

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

A20140007434

UNDER Sections 40, 67, 98 and 237 Te Ture Whenua
Māori Act 1993

IN THE MATTER OF WHAKAPOUNGAKAU 24

BETWEEN TAI ERU
Applicant

AND WIREMU KĪNGI
Applicant

Hearings: 1, 23 and 25 July 2014
(By telephone conference)

Appearances: F Geiringer, for Tai Eru
D Dowthwaite for Wiremu Kīngi

Date: 25 July 2014

ORAL JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] This decision concerns arrangements for a general meeting of beneficial owners for Whakapoungakau 24, also known as Tikitere Trust, to be held on 30 August 2014. The purpose of the meeting is to receive reports and to elect replacement trustees. One trustee, Mrs Fenwick, resigned some time ago while two others, Dr Habib and Mr Heke are now deceased. The arrangements for the meeting are now largely agreed but one particular matter remains unresolved, the venue. There are also concerns over the annual accounts with specific reference to subsidiaries and joint ventures and the suggestion of an independent chairperson for the hui.

[2] Mr Eru insists that the meeting be held at Mataikotare (Waiohewa), the marae of the Ngāti Rangiteaorere tribe. He claims that the majority of the owners of Whakapoungakau 24 hail from that iwi and it is therefore entirely appropriate that the hui be held at the tribal

venue. Mr Kīngi disagrees. He says that the meeting is for owners, not the tribe and that while some may overlap with the other, that is irrelevant to the choice of venue. Mr Kīngi also claims that the meeting is likely to be disrupted by non-owners as has happened in the past. He strongly prefers a neutral and external venue to the marae.

[3] Section 227A of Te Ture Whenua Māori Act 1993 refers to trustees acting by majority where there are three or more trustees. With only two remaining trustees in this case there is arguably no authority for them to do anything other than seek the directions of the Court. They have now both done so in circumstances where they cannot agree particular courses of action.

[4] The issue for determination is simply where should the general meeting of owners for Whakapoungakau 24 Tikitere Trust be held? The appointment of an independent chairperson for the meeting, along with consideration of the election of replacement trustees is also discussed in this decision.

Discussion

Background

[5] I note that proceedings concerning this land have been before the courts since 2009 and have travelled from this to the Māori Appellate Court, the Court of Appeal and now the Supreme Court of New Zealand. There is the likelihood therefore that if the meeting procedure is in some way defective or suspect further challenges may be made. It is thus essential that the meeting arrangements and the conduct of the hui itself are beyond criticism.

[6] The trust order appears to provide for up to five trustees. As foreshadowed, two are now deceased, Dr Habib and Mr Heke, while a third Mrs Fenwick resigned. At a previous judicial conference an issue arose as to whether or not the orders issued on account of the resignation and the passing of two trustees meant that the number of trustees reduced to two. I made two principal points in response to counsel.

[7] First, the language of s 239 of the Act refers to addition, reduction and replacement of trustees. Section 240 is inappropriate to use in such circumstances because none of the three affected trustees are being removed for cause which is what this section contemplates.

Moreover, s 239(2) of the Act provides that the Court may amend its records for a trust if a trustee dies and the Court receives a death certificate for the deceased trustee. As there was not yet any replacement of trustees then the orders could not refer to “addition” or “replacement” which left “reduction” as the relevant term given s 239(1). So once an election is held then suitable replacements can be appointed.

[8] Second, the only way in which the number of trustees can be changed is to vary the trust order and this is done via s244 of the Act. This reality was highlighted in my judgment of 10 September 2010:¹

[65] In *The Trustees of Pukeroa Oruawhata v Mitchell* ² the Court of Appeal underscored the importance of strict adherence to s 244 whenever the Court’s discretion to vary a trust order was invoked. A three step process was necessary that included notice to the beneficiaries, of the proposed variation sufficient opportunity to discuss and consider the proposal, and evidence of a sufficient degree of support among the beneficiaries for the variation.

...

[75] As the Appellate Court noted in *Pukeroa Oruawhata* the ability of this Court to vary trust orders of its own motion was removed by Parliament.³ Careful adherence to s 244 remains essential on any future applications for variation.

[9] As there has been no meeting to consider any such variation then it is quite impossible for the Court to alter the present trust order. There must be sufficient notice, opportunity for discussion and support from the owners before the Court can contemplate any variation let alone one with such consequences that may be relevant to this trust in the present circumstances.

Who should be the independent chairperson for the meeting?

[10] Several names had been suggested and it would appear that Mr Taru White meets with the approval of both trustees. I note that two former staff members, Jackson White and Shane Gibbons, both lawyers, were also mentioned but that exception has been taken at least

¹ (2010) 15 Wāiariki 279

² [2008] NZCA 518

³ (2006) 11 Waiāriki Appellate MB 66 (11 AP 66) at [21]

to Mr Gibbons by Mr Eru. Mr Geiringer submitted that his client did not accept that Mr Gibbons was independent. No evidence has been proffered to support this allegation and I do not recall any formal complaint being lodged with the Registrar over Mr Gibbon's conduct of the last general meeting.

[11] While I accept that Mr White is an experienced trustee and knowledgeable of meeting procedure, out of an abundance of caution, I consider that it would be appropriate for Mr White to have support both before and during the meeting should any legal or procedural point arise that maybe beyond his expertise. I say this in the knowledge that, as foreshadowed, these protracted proceedings have consumed the time of this and three other courts for almost five years. It is therefore critical that everything that can be done to mitigate if not eliminate the risk of procedural difficulties hampering the process should be done. The upcoming meeting is important for all concerned and so every measure that can reasonably be put in place to minimise the risk of future challenge over the process should be adopted.

[12] With this in mind, I direct that Taru White with his consent be appointed independent chairperson of the general meeting of beneficial owners for Whakapoungakau 24 be held on 30 August next. In addition, I will procure the assistance of a suitably qualified individual to support Mr White prior to and during the meeting on any legal questions that might arise. I accept that such an approach is not entirely orthodox but then that would not be unusual for this set of proceedings.

[13] Within 1 month from the end of the meeting Mr White should furnish the Registrar with a report on the conduct of the hui and any other relevant matters. It is envisaged that the counting and checking of votes will take at least two weeks. As soon as those results are to hand then they will be notified to the beneficial owners soon thereafter.

How should the voting for the election of trustees be undertaken?

[14] For the avoidance of doubt, my reading of the trust order, as mentioned, is that the Court may appoint up to five responsible trustees. That would mean therefore that there are currently three vacant positions on the trust. It was also agreed with the parties that the major decisions of the meeting would be undertaken by ballot following registration to ensure the integrity of the process. In addition, it was also agreed that voting by way of postal ballot be made available to beneficial owners who for whatever reason may not be able to attend the meeting in person.

[15] Owners would receive the annual accounts and separate trustee reports from Messrs Kīngi and Eru along with the nominees for the vacant trustee positions ideally two weeks out from the meeting. This will then mean that the notice for the hui must also specify the opening and closing dates for receipt of nominations. For the avoidance of doubt, nominations will not be accepted outside of those dates or from the floor of the meeting.

[16] I record for completeness that Court staff have kindly made themselves available to assist in the logistics of the meeting, which falls on a weekend, including the issuing of the individual notices and information packs, the facilitation of the registration process on the day of the meeting and the taking of minutes.

[17] One final point. I refer the parties to the important decision *Clarke v Karaitiana*.⁴ In that judgment, the Court of Appeal determined that while the highest polling candidates would probably be expected to be appointed, there are other matters that the Court may need to take into account including potential conflicts of interest and the range of skills necessary for the particular trust to function effectively.

Where should the owners' meeting be held?

[18] This key issue has come to the Court for direction because unfortunately the two trustees cannot agree. In summary, Mr Eru insists that the appropriate meeting place is Mataikotare the marae of Ngāti Rangiteaorere. Mr Kīngi opposes that venue as he says the meeting is for the owners of Whakapoungakau 24, not Ngāti Rangiteaorere. In rejoinder, Mr Eru says that, in effect, that is a technical point only given that the vast majority of the beneficial owners are members of the Ngāti Rangiteaorere tribe. Mr Kīngi also says that he also opposes this marae as the venue because he contends that there will be interference by non-owners in the meeting process claiming that this has happened before. Even if that were correct, which is not accepted, says Mr Eru, any person seeking to disrupt the meeting would simply go to the alternative venue.

[19] Clearly there are arguments on either side with both trustees making equally valid points. In the end, the trustees have come to the Court for a decision. I direct that the trustees convene the general meeting of owners on 30 August 2014 at Mataikotare Marae, Rotorua. I acknowledge that many of the beneficial owners affiliate to Ngāti Rangiteaorere

⁴ [2011] NZCA 154

and that the Whakapoungakau lands are identified by that tribe as part of their core interests. That a general meeting of owners would ordinarily be held at a marae connected with the tribe to which the majority of owners affiliate should not be controversial but I accept that there has been at least the perception of difficulties with meetings at the marae in the past. Even so, on balance, I consider that in the present circumstances the venue of the marae is appropriate.

[20] I am satisfied that with the processes for the conduct of the meeting having now been agreed, the potential for possible untoward influence on the decisions of the owners has been reduced. I refer in particular to the agreement that all major decisions including the election of replacement trustees will be by way of ballot and, as foreshadowed, a postal ballot for those owners who cannot attend the hui in person. Then there is the fact that the record of the meeting will be taken by Court staff or some independent contractor to ensure the integrity of the meeting minutes along with the oversight of Mr White. With the appointment of Mr White to chair the meeting, with expert independent legal assistance, I also consider that sufficient precautions have now been arranged to minimise the risk of undue influence and possible procedural impropriety.

Decision

[21] The trustees are formally directed to convene a general meeting of beneficial owners on Saturday 30 August 2014 commencing at 11.00am with registrations to begin at 9.00am. The venue for the meeting is to be Mataikotare (Waiohewa) Marae, Rotorua.

[22] The trustees are directed to notify the owners of the meeting by way of newspaper advertisement and are to include in the agenda reports from the trustees and the election of up to three replacement trustees. Nominations for the trustee vacancies must be made in writing and filed with the Registrar within by noon on 14 August 2014. Voting by way of postal ballot is permissible for any owner who cannot attend the meeting in person and may be lodged with the Registrar until 11 September 2014. The trustees have agreed that a postal vote must include evidence of identity.

[23] The trustees will provide to the case manager the addresses of owners so that a formal notice can be issued from the registry along with copies of the accounts, trustee reports and trustee nominee details. Beneficial owners are invited to register before the meeting by contacting the case manager with suitable identification from Friday 15 August 2014 if that would be more convenient for them.

[24] Mr Taru White will act as independent chairperson of the meeting. Mr White will be assisted by an independent legal consultant who will provide advice and information on meeting process and any other legal points on procedure that might arise during the meeting. Within 1 month from the conclusion of the meeting Mr White will furnish a report to the Registrar on the preparation for and conduct of the meeting including any decisions made.

[25] Leave is reserved for either party to seek further directions at any time.

[26] Costs are reserved.

Pronounced in open Court at 3.45 pm in Rotorua on Friday the 25th day of July 2014

L R Harvey
JUDGE