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

**A20170007456**

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| UNDER | Section 237 of Te Ture Whenua Māori Act 1993 and section 68 of the Trustee Act 1956 |
| IN THE MATTER OF | Kapenga A5 |
| BETWEEN | LORIN MANAHI<br>Applicant |
| AND | THE MĀORI TRUSTEE<br>Respondent |
| AND | MAREE MCFARLANE, ROBERT MCFARLANE, WARWICK MCFARLANE, LORNA SLATER AND DAVID THOMAS AS TRUSTEES OF THE OPEHUIA WHĀNAU TRUST<br>Second Respondent |

**A20170006214**

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| BETWEEN | THE MĀORI TRUSTEE<br>Applicant |
| AND | LORIN MANAHI<br>Respondent |

Teleconference: 18 January 2018, 178 Waiariki MB 274-280

Appearances: C Bidois for the applicants
C Reuhman for the Māori Trustee
G Dennett for the trustees of the Opehuia Whānau Trust

Judgment: 12 April 2018

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**RESERVED JUDGMENT OF JUDGE C T COXHEAD**

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Copies to: C Bidois East Brewster Ltd, JP 30017 Rotorua
C Reuhman Māori Trustee PO Box 5038 Wellington 6145
G Dennett Po Box 644 Rotorua 3040

## Introduction

[1] On 8 December 2017, I confirmed the sale and purchase agreement entered into by the Māori Trustee for the sale of Kapenga A5 block to the trustees of Parekarangi Trust. I then adjourned the related applications to terminate the Kapenga A5 Trust and distribute the proceeds of the sale to the beneficiaries.[1]

[2] Lorin Manahi has now applied for an order per s 237 of Te Ture Whenua Māori Act 1993 and s 68 of the Trustee Act 1956 to restrain the Māori Trustee from proceeding with the sale.

[3] The Māori Trustee has also filed an application requesting that I recall the orders made at the 8 December hearing and issue a new judgment to include an express determination that the Māori Trustee has the power to execute and complete the sale.

[4] A teleconference was held on 18 January 2018 to hear from the parties.[2] At the conclusion of the teleconference I indicated that, following the filing of further submissions, I would issue a decision on the matter.

## Background

[5] Kapenga A5 comprises 43.9359 hectares. There are 8 beneficial owners in the block (including two whānau trusts). In 1972, a trust was established and the land was vested in the Māori Trustee as responsible trustee.[3]

[6] On 8 September 2017, the Māori Trustee entered into a sale and purchase agreement of the block with the trustees of Parekarangi trust for the sum of $825,000. According to the application documentation, there is beneficial owner support from those who together hold 958 shares out of the 1,000 shares in the block.

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1 171 Waiariki MB 254-268 (171 WAR 254-268).
2 178 Waiariki MB 274-280 (178 WAR 274-280).
3 164 Rotorua MB 250 (164 R 250).

**Issues**

[7] There are two issues to determine. First, whether I should restrain the Māori Trustee from proceeding with the sale. Second, whether I should recall the orders made on 8 December 2017 and issue a new judgment.

**Should the Court grant the order restraining the Māori Trustee from proceeding with the sale?**

*Lorin Manahi's submission*

[8] Ms Manahi seeks an order restraining the Māori Trustee from continuing with the sale of Kapenga A5. Mr Bidois, for Ms Manahi, submits that cl 3 of the trust order expressly prohibits the alienation of the block other than in limited circumstances none of which arise here.

[9] He further states that the Māori Trustee executed the sale on 18 October 2017 with full knowledge that the trust order prohibited sale and when the Court confirmed the alienation on 8 December 2017, it confirmed the sale only. He says, no order was made to vary the trust order to remove the prohibition on sale and no order was made under s 64 of the Trustee Act 1956 authorising dealings in trust property.

[10] Counsel further states that per s 68 of the Trustee Act 1956 the Court can review acts and decisions of trustees and make directions, or such orders as the circumstances of the case require. Mr Bidois submits that the three threshold requirements for relief per s 68 are met. Those requirements are that the applicant must be beneficially interested, there must be an act or omission or reasonable grounds to anticipate such an act, omission or decision and that the applicant will be aggrieved.

[11] Counsel submits that Ms Manahi is a person beneficially interested, the Māori Trustee is acting ultra vires by continuing to participate in the sale and it is anticipated that the Māori Trustee will sell the land. Further, the Māori Trustee has not attempted to cancel the sale despite no authorisation being obtained. Mr Bidois adds, that Ms Manahi will be aggrieved at the loss of her whenua if the sale is completed.

[12] Mr Bidois argues that given that the Māori Trustee has no intention of adhering to the terms of trust the Court must intervene to prevent the sale going any further. He states that the Māori Trustee and those owners who support the sale are seeking to sell land not beneficially owned by them as the whole of the block is sought to be sold which includes interests held by those who oppose the sale. As such, counsel submits that any continuation of the agreement to sell evidences an intention by the Māori Trustee to commit an equitable fraud. He submits that the whole of the block can only be sold if the owners consent to the sale per s 149 or if the terms of trust are varied per s 244 of the Act.

[13] In addition, counsel states that the Court should disregard the fact that the sale is supported by persons holding more than 75 per cent of the beneficial interests as that on its own cannot validate a breach of trust.

*Māori Trustees submissions*

[14] Ms Reuhman submits that there was no need for the Court to expressly state that it authorised the Māori Trustee to execute the sale as the Court exercised its inherent jurisdiction to intervene and confirm the alienation notwithstanding the Māori Trustees lack of power and the Court further directed the Māori Trustee to proceed with the alienation.

[15] Counsel says there is no breach of trust as the Māori Trustee is complying with the Courts order that the block be alienated in terms set out in the instrument of alienation and therefore Ms Manahi is not entitled to the relief claimed.

[16] Further, Ms Reuhman argues that there is no need to look at the Trustee Act 1956 as clearly the Court has supervisory jurisdiction under Te Ture Whenua Māori Act 1993 to grant equitable relief.

[17] Counsel refers the Court to the Supreme Court decision in *Erceg v Erceg* which considered the supervisory jurisdiction of the Court in relation to trusts.[4] She states that the Māori Trustees lack of power to execute the sale was clearly before the Court and the Court was required to exercise its supervisory jurisdiction if the alienation was to proceed.

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4 *Erceg v Erceg* [2017] NZSC 28.

Ms Reuhman maintains that the Court did so in granting the confirmation and directing the Māori Trustee to complete the transfer and distribute the proceeds. She adds that the Court also had before it evidence that beneficiaries holding 96 per cent of the shareholding supported the sale. As such the Court in ordering the confirmation was determining the proper course for the trust and the trustee to take and investing the Māori Trustee with the requisite power to do so to ensure there was no breach of trust.

[18] Ms Reuhman submits that it is enough that the Court has determined that the sale should proceed on the terms in the agreement and direct the Māori Trustee to act. The Court did not need to expressly vary the trust order or expressly confer on the Māori Trustee the power of sale.

[19] Counsel states that Ms Manahi is not entitled to relief as the Māori Trustee has not breached its terms of trust nor is a breach anticipated. All the actions taken by the Māori Trustee have been in accordance with the Courts directions and the Courts inherent jurisdiction over the trust.

[20] The Opehuia Whānau Trust support the Māori Trustee's submissions that the application to restrain the Māori Trustee be dismissed.

*Lorin Manahi's submissions in reply*

[21] Mr Bidois accepts that the Court may, by its inherent jurisdiction, authorise a trustee to act outside the terms of trust in certain circumstances. But, he says, on this occasion there were no circumstances to justify an exercise of that very special jurisdiction. Further, he argues that a written application under s 237 or at the very least an oral request made at the hearing was required. No such application or request has been made.

[22] Counsel states that it is a matter of record that the Court did not exercise its powers per s 37(3) of the Act to of its own motion amend the proceedings. As such, he argues that the Court must reject the contention that the Court exercised its inherent jurisdiction to authorise the sale.

[23] Mr Bidois submits that the Māori Trustee has not provided any authorities to support the argument that by granting the confirmation the Court impliedly authorised the Māori Trustee to sell the land. Instead, the authorities say the exact opposite. Counsel relies on *Manning – Kirikiri Pawhaoa B2A1*;[5] and *Tairuakena v Carr;*[6] to argue that the current legal position is that an alienation in breach of trust continues to be actionable by a beneficiary even after confirmation has been granted.

## The Law

[24] Section 237 of the Act states:

> **237 Jurisdiction of court generally**
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> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Maori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.
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> (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

[25] It is well established that s 237 confers on the Court extensive powers with respect to trusts including the ability to grant equitable remedies.[7]

[26] Section 68 Trustee Act 1956 is also relevant:

> **68 Applications to court to review acts and decisions of trustee**
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> (1) Any person who is beneficially interested in any trust property, and who is aggrieved by any act or omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to anticipate any such act or omission or decision of a trustee by which he will be aggrieved, may apply to the court to review the act or omission or decision or to give directions in respect of the anticipated act or omission or decision; and the court may require the trustee to appear before it, and to substantiate and uphold the grounds of the act or omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require:
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> provided that no such order shall—

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5 *Manning – Kirikiri Pawhaoa B2A1* [2011] Māori Appellate Court MB 215 (2011 APPEAL 215).

6 *Tataurangi Tairuakena v Carr* [1927] GLR 369.

7 *Mikaere-Toto v Te Reti B and C Residue Trust - Te Reti B and Te Reti C Block* [2014] Māori Appellate Court MB 249 (2014 APPEAL 249) and *Proprietors of Mangakino Township v Māori Land Court* CA 65/99 16 June 1999.

> (a) disturb any distribution of the trust property made without breach of trust before the trustee became aware of the making of the application to the court:
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> (b) affect any right acquired by any person in good faith and for valuable consideration.
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> (2) Where any such application is made, the court may,—
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> (a) if any question of fact is involved, direct how the question shall be determined:
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> (b) if the court is being asked to make an order that may prejudicially affect the rights of any person who is not a party to the proceedings, direct that any such person shall be made a party to the proceedings.

**Discussion**

[27] Mr Bidois asks the Court to issue an equitable injunction restraining the Māori Trustee from proceeding further with the sale. He argues that the Māori Trustee is expressly prohibited from selling the block and therefore their continuing participation in the sale process is a breach of trust.

[28] There is no denying that this is an attempt, to halt a sale where the Court has already confirmed the sale of purchase agreement. I understand that Ms Manahi has filed an appeal against my decision of 8 December confirming the sale and purchase agreement.

[29] The underlying issue here is that the Māori Trustee will alienate the land in the face of opposition from some of the trusts beneficiaries though I note that the sale has 96 per cent of the owners' approval.

[30] At the hearing on 8 December 2017, I commented that I did not consider that this to be a case of an unreasonable minority opposing matters. That appears to have now changed.

[31] Mr Bidois suggests that the Māori Trustee, will intentionally disregard their trust order, and proceed with the sale. That suggestion is not supported by any evidence. In fact, the contrary is true in that the Māori Trustee has now sought and applied for a recall of the 8 December decision, in order to have clear confirmation that they have expressed power to proceed with the sale.

[32] I therefore decline to make an order under s 237 of Te Ture Whenua Māori Act 1993 and s 68 of the Trustee Act 1956 restraining the Māori Trustee from proceeding further with the sale of Kapenga A5 block.

[33] I now address the recall application.

**Should the recall application be granted?**

*Māori Trustees submissions*

[34] Ms Reuhman, for the Māori Trustee submits that this Court has the power to recall a judgment prior to sealed orders being issued per s 237(1) of the Act and r 11.9 of the High Court Rules and in reliance of the decision of *Pacey v Adlam*.[8] Further, counsel refers to the Supreme Court decision in *Saxmere*,[9] where that Court affirmed that New Zealand Courts may recall a judgment where for some other very special reason justice requires that the judgment be recalled.

[35] Ms Reuhman submits that, in this instance, justice requires the Court to exercise its power to recall the judgment as the judgment did not address a fundamental issue central to the Court decision and orders. That is, that the judgment does not clarify whether the Māori Trustee's entry and execution of the sale and purchase agreement had been ratified by the Court. Counsel argues that these reasons, taken together, amount to a very special reason for the judgment to be recalled.

[36] Further, Ms Reuhman states that if the judgment is not recalled and clarified the parties to the sale are likely to suffer prejudice as a direct result. Whereas if the judgment is recalled no prejudice will be suffered.

[37] The Opehuia Whānau Trust support the recall application.

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8 *Pacey v Adlam - Matata Parish 39A2B2B2A* (2016) 147 Waiariki MB 143 (147 WAR 143).
9 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122.

*Lorin Manahi's submissions*

[38] Mr Bidois submits that this Court does not have the power to recall the judgment for the purposes intended by the Māori Trustee and the Opehuia Whānau Trust. Counsel argues that the Court cannot recall a decision per medium of s 237 as part of its inherent jurisdiction in respect of trusts and such a request to do so is a clear abuse of process. Counsel further contends that the power to recall a judgment is a procedural power akin to the power to stay an application and neither of these powers are powers of the High Court in respect to trusts and as such they are not available to this Court via s 237 of the Act.

[39] In addition, Mr Bidois submits that the Māori Trustee appears to be relying on r 11.10 of the High Court Rules to recall the judgment for the purposes of making further orders. He says that this is an incorrect interpretation of r 11.10 and it would be an abuse of process for the Court to allow it. The powers of correction under r 11.10, Mr Bidois submits, are strictly limited to correction of ambiguities and are not a substitute for rehearing or appeal as established in *Snowdon v Radio New Zealand Ltd*.[10]

[40] Counsel adds that the decision made on 8 December was expressed with the Courts customary clarity and there is nothing unclear or unambiguous in the way the decision is expressed. Consequently, he says, the Courts powers under r 11.10 are not triggered and the Māori Trustee cannot seek relief via that route. The only proper course, Mr Bidois submits, is for the Māori Trustee to seek a rehearing or appeal the decision.

[41] Mr Bidois contends that, in so far as the Māori Trustee is requesting the Court to exercise its inherent jurisdiction to retrospectively and unilaterally vary the trust order to include a power of sale, to avoid a breach of trust, this is opposed. Counsel says that such action would be futile. If the recall application is granted the Court would be restricted to giving a decision on the substantive application that was made by the Opehuia whānau trust. That is, for an order per s 226. Counsel points out that no application was filed per s 237, 244 or 231 and as a result, the Court must decline a recall for the purpose of seeking orders under those sections. In reliance on *Henderson v Henderson* counsel says that the

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10 *Snowdon v Radio New Zealand Ltd* [2013] NZEmpC 91 at [7].

Court would have to disallow any new arguments if it recalled the application therefore making it futile for the Court to grant the recall application.[11]

[42] In summary, Mr Bidois submits that the Court should decline the recall application on the grounds that it is an abuse of process; the jurisdiction that the Māori Trustee and the Opehuia Whānau Trust are inviting the Court to exercise are not available and no submissions were made at the hearing to support the Court varying the trust under s 226 as sought in the original application.

*Māori Trustee's submissions in reply*

[43] Ms Reuhman, in reply, states that both the Opehuia Whānau Trust and the Māori Trustee are asking the Court to exercise its jurisdiction per s 237 to recall the decision and to exercise its inherent jurisdiction in respect of trusts to direct the Māori Trustee to complete the conveyancing of Kapenga A5 in accordance with the conditional agreement for sale and purchase.

[44] Ms Reuhman notes r 2.2(3) of the Māori Land Court Rules 2011 makes it clear that the Court must deal with proceedings in a way that best furthers the stated objectives of facilitating access to the Court and securing the just, speedy and inexpensive dispatch of the business of the Court.

[45] She further argues that the power to recall a judgment is clearly set out in r 11.9 of the High Court Rules and submits that it is unnecessary for the Court to consider r 11.10, the supporting commentary and cases and does not accept that the power to recall is analogous to a stay of proceedings.

[46] Ms Reuhman clarifies that the Māori Trustee is not seeking that the Court exercise its jurisdiction retrospectively. She says that the Court has an inherent jurisdiction over all Part 12 trusts and does not need to specifically refer to s 237 to invoke that section.

[47] Ms Reuhman argues that the recall application is not seeking to allow new arguments or recast the application, rather, the Court was directed to the issue at the

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11 *Henderson v Henderson* (1943) 3 HARE 100.

hearing. Counsel submits that it is fundamental that the Court considered the power of sale as it would not have granted confirmation otherwise.

**Legal principles**

[48] Te Ture Whenua Māori Act 1993 does not specifically provide for the recall of a judgment. Normally, the Court will consider amendment of an order per s 86 of the Act to give effect to the true intention of the Court or to record the actual course and nature of any proceedings in the Court.

[49] In *Pacey v Adlam - Matata Parish 39A2B2B2A,* [12] I observed that this Court "must have the jurisdiction to do what is necessary and have proper processes to enable it to exercise the functions and duties of a Court." I remain of that view. The ability to reopen a decision and recall a judgment prior to orders being sealed is necessary for the Court to function with proper process. For the Court to recall a decision there must be "very special reasons."

[50] Guidance can be taken from the High Court Rules which provide for the recall of judgments in exceptional circumstances. The general principle is that a judgment, once granted, is final and may not be altered except on appeal or review. Such principle will not be departed from lightly, however judgment can be amended or recalled in some circumstances.[13]

[51] In *Wilcocks v Teat*,[14] the High Court stated that what is sought to be corrected must be the result of a slip or a failure to express what was decided and intended. The rule cannot be used where there is subsequently found a more convenient form of order, nor can it be used to vary an order in a fundamental way, or used by a litigant to improve a judgement that has been obtained. The Court also noted that the power can be exercised despite a judgment being sealed.

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12 *Pacey v Adlam - Matata Parish 39A2B2B2A* (2016) 147 Waiariki MB 143 (147 WAR 143) at [43].
13 *BNZ v Mullholland* (1991) 4 PRNZ 299.
14 *Wilcocks v Teat* HC Rotorua, CIV-2008-463-784, 15 March 2011.

[52] The general Courts have emphasised that the recall of a judgment is rarely justified and cannot be used to effectively re-litigate an application, as a substitute for appeal, or to simply vary or add to it.[15]

**Discussion**

[53] It is clear, that when I made my original orders on 8 December, I confirmed the sale and purchase agreement pursuant to 151 of the Act but did not make expressly make orders authorising the Māori Trustee to proceed with the alienation.

[54] Section 152 requires that the Court be satisfied of a list of matters before granting confirmation including that the alienation is not in breach of any trust to which the land is subject. As such, implicit in confirming the sale and purchase agreement must be authority to act on that agreement. If a sale has been approved then it must follow that the vendor has or be given the power to carry out that sale.

[55] The unfortunate situation in this case is that the original application did not include an order pursuant to s 237 to which the Court could authorise the Māori Trustee to execute the sale. Instead, the application that was made was for an order pursuant to s 226 of the Act. Both counsel agreed, that s 226 is not relevant here. Had the application been made for the exercise of the Courts inherent jurisdiction under section 237 the recall matter would have been more straight forward.

[56] I agree that the Māori Trustee's ability to alienate was an issue that was clearly before the Court. However, I am being asked to recall a decision and make orders under provisions that were not before me on 8 December 2017. As stated above, there must be very special reasons for the Court to recall decisions. In these circumstances, I decline to grant the recall application.

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15 *Horowhenua County v Nash (No 2)* [1968] NZLR 362 (SC). *Erwood v Maxted* [2010] NZCA 93. See also *Ngahuia Reihana Whanau Trust v Flight* CA23/03, 26 July 2004.

Pronounced in Rotorua at 8:20 am on this Thursday the 12th day of April 2018.

C T Coxhead
**JUDGE**