

**IN THE MĀORI LAND COURT OF NEW ZEALAND  
WAIKATO MANIAPOTO DISTRICT**

**A20140003631  
A20140003632  
A20140003633  
A20140003634**

UNDER Sections 18(1)(a), 183, 185 and 242, Te Ture  
Whenua Māori Act 1993

IN THE MATTER OF Poike 8E Block

THE MĀORI TRUSTEE  
Applicant

Hearing: 21 March 2014 (74 Waikato Maniapoto MB 82-86 and 259-276)  
20 May 2014 (78 Waikato Maniapoto MB 239-279)  
9 October 2014 (88 Waikato Maniapoto MB 63-81)  
12 November 2014 (89 Waikato Maniapoto MB 43-54)  
1 December 2014 (91 Waikato Maniapoto MB 53-70)  
13 April 2015 (96 Waikato Maniapoto MB 252-269)

(Heard at Tauranga)

Appearances: Mr J N Gear/Mr J Koning for Mr Valentine Nicholas  
Mr M C Gray for Gwendoline Patricia Airth Gray

Judgment: 27 July 2015

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**RESERVED JUDGMENT OF JUDGE S TE A MILROY**

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## Introduction

[1] Poike 8E is a block of Māori freehold land situated in the Tauranga District between Windermere Drive and State Highway 29. The block currently has 94 beneficial owners. At the time of hearing in April 2015 there was no governance structure in place for Poike 8E.

[2] Mr Valentine Nicholas, an owner in the block, arranged for the Bay of Plenty Polytechnic (“the Polytechnic”) to lease the land on an informal basis for the purposes of a car park. The Polytechnic agreed to pay \$50,000 per annum, and by the time of the filing of the applications by the Māori Trustee (set out below) the arrangement had been in place for about three years. The proceeds from the informal lease were paid into a bank account in the name of the Pakere Trust, a private trust set up by the Nicholas whānau to hold the funds for land projects.

[3] The Māori Trustee also holds shares in the block, having obtained them under the ‘Conversion Fund’ policy by which the Māori Trustee was enabled by Part XIII of the Māori Affairs Act 1953 to obtain shares in a block that were considered uneconomic.

[4] By way of further background, the policy which provided for the Māori Trustee to purchase ‘uneconomic shares’ underwent a reversal as a result of continued and growing resistance to the loss of shares by Māori owners. In 1987 changes were made which abolished the Conversion Fund, and returned compulsorily-acquired shares to the original owners or their successors.<sup>1</sup> The relevant provisions in relation to the Māori Trustee’s shares in Poike 8E provided for the value of the shares (being more than \$1000) to be deemed a debt owed to the Māori Trustee by the other owners, and deemed an interest-free advance made to the owners of the other shares, known as a presumed advance.<sup>2</sup>

[5] In March 2014 the Māori Trustee filed applications in the Māori Land Court to:

- a) Determine the right and title to the proceeds from the lease with the Polytechnic pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993 (“the Act”);

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<sup>1</sup> Māori Affairs Amendment Act 1987, s 2.

<sup>2</sup> Māori Affairs Act 1953, s 154.

- b) Appoint the Māori Trustee as agent pursuant to s 185(1) of the Act for the purpose of receiving the proceeds of the alienation by way of lease;
- c) Require the Pakere Trust pursuant to s 242(1) of the Act to account for and pay over the lease proceeds to the Māori Trustee, who would distribute the funds to the persons entitled; and
- d) Appoint the Māori Trustee pursuant to s 185(1) as agent to formalise and sign a lease of the land to the Polytechnic on behalf of the owners.

As part of the applications the Māori Trustee alleged that there was no involvement or consultation by Mr Nicholas with the other owners of the block regarding the lease arrangement.

[6] I heard this matter on the 13 April 2015 and gave indications as to the orders I intended to make to dispose of these applications, except in relation to the issue of repayment of the presumed advance to the Māori Trustee.<sup>3</sup> Counsel for Mr Nicholas and the Māori Trustee were to provide the Court with submissions relating to that matter. Counsel for Mr Nicholas filed submissions dated 21 May 2015 regarding the presumed advance and making further brief submissions regarding the constitution of an investigatory trust. Counsel for the Māori Trustee filed submissions on 11 June 2015,<sup>4</sup> with a brief reply filed by Mr Nicholas' counsel on 3 July 2015. The file was then referred to me to finally determine these matters.

[7] This decision deals with two objections raised by counsel for Valentine Nicholas as follows:

- a) Objecting to the establishment of an “investigatory trust” under Part 12 of the Act; and
- b) Objecting to the payment of a presumed advance to the Māori Trustee and a pro rata distribution of the Māori Trustee's shares to the other owners in the block.

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<sup>3</sup> 96 Waikato Maniapoto MB 252 (96 WMN 252).

<sup>4</sup> The submissions of counsel for the Māori Trustee however are dated 11 June 2014.

## Procedural history

[8] When the applications were filed Judge Clark gave directions and orders prior to and leading up to the hearing as follows:

*21 March 2014:*<sup>5</sup>

- a) An injunction order pursuant to s 238(2) of the Act directing the trustees of the Pakere Trust to transfer all funds held in the name of the trust to be paid into the trust account of Manning Gibbs & Brown, who are the solicitors for Mr Nicholas and the trustees of the Pakere Trust;
- b) A direction pursuant to s 237 of the Act that Manning Gibbs & Brown were not to pay or distribute any of the funds received from the Pakere Trust to third parties until further order of the Court;

*20 May 2014:*<sup>6</sup>

- c) An order appointing the Māori Trustee to act as agent for the owners under ss 183(4), 183(6)(f) and 183(6)(h), with the appointment limited to negotiating a formal lease with the Bay of Plenty Polytechnic;
- d) A direction to the Registrar to call a meeting of owners, setting out the agenda for the meeting, including these items:
  - (i) A possible distribution of funds held by Manning Gibbs & Brown with any decision requiring a vote and resolution;
  - (ii) The future use, management and administration of the block;

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<sup>5</sup> 74 Waikato Maniapoto MB 84 (74 WMN 84).

<sup>6</sup> 78 Waikato Maniapoto MB 275-278 (78 WMN 275-278).

25 July 2014:<sup>7</sup>

- e) A direction to the Registrar to commission Shane Gibbons, pursuant to ss 40(1)(e) and (2), to chair the meeting of owners;

9 October 2014:<sup>8</sup>

- f) A direction that a further meeting of owners be held, with two resolutions to be voted on at that meeting, being:
  - (i) Whether or not to confirm the draft lease prepared by the Māori Trustee, that resolution being required pursuant to s 150C(c)(ii);
  - (ii) Whether there should be a distribution of any of the funds held by Manning Gibbs & Brown and, if so, what amount should be distributed;
- g) A direction that Shane Gibbons be engaged by the Registrar to facilitate the second meeting;

12 November 2014:<sup>9</sup>

- h) A direction confirming that the second meeting of owners for Poike 8E was to proceed on Saturday, 15 November 2014 with the resolution to confirm the draft lease to be put to the owners. However, the second resolution regarding the possibility of distributing funds was not to be put to a vote, but rather there should be general discussion on the matter;
- i) A direction that other general matters which could be raised for discussion included:
  - (i) The future use, management and administration of the block;

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<sup>7</sup> 82 Waikato Maniapoto MB 284-285 (82 WMN 284-284).

<sup>8</sup> 88 Waikato Maniapoto MB 79-80 (88 WMN 79-80).

<sup>9</sup> 89 Waikato Maniapoto MB 53 (59 WMN 53).

- (ii) If a decision is made to enter into the amended lease, who should execute the lease?
  
- (iii) General business.

*1 December 2014:*<sup>10</sup>

- j) An order appointing the Māori Trustee to act as agent of the owners to execute the lease, invoice and collect rent for deposit into the Manning Gibbs & Brown trust account and to act as agent for the purposes of administration of the lease until the owners establish a governance entity;
  
- k) A direction to the Registrar to call a meeting of owners pursuant to s 173(1)(b) seeking the opinion of the owners on the following matters:
  - (i) Whether there should be a distribution of all or any of the funds held by Manning Gibbs & Brown;
  
  - (ii) The future governance of the block, that is whether the owners wish to remain with the Māori Trustee appointed as agent or the possible adoption of a trust;
  
- l) A direction that the meeting of owners was to take place in March 2015 with the Registrar to ascertain whether Mr Shane Gibbons was available to act as facilitator;
  
- m) A direction to the Registrar to have available at the meeting of owners a copy of the standard ahu whenua trust order and a copy of the trust order regularly used in the office of counsel acting for Mr Nicholas. The discussion of the trust was to be led by the Registrar (through Mr Gibbons). The direction also provided that “[i]f there is a desire from a majority of the owners to adopt a trust then the terms of the trust should be discussed and a

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<sup>10</sup> 91 Waikato Maniapoto MB 67-68 (91 WMN 67-68).

call for nomination of trustees. That call and nomination process can be held on that day.”

[9] Apart from the express directions regarding discussions over the future management of Poike 8E, Judge Clark had noted at various points that the owners were discussing future management structures for the block, including an ahu whenua trust structure or a whānau trust structure. Thus I find that the owners had reasonable notice of the issue of what governance structure to adopt for the block, and reasonable opportunity to discuss and consider the governance structure. I also note that Mr Gibbons acted as facilitator for all the Court-directed meetings of owners, and consider that he was cognisant of the content of the owners’ discussions and should have been able to assess the direction of those discussions and the strength of the owners’ support for various governance structures.

#### **Assembled owners’ meeting 14 March 2015**

[10] In line with the directions set out by the Court in December 2014, a meeting of the owners of Poike 8E took place on 14 March 2015. As set out above, Shane Gibbons was the facilitator, and the quorum for the meeting was met, with 61 per cent of the total shareholding (including proxies) present at the meeting. Valentine Nicholas gave a presentation to the meeting but had to leave part way through, which reduced the percentage of shareholding present to 43 per cent. Under the Māori Assembled Owners Regulations 1995 that shareholding percentage is still a quorum for the purposes of the resolutions to be passed at the meeting.

[11] At the meeting a resolution was put by Mr Gibbons and passed by the meeting to establish a two year investigatory trust with five trustees to undertake the following tasks:

- a) To obtain a feasibility study or report at a cost of \$15,000;
- b) To make decisions around continuance of the lease with the Polytechnic;
- c) To make decisions around the distribution of funds;
- d) To report back within one year on the results of the study or report; and

- e) To report back about the future options around ongoing governance.

[12] The meeting elected five trustees, they being Andrew Morrogh, Michael Gray, Shane Gibbons, Jack Bubba Paul and Patricia Burton. There was also an option given to the Nicholas whānau to nominate a sixth trustee to represent them. To take up the option a trustee consent form would need to be completed by a Nicholas whānau member and returned to the Court. The meeting also agreed that the trustees were to meet at least quarterly, determined what the trustee meeting fees were to be, and empowered the trustees to pay out \$8,700, being a presumed advance, to the Māori Trustee, and to distribute the shares of the Māori Trustee pro rata to the other owners.

[13] The signed resolution from the meeting of assembled owners was received by the Court on 11 June 2005.

#### **Hearing on 13 April 2015**

[14] Following the meeting of assembled owners the Court heard applications to confirm the resolutions of owners made on 14 March 2015. At the hearing Mr Gear, on behalf of Valentine Nicholas gave preliminary submissions in relation to the objections, and sought leave to file fuller written submissions within four weeks of the hearing date.

[15] After hearing from Mr Gray, one of the beneficial owners, I deferred making a decision in relation to the presumed advance issue pending receipt of further submissions from counsel for Mr Nicholas, and then from the Māori Trustee in response. However, I indicated that I intended to make orders constituting the trust in accordance with the resolution passed by the assembled owners and to appoint the trustees, once the certified copy of the resolution was received from Mr Shane Gibbons.

[16] Mr Koning filed submissions for Mr Nicholas on 21 May 2015, the Māori Trustee filed submissions in response on 11 June 2015 and Mr Koning gave a brief reply dated 2 July 2015.

[17] At the hearing on 13 April 2015 I set out reasons for indicating that I would make an order constituting the trust, but I did not make orders pending the receipt of the certified

resolution. I take this opportunity to restate and supplement the reasons I gave at hearing for determining to constitute the trust in terms of the resolution of owners. I deal with this issue first and will then deal with the presumed advance issue.

**Investigatory trust – Nicholas submissions**

[18] Counsel for Mr Nicholas submitted that there was a meritorious objection under s 215(4)(b) of the Act to the establishment of an investigatory trust for the following reasons:

- a) There is no such thing as an “investigatory trust” under Part 12 of the Act. The trust would be a full ahu whenua trust and the trustees would be registered proprietors of the Poike 8E block, while the owners became beneficial owners;
- b) An ahu whenua trust does not need to be established for the purpose of investigating various options for the block – a better alternative is to appoint a group of owners as agents for this purpose under ss 183(6)(f) and 183(6)(h). This option has not been fully explored or considered by the owners;
- c) The establishment of an ahu whenua trust effectively predetermines the issue concerning the most appropriate governance entity for Poike 8E; and
- d) Notwithstanding any provisional condition in the trust order, the termination of the trust after two years will still be required to meet the test in s 241 of the Act and the applicable common law principles.

[19] Counsel noted that the Court has a discretion under s 215(1) and must have regard not only to the meritorious objection raised by Mr Nicholas but also ss 17(d), (e) and (f) of the Act.

### Submissions by Mr Gray

[20] At the hearing Michael Gray, who is the son of, and holder of power of attorney for, one of the beneficial owners of the block, Patricia Gray, made the following submissions:

- a) It was Mr Gray's suggestion to the owners that an investigatory trust could be set up, although the preliminary entity need not necessarily have been a trust. What was needed was a group of owners to meet, to consider and to report back to the rest of the owners on an appropriate governance entity. However, he was not overly concerned with the nature of the entity, provided that some structure was put in place and whether it was a trust or an agency was of little moment to him;
- b) The owners clearly indicated at the March 2015 meeting that they wanted to progress the matter, and while acknowledging Mr Nicholas's actions in taking the land to the point where it is at the current moment, those actions were not consistent with the law or the owners wish to move forward;
- c) The owners needed to move forward in terms of substance as the Polytechnic might lose interest and the land revert back to blackberry; and
- d) Mr Nicholas's objections regarding the presumed advance should not hold up the formation of a group of owners under whatever label or title the Court saw fit.

[21] Mr Gray also noted that the objections by Mr Nicholas seemed to smack "of a simple delaying tactic which is what we have seen from Mr Nicholas from day one".<sup>11</sup> Following Mr Gray's submissions Mr Burton, who was present at the March 2015 meeting, gave evidence at the hearing that there was general disagreement among the owners who were at the meeting to Mr Valentine's proposal which he read out at the hui. Unfortunately Mr Gibbons was not present at the April 2015 hearing.

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<sup>11</sup> 96 Waikato Maniapoto MB 259 (96 WMN 259).

**Law**

[22] The relevant statutory provision pursuant to which an investigatory trust might be set up is s 215 of the Act. This section provides:

**215 Ahu whenua trusts**

- (1) The court may, in accordance with this section, constitute an ahu whenua trust in respect of any Maori land or General land owned by Maori.
- (2) An ahu whenua trust may be constituted where the court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land.
- ...
- (4) The court shall not grant an application made under this section unless it is satisfied—
  - (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
  - (b) that there is no meritorious objection to the application among the owners, having regard to the nature and importance of the matter.
- (5) The land, money, and other assets of an ahu whenua trust shall be held in trust for the persons beneficially entitled to the land in proportion to their several interests in the land.

...

[23] In determining whether to set up a trust under s 215 the Court must consider the Preamble and s 2 of the Act which sets out the principles the Court must adhere to in interpreting the Act.

[24] The Court must also exercise its jurisdiction and powers under the Act in accordance with s 17 which provides:

**17 General objectives**

- (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 Maori land and General land owned by Maori in the hands of the owners; and
  - (b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.
- (2) In applying subsection (1), 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.

## Discussion

[25] At the April 2015 hearing my reasons for indicating that I would make orders setting up the trust along the lines set out in the resolution of assembled owners were, in summary:<sup>12</sup>

- a) While s 215 does not specifically authorise the constitution of an investigatory trust, the terms of s 215 are broad, giving the Court jurisdiction to set up a trust in circumstances where that would “promote and facilitate the use and administration of the land and the interests of the persons beneficially entitled...” It is clear that some entity needs to be set up in relation to the block to enable and facilitate the use and administration of the land. Thus the setting up of a trust would be beneficial;
- b) The owners were well aware that the meeting was called to consider, amongst other things, a governance structure for the trust and voted in favour of the investigatory trust proposal;
- c) Mr Nicholas’s objection is on the basis that to set up a trust under s 215 now would be to pre-empt the decision as to what structure was most appropriate for Poike 8E in the long run, and the investigatory trust might prove difficult

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<sup>12</sup> 96 Waikato Maniapoto MB 263-267 (96 WMN 263-267).

to undo if, at the end of the two year period, the owners determined that another structure would be preferable. However, the investigatory nature of the trust, the intention that it would be for two years, and the context and background to the constitution of the trust would all mean that there would be no undue difficulty in undoing the trust if that was the wish of the owners in two years time;

- d) Section 241 gives the Court jurisdiction to terminate a trust and, if read with s 17, gives the Court ample scope to assist the owners to achieve their wishes; and
- e) Given the breadth of the Court's discretion, the Court is not confined under s 215 to setting up only standard form ahu whenua trusts intended to last in perpetuity. Investigatory trusts have been constituted by the Court under the Māori Affairs Act 1953 and Te Ture Whenua Māori Act 1993, and are not a novel structure.

[26] I would also add that the owners were aware of the possibility of the appointment of an agent to undertake preliminary work, as the applications before the Court included the appointment of the Māori Trustee as agent to undertake various tasks on behalf of the owners. The owners also had the benefit of hearing Mr Nicholas' proposal before coming to a conclusion as to their preferred interim structure. After three meetings at which the owners had opportunities to discuss the matter they gave a clear decision as to the entity they wished to undertake the investigatory work. I did not agree that Mr Nicholas raised a meritorious objection at the hearing date, and after further consideration I am of the same view.

[27] Counsel for Mr Nicholas also raised the matters set out in s 17(2)(d), (e) and (f) of the Act. Subsection (2)(d) refers to the protection of minority interests against an oppressive majority. In this case the Nicholas whānau were offered the opportunity to nominate a trustee to be appointed with the other trustees, but have not taken up that offer. The trustees, once appointed, have an obligation to act on behalf of all owners and to act fairly towards the owners as amongst themselves (s 17(2)(e)). I consider that the creation of an investigatory trust would assist with the fulfilment of those objectives under s 17. I

also consider it a practical solution (as per s 17(2)(f)) and I have been presented with no evidence that any other entity would be more appropriate or better placed to undertake the work set out in the resolution of assembled owners.

[28] For these reasons I will make orders at the end of this decision for the constitution of the investigatory trust.

### **Māori Trustee's presumed advance**

[29] The Māori Trustee holds 0.74815 shares out of the total 9.64919 shares in Poike 8E block. At the assembled owners meeting on 14 March 2015 the owners passed a resolution empowering the trustees of the investigatory trust to pay out the sum of \$8,700 to the Māori Trustee, that being the amount deemed as the presumed advance in terms of the amendments made by s 2 of the Māori Affairs Amendment Act 1987 to Part XIII of the Māori Affairs Act 1953. These statutory provisions also provided that upon repayment of the presumed advance the shares would be vested in the other owners of the land pro rata to their existing shares in the land.<sup>13</sup>

[30] As indicated above Mr Nicholas objected to this proposal.

### **Nicholas submissions**

[31] Counsel for Mr Nicholas submitted:

- a) The Māori Trustee relies on s 154 of the Māori Affairs Act 1953 and s 17 of the Interpretation Act 1999 to preserve the rights of the assembled owners to call for shares held by the Māori Trustee to be re-vested in them upon repayment of a presumed advance, despite the repeal of the Māori Affairs Act 1953;
- b) Section 154(f) of the Māori Affairs Act 1953 provides for a meeting of assembled owners to be held under and in accordance with Part XXIII of the Māori Affairs Act 1953 to pass a resolution that the presumed advance be

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<sup>13</sup> Māori Affairs Act 1993, s 154.

repaid. The repayment must then be paid by the Māori Trustee into the general purposes fund as defined in s 23 of the Māori Trustee Act 1953;

- c) Part XXIII of the Māori Affairs Act 1953 was repealed in its entirety on 1 July 1993 and there is no express transitional provision in Part 18 of Te Ture Whenua Māori Act 1993 preserving Part XXIII of the Māori Affairs Act 1953 for the particular purpose of repaying presumed advances;
- d) The assembled owners of Poike 8E have not acquired any rights or interests in the shares held by the Māori Trustee because, by 1 July 1993 when Te Ture Whenua Māori Act 1993 came into force, there had been no resolution to repay the presumed advance passed pursuant to Part XXIII of the Māori Affairs Act 1953;
- e) Accordingly, there is no existing interest, right or duty under s 17 of the Interpretation Act 1999. *Statute Law in New Zealand* reads:<sup>14</sup>

However, anything more abstract or more hypothetical than the rights in the illustrations given will normally not amount to an acquired right for the purpose of section 17: **the mere possibility that at some future time a person may be able to take advantage of the provisions of a statute is not enough.** The following have been held not to be “acquired rights”, and were thus extinguished on the repeal of the relevant statute: **a statutory “right” to acquire land at the option of certain persons, they not having exercised that right at the date of repeal;** a “right” to recover stamp duty on the cancellation of a contract when the contract had not been cancelled at the date of repeal, a “right” to include an agreed rent review provision in a renewal of a lease when at the date of the repeal a lessor had merely made a proposal to this effect but the lessee had not yet accepted a renewal. In each case some further event had to take place before a right could be said to have crystallised. (Emphasis added by counsel for Mr Nicholas);

- f) *Māori Trustee v Ihaia* was wrongly decided and is not binding on the Court.<sup>15</sup> There was no full argument on the application of s 17 of the Interpretation Act 1999 to s 154 of the Māori Affairs Act 1953 in that case.

<sup>14</sup> JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington 2009) at 618.

<sup>15</sup> *Māori Trustee v Ihaia – Omapere Taraire E & Rangihamama X3A (Aggregated)* (2014) 88 Taitokerau MB 9 (88 TTK 9).

## Submissions of the Māori Trustee

[32] The Māori Trustee explained the background to the acquisition of “uneconomic interests” in blocks of Māori land and commented as follows:<sup>16</sup>

16 ...[S]ection 2 of the Māori Affairs Amendment Act 1987 repealed Part XIII and substituted a new Part XIII abolishing the Conversion fund with effect from 1 April 1987. This left the Māori Trustee holding a large number of shares which were dealt with as follows:

- a. Compulsorily acquired shares were to be returned without cost to the original owners or their successors;
- b. Shares that were acquired by voluntary sale were valued as at 1 April 1987 and split into two categories:
  - Shares valued at less than \$1,000 were to be transferred to owners of the other shares in the block in proportion to their several interests in the land; and
  - For those shares valued at \$1,000 or more, the value of the shares was deemed to be a debt owed to the Māori Trustee by the other owners, and a deemed interest-free advance to the owners of the other shares, known as a presumed advance, made by the Māori Trustee out of the Māori Trustee’s General Purposes Fund.

17 The Valuer-General determined, in accordance with the new Part XIII, the amount of all presumed advances as at 1 April 1987. The presumed advance for Poike 8E was set by him at \$8,700.

18 In respect of voluntarily acquired shares valued at \$1,000 or more, section 154 anticipated that all income or other money accruing to the Māori Trustee’s shares would be credited to repayment of the presumed advance and paid by the Māori Trustee into the General Purposes Fund and that the owners could accelerate repayment of the presumed advance by passing a resolution that any part of the income or other money arising from their shares be paid to the Māori Trustee and applied in reduction of the presumed advance.

[33] The Māori Trustee’s submissions in response to the Nicholas submissions are as follows:

- a) The presumed advances repayment mechanism was not expressly brought into the Act, but the presumed advances repayment mechanism continues to operate by reason of the provisions in s 17 of the Interpretation Act 1999 which states that:

**17 Effect of repeal generally**

- (1) The repeal of an enactment does not affect—

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<sup>16</sup> Submissions of the Māori Trustee, filed on 11 June 2015 dated 11 June 2014, at [16] – [18].

...

(b) an existing right, interest, title, immunity, or duty:

(c) an existing status or capacity:

...

- b) Sections 18 and 21 of the Interpretation Act 1999 are also relevant. The mechanisms in Part XIII of the Māori Affairs Act 1953 continue to apply in respect of the presumed advance to the owners of Poike 8E and the Māori Trustee must offer the shares back to all the other owners collectively when sufficient income is generated to repay the presumed advance;
- c) Since the Act came into force all stakeholders involved (the Māori Trustee, owners and the Māori Land Court) have continued to treat Part XIII as operative for the purposes of completion of the payment of presumed advances;
- d) The changes advised by the Chief Registrar to the manner of notifying that the presumed advance was satisfied and of requesting shares to be revested are consistent with substantive rights under the s 154, Māori Affairs Act 1953 regime being preserved, although changes in the manner and procedures to enforce those rights have been implemented;<sup>17</sup>
- e) The procedures in ss 154(f) and (g) of the Māori Affairs Act 1953 applied “when the amount of the presumed advance has been satisfied in full”. These “machinery” procedures are now replaced by applications made by the Māori Trustee pursuant to s 18(1)(a) and (b) of the Act, which deliver the same result to Māori owners;
- f) The principal purpose of the provisions is to secure to the other owners the right to get back the Māori Trustee shares at 1987 values;

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<sup>17</sup> See *B v Legal Services Agency* HC Wellington CIV-2004-404-2546, 19 October 2005.

- g) The repeal of the Māori Affairs Act 1953 did not affect the existing right, interest, title or duty of the Māori Trustee or other owners vis-à-vis the presumed advances and the re-vesting of the shares in other owners;
- h) Therefore all other owners of shares in Poike 8E collectively have an interest in the shares and a right to call for the shares to be vested in them upon repayment of the presumed advance;
- i) The Māori Trustee has a duty to hold those shares in accordance with the provisions of Part XIII and a right to repayment of the presumed advance from the owners of the block collectively;
- j) The key provisions in s 154 of the Māori Affairs Act 1953 as amended by s 2 of the Māori Affairs Amendment Act 1987 are the opening words of that section in paragraphs (a), (b), (d) and (g), not paragraph (f) as set out in the submissions by Mr Nicholas' counsel;
- k) The opening words of s 154 state:

Where... the value of the Fund's shares in that block of land, as determined by the Valuer-General in accordance with section 152 of this Act, is at least \$1,000, the following provisions shall apply...
- l) Section 152 provided for the Valuer-General to make a special valuation of the Poike 8E shares as at the operative date of 1 April 1987. The value of the Poike 8E shares was determined at that date and remains fixed;
- m) Section 154(a) had the effect of vesting in the Māori Trustee a right to be repaid the sum of \$8,700 as that sum:

... **shall** be deemed to be a debt owed to the Māori Trustee, to be satisfied in accordance with the provisions of paragraph (d) of this section.
- n) The Māori Trustee's right to have the debt satisfied vested on the commencement date of the Māori Affairs Amendment Act 1987, being 14 April 1987, but with effect from 1 April 1987;

- o) Section 154(b) goes on to say:

The value of the Fund's shares (as so determined) shall also be deemed to be an advance (hereafter in this section referred to as the presumed advance) made by the Maori Trustee... to the owners of the other shares, as at the operative date, in proportion to their several interests in the land.

- p) The statutory provisions mean that the presumed advance was deemed made by the Māori Trustee to all others in Poike 8E in proportion to their shareholding;
- q) The right of the owners to have the shares vested in them once the presumed advance was satisfied, arose on 14 April 1987;
- r) The purpose of s 154(e) is merely to offer the owners in the block a discretionary means to accelerate the process of repayment of the presumed advance. Satisfaction of the presumed advance is not reliant upon there being a resolution of owners to repay the advance;
- s) The interests, rights and duties of the parties under s 154 are sufficiently specific to continue in existence under s 17 of the Interpretation Act 1999 despite the repeal of the empowering legislation. There is no element of contingency in their existence, and no further event had to take place to establish the existence of the debt of \$8,700 to the Māori Trustee and the right of the owners to call for the shares to be re-vested when the debt is satisfied;
- t) These interests, rights and duties are substantive interests, rights and duties that crystallised on commencement of the legislation in 1987 and are preserved by s 17(1)(b) of the Interpretation Act 1999;
- u) The Court of Appeal discussed s 18 of the Interpretation Act 1999 in *Foodstuffs (Auckland) Limited v Commerce Commission*,<sup>18</sup> and qualified its application to where there are existing (vested) interests, rights and duties at the time of the repeal, commenting that the policy of the law was to avoid

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<sup>18</sup> [2002] 1 NZLR 353.

the unfairness and injustice of the retrospective deprivation of rights or interests;

- v) Judge Armstrong referred to the *Foodstuffs* decision in *Māori Trustee v Ihaia*.<sup>19</sup> In accepting that there is a clear statutory regime in s 154 of the Māori Affairs Act 1953 for the return of shares, and that the owners' existing right to return of the shares was not affected by the repeal of the legislation, Judge Armstrong correctly applied the principles referred to in *Foodstuffs* to the statutory regime in s 154;
- w) If the owners of Poike 8E are deemed not to have acquired rights or interests in the Māori Trustee's shares, then in light of *Māori Trustee v Ihaia* that would be unfair and unjust as the owners collectively would each lose their right to enlarge their personal shareholding at a considerable discount, being the value of the shares as at 1 April 1987;
- x) If the presumed advances repayment regime no longer applied the Māori Trustee would remain a shareholder in a block exercising the rights of shareholders. The Māori Trustee would then have the ability to sell some or all of its shares to anyone within the preferred class of alienees, and to set its own price for sale of the shares rather than being bound to accept the discounted value of the shares as a 1 April 1987;
- y) If the presumed advances repayment regime is held not to continue then that would call in to question the legitimacy of all previous satisfactions of presumed advances since 1993 and consequential revestings of shares. This in turn would require the Māori Land Court to investigate and potentially reverse the vesting of Māori Trustee shares across at least 227 trusts and incorporations affected since 1994;
- z) There is no requirement that any Act must include express transitional provisions when it repeals an earlier Act. The mischief caused by a lack of

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<sup>19</sup> *Māori Trustee v Ihaia – Omapere Taraire E & Rangihamama X3A (Aggregated)* (2014) 88 Taitokerau MB 9 (88 TTK 9).

transitional provisions is adequately dealt with by Part 3 of the Interpretation Act 1999; and

- aa) If the Court is in any doubt as to the correct position the matter can be referred to the Māori Appellate Court by way of case stated.

## Law

[34] Section 154 of the Māori Affairs Act as amended by the Māori Affairs Amendment Act 1987 provides as follows:

### **154 Vesting of shares worth more than \$1,000**

Where, in respect of any block of land, the value of the Fund's shares in that block of land, as determined by the Valuer-General in accordance with section 152 of this Act, is at least \$1,000, the following provisions shall apply:

- (a) The value of the Fund's shares (as so determined) shall be deemed to be a debt owed to the Maori Trustee, to be satisfied in accordance with the provisions of paragraph (d) of this section:
- (b) The value of the Fund's shares (as so determined) shall also be deemed to be an advance (hereafter in this section referred to as the presumed advance) made by the Maori Trustee, out of the General Purposes Fund, to the owners of the other shares, as at the operative date, in proportion to their several interests in the land:
- (c) No interest shall be payable in respect of the presumed advance:
- (d) All income or other money accruing from the Fund's shares shall be credited to repayment of the presumed advance, and shall be paid by the Maori Trustee into the General Purposes Fund:
- (e) The owners of the other shares may at any time, by resolution passed at a meeting of assembled owners held under and in accordance with Part XXIII of this Act, resolve that any part of the income or other money arising from those shares shall be paid to the Maori trustee to be applied in accordance with paragraph (d) of this section:
- (f) When the amount of the presumed advance has been satisfied in full, the Maori Trustee shall sign and seal a certificate to the effect that the shares are shares to which this section applies and that the amount of the presumed advance has been satisfied in full, and shall file a copy of the certificate with the Registrar:
- (g) On the filing of the copy of the Maori Trustee's certificate with the Registrar, the shares shall vest in the owners of the other shares, in proportion to their several interests in the land.

[35] Sections 17, 18 and 21 of the Interpretation Act 1999 provide as follows:

**17 Effect of repeal generally**

- (1) The repeal of an enactment does not affect—
- (a) the validity, invalidity, effect, or consequences of anything done or suffered:
  - (b) an existing right, interest, title, immunity, or duty:
  - (c) an existing status or capacity:
  - (d) an amendment made by the enactment to another enactment:
  - (e) the previous operation of the enactment or anything done or suffered under it.
- (2) The repeal of an enactment does not revive—
- (a) an enactment that has been repealed or a rule of law that has been abolished:
  - (b) any other thing that is not in force or existing at the time the repeal takes effect.

**18 Effect of repeal on enforcement of existing rights**

- (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
- (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

**21 Powers exercised under repealed legislation to have continuing effect**

Anything done in the exercise of a power under a repealed enactment, and that is in effect immediately before that repeal, continues to have effect as if it had been exercised under any other enactment—

- (a) that, with or without modification, replaces, or that corresponds to, the enactment repealed; and
- (b) under which the power could be exercised.

[36] The question of repayment of a presumed advance and reversion of shares held by the Māori Trustee to the other owners in a block was dealt with in the case *Māori Trustee v Ihaia*.<sup>20</sup> In that case Judge Armstrong held that the application of s 154 of the Māori Affairs Act 1953 is preserved by s 17 of the Interpretation Act 1999 because the right of the owners to return of the shares held by the Māori Trustee is an existing right which has not been affected by the repeal of the legislation. Similarly, the abolition of the conversion fund and return of shares to the owners upon repayment of the presumed advance is also

<sup>20</sup> *Māori Trustee v Ihaia – Omapere Taraire E & Rangihamama X3A (Aggregated)* (2014) 88 Taitokerau MB 9 (88 TTK 9).

part of the previous operation of the 1987 Act which is also preserved. Where shares were purchased under the conversion fund those shares are to be returned to the other owners who hold interests in the block at the time the shares are returned. In addition, Judge Armstrong held that the presumed advances regime could be amended so that upon repayment of the advance the shares of the Māori Trustee are cancelled, thus increasing the proportionate shares of the other owners in the block pursuant to s 18(1)(b) of the Act.

[37] Judge Armstrong also referred to the general objectives of the Court under s 17 of the Act in terms of the promotion of the retention of Māori land in the hands of the owners, as well as the desirability of giving effect to the wishes of the owners who approved the agreement with the Māori Trustee.

### Discussion

[38] Having considered the submissions of counsel, and the decision by Judge Armstrong in the *Māori Trustee v Ihaia* case, I find the arguments made by the Māori Trustee to be compelling. I agree with counsel for the Māori Trustee that the key provisions in s 154 of the Māori Affairs Act 1953 as amended by s 2 of the Māori Affairs Amendment Act 1987 are the opening words of that section, and paragraphs (a) and (b) of s 154. By those provisions if the Valuer-General had determined the value of shares in a block of land as at 1 April 1987, then pursuant to s 154(a) the Māori Trustee had a right to be repaid that sum, which was deemed to be a debt owed to the Māori Trustee. The provisions could not be any clearer in establishing a right in the Māori Trustee to be repaid.

[39] Section 154(b) also provides that the value of the shares established by the Valuer-General **shall be deemed to be an advance... made by the Māori Trustee... to the owners of the other shares...** In my view that confirms the existing right of the Māori Trustee to be repaid, and the duty of the other owners to repay the sum. Such rights are clearly preserved by s 17 of the Interpretation Act 1999 which provides that the repeal of an enactment does not affect an existing right or duty.

[40] I agree with the Māori Trustee that s 154(e) provides an alternative mechanism by which the owners in the block can accelerate the vesting of the shares and repayment of the presumed advance. The repeal of that provision does not affect the Māori Trustee's right to

be repaid, or, upon repayment, the obligation for the shares to be vested back in those to whom the presumed advance was made – i.e. the other owners in the block.

[41] Mr Koning sought to persuade me that the mechanism set out in s 154(e) involved a statutory “right” to acquire land at the option of certain persons. His argument was that since that right was not exercised at the date of repeal of the Māori Affairs Act 1953, the Māori Trustee and the owners had lost the right to engage in the repayment of the advance and acquisition of the shares. However, I think that is to misconstrue the nature of the rights and obligations existing between the Māori Trustee and the other owners at the time of repeal of the Māori Affairs Act 1953.

[42] I agree with the Māori Trustee that Judge Armstrong correctly applied ss 17 and 18 of the Interpretation Act 1999 to the presumed advance regime under s 154 of the Māori Affairs Act 1953 to preserve its effect.

[43] Thus the effect of the Valuer-General’s determination as to the value of the Poike 8E shares held by the Māori Trustee was that the owners of Poike 8E were deemed to owe a debt to the Māori Trustee of \$8700 as from the date of determination in 1987. The Māori Trustee had an existing statutory right to be repaid that amount, with the consequence that upon repayment of the presumed advance, the owners have a right to return of the shares to them pro rata to their shareholding in the block. These rights are preserved by operation of s 17 of the Interpretation Act 1999. Thus the assembled owners are entitled to pass a resolution authorising repayment of the advance thus triggering the return of the shares to them pro rata.

[44] Accordingly I will make orders confirming the resolution of the assembled owners that the presumed advance to the Māori Trustee be repaid, with the Māori Trustee to advise the Court as to whether orders should be made cancelling the shares or redistributing the shares amongst the owners upon receiving the funds.

**Other matters**

Manning Gibbs & Brown currently hold the proceeds of the lease to the Polytechnic, and has asked to be relieved of responsibility for the funds and to be paid for their work in administering the monies during the course of these proceedings. The Court has asked for an itemised invoice from Manning Gibbs & Brown before determining whether payment should be made in the amount requested. That invoice has not yet been received from Manning Gibbs & Brown and in the circumstances I consider that the matter should be referred to the trustees to resolve on receipt of an itemised invoice from Manning Gibbs & Brown. The Court has also received an invoice from the Polytechnic for the sum of \$181.12 for the hire of a room for the owners' meeting of the 14<sup>th</sup> March 2015. I will give directions regarding these matters at the end of this decision.

**Orders**

[45] The Court makes orders as follows:

- a) Pursuant to s 175 of the Act confirming the resolutions of the assembled owners made at the meeting of 14 March 2015;
- b) Pursuant to ss 215 and 219 of the Act constituting the Poike 8E Investigatory Trust with the objects of the trust to be as set out in the resolution of the meeting of assembled owners of 14 March 2015;
- c) Pursuant to ss 220 and 222 of the Act appointing Andrew Morrogh, Michael Gray, Shane Gibbons, Jack Bubba Paul and Patricia Burton as trustees of the Poike 8E Investigatory Trust and vesting the land and assets of the trust in them as trustees;
- d) Pursuant to s 242 of the Act directing Manning Gibbs & Brown to pay the sum of \$181.12 to Bay of Plenty Polytechnic in payment of Invoice IN028980 regarding room hire for the owners meeting in March 2015;
- e) Pursuant to s 242 of the Act directing Manning Gibbs & Brown to pay the balance of money held in their trust account on behalf of the owners of

Poike 8E to the trustees of the Poike 8E Investigatory Trust, and to provide an itemised invoice to the trustees for the work completed by Manning Gibbs & Brown in relation to administering the funds;

- f) Pursuant to s 242 of the Act directing the trustees of the Poike 8E Investigatory Trust to pay the sum of \$8,700 to the Māori Trustee in repayment of the presumed advance; and
- g) Directing the Māori Trustee upon receipt of the payment of the presumed advance to apply to the Court either for cancellation of the shares or for the shares to be distributed pro rata to the remaining owners in the block.

The foregoing orders to issue forthwith pursuant to rule 7.5(2)(b) of the Māori Land Court Rules 2011.

Pronounced in open Court at 2.25 pm in Hamilton on the 27th day of July 2015.

S Te A Milroy  
**JUDGE**