

**IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT**

A20130002529

UNDER Sections 237 and 238 of Te Ture Whenua Māori
Act 1993

IN THE MATTER OF Rakiura Māori Lands Trust

BETWEEN DEPUTY REGISTRAR, TE WAIPOUNAMU
MĀORI LAND COURT
Applicant

AND RAKIURA MĀORI LANDS TRUST
Respondent

Hearings: 21 Te Waipounamu MB 13-25, 11 July 2013
(Heard at Invercargill)
19 Te Waipounamu MB 275-311, 8 August 2013
(Heard at Christchurch)

Judgment: 22 November 2013

RESERVED JUDGMENT OF JUDGE S F REEVES

Introduction

[1] At the conclusion of the hearing of the application on 8 August 2013¹, I gave an oral decision setting aside the 2012 election of trustees and directing that a further meeting of beneficial owners be held to consider the election of trustees for appointment by the Court. I advised that written reasons for my decision would follow.

[2] Having reflected further on the evidence and case law, I now conclude that the results of the 2012 election of trustees should stand but that a further meeting of beneficial owners should be held to elect one further trustee.

Procedural background

[3] An application for replacement of two trustees was heard in Invercargill on 5 February 2013². At that hearing trustee Suzanne Spencer, who had passed away, was replaced, and the application to replace Philip Smith following his resignation as a trustee was adjourned.

[4] A number of beneficial owners and trustees attended that hearing, and a judicial conference was held to discuss concerns that had been raised about the trustee election at the Trust AGM in October 2012 whereby existing trustees Stephen Hartevelde and Theona Heaslip were re-elected.

[5] Richard Manning spoke on behalf of a number of beneficial owners who had raised concerns about pre-election process and the impact this may have had on the election result. Other trustees and owners present also spoke both in support and in opposition to the election result.

[6] An application for review of trust pursuant to s 231 of the Act was initiated on the Court's motion, and a further judicial conference was held in Invercargill on 11 July 2013 where, again, trustees and beneficial owners discussed the concerns that had been raised. At that hearing Philip Smith's replacement as a trustee was ordered.

¹ 19 Te Waipounamu MB 275-311 (19 TWP 275-311).

² 17 Te Waipounamu MB 77-89 (17 TWP 77-89).

[7] The review application was set down as a special fixture in Christchurch the following month, and I timetabled the filing of affidavit evidence in support and opposition of the trustee election result.

[8] At the commencement of the hearing on 8 August 2013, on the Court's motion, I substituted the review application with applications pursuant to ss 237 and 238. There were no objections to that course of action.

[9] On 31 October 2013 I issued directions to convene a further meeting of owners, and I now set out my final reasons why the 2012 election of trustees should *not* be set aside.

[10] At issue is the procedure for election of trustees in 2012, including pre-election process, and the effect this may have had on the final result.

Background

[11] The Rakiura Māori Lands Trust ("the Trust") is an ahu whenua trust which was constituted by the Māori Land Court in 1982. There are at least 4500 beneficial owners of nearly 100 blocks on Rakiura (Stewart Island). Mr Manning, who is in support of the application, and Mr Harteveld and Mrs Heaslip in opposition, are three of the five incumbent trustees (following the replacement of Suzanne Spencer and Philip Smith in 2013).

[12] The current trust order dated 6 October 2009 requires a minimum of five and a maximum of seven trustees. There is a three year rotation of existing trustees, with election of new trustees at the AGM of owners. Retiring trustees are eligible for re-election and re-appointment by the Court.

[13] Trustee election process is set out at clause 6 of the Trust order, and in the Standing Orders, which is an appendix to the trust order. Clause 6(e) of the trust order requires nominations to be called for at least 45 days prior to the AGM. Nominations are to be received by the Secretary no later than 28 days before the AGM.

[14] The rules regarding postal voting are set out in paragraph 8(v) of the Standing Orders which provides that postal voting is to be on forms approved by the trustees, and

returned to the Secretary no less than 48 hours prior to the AGM. Paragraphs 8(h) and (i) also provide for alternate and proxy voting on terms approved by the trustees from time to time.

[15] The date for the 2012 AGM was set at a trustees meeting on 22 July 2012 and notified to beneficial owners through the pre-notice of AGM sent out on 7 August 2012, 74 days prior to the AGM. This notice called for nominations of trustees and agenda items. Responses were required by 24 August 2012. The pre-notice stated:

The trustees would like to call for nominations to fill *three* vacancies arising from current trustees Stephen Harteveld and Theona Heaslip retiring by rotation, the retiring trustees making themselves available for re-appointment. (Emphasis added).

[16] The Notice of AGM was mailed to beneficial owners on 9 October 2013, after nominations closed and 11 days prior to the AGM. This included the annual report, agenda, minutes of the 2011 AGM and remote voting options for the meeting, including a postal voting form, and forms for appointment of proxies, alternates, and whānau trust representatives. The postal votes and other appointments were required to be returned by 12.00pm 18 October 2013.

[17] The postal voting form contained the following statement:

There are five nominations for the *two* vacant positions for Stephen Harteveld and Theona Heaslip retiring by rotation. These two existing Trustees along with three other nominations make themselves available for Election. The trustees have decided under Section 6 trustees, Clause b of the Trust Deed to set the number of trustees at five. This means there will only be two Trustees required from the coming election. You may vote for up to two people by ticking the box beside the person you wish to vote for. (Emphasis added).

[18] The AGM was held 20 October 2012 at Awarua Marae, Bluff. The result of the trustee election was: Theona Heaslip – 108 votes; Stephen Harteveld – 101 votes; Simon Gomez – 99 votes; Ray Smith – 68 votes; and Peter Vella – 60 votes.

Issues

[19] Mr Manning raises two main concerns about the pre-election process. Firstly, he says the trustees had not agreed the number of trustee positions to be available for election, and the discrepancy between the number of trustee vacancies in the pre-notice of AGM and notice of AGM caused confusion about the number of trustees being elected. Secondly there was insufficient time allowed for beneficial owners to return their postal votes. He says these matters were likely to have affected the election outcome because the vote was so close, and the 2012 election should be set aside to allow another election to take place.

[20] In response, Mr Hartevelde, who is the chair of the Trust, says the election result should stand. He says the number of trustee vacancies published in the pre-notice of AGM was an error that was subsequently corrected in the notice of AGM, and the election of trustees was conducted according to the standing orders of the Trust. He says the beneficial owners had sufficient time and opportunity to express their views about who they wanted as trustees.

[21] The issue for the Court is whether the election process was sufficiently flawed that the election result should be set aside and a fresh election ordered.

Submissions and evidence in opposition to the election result

[22] Mr Manning filed an affidavit and made oral submissions. He says the trustees never resolved to retain only five trustees following the resignation of Phillip Smith and subsequently Suzanne Spencer's death. The three trustee vacancies published in the pre-notice of AGM was consistent with his understanding there should be six trustees. He says Mr Hartevelde acted unilaterally in deciding to reduce to only two vacant positions.

[23] Secondly, Mr Manning says that the change from three to two vacant positions was confusing for owners in determining how to cast their votes.

[24] Mr Manning also presented a number of complaints he had received from owners about the delay in receiving their meeting packs. He says owners had an unreasonably short time to consider and return their postal votes by the cut-off date, and this disenfranchised owners. This would have been particularly so for whānau trusts holding shares as they would not have had sufficient time to consult their beneficiaries.

[25] We also heard from Mr Simon Gomez, who was an unsuccessful candidate for trustee. He supports Mr Manning's submissions and says the timing of the mail-outs did not give sufficient time for owners to react, and there was confusion over the number of trustee positions. He also said that if it had been clear prior to nominations closing that there were only two positions, nominees could have organised so that the vote was not split, and therefore have a better chance of unseating one of the existing trustees. Whilst possible, I can only view this suggestion as speculative because there can be no way of knowing whether the nominees would have been able to agree on such a course of action in any event.

Submissions and evidence in support of the election result

[26] Mr Harteveld filed an affidavit in response to the matters raised by Mr Manning and also made oral submissions. He says that the Pre-notice contained a clerical error indicating there were three vacancies instead of two. He says the trustees decided in February 2012 not to replace Suzanne Spencer after her death for cost reasons, and that decision was not re-visited by the trustees prior to the 2012 AGM.

[27] Once the issue concerning the number of trustee vacancies was raised by Mr Manning prior to the AGM, Mr Harteveld obtained legal advice which concluded that so long as the error was clearly explained at the AGM and correct voting process is used, that election of two trustees could not be challenged.

[28] In relation to the timing of the mail-out of voting papers, the annual report was delayed, which Mr Harteveld says was Mr Manning's responsibility. As soon as the reports were available on 9 October the meeting packs were mailed to the beneficial owners. There was also information about the AGM and nominees available on the Trust's web-site from the evening of 7 October.

[29] Mr Harteveld says the trustee election proceeded according to the process set out in the standing orders with a motion to confirm the election process, including the number of vacancies, held prior to the vote. This was passed without amendment. Once the election was completed, two further standing motions of the meeting were passed; to confirm the election results, and that the voting papers be destroyed.

[30] He says the trustee elections were keenly contested with robust debate but were procedurally fair. It was not clear that the owners who had complained had been prevented from voting, as most had attended the meeting in person.

[31] Mrs Theona Heaslip who was re-elected as a trustee also made oral submissions. She said that the Trust's election processes are sound, and that there have been close elections in the past without the furore which has resulted from the 2012 election. She says that after Suzanne Spencer's death the trustees decided to keep the number of trustees at five and this decision had not been re-visited.

Law

[32] The Māori Appellate Court and this Court have regularly canvassed the issues surrounding appointment of trustees to Māori land trusts. The law in this regard was considered by the Court of Appeal in the *Clarke v Karaitiana* decision:³

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

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

³ *Clarke v Karaitiana* [2011] NZCA 154, [2011] NZAR 370, at [51]-[53].

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

[33] I adopt the reasoning set out in this decision.

Discussion

Number of trustee vacancies

[34] There is no evidence the trustees discussed this issue prior to the 2012 AGM; or of any agreement or understanding that there would be six trustees and therefore three vacant positions available for election. To the contrary, Mr Harteveld, Mrs Heaslip, and Mr Fife all gave evidence that after the death of Suzanne Spencer in January 2012 there was agreement that five trustees would be maintained, and this had not been re-visited. Mr Manning in an email dated 7 October 2012 to the other trustees' states:

Discussion on the number of vacant positions was never held at either of our last two meets. Although personally in reading the Pre-Notice I saw the rationale for three vacancies due to the loss of Suzanne and I accepted this initiative on your part.

In my view this is tacit acceptance that the status quo was five trustees and that the trustees had not decided otherwise.

Discrepancy in trustee vacancies

[35] The next allegation is that Mr Harteveld unilaterally decided to reduce the number of vacancies between the pre-notice and the notice of AGM. The evidence does not bear this out. Firstly it is clear the trustees had not agreed to have six trustees. Secondly I accept Mr Harteveld's explanation that there was a clerical error on his part in the pre-notice, and this was corrected in the notice of AGM which included the voting papers.

Confusion caused to voters by discrepancy

[36] There was no doubt some confusion caused by the change in trustee vacancies, and this is borne out in the written complaints submitted by Mr Manning. I have accepted Mr Hartevelde's explanation of an error in the pre-notice, which was corrected in the notice of AGM, and then further explained at the AGM. I find that the owners had sufficient notice of the final number of vacancies and that the discrepancy was not of such significance as to undermine the election process.

[37] In any event there was an opportunity at the AGM for owners to amend the number of nominees in the standing motion to confirm the election process. The number of candidates was affirmed without amendment, or much in the way of opposition as confirmed in an email to Richard Manning from Ulva Goodwillie dated 22 October 2012 where she says:

I was the only objector to the motion for 2 candidates on the voting paper. The original pre-AGM material was three – or totally unclear. After the legal explanation by the Trustees were (sic) given, the motion was passed to vote for two candidates only.

Delay in receipt of voting papers

[38] There are no time limits in the Trust rules for distribution of postal voting forms to owners prior to an AGM. The standing orders provide that the postal voting forms shall be available upon request and returned no less than 48 hours prior to the meeting. The issue is whether the time allowed for owners to return their votes was sufficient, specifically whether owners had time to return postal votes two days prior to the meeting.

[39] On the evidence before me, if I allow for a standard three days postal delivery time each way, then owners would have had a minimum of two to three days to complete and post their votes. Although not ideal, in all the circumstances I find this was sufficient time.

[40] Owners had been aware of the AGM date since early August, and Mr Gomez's evidence was that information about the election and nominees was on the Trust website on the evening of 9 October. There was a conflict in the evidence from Mr Gomez and Mr Hartevelde about when the postal voting form was available on the web-site. Mr Gomez

says it was not there on 9 October, whereas Mr Hartevelde believes he had put it up on that date, but accepted that if it wasn't available on 9 October, it would have been available by the following Friday 14 October following his return from work in Wellington.

[41] Mr Manning supplied the Court with eight written complaints from owners about the delay in receipt of voting papers. I have reviewed those complaints and at least six of the complainants attended the AGM in person. I am unable to determine from their letters whether the other two complainants were at the AGM. Presumably those complainants who attended the AGM were in a position to vote, and therefore I cannot find that they were prejudiced by any delay in receipt of voting papers. In any event, voting papers were destroyed after the AGM so I am unable to verify which owners voted.

Decision

[42] In my assessment of the evidence there is nothing to show that the trustees departed from the election processes set out in the trust order or that there were any other procedural defects. There was some ambiguity in the number of vacant trustee positions, but this was an error, and there was sufficient opportunity to correct that error. I have found the time allowed to return postal votes by mail was sufficient, although I acknowledge it would have been preferable if there had been more time allowed. The trustees must ensure they allow for this in their preparations for the next AGM.

[43] The Court of Appeal observed in *Clarke v Karaitiana* that the Court is not bound to appoint the leading candidates elected by beneficial owners, but will ordinarily give substantial weight to the views of owners as demonstrated by the outcome of an election. If the Court is not going to appoint the leading candidates then it must be satisfied that either or both requirements in s 222(2)(b) are absent.

[44] In this case I am satisfied that the beneficial owners had sufficient time and opportunity to express their views at the 2012 AGM about who they wanted as trustees, and that the Court has received a proper indication of those views. Having carefully considered the evidence and submissions I am not persuaded that the Court should intervene to overturn the outcome of the 2012 AGM.

[45] I make the following comments by way of observation: the Trust has comprehensive election processes designed to secure wide owner participation. However given the location of the AGM and the large and wide-spread ownership there is an over dependence on mail-outs to owners, which can be time consuming, expensive and slow. Further development of the trustees' ability to communicate with the owners through email, the web-site, and other social media is necessary to improve communication and owners' participation. In the short term the Trust should ensure that AGM documents including downloadable voting forms are on the website three weeks prior to the AGM, and also that voting forms can be returned by fax, and email.

[46] In my directions of 31 October 2013 I directed that a further meeting of owners be convened to elect one further trustee, which would bring trustee numbers to six. I found as a matter of evidence that the trustees had not decided to increase the number of trustees to six prior to the 2012 AGM, however it was clear from the evidence that the current trustees are stretched in their work-load and there is owner dissatisfaction with the ability of the present trustees to get things done. The appointment of a further trustee will ensure further trustee resource is available.

Dated at Wellington this 22nd day of November 2013.

S F Reeves

JUDGE