. I accept this submission. Based on the evidence presently on the Court file and provided during the hearing, I find that there is insufficient evidence before the Court to confirm whether or not Mr Lloyd is broadly acceptable to the beneficiaries in the context of s222(2)(b) of the Act. Accordingly, the application by Ms Bidois for the appointment of Mr Lloyd is dismissed.

[28] Should that situation change and the Court is presented with evidence to confirm compliance with s222(b) of the Act then the position may be reconsidered. For completeness in this context, I note that the trustees, acting by majority, may regulate their meeting procedures as they see fit, and invite any person to attend their meetings to provide information and advice on any aspect of the trust's business, while ensuring all trustees are properly notified of meetings.

[29] I also record my understanding that a number of trusts use a system of advisory trustees or associates as, in effect, apprentices, to ensure there is a ready supply of potential future trustees available for nomination. The trustees may wish to consider a similar style of arrangement for the future as a means of ensuring that any new trustees were familiar with the business of the trust.

Record of the meeting

[30] The owners represented by Mr Kīngi have communicated various concerns to the independent chairperson Mr Gibbons. They also submit that while the report of the

independent expert was received, this should not be taken to mean the owners present approved of the report's contents. That is accepted. The minutes of the meeting should simply record that the report was received. That is what is set out in the draft transcript of the meeting.

[31] In the absence of any further submissions to the contrary, this issue requires no further comment from the Court, apart from noting that the minutes remain draft until they are approved or amended at the next annual general meeting of owners.

Independent expert

[32] The owners represented by Mr Kīngi have questioned the independence of Mr Brown. Counsel claimed that Mr Brown had worked for Ormat Industries Limited. I understand from the record of the 5 November 2011 owners' meetings that Mr Brown is a partner in Strettons, an accounting firm based in Taupō. One of that firm's principal clients it is said is the Tuaropaki Trust, a successful ahu whenua trust involved in geothermal power generation and other activities.⁶

[33] At the meeting of owners, according to the draft transcript, Mr Brown confirmed that in early 1990s his firm undertook some "administrative work" for Ormat:

I am independent of Ormat. The only- the best way to describe that is - what are Strettons relationships with Ormat? And I go through it in some detail. In the early 1990s my firm Strettons provided some administrative services to Ormat when it was in New Zealand constructing the first stage Rotokawa Project. I got directly involved with that and I don't see that has got anything to do with this project, but that was the relationship. With my work with the Tuaropaki Trust, well it was Strettons work via me with the Tuaropaki Trust. I negotiated with the negotiation team on contracts with Ormat for the supply of the ...to the Tuaropaki Power company and for the engineering procurement and construction contract which was with Ormat.

[34] Ms Hall, the solicitor on the record for Mr Kīngi clients, who was at the meeting, then asked Mr Brown if there was any ongoing expectation of contract work with Ormat to which Mr Brown replied in the negative and opining further that he considered himself independent. Ms Hall then responded by commenting that his opinion was a subjective point of view.

[35] The fact that Strettons undertook administrative work for Ormat in the early 1990s and that Tuaropaki Trust and Ormat are intimately involved in geothermal power generation

for that trust does not necessarily create a terminal conflict that negates Mr Brown's independence from Whakapoungakau 24 and the issues he was required to consider. If there is evidence that Mr Brown has ongoing professional and business relationships directly with Ormat, other than through Tuaropaki Trust and his firms other clients, then the owners represented by Mr Kīngi may have a legitimate reason to question his independence. If not then it is difficult to see, based on the material currently before the Court, how his independence is tainted to the point of unreliability.

[36] In addition, the claim is made by counsel that Mr Brown did not review the evidence of Mr Michener when preparing his report. If this claim is correct and it had been agreed that he would do so then I would need an explanation as to why this was not done. The remedy would be to ask Mr Brown to review that material and if necessary amend his report as appropriate.

[37] Mr Kīngi also refers in the memorandum to the suggestion that Mr Brown reported on the project even though it has changed significantly from its original structure with, *inter alia*, the withdrawal of Green Energy. From the submissions, the presentations made to the owners' hui and the draft transcript of the meeting, it appears that Green Energy are no longer directly involved since Ormat will now undertake all relevant steps to implement the project under a build, operate and transfer arrangement. I also understand it is said that the trustees may yet consider appointing a new project manager.

[38] At first blush this does not appear outlandish or fatally irregular. Unless there is evidence to the contrary then, consistent with the findings in my principal judgment of 10 September 2010, the trustees are entitled to arrange their affairs according to the trust order and their duties including the duty to act prudently. It should go without saying that Mr Brown needed to provide an independent report on the project that the trustees are to proceed with. I acknowledge his summation that the trustees are to be commended for their efforts in settling such an agreement between themselves and the other participants in the project.

[39] I also note in this context the claims that Green Energy must have been paid a cessation fee and the responses from the trustees that such allegations are unfounded.

⁶ See 77 Taupō MB 24

[40] Even so, Mr Kīngi submitted that another expert would be procured by his clients and the Court would be asked to commission a further report on the project. As foreshadowed, the meeting resolved to receive the report, not approve its contents.

[41] In any event, I note the final paragraph of the memorandum filed by counsel that states, regardless of the outcome of the present proceedings, the owners represented by Mr Kīngi were continuing with their appeal in the Court of Appeal to have all of the trustees removed. As foreshadowed, it may be sensible, taking into account the resources of the trust and the significant calls that have already been made on the Special Aid fund, to defer any further meeting of owners until the appeal is determined.

Decision

[42] George Habib is appointed a responsible trustee by way of replacement for the late Mrs Emery per section 239 of Te Ture Whenua Māori Act 1993.

[43] The application for the appointment of Tamarapa Lloyd as a trustee is dismissed.

[44] There will be no order as to costs.

Pronounced in open court at 11.55am/~~pm~~ in ROTORUA on the 23rd day of DECEMBER

2011



L R Harvey
JUDGE