

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

A20140006643

UNDER Sections 269(4) and 269(6), Te Ture Whenua
Maori Act 1993

IN THE MATTER OF Muriwhenua Incorporation

BETWEEN Graeme Neho
Applicant

Hearing: 31 July 2014
(Heard at Kaitaia)

Judgment: 07 August 2014

RESERVED JUDGMENT OF JUDGE D J AMBLER

Introduction

[1] On 7 May 2014 Graeme Noho filed an application under s 269(4) and (6) of Te Ture Whenua Māori Act 1993 (“the Act”) for an investigation into the outcome of the Muriwhenua Incorporation’s (“the Incorporation”) election of members to the Committee of Management (“the Committee”) at its annual general meeting (“AGM”) held on 12 April 2014. Mr Noho raises two concerns in relation to the election.

[2] First, the Committee had notified the shareholders that they could vote by way of a postal vote. However, it is accepted that there had not been a prior special resolution pursuant to rr 12(1)(b) and 20(1) of the Māori Incorporations Constitution Regulations 1994 (“the Regulations”) to enable shareholder to vote by postal vote. The Committee realised that the proposed postal vote was unlawful the day before the AGM and at the meeting the postal votes were set aside and not counted. Mr Noho agrees that a postal vote was unlawful but points out that many shareholders attempted to vote by postal vote and, as a consequence of their votes not being counted, they were excluded from the election process.

[3] Second, in June 2013 Mr Noho resigned as a member of the Committee and in July 2013 Tom Petricevich also resigned. Two other members of the Committee were due to retire by rotation at the 2014 AGM namely, Joaline Subritzky and Tiwha Everitt. However, the Committee only notified the shareholders of two vacancies that needed to be filled. The Committee took that approach as a result of a decision by four members of the Committee (being the chairperson, Marihi Langford, Abbey Brown, Mrs Subritzky and Mr Everitt) on 17 December 2013 that Mrs Subritzky and Mr Everitt would effectively be seconded to serve out the remaining term of Mr Noho (whose term was due to end in 2016) and Mr Petricevich (whose term was due to end in 2015). Mr Noho says that the so-called secondment of Mrs Subritzky and Mr Everitt was unlawful and that the 2014 AGM should have held an election in relation to all four vacancies.

Hearing

[4] I heard the applications at Kaitaia on 31 July 2014. I heard from Mr Noho, from the three members of the Committee who were not up for election (Ms Langford, Mr

Brown and Eddie Moses), and Mrs Subritzky. A shareholder, Marama Pohatu, also spoke and expressed concern about having not received notice of the 2014 AGM.

[5] There is in fact very little factual dispute over what occurred prior to and at the AGM. As explained above, Mr Neho and Mr Petricevich had resigned in June and July 2013 respectively, and stopped participating in the business of the Committee from that time. Mrs Subritzky and Mr Everitt were due for rotation at the 2014 AGM and at the Committee's 17 December 2013 meeting it resolved that they continue in Mr Neho and Mr Petricevich's position. At the hearing before me the members of the Committee could not point to any provision in the Act or the Regulations which permitted Mr Subritzky and Mr Everitt to be seconded in this manner.

[6] The minutes of the Committee's meeting of 17 December 2013 suggest that the reason for this secondment was their concern that it would be difficult for four new members to get up to speed with the Incorporation's business following the 2014 AGM - the Incorporation has seven members in total. However, during the hearing Mr Moses candidly explained that a further reason the Committee wanted to second Mrs Subritzky and Mr Everitt was that they wanted to prevent a "take-over" by members of the Ngāti Kuri Trust Board ("the Trust Board"). I will return to this point later.

[7] The letters and notices sent out to the shareholders in advance of the election apparently advised that there were two vacancies only and that voting could be by way of a postal vote. It is accepted by all the parties that there had not previously been a special resolution authorising a postal vote for the purposes of rr 12(1)(b) and 20(1) of the Regulations. Ms Langford did point to a proposed resolution to that effect at the 24 March 2001 AGM but the minutes of that AGM were not produced to me and the members of the Committee did not rely on that to justify a postal vote at the 2014 AGM. In any event, Mr Neho disputed the authenticity of the purported 2001 special resolution and I was told that the Incorporation has never held a postal vote. As I say, the members of the Committee do not rely on the 2001 special resolution and the day before the 2014 AGM it realised that the postal vote was unlawful.

[8] I also note that the postal vote document the Committee sent out to the shareholders did not comply with Form 2 in Schedule 2 of the Regulations, and that the majority of the

voting forms did not identify who the shareholder was or provide for their signature to be witnessed. The postal vote documents were therefore defective.

[9] The day before the AGM the members of the Committee realised the error of their ways and at the meeting explained the situation to the shareholders. Ms Langford proposed that the postal votes be disregarded. The AGM proceeded on that basis. Voting was by poll vote based on the shareholders in attendance and those holding proxies.

[10] Mr Noho voiced his objections to the postal vote at the AGM. He also pointed out that there were four vacancies on the Committee and that the election should have been for those four positions. Ms Langford told the meeting that the Committee was entitled to second the two members to fill the two positions of the members who had resigned.

[11] Following a discussion between the shareholders the meeting proceeded on the basis of an election for the two positions only. Four candidates stood for election to the two positions: Riria Rewi-Maaka, Lillian Karaka, Jerry Brown and Wiremu Brown. Ms Rewi-Maaka and Ms Karaka were elected to the two positions.

Discussion

[12] There are two issues for the Court to address. First, to identify the flaws in the conduct of the election. Although the parties conceded that there had been flaws, it is still necessary to identify what those particular flaws are if for no other reason than to ensure that they are not repeated in the future. Second, the Court needs to decide how to deal with the flawed election in terms of the remedies available under s 269(4) and (6) of the Act.

The flaws in the election

[13] I conclude that the 2014 election did not comply with the Act or the Regulations.

[14] First, the Committee was not entitled to stipulate voting could be by postal votes. A postal vote is only permissible if it has been authorised by a special resolution of the shareholders at an earlier general meeting. This is provided for in rr 12(1) and 20(1) of the Regulations:

12 Right to vote

- (1) A shareholder may exercise the right to vote either—
 - (a) By being present in person or by proxy or by duly appointed attorney; or
 - (b) If the shareholders by special resolution have so determined at an earlier meeting, by postal vote.

20 Postal votes

- (1) If the shareholders, by special resolution, have so determined at an earlier meeting, a shareholder may exercise the right to vote at a meeting by casting a postal vote in accordance with the provisions of this rule.

[15] As noted earlier, there had not been a special resolution to hold a postal vote.

[16] Second, the Committee's purported secondment of Mrs Subritzky and Mr Everitt to the positions of Mr Neho and Mr Petricevich was contrary to the Act and the Regulations. I can find no provision in either the Act or the Regulations for the Committee to second someone to replace a member who has resigned. Regulation 22(4) of the Regulations does contemplate that a member can be "elected" to fill an extraordinary vacancy caused by resignation and so forth, but that still requires an election by the shareholders. Regulation 22(4) provides:

22 Term of office

- (4) Every member who is elected to fill any extraordinary vacancy caused by death, resignation, or removal from office of any member shall hold office for the remainder of the term for which his or her predecessor was elected.

[17] Regulation 23 (1) further provides that the election of persons to fill vacancies in the Committee shall be conducted at the annual general meeting unless the court in any particular case orders the holding of a special general meeting for this purpose, or unless the Committee decides to submit the filling of a vacancy to a special general meeting convened for that or any other purpose.

[18] Furthermore, it is difficult to understand how Mrs Subritzky and Mr Everitt could have even been elected to Mr Neho and Mr Petricevich's positions in December 2013 when Mrs Subritzky and Mr Everitt were already members of the Committee in their own right and remained as such until the 2014 AGM.

[19] Third, as Mrs Subritzky and Mr Everitt’s positions as members were to end at the 2014 AGM, the 2014 election should have been for four positions, as Mr Noho argued. As we know, the election was for two positions only.

[20] Of particular concern, the purported secondment of Mrs Subritzky and Mr Everitt was an ill-advised attempt by some members of the Committee to dictate the makeup of the Committee itself. Mr Moses referred to the fact that the Committee was concerned that the Trust Board might “take-over” the Committee at the forthcoming AGM. There is no evidence before me to justify that fear. But even if it was a legitimate concern, that is a matter for the shareholders to debate and resolve at the AGM. It is entirely inappropriate for the existing Committee to attempt to retain members on the Committee by purporting to second them to fill positions left vacant by resignations – that is entirely contrary to the Act and the Regulations. No doubt there may be sense in ensuring continuity of membership of the Committee, but that is properly a matter for the shareholders to decide at the AGM.

Remedy

[21] Section 269(6) provides:

269 Committee of management

- (6) The Court may, on the application of any shareholder or officer of the incorporation, investigate the conduct of any election of a member or members to the committee of management, and may either—
- (a) Confirm the appointment of the person or persons elected; or
 - (b) Declare the election invalid and order a new election to be held.

[22] Thus, my options are to confirm the appointment of those elected at the 2014 election or declare the election invalid and order a new election.

[23] In addition, Mr Noho relies on s 269(4) which provides:

269 Committee of management

- (4) Any shareholder may at any time apply to the Court for the removal from office of any member of the committee of management on the ground that—

- (a) The member has failed to carry out his or her duties satisfactorily;
or
- (b) The member has contravened any of the provisions of this Part of this Act or of the constitution of the incorporation, or has otherwise acted in a manner that is incompatible with membership of the committee; or
- (c) It is otherwise in the best interests of the incorporation that the member be removed from office,—

and the Court, on being satisfied that sufficient cause has been shown, may remove that member from office accordingly.

[24] It seems to me that s 269(4) may also be resorted to so as to provide a remedy in relation to a flawed election.

[25] I note that none of the parties asked me to invalidate the election of Ms Rewi-Maaka and Ms Karaka. Nevertheless, given the nature of the deficiencies in the election process I must consider whether these two appointments can stand. I should also add that none of the parties were particularly keen on a further election because of the cost to the Incorporation.

[26] Mr Neho proposed that the four members nominated at the 2014 AGM be confirmed by the Court on the basis that there were four vacancies and four nominees only.

[27] I note that this approach aligns with what should happen at an election where the number of eligible candidates does not exceed the number vacancies. In that case the chairperson of the meeting is required to declare the persons nominated to be elected. This is provided for in r 23(5) of the Regulations:

23 Election of members to committee of management

- (5) If the number of eligible persons so nominated does not exceed the number of members to be elected, the chairperson of the meeting shall declare the persons nominated to be elected.

[28] The Committee supports the appointment of Ms Rewi-Maaka and Ms Karaka but considers that a further election needs to take place for the other two positions. (I note that Mrs Subritzky and Mr Everitt have not been participating in the business of the Committee since May 2014 when Mr Neho raised his concerns regarding the election.)

[29] The Court's primary function under s 269(6) is to ensure that an election occurs in accordance with the Act and the Regulations. The Court has a discretion as far as the remedy that may be applied. But in my view that is a limited discretion as the governing consideration is ensuring that the constitution of the Incorporation is observed.

[30] There have been clear breaches of the Act and the Regulations in relation to the 2014 election. Mr Neho properly raised those issues at the meeting. Although the shareholders did not want to reconvene the election at a further meeting, in my view the Committee and the shareholders did not have the power to cure the flaws in the election process without holding a further election.

[31] The fundamental problems with the 2014 election are that the shareholders were not made aware that there were four vacancies and many shareholders posted postal votes assuming they would be counted when they could not be counted. Those shareholders have effectively been disenfranchised by the flawed election process.

[32] I am mindful that a further election will give rise to additional costs to the Incorporation. But I do not see that I can do anything else.

[33] I am sympathetic to the position of Ms Rewi-Maaka and Ms Karaka. None of the parties want their positions invalidated. However, their election is also tainted by the flawed process. In particular, had the shareholders not been told of the possibility of a postal vote then the election result may well have been different as those shareholders whose postal votes had been disregarded may have voted in person or by proxy. Furthermore, had the shareholders been told that there were four vacancies, and had Mrs Subritzky and Mr Everitt stood for re-election, then the outcome of the election again may have been different. We simply do not know what would have happened and the only remedy is for the election to be run again.

[34] I therefore conclude that the outcome of the 2014 election must be invalidated and that the Incorporation will need to hold a special general meeting within the next four months for the purposes of an election. That means that Ms Rewi-Maaka and Ms Karaka's membership of the Committee is thereby annulled.

[35] The flawed election also brings into question the positions of Mrs Subritzky and Mr Everitt. That is, as their positions as members of the Committee were due to come to an end at the 2014 AGM, and as there has not been a valid election, should they continue as members until the outcome of the SGM's election or should their positions be treated as having come to an end at the April 2014 AGM?

[36] Regulation 22(1) of the Regulations contemplates that members hold office for a term of three years expiring "at the end of the Annual General Meeting held in the third calendar year after the calendar year in which the member was elected". Regulation 22(3) provides that if an Annual General Meeting is not held for any reason "the term of office of that member shall expire at the end of that calendar year." The Regulations do not specify what is to occur in the present situation where a member was due to retire at an AGM but the election was subsequently determined to have been invalid.

[37] In my view, r 22(1) provides the answer: Mrs Subritzky and Mr Everitt's positions as members of the Committee expired at the end of April 2014 AGM. Contrary to the Committee's view, they had not been seconded and, as a result of them not standing for re-election and not being elected, their term as members came to an end at the conclusion of the April 2014 AGM.

[38] Accordingly, Mrs Subritzky and Mr Everitt's positions as members of the Committee came to an end on 12 April 2014. Although I strictly do not need to make an order to that effect, out of an abundance of caution I will make an order under s 269(4) removing them from office.

[39] Finally, Mr Noho raised a concern that the members improperly elected might also be functioning as directors of a company owned by the Incorporation known as Wai Patiki Limited. I agree that only the validly appointed Committee is able to determine who are to be directors of that company, but I am not sure that the directors have to be members of the Committee. Accordingly, I need not make an order in that regard and will leave it to the Committee to address directorship of that company as a result of this decision.

Outcome

[40] The effect of this decision is that the members of the Committee will be reduced to three persons pending the outcome of the SGM, namely, Ms Langford, Mr Moses and Mr Brown. Three is the bare minimum for a Committee under the Act (s 269(1)).

[41] The Incorporation will need to hold a SGM and election before the end of November 2014. There are four vacancies to be filled. Mrs Subritzky and Mr Everitt's positions are for a term of three years. Importantly, because of the effect of r 22(4) of the Regulations, those elected to fill Mr Neho's position and Mr Petricevich's position will be for shortened terms to 2016 and 2015 respectively. That is because they resigned. Thus, I suggest that the two highest polling candidates be for the three year term, the third highest polling candidate be for the term ending in 2016, and the fourth highest polling candidate be for the term ending in 2015.

[42] **Pursuant to s 269(6)(b) of the Act the Court makes an order:**

- (a) declaring the election held on 12 April 2014 to be invalid and, as a consequence, the current members of the Committee are Ms Langford, Mr Moses and Mr Brown; and**
- (b) that the Incorporation is to undertake a new election at a SGM to be held on or before 30 November 2014.**

[43] **Pursuant to s 269(4) of the Act the Court makes an order removing Mrs Subritzky and Mr Everitt as members of the Committee on the basis that their terms ended at the April 2014 AGM.**

[44] The application is now concluded and I leave the Committee to notify the Registrar of the outcome of the SGM in due course.

Pronounced in open Court at 4.33 pm in Whangarei on the 7th day of August 2014.

D J Ambler
JUDGE