

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

**APPEAL 2014/3  
A20140007045**

UNDER Sections 58 and 59, Te Ture Whenua Māori Act 1993

IN THE MATTER OF An appeal by Destiny Savita Mikaere-Toto against a preliminary determination of the Māori Land Court made on 10 April 2014 at 74 Waikato Maniapoto MB 277-293 in respect of Te Reti B and Te Reti C Block

BETWEEN DESTINY SAVITA MIKAERE-TOTO  
Appellant

AND TE RETI B AND C RESIDUE TRUST  
Respondent

Hearing: 11 August 2014  
(Heard at Hamilton)

Court: Judge L R Harvey (Presiding)  
Chief Judge W W Isaac  
Judge P J Savage  
Judge M P Armstrong

Counsel: Mr Koning for the Appellant  
Mr Sharp for the Respondent

Judgment: 01 October 2014

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Introduction

[1] Destiny Savita Mikaere-Toto appeals a preliminary determination of the Māori Land Court that it has jurisdiction to award equitable remedies, in this case equitable compensation or an order to account for profits, for a breach of trust or breach of fiduciary duty.<sup>1</sup>

[2] The grounds of appeal are:

- (a) That the Court erred in framing the preliminary point of law -
  - (i) The Court held that the “short but important point is to decide whether the Māori Land Court has jurisdiction to grant equitable remedies for breach of trust or breach of fiduciary duties.”
  - (ii) The preliminary point of law for determination was: does the Court have jurisdiction under s 237 of Te Ture Whenua Māori Act 1993 (“the Act”) to hear and determine claims in equity; and, if so, does the Court have jurisdiction under s 237 to grant equitable relief, including compensatory damages and account of profits.
- (b) The Court erred in holding that the Court has a broad jurisdiction under s 238 of the Act to hear and determine claims in equity against trustees or in respect of trusts.
  - (i) The phrase in s 238(2) “...(whether by injunction or otherwise)” does not confer a broad equitable jurisdiction on the Court.
  - (ii) The proper construction of s 238 under Part 12 and within the overall scheme of the Act is to enable the Court to properly supervise trusts coming within s 236(1).
  - (iii) The Court does not have the jurisdiction to enforce any equitable relief granted under s 238.
  - (iv) If the legislature had intended to grant the Court a broad equitable jurisdiction then it would have done so by an express provision in s 18 or Part 1 and not by implication under s 238.

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<sup>1</sup> 74 Waikato Maniapoto MB 277 (74 WMN 277).

- (c) The Court erred in holding that the Court has a broad jurisdiction to hear and determine claims in equity against trustees or in respect of trusts by virtue of the combined effect of s 237 of the Act and s 16 of the Judicature Act 1908.
- (i) The phrase in s 237(1) of the Act “...whether by statute...” does not extend to s 16 of the Judicature Act 1908.
- (ii) The proper construction of s 237 under Part 12 and within the overall scheme of the Act is to enable the Court to properly supervise trusts coming within s 236(1).
- (iii) The Court does not have jurisdiction to enforce any equitable relief granted under s 237.
- (iv) If the legislature had intended to grant the Court a broad equitable jurisdiction then it would have done so by an express provision in s 18 or Part 1 and not by implication under s 237.

[3] The issue for determination is whether the Māori Land Court erred in finding that it has jurisdiction to award equitable remedies, in this case equitable compensation or an order to account for profits, for a breach of trust or breach of fiduciary duty. We consider the following questions relevant:

- (a) Is section 18 the primary source of jurisdiction in the Act?
- (b) Does the Court have jurisdiction under s 237 of the Act?
- (c) Does the Court have jurisdiction under s 238 of the Act?
- (d) Does section 238 take primacy over section 237?
- (e) Can an applicant file proceedings under section 237 or 238 of the Act?

### **Background**

[4] Te Reti B and C Residue Trust (“the Trust”) is an ahu whenua trust. The trust was established on 20 July 1971.<sup>2</sup> The original trustees were Clifford Matthews and Eugene Dennis Morgan. The current trustees are Stanley James Urwin, William Hauruia Nepia, Philson

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<sup>2</sup> 31 Tauranga MB 234 (31 T 234).

Tumatawha Piahana, Ranginui Winiata, Christopher Hauruia Nepia, Michelle Turner and Kīngi Junior Te Reohau Ranui.<sup>3</sup>

[5] On 15 February 2013 the trustees filed a claim in the Māori Land Court per s 237 of the Act. They allege that three former trustees, Raymond Te Kura, Luke Stevenson Tamatukarere Matthews and Destiny Savita Mikaere-Toto, breached their obligations as trustees in relation to a land clearing contract. The pleadings seek alternative relief in the form of equitable compensation or an accounting for profit. The trustees allege other breaches of trust but those claims are not directed at the appellant.

[6] On 31 October 2013 Ms Mikaere-Toto filed an application seeking a preliminary determination on a point of law. In summary, that application sought a determination as to whether the Māori Land Court has jurisdiction to hear and determine equitable claims and remedies under s 237 of the Act. A notice of opposition dated 14 November 2013 was filed by the current trustees of the Trust.

[7] The application was heard by Judge Clark on 30 January 2014.<sup>4</sup> He issued a decision on 10 April 2014 which found that the Court does have jurisdiction under s 238(2) of the Act or failing that under s 237.<sup>5</sup> The appellant now appeals that decision. On 7 May 2014 Judge Clark granted leave to appeal against the preliminary determination pursuant to s 59 of the Act.<sup>6</sup>

#### **Appellant's submissions**

[8] Mr Koning argued that the Preamble to the Act and the interpretation and objectives set out in ss 2 and 17 do not support what he described as “the significant extension of the Court’s equitable jurisdiction over trusts” as provided for in the decision under appeal.

[9] He also contended that the general jurisdiction of the Court under s 18 reflects the overall policy of the Act. The legislature has not conferred any broad equitable jurisdiction on the Court in respect of trusts under s 18. If the legislature had intended to give the Court jurisdiction then it would have done so by way of an express provision in s 18 or elsewhere under Part 1 of the Act. The Court’s jurisdiction under ss 237 and 238 of the Act must be interpreted in light of this statutory framework.

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<sup>3</sup> 27 Waikato Maniapoto MB 265 (27 WMN 265).

<sup>4</sup> 71 Waikato Maniapoto MB 266 (71 WMN 266).

<sup>5</sup> 74 Waikato Maniapoto MB 277 (74 WMN 277).

<sup>6</sup> 76 Waikato Maniapoto MB 218 (76 WMN 218).

[10] Counsel submitted that the powers and authorities conferred on the Māori Land Court by virtue of s 237 of the Act, do not include the power to grant equitable remedies for account or compensation. Nor does it extend to s 16 of the Judicature Act 1908. Rather, it limits the jurisdiction of the Māori Land Court to a supervisory role.

[11] Section 238 of the Act, counsel argued, provides the Court with discretion to require a trustee to report on the performance of his or her duties as a trustee and if appropriate enforce the obligations of his or her trust. These provisions do not expressly empower the Court to hear and determine claims in equity for breach of trust or breach of fiduciary duty. Rather, such claims have to be filed in the District Court or High Court. Mr Koning referred to the jurisdiction of the District Court under s 34 of the District Courts Act 1947 in support of this argument.

[12] In oral submissions, Mr Koning's argument was significantly refined. He conceded that the Māori Land Court did have jurisdiction to grant equitable remedies for breach of trust. However, he further argued that this jurisdiction could not be invoked by application from an interested party. That is, an applicant could not file an application under s 237 or 238 of the Act. Rather, he suggested, an applicant would have to file an alternative application such as seeking a review of trust under s 231, or removal of a trustee under s 240. Only then could the Court invoke its jurisdiction under ss 237 or 238 of the Act if the circumstances required such.

[13] Given the significant change in the appellant's approach before us we have set out the relevant oral submissions from Mr Koning in full:

**Judge Armstrong:** Mr Koning, just following on from that, if we were to adopt that approach and look at section 17 couldn't it be said that by holding trustees to account when they have breached their duties that promotes the effective, use, management and development of the land on behalf of the owners?

**J Koning:** That is one argument Sir, yes, but I think it's the effective, use, management, and development by or on behalf of the owners of Māori land and General land owned by Māori. Yes I accept that that is one interpretation that being able to hold trustees to account would assist in that primary objective. I do have some other comments on that, that which I'll come to shortly.<sup>7</sup>

...

**Judge Harvey:** Coming back to the point I raised earlier Mr Koning, and I know we are jumping all over the place...

**J Koning:** That's fine Sir.

**Judge Harvey:** ...but you accept that an obligation of a trustee is not to profit?

**J Koning:** Yes.

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<sup>7</sup> 2014 Māori Appellate Court MB 200 (2014 APPEAL 200) at pp 208.

**Judge Harvey:** And that the Court, of its own motion or with an application, could enforce that obligation by injunction or otherwise and require a trustee to disgorge that profit?

**J Koning:** Yes.

**Judge Harvey:** Isn't that an equitable remedy?

**J Koning:** That is an equitable remedy, well injunction in the Te Ture Whenua Māori Act. I mean there's obviously section 19. Section 238 obviously also refers to injunctions and injunctions themselves I think are section 85. So an injunction of this Court can only be enforced by its transfer to the High Court. Yes, I do accept that Sir, that the Court can and obviously in the appropriate circumstances should grant an injunction for a trustee to disgorge that profit.

**Judge Harvey:** And nine times out of 10 they do and it doesn't need to be taken any further.

**Judge Savage:** Well what do the words "or otherwise" mean?

**J Koning:** I'll come to that Sir.

**Judge Harvey:** It's like "generally" isn't it Mr Koning?

**J Koning:** Pardon?

**Judge Harvey:** It is like generally?

**J Koning:** Generally, yes. In terms of granting an injunction, the Court would obviously have to have an application before it and the Court to grant an injunction, to make a finding that there has been a breach of a trustee's duties to grant the injunction. I think what I would say is that if that came about that there was an application maybe a review of trust before the Court, could possibly also be the removal of a trustee, that the Court has found that there's maybe breaches of trust and that it should make an injunction for the repayment of funds, I accept that the Court does have that jurisdiction. What I in doing my research for this case Sir, was I found very few examples, if any, of the Māori Land Court granting an injunction for the repayment of effectively trust funds for an account of profits.

**Judge Harvey:** Well I mean often we will just say to them you owe this money, you have to pay it back and they pay it.

**J Koning:** Yes.

**Judge Harvey:** There are plenty of examples like that.<sup>8</sup>

...

**Judge Harvey:** So Mr Koning my reading of these provisions is that the Māori Land Court can do anything the High Court can do in respect of trusts generally.

**J Koning:** In respect of trusts generally, yes.

**Judge Harvey:** So that if you get trustees in breach of their duties and doing all sorts of things, transferring property to themselves for example, making profits, issuing grants to their immediate families and not to the rest of the beneficiaries, breaching their duty of impartiality et cetera, surely the Māori Land Court can do anything the High Court can do to provide a remedy under 237 and 238?

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<sup>8</sup> Ibid at pp 209-210.

**J Koning:** Yes I accept that, yes. I don't think I accept His Honour's view that section 16 is contemplated within section 237, section 16 of the Judicature Act. In my research for these submissions, I tried to find some commentary on section 16 and I couldn't find a great deal of cases on section 16 but it seems to me that, in my submission, it can't be imported into your jurisdiction through 237. It seems to me that it's designed for specifically the general jurisdiction of the High Court. It's almost declaratory in nature to say that's the High Court's jurisdiction and I don't think it can be imported like Judge Clark did through 237. I think that, with respect, is a step too far but, other than that, I do accept that this Court does have all those powers that the High Court has in respect of trusts generally. But Sir that's a separate matter from an equitable civil jurisdiction.<sup>9</sup>

...

**J Koning:** ... But in summary though my point, perhaps, may not have been as clear at the start as it is now. But my point is and always has been, is that an applicant cannot file a civil claim under 237 or 238 and for the Court to hear and determine that under those two sections. That is my point, and I think it's the point I did make in the preliminary determination as well, that I accept that this Court has jurisdiction to grant equitable remedies under Part 12. But that in terms of this particular claim it doesn't because this is a civil claim and 237 and 238 do not, I think, found a civil jurisdiction in equity on this Court. And, as I say, I think perhaps I might be accused of splitting hairs there but I think that is the correct interpretation of those two sections. I think I've done...<sup>10</sup>

...

**J Koning:** No, no reply Sir. Mr Sharp, I think Your Honours are clear about my position so I'm not going to repeat it. Just taking up the point about section 37 raised by His Honour Judge Savage, it's not a provision that I'm overly familiar with but I accept that on its plain meaning it means that the jurisdiction of the Court may be exercised on the application of any person claiming to have an interest in the matter. My view remains is that notwithstanding this particular provision is that the claim, as currently framed, would require obviously an application by those interested, which there is, but I just perhaps Your Honour...

**Judge Savage:** They don't even have to have an interest. They don't have to claim to have an interest.

**J Koning:** That's any person claiming to have an interest in the matter, yes Sir. But in terms of, so I can answer properly, the particular point you were making Sir was that...

**Judge Savage:** Well you were attempting to restrict the basis upon which the Court had this jurisdiction and that it couldn't be brought in certain ways and section 37 may suggest that anybody claiming an interest can invoke the Court's jurisdiction.

**J Koning:** And I don't think I've got any particular difficulty with that Sir because obviously the beneficiaries of Te Reti B & C Residue Trust would also, if there was a breach of trust or breach of fiduciary duty, would also have standing to bring a claim against past trustees. I don't see that there's any difficulty there. I'm not sure really given section 37 that you could say that anybody other than the trustees and beneficiaries could make a claim against former trustees which is consistent with, I would have thought, principles of equitable jurisdiction that those that have standing can make a claim against former trustees for a breach of trust. And, in summary, probably section 37 is consistent with that but I think it goes slightly further than that because there are probably other parts of the Act where any person claiming to have an interest may, for example, be in terms of Māori reservations or an estate and so it's broadly drawn to allow the Court to deal with a whole range of applications that come before it. But in terms of this, in my view, the only two

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<sup>9</sup> Ibid at pp 212-213.

<sup>10</sup> Ibid at p 214.

groups that would have standing to bring these claims would be the beneficiaries or the current trustees.<sup>11</sup>

### Respondents' submissions

[14] Mr Sharp largely agreed with the decision of the Court below. He submitted that the approach contended for on behalf of the appellant was contrary to the plain and ordinary meaning of the relevant provisions in the Act.

[15] Counsel referred to the decision of *Savage v Adlam - Lot 39A Sec. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No 2A Parish of Matatā* (currently under appeal to this Court) as authority where equitable remedies had been granted for a breach of trust.<sup>12</sup>

[16] Mr Sharp argued against the approach adopted in the Court below, that it must first look at whether it has jurisdiction under s 238 of the Act, and only then if jurisdiction does not exist, should the Court look to s 237. Counsel submitted that ss 237 and 238 of the Act should be read together when assessing jurisdiction.

### The Law

[17] The English version of the Preamble to the Act states:

Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a tāonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapū: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles.

[18] Sections 2, 17, 236, 237 and 238 of the Act state:

#### **2 Interpretation of Act generally**

- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.
- (2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as tāonga tuku iho by Māori owners, their whanau, their hapū, and their descendants, and that protects wāhi tapu

<sup>11</sup> Ibid at p 220.

<sup>12</sup> *Savage v Adlam - Lot 39A Sec. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No 2A Parish of Matatā* (2014) 95 Waiariki MB 176 (95 WAR 176).



- (3) In the event of any conflict in meaning between the Māori and the English versions of the Preamble, the Māori version shall prevail.

**17 General objectives**

- (1) In exercising its jurisdiction and powers under this Act, the primary objective of the Court shall be to promote and assist in—
- (a) The retention of Māori land and General land owned by Māori in the hands of the owners; and
  - (b) The effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Maori.
- (2) In applying subsection (1) of this section, the Court shall seek to achieve the following further objectives:
- (a) To ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
  - (b) To provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
  - (c) To determine or facilitate the settlement of disputes and other matters among the owners of any land:
  - (d) To protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
  - (e) To ensure fairness in dealings with the owners of any land in multiple ownership:
  - (f) To promote practical solutions to problems arising in the use or management of any land.

**236 Application of sections 237 to 245**

- (1) Subject to subsection (2) of this section, sections 237 to 245 of this Act shall apply to the following trusts:
- (a) Every trust constituted under this Part of this Act:
  - (b) Every other trust constituted in respect of any Māori land:
  - (c) Every other trust constituted in respect of any General land owned by Maori.
- (2) Nothing in sections 237 to 245 of this Act applies to any trust created by section 250(4) .

**237 Jurisdiction of Court generally**

- (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Māori 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.

- (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

**238 Enforcement of obligations of trust**

- (1) The Court may at any time require any trustee of a trust to file in the Court a written report, and to appear before the Court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.
- (2) The Court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

**Discussion**

*Is s 18 the primary source of jurisdiction in the Act?*

[19] Mr Koning argued that the Preamble to the Act and the interpretation and objectives set out in ss 2 and 17 do not support the finding in the Court below. In *The Proprietors of Mangakino Township v Māori Land Court* McGechan J found that s 17(1) is relevant to the exercise of jurisdiction not existence.<sup>13</sup> That is, the jurisdiction of the Court must exist before s 17 can be applied to the exercise of it. Despite that McGechan J went on to find that when there is a threshold question as to the extent of jurisdiction and powers, the objectives intended to be achieved under their exercise may provide some construction guidance.

[20] In the present case, the relevant objectives that apply are those provided for in s 17(1)(b). That is, that the primary objective of the Court is to promote and assist in the effective use, management and development of Māori land on behalf of the owners. This is a core principle promoted throughout the Act and which is echoed in the Preamble and s 2.

[21] In the present context we consider that holding trustees to account where they have breached their duties promotes the effective use, management and development of the land on behalf of the owners. It not only provides restitution or compensation to the trust (and therefore the beneficial owners) but encourages the performance and observation of duties by trustees.

[22] Mr Koning argued that s 18 is the primary source of the Court's jurisdiction in the Act. He contended that:

- (a) The general jurisdiction of the Court under s 18 reflects the overall policy of the Act;
- (b) The legislature has not conferred any broad equitable jurisdiction on the Court in respect of trusts under s 18;

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<sup>13</sup> *The Proprietors of Mangakino Township v Māori Land Court* HC Wellington CP 252/97, 5 May 1998.

- (c) If the legislature had intended to give the Court jurisdiction in this case then it would have done so by way of an express provision in s 18 or elsewhere under Part 1 of the Act; and
- (d) The Court's jurisdiction under ss 237 and 238 of the Act must be interpreted in light of this statutory framework.

[23] Section 18(1) of the Act states that:

**18 General jurisdiction of court**

- (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction...

[24] This provision clearly states that the general jurisdiction of the Court under s 18 is in addition to any jurisdiction conferred on the Court elsewhere. As such s 18 is not the primary source of jurisdiction of the Court it is an additional source of jurisdiction. This is clear from the extensive jurisdiction granted to the Court elsewhere in the Act including:

- (a) The administration of estates under Part 4 of the Act;
- (b) Trusts under Part 12 of the Act;
- (c) Māori Incorporations under Part 13 of the Act;
- (d) Title reconstruction and improvement under Part 14 of the Act; and
- (e) Māori Reservations under Part 17 of the Act.

[25] These parts of the Act (and numerous other provisions) grant extensive powers to the Court on a range of issues that are not expressly referred to in s 18. It would be contrary to the conventional approach of statutory interpretation to read down these provisions on the basis that those powers are not expressly referred to in s 18. This is particularly so given the clear and express wording that the general jurisdiction of the Court in s 18 is in addition to any jurisdiction conferred on the Court other than by that section. Accordingly, we find that s 18 is an *additional* rather than being the primary source of jurisdiction under the Act.

*Does the Court have jurisdiction under s 237 of the Act?*

[26] Mr Koning accepted that the High Court has jurisdiction to grant equitable remedies for breach of trust or fiduciary duties. Despite that Mr Koning argued (at least initially) that the Māori Land Court's jurisdiction under s 237 of the Act is not so extensive and is limited to acting in a

supervisory role. Despite these submissions we consider that s 237 is framed in the widest possible terms. It expressly states that:

...the Māori 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.

[27] The extensive powers conferred on the Māori Land Court with respect to trusts have been confirmed by the Court of Appeal in *The Proprietors of Mangakino Township v Māori Land Court* per Blanchard J:<sup>14</sup>

[24] There is an armoury of powers given to the Court in relation to trusts under Part XII so that it can carry out its guardianship role and there is good reason to read ss 231 and 351, which apply to the particular situation of a general review, in a manner consistent with those powers.

[28] Blanchard J went on to add that:<sup>15</sup>

[27]...The reason for that lies in the fact that trusts are a development of judge made law and courts of equity have for centuries undertaken the function of supervising them. The Māori Land Court is expressly given in s237 in respect of any trust to which Part XII applies “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.” In other words - it is to have the most extensive supervisory powers.

[29] In *Clarke v Karaitiana*, Randerson J also made numerous references to the extensive powers of the Māori Land Court with respect to trusts.<sup>16</sup>

[30] We therefore find little attraction in the limited approach suggested by Mr Koning. We also hold that s 237 of the Act confers on the Māori Land Court all of the powers and authorities of the High Court with respect to trusts. That is after all what the provision says. Given Mr Koning’s submission that the High Court has jurisdiction to grant the relief sought in this case, it is not necessary to address in any detail the extent of the High Court’s jurisdiction. Rather a summary is provided below.

[31] Sections 4 to 6 of the Supreme Court Act 1860 gave the Supreme Court of New Zealand all the legal, equitable and probate jurisdiction possessed by the superior Courts in England. The general jurisdiction of the Supreme Court was preserved by s 16 of the Supreme Court Act 1882 and its successor, s 16 of the Judicature Act 1908.<sup>17</sup> That provision states:

<sup>14</sup> *The Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999 at [24].

<sup>15</sup> *Ibid* at [27].

<sup>16</sup> *Clarke v Karaitiana* [2011] NZCA 154 at [26], [31], [36] and [38].

<sup>17</sup> *Sim’s Court Practice* (NZ) (online ed, Lexis Nexis) at JUD16.1.

## 16 General jurisdiction

The court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

[32] We accept the finding in the Court below that from its inception, the New Zealand Supreme Court, (now the New Zealand High Court), had the complete jurisdiction to hear common law actions, suits in equity and to grant legal and equitable remedies.

[33] We do not accept Mr Koning's proposition that the reference to "...whether by statute..." in s 237 of the Act refers only to the Trustee Act 1956. Surely if that was Parliament's intention they would have specifically referred to the Trustee Act 1956 rather than to statutes generally. Mr Koning's argument that this uncertainty is due to poor drafting of the legislation is untenable.

[34] The reference to "...whether by statute..." in s 237 of the Act must refer to all relevant legislation including s 16 of the Judicature Act 1908. That is after all the source of the general jurisdiction of the High Court, including its inherent jurisdiction, which is also expressly referred to in s 237 of the Act.

[35] For these reasons we find that the Court has jurisdiction under s 237 of the Act to grant equitable remedies, including accounting for profit or equitable compensation.

*Does the Court have jurisdiction under s 238 of the Act?*

[36] The duties upon trustees are well known and have been referred to in numerous decisions throughout many jurisdictions. In *Rameka v Hall*<sup>18</sup> the Court of Appeal cited with approval the obligations of trustees described by the Māori Appellate Court in *Apatu*.<sup>19</sup> This included the well - known principles of:

- (a) A duty of diligence and prudence as an ordinary prudent person of business would exercise and conduct in that business if it were his or her own; and
- (b) A duty not to make a profit for themselves out of the trust property or out of the office of trust.

[37] Section 238 provides that the Court may at any time in respect of any trustee to which the section applies enforce the obligations of his or her trust (whether by way of injunction or

<sup>18</sup> *Rameka v Hall* [2013] NZCA 203.

<sup>19</sup> *Apatu v Puna - Owahaoko C 1 and 2* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34).

otherwise). As set out above, in response to questioning from the Court, Mr Koning accepted that the imposition of equitable remedies for breach of trust is simply enforcing the obligations of trust upon that trustee.<sup>20</sup> In other words, ordering a trustee to account for profit is simply enforcing the obligation on the trustee not to make a profit out of trust property or out of the office of trust.

[38] This approach is supported by the decision in *Re Dawson* where Street J referred to the ongoing obligation on a trustee to restore to the trust estate the assets which he or she deprived it by reason of the breach:<sup>21</sup>

...in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored *in specie*, it will fall for quantification at the date when recoupment is to be effected, and not before.

[39] This approach was endorsed in New Zealand in *Re Mulligan*:<sup>22</sup>

...The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. That obligation is of a personal character. The trustee is liable to place the trust estate in the same position as it would have been if no breach had been committed....

[40] For these reasons, and as conceded by Mr Koning, we also find that the Court has jurisdiction to grant equitable remedies to enforce the obligations of a trustee under s 238 of the Act. That includes orders for restitution, equitable compensation or accounting for profit.

[41] It was raised before the Court whether s 238 of the Act can only be exercised against current trustees still in office. If that is the case then the Court could only rely on s 237 to grant equitable remedies against former trustees who breached their duties. Given our findings on s 237 and as set out below, it is unnecessary to resolve this point in the present case.

*Does s 238 of the Act take primacy over s 237?*

[42] In the Court below it was held that s 237 of the Act is subject to s 238. That is, the Court must first look at whether it has jurisdiction in respect of a matter under s 238 when considering whether to grant equitable remedies against a trustee. It is only if the Court does not have jurisdiction under s 238 can it then act under s 237. In making this finding the Māori Land Court

<sup>20</sup> 2014 Māori Appellate Court MB 200 (2014 APPEAL 200).

<sup>21</sup> *Dawson Re: Union Fidelity Trust Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSW 211, at p 216.

<sup>22</sup> *Re Mulligan* [1998] 1 NZLR 481 at p 507 per Panckhurst J. See also, *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at p 687 and *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at p 434.

relied on the decision of this Court in *Tito – Mangakahia 2B2 - No 2A1A*. In that case the Court found that:<sup>23</sup>

[31] Therefore, we consider that where there is an express provision in Part 12 of the Act, to use another authority through section 237 for the same task would be an obvious inconsistency. The Court should use the express statutory provisions as provided in Part 12 for the administration of Māori land trusts unless a case falls under one of the exceptions we outline below. In this case, it is the express provision of section 222 which prevails over section 237.

[43] While we appreciate the careful application of this authority, we consider that the principles set out by this Court in *Tito – Mangakahia 2B2* do not apply here. In *Tito – Mangakahia 2B2* the Māori Land Court appointed the Māori Trustee as the responsible trustee of the Mangakahia 2B2 Ahu Whenua Trust. That proposed appointment was unanimously opposed at a meeting of owners called for that purpose. Section 222(2) of the Act requires that the Court shall not appoint a trustee unless the Court is satisfied that the proposed trustee is broadly acceptable to the beneficiaries. The Māori Trustee was not broadly acceptable to the beneficiaries in that case and so s 222(2) was not satisfied. To address this the Māori Land Court in that case made the appointment in reliance on ss 236 and 237 of the Act and on s 51 of the Trustee Act 1956. That approach was to allow the Court below to rely on the powers of the High Court to make an appointment under the provisions of the Trustee Act 1956, which did not require that the trustee be broadly acceptable to the beneficiaries.

[44] This Court found that relying on s 237 of the Act to appoint a trustee under the Trustee Act 1956 circumvented the express requirements of s 222(2) of the Act, which required the Court to appoint a trustee who was broadly acceptable to the beneficiaries. This Court also found, that to do so was inconsistent with the express provisions of s 222(2) of the Act, and so the express provision of s 222 prevailed over s 237. Despite that, the Court found that there may be some circumstances where an appointment under the Trustee Act 1956, rather than s 222, would be appropriate.

[45] These circumstances do not apply to the present case. The granting of equitable relief against a trustee under s 237 of the Act is not inconsistent with enforcing the obligations of a trustee under s 238. Rather these powers are complimentary and in some cases would overlap. We do not consider that the granting of equitable relief under s 237 of the Act would seek to circumvent the provisions or the requirements for relief under s 238. Rather, read together these provisions represent part of the armoury of powers conferred on the Māori Land Court with respect to trusts under Part 12. Accordingly, we find that s 238 does not take primacy over s 237. Rather these provisions together provide a range of complimentary powers to enable the Court to carry out its supervisory function over trusts under Part 12 of the Act.

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<sup>23</sup> *Tito – Mangakahia 2B2 - No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86).

[46] In the present case the statement of claim was filed under s 237 of the Act and so the Māori Land Court should have dealt with it on the basis of that provision. There was no need to turn to s 238 of the Act. If the Māori Land Court sought to exercise jurisdiction under s 238, then in the absence of a fresh application under that provision the Court would have to do so under s 37(3) of the Act, which requires notice to the parties.

*Can an applicant file proceedings under s 237 or s 238 of the Act?*

[47] In oral submissions Mr Koning argued that, while the Court has jurisdiction to grant equitable relief, an applicant cannot file an application in reliance on ss 237 or 238 of the Act. Rather, an application would have to be filed either seeking a review of the trust under s 231 or the removal of trustees under s 240 and the Court could then exercise its jurisdiction under ss 237 or 238 of its own motion.

[48] Mr Koning's principal contention centred on the fact that ss 237 and 238 did not contain express provision that a trustee or beneficiary "may apply to the Court" under those provisions. This can be contrasted with s 231 which includes express provision that a trustee or beneficiary "may apply to the Court to review the terms, operation, or other aspect of the trust."

[49] We do not accept Mr Koning's argument. There are many sections in the Act which do not expressly refer to the right to apply to the Court under that particular provision. Such an omission cannot mean that an applicant is unable bring an application in reliance on that provision. For example, there is no requirement in s 240 which expressly states that an applicant can file an application for removal of a trustee for cause. Indeed, this Court has previously found that a formal application was not required. The only necessity was for the affected trustee to have notice of a proceeding for removal.<sup>24</sup> Despite that, many such applications have been filed and granted in the past. Mr Koning also relied on s 240 of the Act as the type of application that could be filed which would allow the Court to exercise its jurisdiction under ss 237 or 238.

[50] We also note that s 238 expressly states that the Court can exercise its powers under that provision "...at any time...". It would be absurd if this provision would allow the Court to exercise those powers at any time except on application from an interested party.

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<sup>24</sup> *Marino – Repongaere 4G (Part)* (2004) 34 Gisborne Appellate Court MB 98 (34 APGS 98).



[51] Section 37(1) of the Act states:

**37 Exercise of jurisdiction generally**

(1) Subject to any express provisions of this Act or of the rules of Court relating to the making of applications, the jurisdiction of the Court may be exercised on the application of—

- (a) Any person claiming to have an interest in the matter; or
- (b) The Minister or the Chief Executive or a Registrar.

[52] This provision is clear that any person claiming to have an interest in the matter can apply to the Court seeking an exercise of its jurisdiction. This includes filing an application under s 237, under s 238, or under both provisions.

**Decision**

[53] The appeal is dismissed.

[54] The parties are to file memoranda within 21 days on costs.

This Judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

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W W Isaac  
**CHIEF JUDGE**

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L R Harvey (Presiding)  
**JUDGE**

P J Savage  
**JUDGE**

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M P Armstrong  
**JUDGE**