I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIPOUNAMU
In the Māori Land Court of New Zealand
Te Waipounamu District

A20210013839
A20220009007

WĀHANGA *Under*	Section 280, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Waitutu Incorporation
I WAENGA I A Between	RICHARD MANNING Te Kaitono Tuatahi *First Applicant*
	DIANE HOLLOWAY Te Kaitono Tuarua *Second Applicant*
ME *And*	WAITUTU INCORPORATION Te Kaiurupare Tuatahi *First Respondent*
ME *And*	WAITUTU HOLDINGS COMPANY LIMITED Te Kaiurupare Tuarua *Second Respondent*

Nohoanga: *Hearing*	5 May 2022, 79 Te Waipounamu MB 13-21 (Judicial conference held by AVL) 18 October 2022, 80 Te Waipounamu MB 35-45 (Hearing by AVL)
Kanohi kitea: *Appearances*	C Hirschfeld for the First and Second Applicant N Day for the First and Second Respondent
Whakataunga: *Judgment date*	3 February 2023

TE WHAKATAUNGA Ā KAIWHAKAWĀ S F REEVES
Judgment of Judge S F Reeves

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He kōrero tīmatanga
Introduction

[1] Diane Holloway and Richard Manning have filed an application under s 280 of Te Ture Whenua Māori Act 1993 ("the Act") for an investigation into the affairs of the Waitutu Incorporation ("the Incorporation").

[2] The applicants say they have the support of the required number of shareholders to trigger the Court's jurisdiction to investigate per s 280(3) of the Act. The Incorporation opposes the application and says the threshold has not been met.

[3] This judgment is a preliminary determination of whether the Court's jurisdiction to investigate has been established.

He aha ngā take?
What are the issues?

[4] The applicants say they have provided reliable evidence to satisfy the Court that the statutory threshold for an investigation has been met, while the Incorporation says that the evidence provided does not show that one-tenth of the shareholding supports an investigation.

[5] The key issue is whether the evidence provided is sufficient to satisfy me that at least one-tenth of shareholders are in support of the application to investigate.

He aha te ture?
What are the legal principles?

[6] Section 280 of the Act states:

> **280 Investigation of incorporation's affairs**
>
> (1) The court may appoint 1 or more persons (in this section referred to as examining officers) to investigate the affairs of a Maori incorporation and to report to the court in such manner as the court directs.
>
> (2) The person or persons so appointed may (with the consent of the chief executive) be officers of the Ministry.
>
> (3) The court's jurisdiction under subsection (1) may be exercised—
>
> (a) on the application of shareholders together owning not less than one-tenth of the shares; or

(b) pursuant to a declaration by special resolution passed by a general meeting of shareholders that the affairs of the incorporation should be investigated.

(c) *[Repealed]*

[7] Prior to 2002, the Māori Land Court had a wider jurisdiction under s 280(3)(c) to initiate an investigation on its own motion. Amendments to the Act in 1993 and again in 2002, gave more power to incorporations to regulate their own affairs and restricted the Court's oversight. The Act now shows a clear intention that shareholders and not the Court exercise powers of intervention, at least in the first instance.

[8] The Act grants limited jurisdiction to the Court to consider applications for investigations into the affairs of incorporations. The threshold requirement in s 280(3) is a strict necessity.

[9] In relation to who is a shareholder for the purposes of s 280(3), s 246 of the Act states:

> **246 Interpretation**
>
> In this Part, unless the context otherwise requires,—
>
> […]
>
> **shareholder,** in relation to a Maori incorporation, means every person who is registered as the holder of any shares in the incorporation, whether as beneficial owner, trustee, administrator, or otherwise

[10] In relation to when trustees may act by majority, s 227(1) of the Act states:

> **227 Trustees may act by majority**
>
> (1) Subject to any express provision in the trust order and except as provided in subsections (2) and (3), in any case where there are 3 or more responsible trustees of a trust constituted under this Part, a majority of the trustees shall have sufficient authority to exercise any powers conferred on the trustees.

[11] Section 69 sets out the evidence the Court may receive:

> **69 Evidence in proceedings**
>
> (1) The court may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter that, in the opinion of the court, may assist it to deal effectively with the matters before it, whether the same would, apart from this section, be legally admissible in evidence or not.

(2) The court may itself cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence, as it considers may assist it to deal effectively with the matters before it, but shall ensure that the parties are kept fully informed of all such matters and, where appropriate, given an opportunity to reply.

(3) Subject to the foregoing provisions of this section, the Evidence Act 2006 shall apply to the court, and to the Judges of the court, and to all proceedings in the court, in the same manner as if the court were a court within the meaning of that Act.

Kōrerorero
Discussion

[12] The applicants have the onus to provide sufficient evidence to establish to the Court's satisfaction that at least ten percent of shareholders support the application for investigation. There is limited case law on the requirements to demonstrate that the threshold has been met, as in the majority of reported cases the threshold has been met before the substantive application is heard. [1]

[13] The Secretary of the Incorporation gave evidence that as of 17 June 2022 there were 5365.68125 shares in the Incorporation held between 1093 shareholders.[2] The Court has received signed declarations in support from 54 individuals holding 388.30276 shares equating to 7.2367% of the shares. There are a further 24 declarations in support signed by individuals associated with 16 whānau trusts holding 304.69814 shares.[3]

[14] The applicants say that the combined total support, evidenced by the declarations they have provided, is 693.0009 shares, an amount in excess of the ten percent required.

[15] On balance, I am reasonably satisfied that the evidence shows support for the application from individual shareholders holding 388.30276 shares (7.2367%). The remaining issue is whether there is sufficient evidence to satisfy the Court that whānau trusts support the application. If I am not satisfied, then the applicants will have failed to reach the statutory threshold.

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1 The applicants referred to the case of *Bennett v Proprietors of the Waipiro A22B3 Incorporation* (2014) 39 Tairāwhiti MB 257 (39 TRW 257) at [4] and [23], which is such an example.
2 Affidavit of Leonie Gale dated 18 July 2022.
3 Affirmations of Diane Holloway dated 15 June 2022 and 11 August 2022.

[16] Section 246 of the Act provides where a whānau trust is a registered holder of shares in an incorporation, then it is the trustees who are the shareholder. The applicants are seeking to demonstrate that a number of whānau trusts support the investigation. The evidence is contained in the two affirmations of Diane Holloway dated 15 June 2022 and 11 August 2022.

[17] The 15 June affirmation has 24 declarations relating to whānau trusts that support the investigation. All are signed by individuals who have incorrectly declared that they hold shares in the Incorporation absolutely. Two individuals identify themselves as trustees without any additional information about how they are authorised.

[18] I would have expected a trustees' resolution for each whānau trust. If less than three trustees, then a unanimous resolution is required. Where there are three or more trustees, s 227(3) of the Act allows trustees to act by majority, but this would also be required to be documented. Otherwise, trustees' support can be evidenced by having all trustees sign a document to that effect. Basically, no verifiable evidence has been provided with any of the declarations that the application is supported by a quorate group of trustees.

[19] The Incorporation concedes in its notice of opposition that of the 16 trusts who have provided declarations, only the trustees of the Winsom Aroha Whānau Trust representing 5.5 shares or 0.1025% have all signed their support.[4] This may indeed be the case, but as noted above there is no verifiable evidence that any or all of those individuals are trustees, or whether there are more or less than three trustees.

[20] In her affirmation of 11 August 2022, Diane Holloway provides a number of amended declarations with additional signatures and she states that signatures of most trustees have been collected. But again, I cannot tell conclusively from either the amended declarations or Ms Holloway's statements whether signatories are trustees, or whether quorate trustee decisions have been made.

[21] Another issue is whether the declarations comply with the requirements of the Māori Land Court Rules for evidence in proceedings, being neither sworn nor declared before any of the persons set out in r 6.19, instead witnessed by other individuals, some of whom may be interested in these proceedings.

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4 Notice of Opposition dated 1 July 2022.

[22] Ms Day for the Incorporation has objected to the 11 August affirmation being admitted into evidence on the basis it was received past the cut-off date for the submission of evidence.

[23] Pursuant to s 69 of the Act I have a wide discretion to receive any evidence I consider will assist me to deal with the matter before me. I am satisfied counsel for the Incorporation was able to consider the 11 August affirmation prior to the hearing and to give submissions. On balance, I consider the evidence will assist me but there are shortcomings such as the hearsay nature of many of the statements made by Diane Holloway, and the limited probative value of the declarations. For these reasons, the evidence can only have limited weight. At best it is an indication, albeit a strong one, of support from whānau trusts for the application.

[24] Mr Hirschfeld for the applicants, perhaps being aware of shortcomings in the evidence, has warned me against prolixity and urged me to take a robust view of the documentation. I take into account s 17(2)(f) of the Act which requires me to promote practical solutions. I also take into account s 17(2)(a) which requires me to ascertain and give effect to the wishes of owners of the land to which any proceedings relate.

[25] The onus is on the applicants to provide the evidence to establish that the s 280(3)(a) threshold has been met. An investigation can be a time-consuming and costly process for all parties. I must be satisfied that the evidence offered is sufficient to establish the support of the whānau trust shareholders. For the reasons given I am not satisfied there is sufficient evidence that the threshold in s 280(3)(a) has been reached.

Whakataunga

Decision

[26] For the reasons stated, the applicants have failed to establish the Court's jurisdiction to investigate as required by s 280(3)(a) of the Act.

[27] The applicants have 28 days to offer further evidence, if they wish, taking into account the issues identified in this decision. I am prepared to deal with an amended application as a special fixture outside the usual pānui, but for Court administration reasons that cannot be heard before April 2023. Any hearing of the amended application will be on 21 days' notice to all affected parties.

[28] Counsel may wish to submit memoranda as to costs.

I whakapuaki i te wha karaka i Te Whanganui-a-Tara o te rā toru o Huitanguru i te tau 2023.
Pronounced at 4:00 pm in Wellington on this 3rd day of February 2023.

S F Reeves
KAIWHAKAWĀ