IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20140003345
A20140003346

UNDER	Section 19, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Te Tii (Waitangi) B3 Ahu Whenua Trust
BETWEEN	RICHARD BOYD TAKIMOANA MEREAWAROA DAVIES Applicants

A20140003363

UNDER	Section 18(1)(a), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Lot 18 DP 61631
BETWEEN	MEREAWAROA DAVIES Applicant

A20140003364

UNDER	Section 18(1)(a), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Lot 16 DP 61631
BETWEEN	RICHARD BOYD TAKIMOANA Applicant

Hearing: 9 September 2014
(Heard at Whangarei)

Judgment: 31 October 2014

RESERVED JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Richard Boyd Takimoana and Mereawaroa Davies are occupying residential properties at Te Tii, Waitangi pursuant to leases granted by the Te Tii (Waitangi) B3 Ahu Whenua Trust ("the Trust"). The fixed term of both leases expired on 26 July 2013. On or around 13 December 2013 a notice to quit was served on behalf of the Trust on both Richard and Mereawaroa requiring them to vacate and deliver possession of the land.

[2] On 7 March 2014 Richard and Mereawaroa filed various applications seeking relief from this Court. Those applications include:

(a) Applications by Richard and Mereawaroa per s 19(1)(b) of Te Ture Whenua Māori Act 1993 ("the Act") seeking an urgent injunction preventing the trustees from evicting them from the land.

(b) Applications by Richard and Mereawaroa seeking a determination per s 18(1)(a) of the Act that the trustees are acting in breach of their duties and are estopped from purporting to evict them from the land.

Background

[3] The Trust was constituted on 15 April 1954.[1] The current trustees are Pita Apiata (Jnr), Maryanne Baker, Hinewhare Harawira, Leon Gary Penney, George Riley, Marina Taituha, Wiremu Leslie Tane, Ngareta (Kim) Vlaardingerbrook and Albie Apiata.[2]

[4] In *Baker – Te Tii (Waitangi) B3 Trust*,[3] Judge Ambler set out a helpful summary concerning the history of the Trust. Relevant extracts from that judgment are reproduced below.

> *The land and the Trust*
>
> [11] The land known as Te Tii was part of an area that was originally alienated to Henry Williams prior to the Treaty of Waitangi. In 1839 Henry Williams returned the Te Tii block. In 1968 Judge Nicholson of this Court summarised his understanding of the history of the land:
>
> > ...Going back into the history just a little bit – the list of owners at present in force was fixed in 1891 by the Māori Appellate Court and some successions were recorded up to 1918. There were 253 names on the 1891 list and there are 273 names on the list in 1918 when it was before the Court again. There

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1 28 Bay of Islands MB 110 (28 BI 110).
2 80 Taitokerau MB 233 (80 TTK 233).
3 *Baker – Te Tii (Waitangi) B3 Trust* (2011) 19 Taitokerau MB 116 (19 TTK 116).

> have been no successions recorded since then on Te Tii B so the land really and truly is the Ngati Rahiri and its descendants of those original 253 people who were verified in 1891 as being the owners. It was fully considered then. I have read all the records starting from when the land had been sold and was then given back to the people. It was given by Henry Williams in 1839 to Wi Kemara and the Ngati Rahiri and in 1891, after some arguments, there being no descendants of Wi Kemara, the only owners were the Ngati Rahiri they were listed and with 251 people.

> [12] Judge Nicholson's reference to "253" owners is a mistake: the 1891 list of owners shows there to be 251 owners of which approximately 90 were minors. The Court did not determine the relative interests of the owners and today the owners are not recorded as having any individual shares, that is, their shares are shown as "0".

> [13] By the time the Trust was established in 1954 this part of the Te Tii block was known as Te Tii B and eventually came to be known as Te Tii (Waitangi) B3. The land was subsequently subdivided, some areas were sold, and today 70 Māori freehold land blocks remain under the administration of the Trust. The land is adjacent to the Waitangi Marae, Te Tii (Waitangi) A, which is under separate administration. Four of the blocks are under commercial leases, some of which are due to expire in 2014. There are approximately 45 residential properties which are rented to beneficiaries or members of their whanau. The Trust also operates a holiday park and a backpacker accommodation business on parts of the land.

> [14] The Court's record shows there to be 1,317 owners. However, as Judge Nicholson intimated, successions have been sporadic and it seems that many beneficiaries are divided on whether successions are even appropriate for this land. The lack of successions is also explained by the fact that the trust order provides that the beneficiaries are the "descendants" of the original 251 owners. Thus, from its inception the Trust has operated much like a whenua topu trust and it is the whakapapa to the original 251 owners that determines the beneficiaries and not the Court's list of owners. The current beneficiaries are estimated to number more than 5,000, though a register is not kept.

[5] Richard Takimoana is the only surviving child of Rufus and Frances Takimoana. Richard is a beneficiary of the Trust through his father being a descendant of Putiputi Apiata one of the original 251 owners.

[6] Mereawaroa Davies is the daughter of Dennis and Te Whakaiti Takimoana. Mereawaroa is also a beneficiary of the Trust through her father as a descendant of Putiputi Apiata.

[7] In the late 1960s Richard's and Mereawaroa's parents, along with a number of other families, were living on the camp ground lands owned by the Trust.[4] They did so without any grant or consent from the Trust. In 1968, the trustees in office at that time took steps to remove those families from the camp ground.

[8] The minutes of a trustee meeting dated 13 December 1968 record the following:[5]

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4 Waitangi Holiday Park – Te Ti B Part Being Lot 3-9 DP 61631.

5 Affidavit of Wiremu Tane sworn 9 May 2014 Exhibit M.

> Notify squatters they are to vacate the land by the 1st of February 1968 otherwise other action will be taken.
>
> Offer them the choice of applying to the Māori Affairs Dept for housing assistance also apply to the Trust for a section.

[9] Both Richard's and Mereawaroa's parents took up that offer.

[10] On or around 1 December 1971 Mereawaroa's parents entered into a lease over Lot 18 DP 61631, CT NA18A/618 ("Lot 18"). The lease was registered against the title as Lease 265702. The terms of that lease include:

(a) The lease was for an initial fixed term of 21 years from 27 July 1971;

(b) The lessee had a perpetual right of renewal of the lease as provided for in ss 2 – 20 of the First Schedule to the Public Bodies Leases Act 1969;

(c) Upon determination of the lease the lessee had to yield and deliver to the lessor the land and all buildings, fences, hedges, gates, drains and sewers in good condition;

(d) No compensation was payable to the lessee as a result of improvements made or erected upon the land;

(e) Rent was fixed for the first 10 years at $1.00 per week. After that rent was to be reviewed in accordance with s 22 of the Public Bodies Leases Act 1969.

[11] In 1971 Richard's parents entered into a lease over Lot 16 DP 61631, CT NA18A/616 ("Lot 16"). The lease was registered against the title as Lease 265700. A copy of that lease is no longer available however all parties agreed that it was identical in its terms as the lease to Mereawaroa's parents over Lot 18 dated 1 December 1971.

[12] On or around 9 February 1979 both Richard's and Mereawaroa's parents signed new leases ("the substituted leases") in relation to Lot 16 and Lot 18 respectively. The original leases ("the perpetual leases") were surrendered. The terms of the substituted leases for Lot 16 and Lot 18 were identical. Those terms include:

(a) The term of the lease was fixed for a period of 42 years from 27 July 1971 terminating on 26 July 2013;

(b) At the end of the fixed term there was no right of renewal of the lease;

(c) The rent was fixed for that 42 year period at $1.00 per week;

(d) At the end or sooner determination of the term the lessee must yield up to the lessor all buildings, fences, gates, hedges, culverts, drains and other improvements in good condition;

(e) No compensation is payable to the lessee in respect of any improvements effected by the lessee on the land;

(f) The lessee is not entitled to remove any buildings or improvements from the land.

[13] Rufus Takimoana passed away on 25 July 1986. On or around 22 May 1992 Frances Takimoana assigned the substituted lease of Lot 16 to Richard. The Trust consented to the assignment and it was registered against the certificate of title. Frances Takimoana passed away on 11 August 2002. Both she and her husband Rufus resided at the property at Lot 16 until their deaths. Richard now lives in the property at Lot 16 with his family.

[14] Te Whakaiti Takimoana passed away on 22 August 2011. Dennis Takimoana passed away on 15 July 2013. They lived at the property at Lot 18 until their deaths. Mereawaroa now occupies the property at Lot 18 with her family.

[15] On or around 13 December 2013 the Trust served a notice to quit on both Richard and Mereawaroa requiring that they quit and deliver possession of Lot 16 and Lot 18. The notice was served on the applicant's Counsel Mr Peters. Mr Peters initially advised that he did not have instructions to accept service. Instructions to accept service were subsequently received and so service of the notice is not in issue.

[16] Richard and Mereawaroa now seek relief from this Court.

Issues

[17] The applications filed by Richard and Mereawaroa are largely identical. They are both seeking a determination per s 18(1)(a) of the Act on the basis that the trustees have acted in breach of their duties and that they are estopped from purporting to evict them from the land.

[18] Initially both Richard and Mereawaroa sought urgent injunctions preventing the trustees from evicting them from the land until the substantive issues had been determined. By letter dated 13 March 2014 counsel for the Trust, Mr Magee, provided an undertaking on behalf of the Trust that they will not seek to act on the notice to quit served on the applicants until the substantive proceeding has been determined by the Court.

[19] By memorandum dated 19 March 2014 counsel for the applicants, Mr Peters, advised that on the basis of that undertaking the applications for injunction were to be adjourned in favour of determining the substantive issues before the Court.

[20] As such it is not necessary to address the applications seeking urgent injunctive relief.

[21] The matters in issue between the parties were refined during the course of the hearing. The following issues now arise for determination by the Court:

(a) Do the applicants have standing to bring the proceeding?

(b) Have the trustees acted in breach of their duties by terminating the leases over Lot 16 and Lot 18 or if not is any such decision nevertheless invalid?

(c) Are the trustees estopped from purporting to evict Richard and Mereawaroa from the land?

(d) If estoppel arises, do the affirmative defences of laches or acquiescence apply?

Do the applicants have standing to bring the proceeding?

[22] Mr Coutts appeared at the hearing on behalf of the Trust with the leave of the Court. Mr Coutts did not raise any issue as to the standing of the applicants. Certainly there could be no issue with Richard given that he took an assignment of the substituted lease over Lot 16 from his mother. Mereawaroa however did not. The substituted lease over Lot 18 is still registered in her parents' names. Given that standing was not in issue before me I have not addressed this matter in any detail.

[23] From my review of the authorities Mereawaroa would have standing if she obtained Letters of Administration with respect to her father's estate.[6]

[24] Letters of Administration have not been obtained. Mereawaroa gave evidence that her father died intestate and she has applied to the Māori Land Court for succession to his Māori land interests. Court staff were unable to locate any such application. An application to constitute a Whānau Trust was appended to Mereawaroa's affidavit filed with the Court.

[25] Despite this, Mereawaroa, with the support of her siblings, would be entitled to apply for Letters of Administration appointing her as the administrator of her father's estate. In the absence of any protest as to her standing there is no apparent reason why I should require Letters of Administration to be obtained in this case. Requiring such a procedural step would only result in further cost and delay. Throughout this proceeding all parties have sought to adopt a pragmatic approach to address the substantive issues before the Court in an efficient manner.

[26] Even in the absence of Letters of Administration, Mereawaroa has sufficient standing to bring these applications as someone who can claim to have an interest in the matter as per s 37(1)(a) of the Act.[7] On the basis of the evidence before the Court Mereawaroa (along with her siblings) is entitled to succeed to her father's estate. She is also entitled to apply for Letters of Administration with respect to the estate.

Have the trustees acted in breach of their duties by terminating the leases over Lot 16 and Lot 18 or if not is any such decision nevertheless invalid?

[27] Mr Peters, on behalf of the applicants, argues that the trustees have breached their duties in seeking to terminate the leases over Lot 16 and Lot 18. In the alternative Mr Peters argues that in making this decision the trustees did not follow the proper process and did not take into account all relevant matters. As such, Mr Peters asserts that any such decision was invalid.

Submissions for the applicants

[28] Mr Peters referred to s 17 and the Preamble to the Act which set out the core objectives of the Act. This is to promote the retention of the land in the hands of its owners their whānau and their hapū and to facilitate occupation, development and utilisation of the land for the benefit of the

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6 Administration Act 1969, ss 2, 24, 29, 30, 77; see also *Lazarus – Peter Pene Mosses* (2010) 9 Taitokerau MB 197 (9 TTK 197); *Mackley v Nutting* [1949] 1 All ER 413 (CA); Perpetual Lease clause 24; Substituted Lease, recitals.

7 *Paul – Motatau 1B3A* (2010) 11 Taitokerau MB 212 (11 TTK 212); *Moetara – Pakanae 2Y3A* (2014) 88 Taitokerau MB 242 (88 TTK 242).

owners, their whānau and their hapū. Mr Peters also referred to the decisions in *Rameka v Hall*[8] and *Larkins v Kaitaia*[9] which emphasised the importance of these objectives.

[29] Mr Peters argued that an Ahu Whenua Trust is established within this overall statutory scheme and therefore the duties of the trustees must be flavoured by the overall objectives of the Act. In the present case Mr Peters argues that with respect to Lot 16 and Lot 18 the trustees should be promoting the retention, use and occupation of these blocks by the beneficiaries of the Trust and in particular in favour of Richard and Mereawaroa given that they and their families have occupied these blocks for an extended period of time.

[30] Mr Peters also argued that there are a number of general trustee duties which are relevant in the present case. This includes: adhering rigidly to the terms of the trust; acting fairly by all beneficiaries; exercising powers for proper purposes; ensuring that the trustees' actions are not based on a mistake; and acting in the best interests of the beneficiaries.

[31] Mr Peters relied on the decision in *Re Schroder*[10] where the trustees were criticised for their active opposition to one beneficiary in the name of future (including unborn) beneficiaries.

[32] Mr Peters referred to the objects of the Trust as set out in the Trust Order and argued that while the trustees may have a discretion in terms of their decision making, they are obliged to take into account all relevant circumstances having regard to their terms of trust when exercising that discretion. Mr Peters contends that if the trustees do not follow this process their conduct amounts to a breach of trust. In particular, Mr Peters argued that there is a requirement for the trustees to apply their mind to the best interests of the beneficiaries and they are not entitled to take into account matters which cannot lawfully be put into effect as to do so would deny the very objects of the Trust Order.

[33] In the present case Mr Peters argued that the trustees intend to use Lot 16 and Lot 18 for commercial development. Mr Peters states that this is not within the confines of the Trust Order, is contrary to the previous utilisation of the land, and is inconsistent with the zoning restrictions concerning Lot 16 and Lot 18. Mr Peters argued that as such the trustees had misdirected themselves in deciding to terminate the leases over Lot 16 and Lot 18 on the basis of pursuing commercial development which they could not give effect to. Mr Peters contends that the trustees failed to give due weight to the position of the applicants as beneficiaries of the Trust and the overall objectives of the Act of promoting retention and utilisation of the land by the owners.

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8 *Rameka v Hall* [2013] NZAR 1208 (CA).
9 *Larkins v Kaitaia – Waihou Hutoia D2A Block* [2013] Māori Appellate Court MB 159 (2013 APPEAL 159).
10 *Re Schroder's Wills Trusts* [2004] 1 NZLR 695.

[34] In support of this argument Mr Peters produced a commentary in the form of a summary chart from the Westlaw NZ Electronic Library[11] Mr Peters contends that this sets out the various steps that trustees must take in exercising a discretionary power.

[35] During the hearing I raised with Mr Peters whether these issues properly fall within the Court's jurisdiction under s 18(1)(a) of the Act. The conventional approach would be to raise matters concerning trustee decision making and the exercise of trustee powers pursuant to Part 12 of the Act such as an application for the enforcement of obligations of trust as per s 238. Mr Peters submits that in the present case such issues were relevant as to whether there had been a valid exercise of the powers of the trustees to terminate the leases over Lot 16 and Lot 18. Mr Peters contends that this falls within the jurisdiction of s 18(1)(a) of the Act as the Court is being asked to determine whether those leases have been properly terminated or whether the applicants have ongoing rights of occupation with respect to Lot 16 and Lot 18.

Submissions for the Trust

[36] Mr Coutts, for the Trust, argued that the principles and objectives of the Act as set out in the Preamble and s 17 are matters for the Court to take into account in the exercise of the Court's jurisdiction. Mr Coutts argued that these objectives are not obligations owed by the trustees in the exercise of their office.

[37] Mr Coutts also argued that even if one was to apply the principles and objectives of the Act, promoting the retention of the land in the hands of the owners, their whānau and their hapū and facilitating the occupation, development and utilisation of the land for the benefit of the owners does not restrict the trustees in how the land is to be utilised. In particular, Mr Coutts argued that these objectives do not require the trustees to apply the land for the direct use by the beneficiaries as long as any use is in the best interests of the beneficiaries.

[38] In relation to the decision-making process carried out by the trustees Mr Coutts argued that this Trust is one of the better administered trusts in the Taitokerau district. Mr Coutts also argued that the trustees took into account all relevant matters in making their decisions concerning the leases over Lot 16 and Lot 18.

[39] Mr Coutts submits that it is for the trustees to manage and administer the land and it is only if they act in breach of their powers or their duties that the Court should intervene. Mr Coutts

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[11] Kenny J, Trusts: A – Z of New Zealand Law, part 6.6, Summary Chart, Westlaw New Zealand online commentary

contends that such a breach, or the requirement for intervention, has not been made out in the present case.

[40] Mr Coutts further argued that the general objectives of the Act have already been taken into account by settling this land into the Trust. Mr Coutts argued that the effect of the Trust is for the land to be managed and administered by the trustees for the benefit of the beneficial owners.

[41] Finally, Mr Coutts contends that the trustees have not in fact made a decision to evict the applicants and their families from the land. Rather, the trustees are simply seeking a determination as to the current status of the leases over Lot 16 and Lot 18 and in particular whether there are any ongoing rights in favour of the applicants or ongoing obligations on the trustees. If the Court determines that those leases have properly come to an end, the trustees then intend on entering into further discussions with the applicants as to the potential grant of a residential tenancy to allow continued occupation of Lot 16 and Lot 18 by the applicants and their families.

Discussion

[42] Mr Peters argues for a very narrow interpretation of the trustees' powers with respect to Lot 16 and Lot 18. In effect, Mr Peters argues that taking into account the objectives of the Act, the duties on the trustees, the zoning restrictions with respect to this land, and the previous occupation of this land by the applicants and their families, the trustees have no option other than to continue to grant occupation rights to the applicants. The trustees' powers are not restricted in this way.

[43] Section 223 of the Act states:

> **223 General functions of responsible trustees**
>
> Every person who is appointed as a responsible trustee of a trust constituted under this Part of this Act shall be responsible for—
>
> (a) Carrying out the terms of the trust:
>
> (b) The proper administration and management of the business of the trust:
>
> (c) The preservation of the assets of the trust:
>
> (d) The collection and distribution of the income of the trust.

[44] Section 226 of the Act states:

226 General powers of trustees

(1) The Court may, in the trust order, confer on the trustees such powers, whether absolute or conditional, as the Court thinks appropriate having regard to the nature and purposes of the trust.

(2) Subject to any express limitations or restrictions imposed by the Court in the trust order, the trustees shall have all such powers and authorities as may be necessary for the effective management of the trust and the achievement of its purposes.

[45] Clause 1 of the Trust Order States:

OBJECTS

1. Subject to any express restriction, the objects of the Trust shall be to promote and facilitate the occupation, use, development and administration of the land for the benefit of the beneficiaries, to ensure the retention of the land by the trustees, to represent the beneficiaries in all matters relating to the land.

[46] Clause 6 of the Trust Order states:

6 FUNCTION OF TRUSTEES

6.0 The functions of the trustees shall be to administer the assets and revenue of the Trust in accordance with the provisions of Section 215 of Te Ture Whenua Māori Act 1993 for the general benefit of those descendants of the original 251 tupuna listed in the first schedule.

[47] Clause 5.0, 5.2 and 5.5 of the Trust Order states:

5 POWERS OF TRUSTEES

5.0 TO develop the land or part or parts thereof as the trustees may from time to time decide for residential, commercial, agricultural, horticultural and silvicultural purposes and such other purposes as the trustees see fit and for such purposes to employ surveyors, architects, land agents or contractors to prepare plans, make roads, lay drains and do all such other acts and deeds as may in the opinion of the trustees be necessary or desirable for the carrying out of such development, PROVIDED that the trustees shall not transfer the fee simple of the whole or any parts of the land.

…

5.2 TO lease any allotment or allotments or any larger parts at such rental and upon such terms of renewal, payment of compensation and other conditions and to grant renewals of such leases and to accept surrenders thereof.

…

5.5 TO issue and prosecute and to defend and to counterclaim in the Māori Land Court and in any other Court of New Zealand all or any class of proceeds with which the trustees may determine or in which they are named as a party.

[48] These provisions in the Act and the Trust Order all indicate that the trustees have a wide range of powers in administering these lands. The options available to the trustees in how to utilise Lot 16 and Lot 18 are not limited in the manner contended for by Mr Peters.

[49] This approach is supported by a decision of the Māori Appellate Court in *Eriwata – Waitara SD*[12] where the Court found:

> [5] When trustees are appointed to an Ahu Whenua Trust, they take legal ownership. The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Māori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

[50] The same applies in the present case. It is for the trustees to decide who should continue to occupy Lot 16 and Lot 18. Their powers are not limited in the manner contended for by Mr Peters. The approach in *Eriwata*[13] is not new or novel in the context of trust administration. A similar approach has been adopted in other jurisdictions. *Re Brockbank (deceased),*[14] *Re Whichelow*[15] and *Re Steed's Will Trusts,*[16] are all examples where the English courts have expressed reluctance to interfere with decision making by trustees.

[51] I do accept that the Court can intervene in trustee decision making in some limited circumstances. While the above decisions show a general reluctance to do so, intervention can be justified in certain cases. There is no evidence to suggest that those circumstances apply here.

[52] In evidence, the Chairperson of the Trust Mr Tane confirmed that the process adopted by the Trust in terms of terminating these leases and delivering the notice to quit was approved by a majority of trustees at a trustee meeting.[17]

[53] Mr Tane refutes that the trustees intend to use Lot 16 and Lot 18 for commercial development. He states that this has never been raised during his time as trustee and that the

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12 *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust – Waitara SD s6 and 91 Land Trust* (2005) 15 Aotea Appellate MB 192 (15 AOT 192). This finding was endorsed in the subsequent decision of the Maori Appellate Court in *Nicholls v Nicholls – Part Papaaroha 6B* [2013] Māori Appellate Court MB 598 (2013 APPEAL 598).

13 *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust – Waitara SD s6 and 91 Land Trust (2005) 15 Aotea Appellate MB 192 (15 AOT 192).*

14 *Re Brockbank (deceased), Ward v Bates* [1948] 1 All ER 287.

15 *Re Whichelow, Bradshaw v Orpen* [1953] 2 All ER 1558.

16 *Re Steed's Will Trusts, Sanford v Stevenson* [1960] 1 All ER 487.

17 88 Taitokerau MB 372 (88 TTK 372).

trustees are of the view that these properties will continue to be used for residential accommodation.[18]

[54] Mr Tane stated that the trustees have been actively recovering the Trust's leasehold properties for some time. This has included recovery of at least seven leasehold premises where those leases had expired since 2005.[19] The Trust's general approach is to then offer a residential tenancy to those previously in occupation under the lease.[20]

[55] Mr Tane gave evidence that the trustees prefer residential tenancies over registered leases as it allows a more fair and equitable process so that the trustees can act for the benefit of all beneficiaries.[21] Mr Tane advised that when dealing with vacant properties in the trust's residential portfolio, the trustees offer the properties to beneficiaries first, and it is only if there are no beneficiaries who wish to occupy the properties, that they are then offered to those outside of the beneficiary class.[22]

[56] Mr Tane stated that they have an informal policy of offering one residential property per family of the original 251 owners.[23] This approach is to try and ensure that the opportunity to occupy the properties is offered evenly amongst the beneficiaries so that the properties are not dominated by any particular family. Even on this approach with only 45 properties, 251 original owners, and an estimated 5,000 beneficiaries, there are simply not enough properties for all beneficiaries to occupy.

[57] On the face of it this policy would cut across the applicants in the grant of future residential tenancies over Lot 16 and Lot 18 as they both descend from Putiputi Apiata. However, Mr Tane confirmed that previous occupation by a beneficiary would still be taken into account by the trustees.[24] As such this policy is in effect a guide and is not inflexible. In the present case they will be looking to negotiate first with the applicants given their previous occupation of the properties.[25]

[58] It is also important to note that the trustees have not yet made a decision on the future use of Lot 16 and Lot 18. The notice to quit that was served on both Richard and Mereawaroa does state that the applicants and their families are required to quit and deliver possession of the land. Those notices give the clear impression that the trustees require the applicants to vacate the land.

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18 Affidavit of W Tane sworn 9 May 2014 paragraph 26. 88 Taitokerau MB 356 and 361 (88 TTK 356,361).
19 Affidavit of W Tane sworn 9 May 2014 paragraph 12.
20 88 Taitokerau MB 374 (88 TTK 374).
21 88 Taitokerau MB 365 (88 TTK 365).
22 88 Taitokerau MB 365 (88 TTK 365).
23 88 Taitokerau MB 362 (88 TTK 362).
24 88 Taitokerau MB 362 (88 TTK 362).
25 88 Taitokerau MB 356 and 374 (88 TTK 356, 374).

However, Mr Tane has confirmed on behalf of the Trust that this is not necessarily the case. The trustees are attempting to bring the current lease arrangements to an end to ensure something of a clean slate before entering into negotiations with the applicants about potential further occupation rights by way of a residential tenancy.[26] This approach was also confirmed in submissions by Mr Coutts on behalf of the Trust, in a file note from Mr Tane following a meeting he had with the applicants on 17 July 2013,[27] and in correspondence from Mr Tane to the applicants' legal advisors.[28]

[59] Based on this evidence, it reasonably appears that the trustees are acting for the benefit of the beneficiaries as a whole. I do not consider that they are acting in bad faith or with improper motive. Their approach to Lot 16 and Lot 18 is consistent with their general approach in relation to the Trust's leasehold properties. They are faced with a difficult decision concerning the ongoing use and occupation of Lot 16 and Lot 18 but such decisions are for the trustees to make.

[60] I am also unable to find any breach of trust as contended for by Mr Peters. The trustees' decision is not in breach of the Trust Order nor is it contrary to the general functions of trustees as per s 223 of the Act or the general powers of the trustees as per s 226 of the Act.

[61] Mr Peters relied on the decision in *Re Hastings-Bass*[29] where the Court found that in a clear case on the facts the Court can put aside the purported exercise of a fiduciary power if satisfied that the trustees never applied their minds at all to the exercise of the discretion entrusted to them. In that case the Court did intervene as there was a total failure on the part of the trustees to consider whether or not in their discretion Camel Hill Farm ought to go to John Gregory Turner. The trustees in that case did not appreciate that they had a discretion to exercise at all. This does not apply in the present case.

[62] Mr Peters also referred to the decision in *Re Schroder*.[30] In that case Nicholson J referred to the decision of *Alsop Wilkinson (a firm) v Neary and others*[31] where the Court held:

> In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in *Merry's* case) offer to submit to the court's directions, leaving it to the rivals to fight their battles.

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26 88 Taitokerau MB 369-370 (88 TTK 369-370).
27 Affidavit of W Tane sworn 9 May 2014 exhibit AU.
28 Affidavit of R Takimoana sworn 7 March 2014 exhibit I.
29 *Re Hastings-Bass* [1975] CH 25; [1974] 2 All ER 193.
30 *Re Schroder* [2004] 1 NZLR 695.
31 *Alsop Wilkinson (a firm) v Neary and others* [1996] 1 WL:R 1220 at 1225.

[63] Nicholson J went on to criticise the trustees in that case as they were in effect siding with one group of beneficiaries over another when they should have left it to the beneficiaries to prosecute their respective arguments before the Court.

[64] These circumstances do not apply here. This is not a case where there is a dispute between two competing groups of beneficiaries and the trustees are taking sides with one group against the other. The applicants have initiated this proceeding against the Trust. The trustees are entitled to defend themselves.[32]

[65] The trustees have also emphasised that they are simply seeking a determination on the current status of the leases so that they can then make a decision concerning the future utilisation of the land. Such future use includes the potential grant of a residential tenancy to the applicants. This is not a case of the trustees' unfairly targeting one group of beneficiaries. Their actions are consistent with their overall approach in other cases involving the expiration of leases. The principles expressed in *Re Schroder*[33] do not apply.

[66] Mr Peters argued that the process required for the exercise of discretionary powers by the trustees as set out in the summary chart in the Westlaw commentary[34] was not followed in the present case. During the hearing I asked Mr Peters what authority he relied on to support the approach contended for in that commentary. Mr Peters referred to the decision of *McPhail v Doulton*.[35] In that case the House of Lords had to consider whether a trustee's power of appointment among classes is valid where it would be impossible to determine every member of the class or whether the power would fail for uncertainty. The House of Lords found that the power would be valid if it could be said with certainty that any given individual was or was not a member of the class although it would be impossible to determine the entire class. The decision in *McPhail* does not address the steps set out in the commentary as contended for by Mr Peters.

[67] That commentary also references an earlier decision of the House of Lords in *Re Gulbenkian's Settlement Trust.*[36] That decision concerned a similar issue as in *McPhail* and again does not address the steps set out in the commentary.

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32 Clause 5.5 of the Trust Order specifically states that the trustees are empowered to defend themselves in proceedings before the Maori Land Court where they are named as a party

33 *Re Schroder* [2004] 1 NZLR 695.

34 Kenny J, Trusts: A – Z of New Zealand Law, part 6.6, Summary Chart, West Law New Zealand online commentary

35 *McPhail v Doulton* [1972] 2 All ER 220.

36 *Re Gulbenkian's Settlement Trust* [1968] 3 All ER 785.

[68] Given the lack of authority in relation to this commentary, it is not clear what the status of that commentary is. In any event, as set out in the evidence of Mr Tane referred to above, I consider that the trustees have taken into account all relevant matters in this case.

[69] For these reasons I do not consider that the trustees are acting in breach of their duties. I have not seen any evidence to suggest that they have breached the Trust Order, the Act, or general trustee' duties in relation to this matter.

[70] Nor have I seen any evidence to suggest that the trustees have failed to adopt a proper process in making their decisions concerning Lot 16 and Lot 18. The decision was approved by a majority of trustees at a trustee meeting. The approach is also consistent with earlier decisions made by the trustees concerning the recovery of leasehold premises where the lease had expired.

[71] The decisions that they are making concerning the ongoing use of Lot 16 and Lot 18 are difficult decisions but they are decisions for the trustees to make. The evidence suggests that the trustees are trying to implement policies that favour occupation by the beneficiaries and that allows a broad range of the beneficiaries to have the opportunity to occupy the properties. Those policies are not inflexible and the trustees will consider a particular case before them. In doing so the trustees are reasonably acting in the best interests of the beneficiaries as a whole. Perhaps most importantly in the present case is that the trustees wish to enter into negotiations with the applicants first as the preferred tenants in relation to ongoing occupation of Lot 16 and Lot 18.

[72] I find no reason why the Court should interfere with the trustees' decision making in the present case.

Are the trustees estopped from purporting to evict Richard and Mereawaroa from the land?

[73] Richard and Mereawaroa allege that the trustees in office at the time the substituted lease was entered into acted unconscionably. In particular, they allege that the trustees misled their parents into signing the substituted lease and that in doing so their parents did not understand that they were surrendering their perpetual right of renewal. They argue that equity should intervene and in particular that the trustees should be estopped from relying upon the fixed term in the substituted lease which has now expired.

Submissions for the applicants

[74] Mr Peters relies on the decision of *Cornwall Park Trust Board Incorporation v Chen*.[37] In particular Mr Peters refers to paragraph 49 of that decision where Faire AJ referred to the following extract in Butler's *Equity and Trusts in New Zealand*:[38]

> Although the modern approach is "to depart from strict criteria and to direct attention to overall unconscionable behaviour" it is nevertheless clear that the party alleging an estoppel must show that:
>
> (a) A belief or expectation has been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
>
> (b) The belief or expectation has been reasonably relied on by the party alleging the estoppel;
>
> (c) Detriment will be suffered if the belief or expectation is departed from; and
>
> (d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[75] Mr Peters argues that when the substituted lease was entered into in 1979 it was on the clear understanding that the rights to perpetual occupation were protected. He argues that the applicants' parents did not have the benefit of independent advice, that they were influenced by a trustee whom they trusted and that they were given an expectation of permanent occupation on which they relied.

[76] The applicants rely heavily on the letter from the trustees dated 10 July 1978 that was sent to both Richard's and Mereawaroa's parents. In particular they place emphasis on the third paragraph of this letter which states:[39]

> The Trustees think your main thought is to reside permanently at Waitangi and to enable you to achieve this I have been authorised to offer you the following alternative lease…

[77] Mr Peters argued that Richard's and Mereawaroa's parents relied on this statement and understood that they would continue to have permanent occupation with respect to Lot 16 and Lot 18. Mr Peters further argued that these factors were compounded as the lease document and letter of explanation were prepared on behalf of the Trust, and Richard's and Mereawaroa's parents relied on statements made by the trustees which reinforced their understanding that they were able to reside on Lot 16 and Lot 18 permanently.

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37 *Cornwall Park Trust Board Incorporation v Chen* [2013] NZHC 1067.

38 *Cornwall Park Trust Board Incorporation v Chen* [2013] NZHC 1067 at [49]. Also see paragraph [50] and [51] which are also relied on by Mr Peters.

39 Affidavit of Richard Takimoana sworn 7 March 2014 Exhibit "D".

[78] Mr Peters contends that this belief as to permanent occupation can be the only valid explanation in this case as he says there is no other reason as to why Richard's and Mereawaroa's parent would surrender the perpetual lease.

[79] Mr Peters questioned the integrity of the statement on behalf of the Trust in the letter of 10 July 1978 which referred to potential financial difficulties for the lessee under the perpetual lease. Mr Peters suggested that this was something of a ruse to influence Richard's and Mereawaroa's parents into signing the substituted lease.

[80] Mr Peters argues that on this basis the Trust created or encouraged a belief or expectation through these representations made and the applicants' parents reasonably relied on that belief or expectation in signing the substituted lease.

[81] As to detriment Mr Peters argued that under the substituted lease Richard's and Mereawaroa's parents gave up their perpetual right of renewal of the lease. Mr Peters contends that this demonstrates clear detriment suffered by the applicants' parents as a result of the belief or expectation encouraged by the trustees at that time. Mr Peters submits that it would now be unconscionable for the trustees to rely on the terms of the substituted lease and in particular for the trustees to assert that the current applicants do not have an ongoing right of permanent occupation with respect to Lot 16 and Lot 18.

[82] I note that in their affidavit evidence Richard and Mereawaroa referred to improvements that were made to the houses located on Lot 16 and Lot 18. Initially these works, and the costs expended on them, were relied on as further detriment should the terms of the substituted lease be enforced. In response to questions from the Court both Richard and Mereawaroa confirmed that at no stage did they advise the trustees of these works. Both Richard and Mereawaroa stated that they understood that they and their families owned the houses and so there was no need to obtain consent from the trustees.[40]

[83] This is incorrect and consent of the trustees to alterations to the houses was required under both the perpetual lease and the substituted lease.[41] In light of this, Mr Peters responsibly conceded that these works could not be relied on as detriment suffered in relation to the estoppel argument.

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40 88 Taitokerau MB 328 and 333 (88 TTK 328,333).
41 Perpetual lease clause 6; Substituted lease clause 16.

Submissions for the Trust

[84] Mr Coutts on behalf of the Trust accepted that where estoppel arises equity will intervene to prevent the party estopped from relying on the terms of a contract. However, Mr Coutts argued that estoppel has not been made out by the applicants and the terms of the substituted lease should prevail.

[85] Mr Coutts also referred to the letter from the Trust dated 10 July 1978. Mr Coutts emphasised that the end of the letter clearly states that the lease containing the perpetual right of renewal is to be surrendered and that a new lease is to be entered into for a term of 42 years from 27 July 1971. Mr Coutts argued that both Richard's and Mereawaroa's parents signed the letter indicating their acceptance of that offer.

[86] Mr Coutts submits that the surrender of the perpetual lease and the new substituted lease were then registered against the relevant certificates of title. Mr Coutts argued that the performance of the contractual terms under the substituted lease was effected by the parties and in particular that the rental paid by the lessees over that 42 years period was fixed at $52.00 per annum.

[87] Mr Coutts rejected the argument by Mr Peters that the trustees at that time acted deceitfully by referring to an increase in costs for the lessee under the perpetual lease. Mr Coutts referred to the terms of the perpetual lease which provided that rent was to be fixed at $1.00 per week for the first 10 years after which the rent was to be reviewed pursuant to s 22 of the Public Body Leases Act 1969. Mr Coutts argued that had this occurred the rent would undoubtedly have increased and the cost for the lessee would have risen if they continued to occupy Lot 16 and Lot 18. Mr Coutts submits that this concern was addressed by the Trust under the substituted lease as the rent was fixed at $1.00 per week for the whole 42 year term.

[88] Mr Coutts argued that the Trust has not acted unconscionably and that there was consideration from both sides when the substituted lease was entered into. The lessee gave up their perpetual right of renewal of the lease. The Trust gave up their right to review the rent after the expiration of the initial 10 year term. In effect, Mr Coutts argued that it would now be unconscionable for the applicants to deny the terms of the substituted lease when they and their parents have had the benefit of a fixed low rent for that 42 year period.

[89] As to the statement in the Trust's letter to the lessees that the substituted lease would allow them to reside at Waitangi permanently, Mr Coutts argued that in fact this took place as those

original lessees resided in Lot 16 and Lot 18 until their deaths. As such, Mr Coutts argued that this representation has been honoured.

[90] Mr Coutts also argued that once the status of the current leases are resolved by the Court the Trust seeks to enter into negotiations with the applicants as to the grant of a further right of occupation of Lot 16 and Lot 18 by way of a residential tenancy. Mr Coutts emphasised that the applicants may well continue to occupy these lands albeit on more market terms to reflect the interests of all beneficiaries of the Trust.

[91] Mr Coutts submits that when Richard took an assignment of the substituted lease from his mother he was represented by Law North solicitors. As such, he says it was incumbent upon Richard's solicitor to advise him of the terms of the substituted lease that he was purchasing. Mr Coutts argued that any misunderstanding that Richard may have as to the terms of the substituted lease is an issue that he needs to pursue with the solicitor who acted for him at the time of the assignment. Mr Coutts contends that it is not appropriate for Richard to pursue the Trust as the Trust was not involved in the assignment of the lease other than as to a procedural step in consenting to the assignment.

[92] Mr Coutts submits that for these reasons the claim of equitable estoppel should be dismissed.

The Law

[93] In *Commissioner of Inland Revenue v Morris*[42] the Court of Appeal found that:

> The essence of the doctrine is that a person is not permitted to enforce strict legal rights when it would be unjust that he should be allowed to do so, having regard to the dealings which have taken place between the parties. But those dealings must amount to one party having been led by the attitude of the other to alter his own position.

[94] In *Andrews and Colonial Mutual Life Assurance Society Limited*,[43] the High Court referred to the five probanda which had previously been required for the operation of proprietary estoppel. Those probanda are:[44]

(a) The plaintiff must have made a mistake as to his legal rights;

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42 *Commissioner of Inland Revenue v Morris* [1958] NZLR 1126.
43 *Andrew and Colonial Mutual Life Assurance Society Limited* [1982] 2 NZLR 556.
44 Ibid at 568.

(b) The plaintiff must have expended money or done some other act on the faith of his mistaken belief;

(c) The defendant, who is the possessor of the legal right, must know of the existence of his own right inconsistent with the right claimed by the plaintiff;

(d) The defendant, as possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not so know, there is nothing to call upon him to assert his own rights;

(e) The defendant, as possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts he has done either directly or by abstaining from asserting his legal rights.

[95] At page 570 of that decision Barker J went on to find:[45]

> However, the recent cases show that strict adherence to the probanda is not necessary; it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed another to assume to his detriment rather than inquiring whether the circumstances can be fitted into some preconceived formula.

[96] This flexible approach was supported by the decision of the Court of Appeal in *Gillies v Keogh*.[46] In that decision Cooke P commented that the tide has set on the view that proprietary estoppel and promissory estoppel are entirely separate and take their origins from different sources.[47] Richardson J stated that there had been a trend away from the strict application of the five probanda to a more flexible test of unconscionability. Despite that, Richardson J considered that there were still three essential elements which had to be satisfied namely:

(a) The creation or encouragement of a belief or expectation;

(b) A reliance by the other party; and

(c) Detriment suffered as a result of that reliance.[48]

[97] This approach was endorsed in the subsequent decision of the Court of Appeal in *Goldstar Insurance Co Limited v Gaunt* [1998] 3 NZLR 80.

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45 Ibid.
46 *Gillies v Keogh* [1989] 2 NZLR 327.
47 Ibid at 331.
48 Ibid at 345-347.

[98] In the House of Lords decision of *Thorner v Major* [2009] 3 All ER 945, Lord Scott found that:[49]

> Lord Walker, in para [29] of his opinion, below, identified the three main elements requisite for a claim based on proprietary estoppel as, first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and, third, some detriment incurred by the claimant as a consequence of that reliance. These elements would, I think, always be necessary they might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity.

Discussion

[99] Having reviewed the above authorities it is clear that the modern trend is to adopt a more flexible approach when considering claims in equitable estoppel. Nevertheless at least three main elements must be met. Those are:

(a) A creation or encouragement of a belief or expectation;

(b) A reliance by the other party; and

(c) Detriment as a result of that reliance.

[100] While all of these elements must be met that on its own may not be sufficient. The Court must then assess the overall circumstances of the case and determine whether it would be unconscionable for the party against whom estoppel is alleged to enforce their strict legal rights.

Did the Trust create or encourage a belief or expectation in this case?

[101] Much relies in this case on the contents of the letter from the Trust dated 10 July 1978. Indeed both parties rely on the same letter. The letters to Richard's and Mereawaroa's parents are identical other than that they are addressed to the different lessees. Given the importance of this letter the full body of the letter is set out below:[50]

> You are the lessee of the above land and rental for the first ten years, expiring 26th July 1981, has been set at $52.00p.a. For the remaining 11 years of the first term of the lease, and for any renewal thereof, annual rent is to be determined in accordance with Section 22 of the Public Bodies Leases Act 1969[.] This lease has perpetual right of renewal.
>
> The Trustees are aware of the extremely high land value (that is value of the land without improvements) being assessed by the Valuation Department for the Waitangi area and are

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49 *Thorner v Major* [2009] 3 All ER 945 at [15].

50 Affidavit of W Tane sworn 9 May 2014 Exhibit "AA".

> concerned that you may have difficulty in meeting the assessed rental under the lease at the expiry of the first 10 year term together with increased land rates.
>
> The Trustees think your main thought is to reside permanently at Waitangi and to enable you to achieve this I have been authorised to offer you the following alternative lease, subject only to the consent of the Department of Maori Affairs who hold a first mortgage over your section;
>
> 1. That the present lease containing perpetual right of renewal be surrendered.
>
> 2. That a new lease be entered into for a term of 42 years from 27/7/1971 at a rental of $52.00 per annum with general terms and conditions as recently negotiated by the Trustees with other lessees.
>
> This offer is available until 11th August 1978.

[102] The letter has the words "Without Prejudice" noted on it. Despite that both sides filed the letter in evidence and it was agreed by Counsel that there was no issue as to the admissibility of the letter.

[103] Written at the bottom of the letter to Mereawaroa's parents are the words "We agree". The letter has then been signed by both Dennis and Whakaiti Takimoana. Written at the bottom of the letter to Richard's parents are the words "We accept Proposal No. 2". Both Rufus and Frances Takimoana have also signed that letter.

[104] There are two competing statements in the letter.

[105] The third paragraph states that:[51]

> The Trustees think your main thought is to reside permanently at Waitangi and to enable you to achieve this I have been authorised to offer you the following alternative lease…

[106] This sentence on its own gives the impression that the new lease will facilitate permanent residence at Waitangi. However, there is a clear and unambiguous statement immediately following this paragraph that the present lease containing perpetual rights of renewal will be surrendered and that a new lease is to be entered into for a term of 42 years from 27 July 1971.

[107] The Court must now try to reconcile the two statements and in particular assess what meaning must be given to the letter as a whole.[52]

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[51] Ibid.

[52] This approach was adopted in *Travel Agents Association of New Zealand Incorporated v NCR NZ Limited* HC Wellington CP 1069-90, 27 March 1991 at page 10 where Eichelbaum CJ also assessed the letter in that case as a whole.

[108] In *Travel Agents Association of New Zealand Incorporated v NCR (NZ) Limited*[53] Eichelbaum CJ found that while the modern test for estoppel focuses on the concept of unconscionability, whether the representation relied on is clear and unequivocal or unambiguous is still significant. Eichelbaum CJ went on that:

> Whether the subject matter is estoppel or contract, the meaning has to be assessed objectively, by the standard of the reasonable person in the position of the representee. Any finding of unconscionability must be grounded upon an interpretation which the reasonable person would have drawn from that letter, together with the defendant's resiling from that position.

[109] The requirement for a clear and unequivocal representation was supported by the decision of the Privy Council in *Super Chem Products Limited v The American Life and General Insurance Company Limited*.[54]

[110] In *Thorner and Major*[55] Lord Walker found that to establish proprietary estoppel the relevant assurance must be clear enough and that what amounts to sufficient clarity is hugely dependent on context.

[111] These authorities establish that the representation must have been sufficiently clear. What amounts to sufficient clarity will dependent on the context. The meaning is also to be assessed objectively by the standards of the reasonable person in the position of the representee.

[112] In the present case we are dealing with lessees who are being asked to surrender their existing lease which contained perpetual rights of renewal and to sign a new lease which contained a fixed term with no right of renewal. The lessees themselves did not have independent legal advice. Their first language was Māori and they did not have a great command of the English language other than Richard's mother who he said was very well educated and articulate in the English language. Mereawaroa gave evidence that her father would have been 30 years old at that time and her mother would have been 36.[56] Richard said that his mother would have been 37 years old and his father 29.[57]

[113] Had the letter in this case only made the statement 'That the trustees think your main thought is to reside permanently at Waitangi and to enable to achieve this I have been authorised to offer you the following alternative lease…' the case for the applicants would have been much

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53 *Travel Agents Association of New Zealand Incorporated v NCR NZ Limited* HC Wellington CP 1069-90, 27 March 1991.

54 *Super Chem Products Limited v The American Life and General Insurance Company Limited* [2004] 2 All ER 358. Also see *Marine Steel Ltd v The ship "Steel Navigator"* [1992] 1 NZLR 77.

55 *Thorner v Major* [2009] 3 All ER 945.

56 88 Taitokerau MB 329 and 331 (88 TTK 329,331).

57 88 Taitokerau MB 336 (88 TTK 336).

stronger. However, the letter does go on to clearly state that the lease with a perpetual right of renewal will be surrendered and a new lease entered into.

[114] I do accept that the letter may have been unclear to a reasonable person in the position of the applicants' parents. In *Travel Agents Association of New Zealand Incorporated*, Eichelbaum CJ found:[58]

> At the best the statements were ambiguous and would have put the reasonable person upon enquiry as to their meaning and intent.

[115] It is difficult to escape the same conclusion in the present case.

[116] Even if I were to accept the argument for the applicants that their parents relied solely on the statement in the letter that they were to reside permanently at Waitangi, there is still the difficulty of trying to ascertain what that means in the present context.

[117] The applicants' parents have never had a right of permanent occupation with respect to Lot 16 and Lot 18. The perpetual lease was simply a lease for a fixed term of 21 years with a perpetual right of renewal. That does not necessarily provide a permanent right of occupation. A breach of an essential term of the lease such as non-payment of rent could still result in the trustees taking steps to terminate the lease.[59]

[118] What then can be drawn from a mistaken belief of residing permanently in a leasing arrangement. A lease cannot simply continue forever so at most the only inference which could be drawn is that the lessees would continue to have a perpetual right of renewal. However, the letter clearly stated that this was to be surrendered. Even if that was the belief held, what are the terms of the right of renewal that would have existed in this case? If the right of renewal was to continue as per the original perpetual lease why was there a need to sign a new lease in the first place? Surely these ambiguities would have caused a reasonable person in the position of the applicants' parents to make enquiries or to seek advice.

[119] There is also attraction in Mr Coutts' argument that if the statement that those original lessees were to reside permanently at Waitangi were to be given effect then that has occurred. Both Richard's and Mereawaroa's parents resided permanently in the properties at Lot 16 and Lot 18 until their deaths. As such, there is some force in the argument that to the extent that there was a representation made that was honoured.

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58 *Travel Agents Association of New Zealand Incorporated v NCR NZ Limited* HC Wellington CP 1069-90, 27 March 1991 at p 11.

59 Perpetual lease clause 21.

[120] In cross-examination Mr Peters put to Mr Tane that the statement in the letter as to residing permanently referred to the original lessees and their families. Mr Tane agreed with this proposition. Mr Tane later clarified in his evidence that he was referring to the ability of those original lessees to reside in Lot 16 and Lot 18 along with their families at the time.[60] While Mr Tane's evidence on this is relevant, ultimately it is for the Court to assess the meaning of the letter rather than Mr Tane. This is particularly so given that: Mr Tane was not the author of the letter; he was not a trustee at the time it was written; and an objective assessment is required based on a reasonable person in the shoes of the representee.

[121] Both Richard and Mereawaroa also gave evidence of oral statements they say were made by trustees which support their case.

[122] Richard states that he does not remember the substituted lease being entered into as he was only a teenager at the time. He did not recall his parents ever saying they had signed a different lease.[61] As such, there is no evidence of any oral statements that may have been made to Richard's parents at the time they signed the substituted lease.

[123] In his affidavit Richard states that at the time he took an assignment of the lease he discussed this with other trustees and:[62]

> … we all agreed it was intended that we would remain in our home and that our whanau / family will always remain here in Waitangi.

[124] This evidence is very vague. None of these trustees were called to give evidence and there are no written records of what was discussed. In oral evidence Richard stated these discussions were actually focussed on the transfer of the lease and they thought the lease would just roll over.[63]

[125] Mereawaroa said that prior to his death her father recounted what a trustee told him when he signed the substituted lease. Her evidence was that Tupu Puriri said to her father:[64]

> Sign this – it's okay. You're still going to have your house and everything but you will be able to live there at a cheaper rate.

[126] Sadly both Tupu Puriri and Dennis Takimoana have passed away. As such this evidence is not a firsthand account. Rather Mereawaroa is recounting what her father told her about what a trustee told him. The difficulties with reliance on such evidence is obvious.

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60 88 Taitokerau MB 373 (88 TTK 373).
61 Affidavit of R Takimoana sworn 7 March 2014 paragraph 18.
62 Affidavit of R Takimoana sworn 7 March 2014 paragraph 22.
63 88 Taitokerau MB 334 (88 TTK 334).
64 Affidavit of Mereawaroa Davies sworn 7 March 2014 paragraph 22.

[127] This statement does not imply or represent permanent residence in favour of the lessee. At the same time it does not draw the attention of the lessee to the surrender of the perpetual right of renewal. On balance I consider that even if relied on this statement is neutral. It does not add to or detract from the letter which accompanied the substituted lease.

[128] Mereawaroa also gave evidence that Hirini Parata and Eruera Taurua, who were trustees at the time of the substituted lease, said that they believed that her parents had a permanent lease. Hirini and Eruera said this at her father's funeral which was in 2013.[65] These were not statements made to her parents at the time the substituted leases were entered into and so the statements cannot be relied on as a representation which encouraged her parents to enter into the lease. If anything this evidence goes towards the trustees' understanding of the arrangements entered into at the time. Curiously, Mereawaroa confirmed that both of these trustees are alive yet neither of them were called to give evidence.

[129] It is difficult to place any weight on these statements given that these trustees did not give evidence before me. Even if the trustees made those statements it may be based on their own misunderstanding of the lease terms, or they could be referring to the terms of the perpetual lease rather than the substituted lease. Given the length of time since the leases were signed such confusion would be understandable.

[130] This evidence also conflicts with the written records of the trust concerning the substituted leases. The minutes of a trustee meeting on 6 August 1978 record:[66]

> Lot 16 DP61163 R & F.J. Takimoana
>
> Meeting was advised that the above lessee had accepted the Trust's offer of an alternative lease and were prepared to surrender their perpetual lease. The matter had been referred to our solicitors who were seeking the consent of the Department of Maori Affairs to this surrender and alternative leasee as the Department held a mortgage over the lessee's interests.
>
> Lot 18 DP61163 D.N. & W. Takimoana
>
> Meeting was advised that the above lessees had been offered an alternative lease and this offer was open for acceptance until 11 August 1978.

[131] The minutes of a trustee meeting of 4 February 1979 record:[67]

> Lot 16 DP 61163 R. & F.J. Takimoana
>
> Moved

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65 88 Taitokerau MB 329 (88 TTK 329).
66 Affidavit of W Tane sworn 9 May 2014 exhibit W.
67 Affidavit of W Tane sworn 9 May 2014 exhibit Y.

> M. Puriri
>
> M.E. Moon
>
> That surrender of lease with perpetual rights of renewal be accepted and that new lease be executed for period commencing 27th July 1971 to 26th July 2013 with no compensation payable for improvements and with no right of renewal and with annual rental of $52.00.
>
> Carried
>
> …
>
> Lot 18 DP 61163 D.N. & W. Takimoana
>
> Moved
>
> M. Puriri
>
> M.E. Moon
>
> That surrender of lease with perpetual rights of renewal be accepted and that new lease be executed for period commencing 27th July 1971 to 26th July 2013 with no compensation payable for improvements and with no right of renewal and with annual rental of $52.00.
>
> Carried

[132] These minutes show that the trustees did not have a common understanding that Richard and Mereawaroa's parents had permanent rights of occupation of Lot 16 and Lot 18. Rather the minutes expressly record that the leases with perpetual rights of renewal were being surrendered in favour of new leases with a fixed term, a fixed rental, no right of renewal and no compensation for improvements. Both Eruera Taurua and Hirini Parata are recorded as being in attendance at both of these meetings. As such this directly contradicts Mereawaroa's evidence as to their understanding of the leasing arrangements.

[133] The effect of the substituted leases was also communicated to the beneficiaries of the Trust on at least two occasions. The notice for a meeting of beneficiaries on 10 May 1980 includes the presentation of a financial report as an item on the agenda.[68] Filed with that notice is the Treasurer's Report which has noted at the top 'Confidential to beneficiaries only'. Under the section titled 'Leases' the report notes:

> Since the present Trustees were appointed in 1973, continuing efforts have been made to re-negotiate leases containing compensation provisions…
>
> In the same period the three perpetually renewable leases held by three beneficiary/lessees have been re-negotiated to terminating leases without compensation and without increase in ground rent.

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68 Affidavit of W Tane sworn 9 May 2014 exhibit Z.

[134] At the end of the report is a statement by the treasurer, Margaret Puriri, asking for the report to be formally adopted. There is no record filed with the Court of who attended this meeting.

[135] The minutes of a beneficiary meeting on 7 December 1991 record:[69]

> Mere Tua – Why is there no compensation at the end of the leases.
>
> Wiremu Puriri – replied that the leaseholders pay only $52 per year instead of the todays market rate of $5000 per year and hence that is the way they pay the Trust at the end of their lease term.

[136] The minutes for this meeting on 7 December 1991 record that a number of trustees and forty three beneficiaries attended. There is no record of who the beneficiaries in attendance were. At least one of those trustees was Robert Takimoana who is Richard Takimoana's twin brother.

[137] It is not known whether Richard's and Mereawaroa's parents attended these meetings. Despite that, this evidence does confirm that the trustees understood that the perpetual leases had been surrendered in favour of the substituted leases and they made attempts to inform the beneficiaries of this. This evidence directly contradicts the oral evidence from Richard and Mereawaroa that it was widely believed (including by the trustees in office at the time) that their parents had permanent rights of occupation. One could also reasonably infer that if this was contrary to his parents' understanding of the leasing arrangements, Robert would have raised this with his parents following the meeting of beneficiaries in 1991.

[138] For these reasons, while the letter from the Trust raises some questions as to the meaning of the statement 'to reside permanently at Waitangi', in the context of the letter as a whole and in the circumstances of this case I am not satisfied that this statement is sufficiently clear to give rise to estoppel. At most it would have caused a reasonable person to embark on further enquiry.

[139] The evidence from Richard and Mereawaroa as to statements made by the trustees is not sufficiently certain or reliable to found an argument in estoppel. Most of these statements were made after the substituted leases were signed and so could not have influenced the original lessees in signing the substituted leases. Also, little reliance can be placed on this evidence given that the makers of those statements are either deceased or were not called to give evidence. There could be a valid explanation for those statements if there was an opportunity to explore them with the maker. This evidence also contradicts the Trust's written records which show that the trustees were acting on the basis that the perpetual lease and perpetual rights of renewal were being surrendered in favour of the substituted leases with no rights of renewal, no compensation and a fixed rent.

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[69] Affidavit of W Tane sworn 9 May 2014 exhibit AC.

[140] There were also attempts to advise the beneficiaries of this at beneficiary meetings on 10 May 1980 and 7 December 1991. While the evidence does not show whether Richard's and Mereawaroa's parents attended those meetings, it does show that the trustees were open about the effect of the substituted leases. They were not attempting to deceive the beneficiaries or to give the impression that Richard's and Mereawaroa's parents continued to have perpetual rights of renewal. In the face of this evidence it is very difficult to maintain the argument that it was a widely held belief that Richard's and Mereawaroa's parents had rights of permanent occupation.

[141] For these reasons I do not consider that there is sufficient evidence in this case to establish that the Trust created or encouraged an expectation or belief as contended for by the applicants.

Did the applicants or their parents rely on the representations made by the Trust when entering into the substituted lease?

[142] If I am wrong in my finding concerning the representations made by the trustees above, I must then consider whether the applicants' parents relied on the representations made by the trustees in entering into the substituted lease. It is fundamental that for an estoppel to arise the party alleging estoppel must have relied on the belief or expectation in question. An estoppel will not arise if the alleged belief or expectation was not in fact held by the party claiming the estoppel.

[143] It is the cornerstone of the applicants' case that their parents believed that they had a right of permanent occupation of Lot 16 and Lot 18. Mr Peters argued that they may not have been familiar with the nuances or effects of lease provisions but the one matter that they did understand and believed was that they were entitled to permanent occupation of Lot 16 and Lot 18. This belief was repeated throughout Richard and Mereawaroa's evidence.

[144] In oral evidence before the Court both Richard and Mereawaroa clarified their parents' understanding of the leasing arrangements. Given the importance of this evidence the relevant extracts from the Court minute are set out below:[70]

> **Court:** Now, exhibit E to your affidavit is the initial lease that was signed...
>
> **M Davies:** Yes.
>
> **Court:** ...which was the one that had the perpetual rights of renewal. So your evidence to the Court is, essentially, that even though they signed the new lease in 1979 they were still under the impression that these same terms applied in this original lease?
>
> **M Davies:** Yes. Yes, they believed that we could go back to the trust and have a talk to them and then organise something else after that. I said to Mum, I remember saying to her, "Well what happens then, you know?" She goes, "Just go back to the trust and talk to them

[70] 88 Taitokerau MB 295 (88 TTK 295) at MB 330-331.

> and see what happens. Talk to them and see what they say, originally." And I said, "What if, what if we want to move back to the motor camp?" And she says, "Well why not, it's yours." That's what she said, because that is where we originally came from.
>
> **Court:** Did your mother talk to you about, or did you raise with her in the scenario of you going back to the trustees what would happen if the trustees said no?
>
> **M Davies:** No. No, she – both my parents were under the belief that we would be able to go to the trustees and have a talk to them and see what they say. We did say, she said - I said to her, "What happens if they say no?" And she said, "Well move back to the camp, that's where you belong."

[145] Richard's evidence was as follows:[71]

> **Court:** So even when you did look at the lease in the mid-90s and saw that it was a fixed term you were under the impression that?
>
> **R Takimoana:** Once it came to that end of term that we would have discussions as a whānau. We are whānau, the beneficiaries are whānau. Let's talk, let's get an amicable resolution to what we have as a trust because we do, we treated the trust as family because we thought even though they were like the bigger brother because they own the land, but we thought because we are part of it we owned the land ourselves.
>
> **Court:** Did you ever talk to your mother – and I put this question to Ms Davies, but did you ever talk to your mother about what she or you thought might happen if during those discussions the trustees said no to a further lease?
>
> **R Takimoana:** Move my house back to where it belongs in the motor camp.
>
> **Court:** So was that a discussion that your mother had with you as well?
>
> **R Takimoana:** Yes, because even though we leased that, our land was across the fence, that was our home. My grandfather, my great grandmother and my ancestors before that.

[146] This evidence indicates two important matters. Firstly, in the discussions with their parents it appears that both Richard's and Mereawaroa's parents did not say that they would always be able to live on Lot 16 and Lot 18 as of right, but rather that they should go and talk to the trustees. Richard talks about having discussions as a whānau to get an amicable resolution. Mereawaroa made similar statements that her parents believed that they could go back to the Trust and have a talk and organise something else. Her mother told her to go back to the Trust and talk to them and see what happens. This indicates that their parents were telling them to go and talk to the trustees about entering into a new arrangement rather than being entitled to continued occupation as of right. This approach is consistent with what one would expect under the substituted lease when the fixed term comes to an end.

[147] Even more importantly both Richard and Mereawaroa discussed with their parents as to what would happen if the trustees refused to enter into a further arrangement for continued

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[71] 88 Taitokerau MB 295 (88 TTK 295) at MB 334.

occupation of Lot 16 and Lot 18. On both occasions their parents told them to pick up the house and to take it back to the camp ground lands being the area that they originally occupied prior to entering into the perpetual leases. This shows that both of their parents were aware that the trustees may not agree to a further leasing arrangement. This is completely inconsistent with a perpetual right of renewal or a permanent right of occupation as now contended for by the applicants.

[148] There is also a lack of evidence around what part, if any, the fixed rent under the substituted lease played in influencing them to sign the substituted lease. There was a clear benefit to the lessees having the rent fixed at $1.00 per week for 42 years and this was referred to in the letter from the Trust. I have not heard any evidence around what the views of the applicants' parents were around that and whether that played a part in their signing of the substituted lease.

[149] In addition to these difficulties it is also clear that when Richard took an assignment of the substituted lease he was represented by Tony Ray of Law North solicitors. Richard initially agreed that Mr Ray acted for both himself and his mother concerning the assignment of the lease. Later in oral evidence Richard resiled from this position saying that Mr Ray acted more for his mother than for him. Despite this I am satisfied that Mr Ray acted for both parties.

[150] There is a memorandum of transfer on the Court file which has been certified as correct by the solicitor for the transferee. That signature appears to be that of Mr Ray. Mr Coutts also raised in cross-examination that Richard took out a loan to purchase the substituted lease and a mortgage was registered against the title. Although Richard was unclear as to the process that occurred, I accept the point raised by Mr Coutts that a solicitor would have been required to register that mortgage. Richard's initial evidence was also that Law North did act for both him and his mother. It was only when questioned on this that he resiled from this position. Finally, there is a letter to the Trust from Mr Ray dated 23 March 1993 seeking the consent of the Trust to the assignment of the lease.[72] In that letter Mr Ray states that he acts for both Richard and his mother.

[151] This raises several issues. Firstly, it cannot be said that Richard relied on the letter from the Trust of 10 July 1978 when taking the assignment. Rather, it appears that he relied primarily on comments from his mother. Richard's evidence as to discussions with some of the trustees at the time of the assignment is too vague and ambiguous as to form a claim in estoppel. There are also issues as to reliability of the evidence given that none of those trustees were called to give evidence and there are no written records confirming those discussions.

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[72] Affidavit of W Tane sworn 9 May 2014 exhibit AR.

[152] Also, Richard had access to independent legal advice at the time of purchasing the lease. To the extent that Richard did not understand the terms of the lease that he was purchasing he should have sought advice from his solicitor. If Richard simply purchased the lease without seeking such advice then he must have done so at his own risk. To the extent that Mr Ray may not have protected his interests by pointing out the terms of the lease then any claim is against Mr Ray not the Trust.

[153] It is also apparent that the applicants and their parents did not understand fundamental terms of the perpetual lease. Both Richard and Mereawaroa stated in evidence that under the perpetual leases their families owned the houses that were built on Lot 16 and Lot 18. They asserted that it was only under the substituted leases that ownership passed to the Trust.[73] This is not the case.

[154] Clause 7 of the perpetual lease states that:

> The lessee will during the said term keep and maintain and at the end or sooner determination thereof yield and deliver up the said land and all buildings, fences, hedges, grates, drains and sewers now or hereafter erected constructed or being upon bounding or under the same in good clean substantial order condition and repair.

[155] Clause 18 of the perpetual lease states:

> That no compensation shall be payable to the lessee in respect of any improvements effected by the lessee at any time on the said land.

[156] Reading these provisions together, upon termination of the perpetual lease ownership of the house rested with the Trust and no compensation was payable to the lessee. It appears that the applicants were not aware of these provisions. I accept that if the perpetual right of renewal was exercised the effect of these provisions would not crystallise. However, this does demonstrate misunderstandings held by the applicants and their families concerning the terms of the perpetual lease.

[157] A similar misunderstanding arose for both Richard and Mereawaroa concerning making alterations to the houses. Richard, Mereawaroa and their families believed that they were entitled to undertake the works without seeking consent from the trustees.[74] Clause 6 of the perpetual lease provides that the lessees cannot alter any building without the consent of the lessors in writing. Clause 16 of the substituted lease contains a similar provision. This further emphasises that even if

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[73] Affidavit of R Takimoana sworn 7 March 2014 paragraph 29. 88 Taitokerau MB 328 and 333.
[74] 88 Taitokerau MB 328 and 333 (88 TTK 328,333).

the terms of the perpetual lease were still in force, the applicants and their families did not properly understand those terms.

[158] This is relevant in the present case as to the extent that the applicants or their families may have misunderstood the effect of signing the substituted lease, it may well be that this arose due to their own lack of understanding of the terms of the lease rather than through representations made by the trustees.

[159] Finally, in his evidence Richard confirmed that he became aware of the fixed term of the substituted lease shortly after he took the assignment of the lease from his mother in 1992. Upon settlement Mr Ray sent Richard a copy of the updated certificate of title which showed that the lease had been assigned in his name. The notation on the title also clearly states that the lease terminates on 26 July 2013. Richard confirmed that since receiving a copy of the title he was always aware that the substituted lease had a fixed term which would expire. He just believed that a further arrangement could be entered into with the Trust.[75]

[160] Once again, this is consistent with entering into a new arrangement rather than exercising a right of renewal. This also demonstrates that Richard knew that the lease would terminate upon expiry of the fixed term yet he took no steps to clarify or protect his position for over 20 years.

[161] For these reasons I am not satisfied that the applicants or their parents relied on the alleged representations by the trustees in entering into the substituted lease.

Did the applicants or their parents suffer detriment as a result of entering into the substituted lease?

[162] By entering into the substituted leases both Richard's and Mereawaroa's parents surrendered their perpetual right of renewal in favour of a fixed term of 42 years. As such, they undoubtedly suffered detriment to the extent that they lost the perpetual right of renewal as was contained in the perpetual lease.

[163] However, the substituted lease also provided an additional benefit in that it fixed the rent for a term of 42 years. This raises the question as to whether the detriment of surrendering the perpetual right of renewal was offset by the benefit of the fixed rent over that prolonged period.

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75 88 Taitokerau MB 335 – 336 (88 TTK 335-336).

[164] There is no evidence before me providing a proper basis as to the value of the perpetual right of renewal or the rent increases that would have been realised had the perpetual lease been retained.

[165] The recitals to the perpetual lease state that after the initial 10 year period:

> …the annual rental to be determined in accordance with Section 22 of the Public Bodies Leases Act 1969.

[166] Section 22 of the Public Bodies Leases Act 1969 states:

> **22** Periodic review of rents
>
> (1) Subject to this section, a lease granted under this Act may contain provision for the review of the yearly rent payable thereunder at such periodic intervals during the term of the lease, being not less than 5 years, as the leasing authority thinks fit.
>
> (2) Where a lease contains any such provision for the review of rent—
>
> (a) Not earlier than 9 months and not later than 3 months before the expiry by effluxion of time of any such period (not being the last such period of the term of the lease), or as soon thereafter as may be, the leasing authority shall cause a valuation to be made by a person whom the leasing authority reasonably believes to be competent to make the valuation of the fair annual rent of the land for the next ensuing period of the term of the lease, so that the rent so valued shall be uniform throughout the whole of that ensuing period:
>
> (b) As soon as possible after that valuation has been made, the leasing authority shall give to the lessee notice in writing informing him of the amount of that valuation and requiring him to notify the leasing authority in writing within 2 months whether he agrees to the amount of that valuation or requires that valuation to be determined by arbitration in accordance with paragraph (c) of this subsection:
>
> (c) Within 2 months after the giving of that notice to the lessee, he shall give notice in writing to the leasing authority stating whether he agrees to the valuation specified in the notice given to him or requires that valuation to be determined by arbitration. If he so requires, that valuation shall be determined in accordance with the provisions of clauses 7 to 11 of Schedule 1 to this Act, which shall, with the necessary modifications, apply as if the valuation were being made to determine the rent payable under a renewal lease:
>
> (d) If the lessee fails to give to the leasing authority within the time specified in paragraph (c) of this subsection the notice referred in that paragraph, he shall be deemed to have agreed to the valuation set out in the notice given to him under paragraph (b) of this subsection:
>
> (e) The yearly rent agreed to or deemed to have been agreed to by the lessee or determined by arbitration under this subsection shall be the yearly rent payable under the lease for that ensuing period.

[167] This provides that the new rent shall be determined by valuation, or if that is disputed, by arbitration.

[168] In closing submissions Mr Peters argued that in comparing these two values his clients gave up $90,000.00 of improvements under the perpetual lease in consideration for paying rent in 1978 which would not have exceeded $1,000.00 per annum.

[169] These comments were made from the bar and no evidence was provided to support these assessments. Rating valuations from the Far North District Council were filed which state that the value of improvements on Lot 16 is $86,000.00 and on Lot 18 is $81,000.00. Mr Peters may have been referring to these rating valuations in round figures. Even if that is the case I am not convinced that the current value of the improvements as assessed for rating purposes is the proper basis to assess the value of the perpetual right of renewal. I do not know how Mr Peters arrived at a market rent in 1978 of less than $1,000.00 per annum. To determine value on such matters I would expect to receive expert evidence from a registered valuer with relevant expertise and skill in making such assessments. I cannot rely on Mr Peters' comments from the bar.

[170] The minute of the beneficiaries meeting on 7 December 1991 records a statement by Wiremu Puriri that the market rent at that time was $5,000.00 per annum.[76] There is nothing in the minute to set out the basis of that claim. If that alleged market rent was maintained without any further increase from 7 December 1991 until the expiry of the fixed term on 26 July 2013, that would amount to forgone rent in excess of $105,000.00. I do not assert that this reflects the actual rental forgone under the substituted lease but it serves to illustrate that there was significant benefit in the fixed rent under the substituted lease and this has to be taken into account in assessing whether any detriment was suffered overall.

[171] Ultimately all that can be drawn from the current evidence before the Court is that while parts of the substituted lease were less favourable, in that the lessees surrendered their perpetual right of renewal, other parts were more favourable, in that the rent was fixed at a low rate for a 42 year period. In terms of assessing whether the lessees suffered detriment as a whole by entering into the substituted leases I would need sufficient evidence comparing these values. In the absence of such evidence I am unable to draw any firm conclusions as to whether detriment was suffered in this case.

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[76] Affidavit of W Tane sworn 9 May 2014 exhibit AC.

Would it be unconscionable for the trustees to rely on the terms of the substituted lease?

[172] Even if I am wrong on all of the above matters concerning the necessary elements of estoppel, the Court must still look at the overall conduct of the parties and the circumstances of the case and determine whether it would be unconscionable to allow the trustees to rely on the terms of the substituted lease.

[173] While the letter from the trustees in 1978 may have caused some confusion over the statement about residing permanently at Waitangi, I do not consider that this was intentional or that the trustees set out in any way to try and deceive or trick the lessees into signing the substituted lease. The trustees reported back to the beneficiaries about the effects of these arrangements at the beneficiaries meeting the year after the substituted leases were signed. Clearly they were attempting to inform the beneficiaries of what had happened.

[174] I also consider that fixing the rent at $1.00 per week for 42 years provided a real and tangible benefit to the lessees. The statement by Wiremu Puriri at the meeting of beneficiaries on 7 December 1991 shows that the trustees intended to offset the forgone rental increases through receiving ownership of the house, without payment of compensation, at the end of the fixed term.

[175] While Richard and Mereawaroa's parents may not have completely understood the terms of the substituted lease I am satisfied that they were aware that the fixed term was going to come to an end and that in order to secure further occupation rights they would need to talk to the trustees and enter into a further arrangement. Indeed they said as much to both Richard and Mereawaroa. Their comments that if the trustees did not agree the houses should be moved back to the camp ground only reinforces that they were aware of the possibility that a new arrangement may not be entered into.

[176] It is also compelling in this case that these issues are only being raised now when at least Richard has been aware of the expiration of the fixed term for over 20 years. The applicants and their parents have had the benefit of a fixed low rent for a 42 year period and now they also seek to revive the perpetual right of renewal as contained in the perpetual lease. To grant the relief sought now would result in unjust enrichment to the applicants and their families as they would in effect have the benefit of the fixed rent under the substituted lease and the benefit of the perpetual right of renewal under the perpetual lease. This would also cause undue detriment to the Trust as it has forgone the right to review the rent and receive higher rental over that period as was provided for under the perpetual lease.

[177] I certainly appreciate the sentiments expressed by the applicants. Their families have lived in these properties for over 40 years. They built the houses, have looked after them and have paid the mortgages that were taken out to erect the houses in the first place. They have raised their families in these properties and undoubtedly they view these properties as their home. However, that does not change the fact that the land is owned by the Trust and the Trust must act for the benefit of all beneficiaries. While the applicants and their families have an undoubted connection to Lot 16 and Lot 18 they have also had the benefit of a very low rental over a very long period of time.

[178] I am also heartened by the comments from Mr Tane that this is not the end of the matter. Having determined the status of the leases I understand that the trustees will now seek to enter into negotiations with the applicants concerning the grant of a continued right of occupation of Lot 16 and Lot 18. Any further grant may well be on market terms but Mr Peters commented during the hearing that his clients would likely accept that. As such, it appears that there is still every possibility that the applicants will be able to continue to remain in these properties albeit on new arrangements.

[179] Having considered all of these matters, this is not a case where equity should intervene.

Do the affirmative defences of laches or acquiescence apply?

[180] As I have found that equitable estoppel does not arise there is no need to determine whether the affirmative defences of laches or acquiescence apply.

Decision

[181] The trustees have not breached the Act, the Trust Order, or general trustee duties in seeking to bring the existing leases over Lot 16 and Lot 18 to an end.

[182] Where the trustees are acting within their powers and no breach of trust has occurred the Court will only intervene in the trustees' decision-making in very limited circumstances. Those circumstances do not apply here and there is no reason for the Court to intervene in the trustees' decision concerning the leases of Lot 16 and Lot 18.

[183] The circumstances in this case do not give rise to equitable estoppel and the trustees are entitled to rely on the terms of the substituted leases.

[184] The applications filed by the applicants are dismissed.

Costs

[185] Although the applicants have been unsuccessful in this matter, given the nature and importance of the issues raised my preliminary view is that costs should lie where they fall.

[186] If either party disagrees with that preliminary view memoranda on costs are to be filed within 21 days from the date of this decision. Any order for costs will then be considered on the papers.

Pronounced in open Court at Whangarei this 31st day of October 2014.

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M P Armstrong
JUDGE