

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

**A20150002503  
APPEAL 2015/11**

UNDER Section 58, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Okahu 1, Okahu 3B2B2A, Okahu 3B2B2C,  
Okahu 3B2B2D, Okahu 4A, Okahu 4B, Okahu  
4D, Okahu 4C1, Okahu 4C2, Okahu 3A and  
Okahu 3B2A

BETWEEN DESMOND WILLIAM MAHONEY, TE URI  
REIHANA-NGATOTE & JOHN (HONE)  
PETERS  
Appellants

AND TRUSTEES OF THE NICHOLAS GEORGE  
TE PAA WHĀNAU TRUST  
Respondents

Hearing: 12 August 2015  
(Heard at Whangarei)

Court: Judge C L Fox (Presiding)  
Judge S Te A Milroy  
Judge C T Coxhead

Appearances: Mr D W Mahoney for the appellants  
Mr J P Bell-Connell, counsel for the respondents

Judgment: 07 September 2015

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Background

[1] Desmond Mahoney, Te Uri Reihana-Ngatote and John (Hone Peters) appeal a decision of the Māori Land Court constituting an ahu whenua trust over several Okahu blocks. On 9 March 2015 Judge Ambler constituted ahu whenua trusts over each of Okahu 3B2B2A, Okahu 3B2B2C, Okahu 3B2B2D, Okahu 4A, Okahu 4B, Okahu 4D, Okahu 4C1, Okahu 4C2, Okahu 3A and Okahu 3B2A (“the trust blocks”). Judge Ambler then made an order amalgamating the trusts pursuant to s 221 of Te Ture Whenua Māori Act 1993 (“the Act”) to form a single ahu whenua trust known as the Ngakahu-Ngakohu Whānau Ahu Whenua Trust (“the trust”).<sup>1</sup>

[2] Ahjun Ahoy, Gina Allen, Judy Baker<sup>2</sup> and Kristine Te Paa were appointed as interim responsible trustees of the trust. Des Mahoney, Te Uri Reihana-Ngatote and Hone Peters were also appointed as advisory trustees. All appointments were for a term of 12 months from 9 March 2015.

[3] The Court directed, pursuant to s 238, that the responsible trustees were to:<sup>3</sup>

- a) Gain control and possession of all money, assets and documentation relating to the trust blocks which the advisory trustees, acting as an Interim Management Committee (“IMC”) of the blocks prior to the application to the Court, had in their possession;
- b) Review forthwith arrangements entered into by the IMC with a lessee (“the Grbich family”), a beekeeper (“Haines”) and rating arrangements made with the Far North District Council (“FNDC”);
- c) Devise an appropriate method of apportioning income from the Grbich lease, the Haines beekeeping arrangement, the rating arrangement with FNDC and any other arrangement amongst the various blocks; and

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<sup>1</sup> *Far North District Council - Okahu 3B2B2* (2015) 97 Taitokerau MB 234 (97 TTK 234).

<sup>2</sup> Note due to a typographical error Judy Baker is recorded as Julie Baker in the vesting order made at 97 Taitokerau MB 234 (97 TTK 234).

<sup>3</sup> *Far North District Council - Okahu 3B2B2* (2015) 97 Taitokerau MB 234 (97 TTK 234) at [104].

- d) Convene a general meeting of beneficial owners within 12 months to address the trusteeship and any variations to the trust order.

### **Issue**

[4] The appellants are the interim advisory trustees. They set out a number of complaints in their grounds of appeal, most of which were resolved by discussion and clarification at the hearing of this appeal.

[5] The main issue for determination is whether the Māori Land Court should have appointed Kristine Te Paa as a trustee given that:

- a) the Court was aware of allegations made against her concerning her awareness of and/or collusion in the collection of monies and goods by her father from the lessee of the land blocks for which her father failed to account to the owners; and
- b) no other owners, besides the Te Paa Whānau Trust, supported her appointment.

### **Procedural matters**

[6] Prior to the hearing we granted leave to the appellants to adduce further evidence on the basis that the appellants had received a copy of submissions from the Te Paa Whānau Trust just prior to the lower court hearing of 9 February 2015, and did not have sufficient notice or opportunity to respond to those submissions.<sup>4</sup>

[7] Counsel for the respondent objected to the application to adduce further evidence, on the basis that the material was not new, not relevant or was in fact legal submission and should be admitted in that way. The further evidence adduced was in fact uncontroversial and the matter was not taken any further by counsel for the respondent.

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<sup>4</sup> [2015] Māori Appellate Court MB 394 (2015 APPEAL 394).

[8] We note that following the lower court hearing the appellants filed audited accounts prepared in relation to funds received by the IMC from Grbich and Haines. The accounts were also filed to demonstrate that the IMC were accounting properly for monies received in anticipation of the constitution of the trust. That information also provided answers over concerns, raised by the Te Paa Whānau Trust, in relation to how the monies were being collected and accounted for. We do not apprehend, however, that Judge Ambler had any serious concerns over the actions of the IMC, given that he appointed the IMC members as advisory trustees.

### **Further Evidence**

[9] Mr Mahoney gave evidence before us that the interim trustees were unable to operate effectively as two of the trustees, Ahjun Ahoy and Judy Baker refused to deal with Kristine Te Paa given the allegations made against her father. Mr Mahoney also alleged that, as Kristine Te Paa resided in Australia, communication with her was ineffective and time-consuming. He alleged that the interim trustees have been unable to address the directions given by Judge Ambler because of these issues.

### **Submissions for the appellants**

[10] The submissions for the appellants can be summarised as follows:

- a) The allegations against Kristine Te Paa and her father are such that she is not suitable to be appointed as a trustee pursuant to s 222(2)(a) of the Act;
- b) Kristine Te Paa is not broadly acceptable to the beneficiaries of the trust;
- c) There was a breach of natural justice. The appellants did not have sufficient notice or opportunity to respond to the submissions made by the Te Paa Whānau Trust at the hearing held on 9 February 2015.

[11] The appellants requested that the matter be sent back to the lower Court to remove Kristine Te Paa as an interim responsible trustee, and replace her with the trustees nominated at the election of trustees carried out at the owners' hui held on 12 July 2014.

## Submissions for the respondent

[12] The respondent submitted that:

- a) The Court exercised its discretion under s 222 to appoint Ms Te Paa. To succeed on appeal the appellant must demonstrate that the lower court:
  - (i) made an error of law or principle;
  - (ii) took into account irrelevant principles or failed to take into account relevant ones; and
  - (iii) the decision was plainly wrong.
- b) The voting process adopted by the owners at the hui of 12 July 2014 was flawed. Voting was done on a global basis, which allowed people with no interest in certain blocks to have their votes counted against nominee trustees for those blocks, which affected the outcome of the vote;
- c) In the circumstances it was appropriate for the lower court to hold that fairness among multiple owners of multiple blocks could be best ensured by a voting process which takes account of shareholdings in each of the blocks;
- d) The refusal to allow proxy voting affected the outcome in relation to the nominees from the Te Paa Whānau Trust, as they could not attend the meeting in person;
- e) In the circumstances it was appropriate for the lower court to appoint interim trustees until such time as a robust election process could take place;
- f) The Court was justified in not appointing the nominees for trustees who did not attend the hearing on 9 February 2015 due to the lack of evidence about their skills and abilities;

- g) The main reason for Kristine Te Paa's appointment as an interim trustee was her work and business background, which made her suitable to undertake the tasks set for the interim trustees;
- h) Although Kristen Te Paa lives in Australia, the trust order provides for trustee meetings to occur by telephone and other electronic means such as Skype, so that travel expenses can be minimised;
- i) The lower court was right to steer away from the parties' dispute regarding historical dealings with the lands;
- j) Although it is accepted that the appellants did not have sufficient notice or opportunity to respond to the respondent's submissions ahead of the hearing on 9 February 2015, those submissions did not materially affect the decision of the Court. The relief the Te Paa Whānau Trust sought in those submissions was that the appointment of trustees be deferred until a general meeting of beneficiaries could be held; and
- k) The appellants are unable to point to an error of legal principle or failure to take into account relevant factors, or that the Court took into account irrelevant factors. The Court's exercise of its discretion was not plainly wrong.

## Law

[13] Sections 221 and 222 of the Act provide:

### **221 Power of court to amalgamate trusts**

- (1) The court may order the amalgamation of 2 or more trusts (other than kai tiaki trusts) constituted under this Part, if—
  - (a) all trustees of the trusts to be amalgamated apply for the order; and
  - (b) the court is satisfied that—
    - (i) the beneficiaries of the trusts to be amalgamated have had sufficient notice of the proposal to amalgamate and sufficient opportunity to discuss and consider it; and

- (ii) there is a sufficient degree of support for the application among the beneficiaries of the trusts to be amalgamated.
- (2) Where any 2 or more ahu whenua or whenua topu trust are amalgamated, the income shall be held for such purposes as are specified in the order for the amalgamation of the trusts.

**222 Appointment of trustees**

- (1) Subject to subsections (2) and (3), the court may appoint as trustee of any trust constituted under this Part—
- (a) an individual; or
  - (b) a Maori Trust Board constituted under the Maori Trust Boards Act 1955 or any other enactment, or any body corporate constituted by or under any enactment; or
  - (c) a Maori incorporation; or
  - (d) the Māori Trustee; or
  - (e) Public Trust; or
  - (f) a trustee company within the meaning of the Trustee Companies Act 1967.
- (2) The court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part,—
- (a) shall have regard to the ability, experience, and knowledge of the individual or body; and
  - (b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.
- (3) The court shall not appoint any individual or body to be a trustee of any trust constituted under this Part unless it is satisfied that the proposed appointee consents to the appointment.
- (4) Subject to subsection (5), the court may appoint any such individual or body as a responsible trustee, or an advisory trustee, or a custodian trustee.
- (5) For every trust constituted under this Part the court shall appoint 1 or more responsible trustees, and may appoint 1 or more advisory trustees and 1 or more custodian trustees.

[14] In *Clarke v Karaitiana* the Court of Appeal examined the considerations relevant to the appointment of trustees:<sup>5</sup>

[51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The

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<sup>5</sup> *Clarke v Karaitiana* [2011] NZCA 154, [2011] NZAR 370 at [51] and [53].

importance of the views of the beneficial owners of the trust is underlined by s 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.

...

[53] It will be plain from these observations that the discretion of the Court is not broad and unfettered. Of course, the Court may take into account such other matters as it thinks fit but the exercise of its discretion will be primarily guided by s 222(2). The importance ordinarily attaching to the views of the owners highlights the need to design meeting procedures which are likely to secure the widest possible input from the owners

[15] In *Taueki – Horowhenua X1B 41 North A3A and 3B1* the Māori Appellate Court discussed the role and function of an Appellate Court on appeal.<sup>6</sup>

[42] The Supreme Court recently considered the general scope of the appellate court function where there is an appeal by way of rehearing in *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103.

...

The Supreme Court concluded that the High Court was required to come to its own view on the merits. The weight it gives to the decision of the Commissioner is a matter of judgment. If it is of a different view from the Commissioner and is therefore of the opinion that the Commissioner's decision is wrong, it must act on its own view. While the decision does not deal directly with our jurisdiction, it reinforces the principle that, aside from matters of assessment of credibility of witnesses or exercise of judicial discretion, an appellate court's role is not to defer to the view of the lower court but to must make up its own mind.

[43] The Supreme Court was not required to consider the principles applicable to an appeal against the exercise of a judicial discretion. The law in that regard is well settled. In *Harris v McIntosh* [2001] 3NZLR 721 the Court of Appeal confirmed that an appellant has the burden of showing that the judge had acted on a wrong principle, or that he or she failed to take into account some relevant matter, or that he or she took account of some irrelevant matter, or that he or she was plainly wrong. We refer also to the fuller discussion of appeals against judicial discretion by Judge McHugh in this Court in *Re Tarawera C6* (1982) 9 TakitimuACMB 286-324 at 306-310.

[44] The Maori Appellate Court has a particular duty to intervene in respect of orders of the Court that are made without jurisdiction. In *Re Maungatautari 5BIA and 1 other, Matehaere v Baillie* (1976) 15 Waikato-Maniapoto ACMB 188 the view was expressed that this Court could itself take steps to rectify orders even though the parties no longer wished to proceed with the appeal:

“This Court is far from unmindful of the fact that it is a “titles Court” and in addition that it has an unambiguous responsibility of ensuring that where a patent deficiency in a purported order of the Maori Land Court presents itself of taking some step towards its correction or of putting that order at an end.”

[45] In *Re Torere 34A and Torere 50B2* (1983) Rotorua ACMB 6/322 the Court expressed this principle as follows:

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<sup>6</sup> *Taueki - Horowhenua X1B41 North A3A and 3B1* (2008) 16 Whanganui Appellate Court MB 30 (16 WGAP 30) cited with approval in *Apatu v Trustees of Owhaoko C Trust - Owhaoko C* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34). See also *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.



“When an Appellate Court is satisfied that the lower Court has exceeded its jurisdiction in purporting to make an order it is the clear duty of the Appellate Court to annul that order. This principle is set out in Halsbury's Laws of England, 4th ed. Vol.10 at p. 325, para 717 viz “It is the duty of an Appellate Court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the Court below” - and at p. 326, para 718: “Where, by reason of any limitation imposed by Statute, charter or commission, a Court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled.” See also 4th Ed Vol1, p 159 at para 165. See also dictum of Fair J. in *Bethune v Bydder* 919380 NZLR, 1. Refer also *Re Eruini Maihi* (1916) GLR p 131, 136 where it is said that the Maori Land Court has jurisdiction to cancel an order in the sense of declaring it null and void on the ground of fraud, or for want of jurisdiction, notwithstanding the time for appeal and rehearing has expired.”

[46] From these authorities we take clear guidance that it is this Court's function to consider for itself the issues that had to be determined at the original hearing, that we have a duty to correct any orders made without jurisdiction and that, where there are proper grounds to do so, we should overturn the exercise of a judicial discretion.

[16] We adopt the principles set out in that decision.

## **Discussion**

[17] We agree with counsel for the respondent that the complexities of the process embarked upon by the appellants, when they were the IMC for the land blocks, have only become apparent to them as they worked through the process. In particular the voting process conducted at the hui of 12 July 2014 was on a global basis over all of the trust blocks as a whole, rather than on a block by block basis.

[18] It was accepted by all parties that the permanent trustees ought to be representative of each of the blocks, apart from Okahu 3B2B2A - D.<sup>7</sup> Such representation would mean that the owners of each of the blocks would vote on the trustees for their particular block, and owners in other blocks would not be able to affect the outcome of the vote. Similarly the disallowance of proxy votes also affected the outcome at 12 July 2014 hui. We agree with Judge Ambler that the process was flawed and could not be relied upon to appoint permanent trustees.

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<sup>7</sup> Judge Ambler treated the Okahu 3B2B2A-D blocks as a single block group because three of the blocks were house sections cut off from the parent block and currently unoccupied.

[19] In the circumstances, given the need for leasing arrangements, rating arrangements and other matters to be formalised, the decision by Judge Ambler to appoint interim trustees cannot be faulted.

[20] In assessing Ms Te Paa's suitability as an interim trustee, Judge Ambler correctly took into account Ms Te Paa's business and work experience. Although allegations in relation to Ms Te Paa's involvement with her father's activities in the past were made, they were simply that. There was no probative evidence before the Court about Ms Te Paa's father's activities, and even if such allegations as were made could be proven it did not show that Ms Te Paa was aware of any wrongdoing on the part of her father. Again, taking into account that Ms Te Paa was appointed as an interim trustee only, and that three other responsible trustees and three advisory trustees were also appointed, we consider Judge Ambler correctly weighed the relevant factors under s 222(2)(a) in making his decision.

[21] We also consider that Judge Ambler was correct in his assessment that, given the backing of the Te Paa Whānau Trust, and their sizable shareholding in some of the blocks there was sufficient evidence to demonstrate that Ms Te Paa was broadly acceptable to the beneficiaries in respect of those blocks. The need for the appointment of a Te Paa whānau representative is strengthened in the light of the patchy communications between the IMC and the Te Paa whānau during the lead up to the hearings. Appointing Ms Te Paa to be an interim trustee would assist the communications between a large shareholding group and the trustees, and in other circumstances might have been expected to assist in the transition from a group of individual blocks to a single trust entity.

[22] For these reasons we see nothing wrong with the decision made by Judge Ambler on 9 March 2015.

[23] Nevertheless, as set out above, further information made available to this Court indicates that the interim trustees are not working together as a cohesive group. Once it became apparent that Ahjun Ahoy and Judy Baker refused to work with Ms Te Paa it would have been reasonable and sensible for the remaining trustees to seek directions from the lower court. That has not occurred. The trustees have instead sought recourse to this Court. The situation is unsatisfactory, and we intend to address it by referring the matter

back to the lower court for a review. Failure to comply with Court directions is a breach of trustees' duties per s 238 of the Act.

**Decision**

[24] Pursuant to s 56(1)(d) and s 37(3) of the Act the Māori Land Court is directed to conduct a review of the trustees' performance per s 238(1) of Te Ture Whenua Māori Act 1993.

[25] For the avoidance of doubt the appeal is concluded and the Māori Land Court is to deal with the s 238 matter as if it originated in the lower court.

[26] For the reasons given above the appeal is therefore dismissed.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

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C L Fox (Presiding)

**JUDGE**

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S Te A Milroy

**JUDGE**

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C T Coxhead

**JUDGE**