IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20150001489

UNDER	Sections 58 and 269(6), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	The Proprietors of Torere 64 Incorporated
BETWEEN	GARRY MAX WATSON Appellant
AND	AMIRIA PARKER, TANIA MIHAERE, WIRANGI PERA AND CHRISTINE PETERS Respondents

Hearing:	12 August 2015 (Heard at Rotorua)
Coram	Judge P J Savage (Presiding) Judge D J Ambler Judge M J Doogan
Appearances:	Mr C M Bidois, counsel for the Appellant Mr S J Clews, counsel for the Respondents
Judgment:	07 October 2015

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] Garry Watson appeals Deputy Chief Judge Fox's decision of 10 December 2014.[1] The decision concerned Marie Hutchison's application for an investigation into the conduct of the 2014 election of members to the committee of management of the Proprietors of Torere 64 Incorporated ("the Incorporation"). The application was under s 269(6) of Te Ture Whenua Māori Act 1993 ("the Act").

[2] Judge Fox conducted an investigation into the election based on the uncontested evidence of the parties. She concluded that there were anomalies in the conduct of the election due to invalid votes being counted, declared the election invalid and ordered a new election. In light of the resignations of all other members of the committee of management (which were to take effect on 12 December 2014), Judge Fox also invoked s 269(5) and appointed "Deloitte's [sic] of Rotorua or similar experts in Māori land commissioned by the Registrar, to become a committee of management member" to administer the Incorporation until the next AGM.[2]

[3] Mr Watson, represented by Curtis Bidois, agrees there were voting anomalies in the election but argues that it was open to Judge Fox to appoint the highest polling candidates to the two vacant positions on the committee of management once the invalid votes were discounted, being himself and Stella Taku, and that Judge Fox was not obliged to declare the election invalid and order an entire new election.

[4] The respondents, Amiria Parker, Tania Mihaere, Wirangi Pera and Christine Peters, who were represented by Stephen Clews, seek to uphold Judge Fox's decision that a further election was necessary, though they raise issues regarding the appointment of Deloitte Rotorua under s 269(5).

[5] Ms Hutchison did not participate in the appeal.

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1 *Hutchison – Torere 64 Incorporation* (2014) 109 Waiariki MB 260 (109 WAR 260).
2 Ibid, at [14].

Background

The election

[6] The Incorporation administers the Torere Section 64 block of Māori freehold land which comprises over 3,800 hectares, along with Torere Section 14 block, comprising over 35 hectares. The land is mostly under a forestry lease and part of it is used for grazing. The Incorporation also owns a commercial building in Opotiki. Its committee of management comprises five members.

[7] Prior to the August 2014 AGM the members of the committee of management were Amiria Parker (chairperson), Diana Anderson (treasurer), Tania Mihaere (secretary), Christina Peters and Wirangi Pera. Ms Parker and Ms Anderson were due to retire at the 2014 AGM and stood for re-election. Mr Watson and Ms Taku also stood for election. Te Aruhe Mio was also listed as standing for election, though that was apparently an error.

[8] The AGM was held on 30 August 2014. The chairperson declared the result of the election to be as follows:

Total shares voted	4532.49956
Amiria Parker	2419.890541
Diana Anderson	2333.583773
Garry Watson	2151.296547
Stella Taku	1962.962517
Te Aruhe Mio	60.935492

[9] Thus, Ms Parker and Ms Anderson were declared to be re-elected. In addition, the shareholders also voted in relation to 16 separate special resolutions. Those special resolutions are not directly the subject of the appeal as the application to the lower Court was solely concerned with the outcome of the election.

[10] Following the AGM, several shareholders and/or members of their whānau expressed concerns that a number of proxies had been issued on behalf of shareholders who were deceased, and that the votes based on those proxies were invalid. Once the invalid votes were discounted, Mr Watson and Ms Taku were said to be the highest polling

candidates, and should have been elected as the two replacement members of the committee of management.

The application

[11] On 22 October 2014, Ms Hutchison and others applied to the lower Court for an investigation into the 2014 election pursuant to s 269(6) of the Act. The application was supported by several affidavits from shareholders or other interested parties who outlined the circumstances of the election and the fact that the votes counted included at least two votes cast pursuant to proxies purported to be issued by or on behalf of deceased owners.

[12] On 10 November 2014, Mr Clews filed a Notice of Intention to Appear on behalf of the respondents, advising that they supported the inquiry; that the practise of the Incorporation for many years had been to permit administrators or beneficiaries of the estates of deceased shareholders to cast votes; that having taken legal advice the committee members acknowledged that the practise was wrong; that as a result, votes were improperly cast at the AGM; that the votes improperly cast were not limited to those referred to in the application; and that the committee members recognised that they did not have a mandate from the shareholders and gave notice of their resignation as members of the committee of management with effect from 12 December 2014.

[13] On 8 December 2014, Mr Clews filed a memorandum with the Court in which he advised that the committee of management had reviewed the process followed at the election. Ms Hutchinson's application had identified two instances of invalid votes. However, the committee of management's review identified 17 instances of invalid votes.

[14] On 9 December 2014, Mr Bidois filed a memorandum wherein he advised that in addition to the 17 invalid votes identified by Mr Clews' clients, Mr Watson had identified three other votes that were improperly cast, bringing the total invalid votes to 20 (out of a total of 98 votes cast). Mr Bidois annexed a spreadsheet which calculated the outcome of the election once the votes improperly cast were discounted, with the result being:

Garry Watson	1951.75313
Stella Taku	1793.16967
Amiria Parker	578.382741

Diana Anderson 571.896801

[15] Consequently, Mr Bidois submitted that the correct outcome of the election was that Mr Watson and Ms Taku were elected to the two vacant positions on the committee of management. He therefore invited the Court to exercise its jurisdiction under s 269(6)(a) to confirm the appointment of Mr Watson and Ms Taku. We also note that Mr Bidois' client calculated that each of the 16 special resolutions had been validly passed once the invalid votes were discounted.

The hearing

[16] The hearing took place before Judge Fox at Opotiki on 9 December 2014.[3]

[17] Ms Hutchison appeared and spoke to her application.

[18] Mr Bidois appeared for Mr Watson and spoke to his client's request that he and Ms Taku be confirmed as the duly elected members of the committee of management as a result of the election. Mr Bidois relied on the spreadsheet contained in his memorandum of 9 December 2014, which had been prepared by Joshua Watson. Joshua Watson was available to give evidence in relation to his calculations but no one took issue with those calculations.

[19] Mr Clews appeared for the respondents. He did not dispute Mr Bidois' calculation that there were 20 votes invalidly cast or Joshua Watson's calculation of the correct outcome of the election. However, Mr Clews argued that due to the anomalies, Judge Fox's only option under s 269(6) of the Act was to declare the election invalid and order a new election.

[20] The primary dispute before Judge Fox therefore concerned the remedies available to the Court in light of the casting of invalid votes. Mr Bidois argued that although invalid votes had been cast the election as a whole was not invalid, and that under s 269(6)(a) the Court could determine who had been validly elected and appoint those persons, namely Mr Watson and Ms Taku. Conversely, Mr Clews argued that the election was invalid, and the

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[3] 112 Waiariki MB 124 (112 WAR 124).

only option for the Court was to declare the election invalid and order a new election under s 269(6)(b).

Judge Fox's decision

[21] Judge Fox delivered her oral decision on 10 December 2014.[4] She identified that it was common ground that at least 20 votes were invalidly counted. She concluded that an investigation was appropriate based on the evidence tendered to the Court, which demonstrated the anomalies in the conduct of the election. The declaration that Ms Parker and Ms Anderson were elected was therefore invalid.

[22] Judge Fox preferred Mr Clews' interpretation of s 269(6) rather than that of Mr Bidois. That is, having held that the election was invalid, she ruled that the Court was restricted by s 269(6)(a) and (b) to order a new election. She did not accept that under s 269(6)(a) she could appoint Mr Watson and Ms Taku as the persons lawfully elected by the shareholders.

[23] Furthermore, in light of the wholesale resignation of the current committee of management, which would leave the Incorporation without a committee of management from 12 December 2014, Judge Fox invoked s 269(5) and appointed "Deloitte's [sic] of Rotorua or similar experts in Māori land commissioned by the Registrar, to become a committee of management member" to administer the Incorporation until the next AGM, which was to be held no later than six months from the date of their appointment.

[24] We note that notwithstanding the stated outcome of the decision, the lower Court did not issue an order appointing Deloitte Rotorua or any other persons to the committee of management, an AGM has not been held, and there are currently no members of the committee of management in charge of the Incorporation. Following the hearing, we were advised that the insurance in respect of the Incorporation's forest was due for renewal.

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4 *Hutchison – Torere 64 Incorporation* (2014) 109 Waiariki MB 260 (109 WAR 260).

Arguments on appeal

Section 269(6)

[25] At its essence, the appeal involves an exercise in statutory interpretation of s 269(6) of the Act. That subsection provides:

> **269 Committee of management**
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> ...
>
> (6) The Court may, on the application of any shareholder or officer of the incorporation, investigate the conduct of any election of a member or members to the committee of management, and may either—
>
> (a) Confirm the appointment of the person or persons elected; or
>
> (b) Declare the election invalid and order a new election to be held.
>
> ...

The appellant's arguments

[26] Mr Bidois argues that Judge Fox misinterpreted s 269(6). He says that in concluding that she could not "confirm the appointment of the two persons who were declared elected on the day during the AGM",[5] Judge Fox added a gloss to s 269(6)(a) to the effect that the Court's only option under that subsection is to "confirm the appointment of the person or persons [declared] elected". That is, Judge Fox effectively excluded conducting a recount and confirming the appointment of the person or persons validly elected as an option available to her as part of the investigation.

[27] Mr Bidois argues that having conducted an investigation under s 269(6), one option open to the Court was to confirm the appointment of Mr Watson and Ms Taku as the two persons validly elected under s 269(6)(a). In support of this interpretation Mr Bidois relies on several points:

(a) Section 5 of the Interpretation Act 1999 directs the Court to ascertain the meaning of a provision from "its text and in the light of its purpose";

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5 *Hutchison – Torere 64 Incorporation* (2014) 109 Waiariki MB 260 (109 WAR 260) at [10].

(b) Judge Fox's interpretation does an injury to the text of s 269(6)(a) by adding a gloss to that provision by limiting the Court to being able to only confirm the appointment of the person or persons *declared* elected at the AGM;

(c) Judge Fox's interpretation would remove the efficacy of s 269(6) by removing the power of the Court to give effect to the correct outcome of an election;

(d) In interpreting s 269(6), the Court can rely on the statutory context including the Māori Incorporations Constitution Regulations 1994 ("the Regulations"), and cl 23(8) of sch 1 in particular, which provides that the chairperson is to declare the persons "who have received the highest number of votes" to be elected. Where s 269(6)(a) speaks of the Court confirming the appointment of "the person or persons elected", the Court is not asked to confirm the "appointment" as reflected in the chairperson's declaration under cl 23(8) of sch 1 of the Regulations, but rather the appointment in accordance with the decision of the shareholders as reflected in the correct outcome of the election;

(e) In support of the argument that "the person or persons elected" in s 269(6)(a) are not restricted to the person or persons declared elected at the AGM, it is notable that the earlier part of s 269(6) uses different terminology by referring to "any election of a member or members to the committee of management". Had the legislation intended that the remedy available under s 269(6)(a) be limited to confirming the appointment of the person or persons *declared* elected at the AGM, then s 269(6)(a) might have also used the phrase "the member or members" elected.

[28] Mr Bidois argues that Judge Fox's approach to her function under s 269(6) was wrong. He relies upon *Neho – Muriwhenua Incorporation* for the proposition that s 269(6) requires the Court to undertake a two-step process: first, to identify the flaws in the election process, if any; and, second, to then decide how to deal with the flawed process in terms of the remedies available under s 269(6). [6]

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[6] *Neho – Muriwhenua Incorporation* (2014) 84 Taitokerau MB 189 (84 TTK 189).

[29] Mr Bidois says Judge Fox did not take this approach as, once she found there were anomalies in the election process, she concluded that she was obliged to declare the election as a whole to be invalid and order a new election under s 269(6)(b). In doing so, Judge Fox failed to take into account relevant considerations, including that shareholders who had lawfully participated in the election had not had their votes counted, and that per s 17(2)(a) of the Act the Court is meant to ascertain and give effect to the wishes of the owners.

[30] Mr Bidois also challenges Judge Fox's conclusion that the correct outcome of the election could not be ascertained because there may be other invalid votes cast at the AGM. Judge Fox expressed the issue in this way in her judgment:[7]

> [11] I do not accept the arguments put by Mr Bidois in favour of Mr Watson, that having held the election itself was invalid, I could still go on and appoint the next highest polling candidates. Even the applicant Marie Catherine Hutchison acknowledges that there may be other invalid votes cast at the AGM, we just don't know. Because we don't know the answer to that point, I couldn't safely declare either Mr Gary [sic] Watson or Ms Taku to be validly elected pursuant to this section and confirm their appointment. I am left in no other position than to require a new election to be held.

[31] Mr Bidois says that Judge Fox misstated the situation with the invalid votes. The investigation and hearing on 9 December 2014 had proceeded on the basis that there were 20 invalid votes cast. Mr Clews did not challenge that figure. Furthermore, the applicant, Ms Hutchison, did not say there may have been more invalid votes; she referred instead to there being a number of "issues". There was no direct evidence of other votes being invalid. It was therefore wrong for Judge Fox to speculate that there may be further invalid votes.

[32] Finally, we raised with Mr Bidois and Mr Clews the efficacy of Judge Fox's order under s 269(5) appointing "Deloitte's [sic] of Rotorua" as a member of the committee of management. Deloitte Rotorua is, according to counsel, a partnership of two individuals (Murray Patchell and John McRae). The effect of Judge Fox's decision – there is no final order – is that there will be no more than two members of the committee of management of the Incorporation. Pursuant to s 269(1) of the Act and cl 21 of sch 1 of the Regulations,

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[7] *Hutchison – Torere 64 Incorporation* (2014) 109 Waiariki MB 260 (109 WAR 260).

there must be a minimum of three members of a committee of management of any incorporation.

[33] The situation is, therefore, that even if Mr Bidois' client is successful on appeal, and Mr Watson and Ms Taku are appointed to the committee of management, because the rest of the members of the committee of management resigned, that will leave the Incorporation with only two members on the committee of management. Conversely, if Mr Watson's appeal is unsuccessful, there will still be only two members on the committee of management, being the two partners of Deloitte Rotorua.

[34] Mr Bidois argued that s 269(5) does not apply to this situation and that the Court's only remedy is to invoke s 280(7)(b) and appoint an additional member or members to the committee of management. As he argued before Judge Fox, Mr Bidois says that an expansive approach is required to the interpretation of s 280(7) of the Act. Where that provision refers to "the result of any investigation or examination into the affairs of a Māori incorporation", that includes not only an investigation under s 280 itself, but also an investigation under s 269(6). Section 280(7)(b) provides:

> **280 Investigation of incorporation's affairs**
>
> ...
>
> (7) Where, as the result of any investigation or examination into the affairs of a Maori incorporation, the Court thinks it necessary to do so, it may, notwithstanding any of the provisions of this Part of this Act, do all or any of the following:
>
> ...
>
> (b) Appoint, for such period as it thinks fit, some person or persons to hold office as an additional member or additional members of the committee of management:
>
> …

The respondents' arguments

[35] Mr Clews seeks to uphold Judge Fox's interpretation of s 269(6) and her decision to invalidate the election and order a new election.

[36] Mr Clews argues that the words "the person or persons elected" in s 269(6) are a reference to the persons declared to be elected as a result of the process outlined in cl 23 of sch 1 the Regulations. That is because the Court's function under s 269(6) is to investigate an election of a member or members to the committee of management, and the option under s 269(6) to "confirm the appointment" of the person or persons elected must be a reference back to the "appointment" that resulted from the election. That is, the power under s 269(6)(a) is to recognise the validity of what has already taken place. If the power under s 269(6)(a) was intended to enable the Court to replace an elected person with another person, then wording to that effect would have been used. Therefore the chairperson's act of declaring the outcome of the election under cl 23(8) of sch 1 is the "appointment" referred to in s 269(6)(a).

[37] Mr Clews does not accept that Judge Fox's interpretation added a gloss to s 269(6)(a) to the effect that it means "the person or persons [declared] elected". The natural reading of the section was that the Court is empowered to confirm the appointment of the persons elected to the committee of management. Nevertheless, Mr Clews did accept that there was some ambiguity in s 269(6) referring at the outset to an election of "a member or members to the committee of management", and s 269(6)(a) referring to the appointment of "the person or persons elected".

[38] In answer to our question about the outcome under s 269(6) if there was (hypothetically) a simple miscount of votes by the chairperson leading to an incorrect declaration under cl 23(8) of sch 1, Mr Clews accepted that on his interpretation of s 269(6) the Court would not be able to conduct a simple recount and appoint those persons validly elected, and the Incorporation would have to be sent to a fresh election under s 269(6)(b).

[39] Mr Clews submitted that it was open to Judge Fox to conclude that she could not be certain as to the existence and effect of other invalid votes cast at the election, and that it would not be safe to declare any other person elected. Nevertheless, he accepted that there was no challenge at the hearing to the evidence on behalf of Mr Watson that there were 20 invalid votes, and explained that Judge Fox did not enter into a detailed investigation of the votes but acted on the basis of the submissions filed.

[40] As for Judge Fox's decision to appoint Deloitte Rotorua as a member of the committee of management under s 269(5) of the Act, Mr Clews saw difficulties in that approach. It was questionable whether the appointment of a firm was in the contemplation of s 269(5). It was also doubtful whether the Court could invoke s 269(5) to fill the third vacancy as it is questionable whether "the shareholders have failed to fill a vacancy in the committee" as required under s 269(5). Section 269(5) provides:

> **269 Committee of management**
>
> ...
>
> (5) The Court may appoint any qualified person to be a member of the committee of management of a Maori incorporation, notwithstanding that that person has not been elected as a member pursuant to subsection (2) of this section, in any case where the shareholders have failed to fill a vacancy in the committee.

[41] In any event, Mr Clews agreed that there needed to be a minimum of three members of any committee of management. Whether or not the appellant was successful in the appeal, there would still be only two members on the committee of management. Mr Clews did not have any instructions from his clients as to whether they would consent to being appointed by the Court to fill any gap.

[42] In Mr Clews' view, the Court's only ability to fill the gap in membership of the committee of management would be pursuant to s 280(7)(b) of the Act, but only if the Court was satisfied that s 280(7)'s reference to "any investigation or examination into the affairs of a Māori Incorporation" applied not only to an investigation under s 280 but also an investigation under s 269(6). In the lower Court he had argued that it did not.

Further submissions

[43] At the conclusion of the hearing on 12 August 2015 we asked counsel whether they had considered any earlier legislation or case law that might assist in the interpretation of s 269(6).[8] They had not. We indicated that we may research the legislative history of s 269(6) and provide a further opportunity to make submissions. We subsequently set out

[8] 2015 Māori Appellate Court MB 454 (2015 APPEAL 454).

the result of our research in a minute of 24 August 2015 and invited counsel to file submissions by 31 August 2015.[9]

[44] The result of our research was that the predecessors to s 269(6) were s 52 of the Māori Affairs Amendment Act 1967 ("the 1967 Act") and s 292 of the Māori Affairs Act 1953 ("the 1953 Act") respectively. We set out those provisions in our minute and also referred counsel to various decisions of the lower Court and of this Court in relation to the provisions in the 1953 Act.[10] We note here that the regime under the earlier legislation was quite different to what is found in the current Act, in that under the earlier legislation the Court had the role of appointing or refusing to appoint persons to the committee of management of an incorporation following an election (much like with a trust under the current Act), whereas under the current Act the Court has no such role except in the extraordinary situations contemplated by ss 269(5) and (6), and 280(7).

[45] Mr Bidois filed submissions on 31 August 2015. He noted the significant philosophical shift from the 1953 Act and 1967 Act – said to be a "state-knows-best" philosophy – to that under the current Act of giving effect to the wishes of the owners. In relation to committees of management of incorporations in particular, the power to appoint persons to the committee of management is vested in the shareholders in the first instance; the Court's discretion to refuse to appoint a person elected by the shareholders has been removed; and the Court's power to remove members of a committee of management of its own motion has been taken away completely.

[46] Thus, statements made in decisions such as *Te Ua v Halbert – Waihirere Incorporation* in the context of the 1953 Act, that the Court had control over the appointment of members to the committee of management, were no longer correct. More to the point, Mr Bidois submitted that these changes in legislative philosophy mean that s 269(6) ought to be interpreted in a manner that best gives effect to the wishes of shareholders as expressed through the election process.

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9 2015 Māori Appellate Court MB 428 (2015 APPEAL 428).

10 *Proprietors of Anaura Incorporation* (1961) 3 Tolaga Bay MB 200 (3 TOL 200); *Proprietors of Taharoa 2C1 Incorporation* (1961) 64 Wairoa MB 290 (64 WR 290); *Te Ua v Hooper – Mangatu Incorporation* (1960) 29 Gisborne Appellate MB 287 (29 APGS 287) and *Te Ua v Halbert – Waihirere Incorporation* (1960) 29 Gisborne Appellate MB 271 (29 APGS 271).

[47] Mr Bidois also submitted that upon an examination of the earlier legislation, it was clear that the use of the terms "member or members" and "person or persons elected" in s 269(6) was not ambiguous, as Mr Bidois had in fact argued in oral submissions before us, but rather intentional and consistent with that earlier legislation. The term "member" refers to a person who has already been appointed to a committee of management; the term "person" refers to the persons elected by the shareholders prior to that person being formally appointed as a member of the committee of management. Consequently, Mr Bidois argues that where s 269(6)(a) empowers the Court to confirm the appointment of the "person or persons elected", it must mean the highest polling candidates in the elections, and not necessarily the "member or members" declared to be elected.

[48] Mr Clews filed submissions on 26 August 2015. He too observed that the provisions in the earlier legislation demonstrate a policy shift in the current Act which places further constraints on the Court's ability to oversee and involve itself in the appointment of members to a committee of management. After reviewing the *Te Ua v Hooper – Mangatu Incorporation* and *Proprietors of Taharoa 2C1 Incorporation* decisions, Mr Clews summarised the principles to be gleaned from those decisions:

> 23. In summary, where there exists machinery to work out the true result of an otherwise procedurally flawed election, the result of election has not in any way been affected by any irregularity in the election process, and upholding the election will not be detrimental to the incorporation, nor Māori nor public interest, there is persuasive authority to say with certainty that the Court may give effect to the true outcome of the flawed election. [sic]

[49] However, Mr Clews contrasted the provisions in s 292 of the 1953 Act and s 52 of the 1967 Act with ss 269 and 280 of the current Act. To the extent that the authorities cited concerning s 292 of the 1953 Act might enable the Court to remedy a flawed election, Mr Clews submitted that those authorities are limited to the earlier legislative framework and do not apply to the current Act. While remedying an election would serve the purposes of the current Act in preserving the autonomy of Māori and empowering incorporations to manage their own affairs, that would involve "significantly more judicial interference" and would confer upon the Court powers that are not contained in s 269(6) or s 280 or the Preamble of the Act.

Discussion

[50] The arguments on appeal give rise to three issues.

[51] First, what is the correct interpretation of the Court's powers under s 269(6)?

[52] Second, if it was open to Judge Fox to appoint Mr Watson and Ms Taku in reliance upon s 269(6)(a), were the grounds made out for the Court to take that step?

[53] Third, what action, if any, can the Court take to address the situation (whether or not the appeal succeeds) of the Incorporation having only two prospective members on its committee of management?

Section 269(6)

[54] In undertaking our task of interpreting s 269(6) of the Act we are guided by s 5 of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[55] Further guidance regarding the text of s 269(6) can be gleaned from the wording in the equivalent provisions of earlier legislation (even though they may be to different effect) and, to a lesser degree, the wording used in the Regulations. This Court has not previously addressed the interpretation of s 269(6) in any decisions, though the lower Court has issued several decisions concerning the subsection.[11]

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[11] *Rickard v Tukiri – Te Kopua 2B3 Block Incorporated* (2000) 92 Waikato MB 157 (92 W 157), *Hipango v Peehi – Atihau-Whanganui Incorporation* (2008) 221 Aotea MB 152 (221 AOT 152); *Ngamoki-Cameron v Koopu – The Proprietors of Mangaroa and other blocks Incorporated* (2014) 91 Waiariki MB 279 (91 WAR 279); and *Neho – Muriwhenua Incorporation* (2014) 84 Taitokerau MB 189 (84 TTK 189).

[56] Section 269(6) empowers the Court to investigate a committee of management election. There is no express limit on the scope or manner of the Court's investigation. For example, the investigation could be as simple as a re-count of votes, or an assessment of whether invalid votes have been cast (as in the present case), or an assessment of more fundamental flaws in an election process that might render the entire election invalid (as was the case in *Rickard v Tukiri – Te Kopua 2B3 Block Incorporated* and *Neho – Muriwhenua Incorporation*).

[57] Although s 269(6) does not limit the scope or manner of the investigation itself, it does prescribe the remedies available:

> The Court … may either –
>
> (a) Confirm the appointment of the person or persons elected; or
>
> (b) Declare the election invalid and order a new election to be held.

[58] The appellant and respondents disagree on the breadth of the remedies available under s 269(6)(a) and (b). According to counsel, there are three possible scenarios.

[59] First, Mr Bidois and Mr Clews accept that where the Court's investigation determines there is no irregularity in the conduct of an election, then under s 269(6)(a) the Court can simply confirm the appointment of the person or persons declared elected. Indeed, if there is no irregularity an order under s 269(6)(a) may not be necessary.

[60] Second, Mr Bidois argues that where the Court concludes there is an irregularity in the conduct of an election, but the correct outcome can be ascertained as a result of the investigation, then under s 269(6)(a) the Court may confirm the appointment of the person or persons validly elected. Mr Clews disputes that such a remedy is available due to the wording of s 269(6)(a).

[61] Third, Mr Bidois and Mr Clews accept that where an investigation determines that the conduct of an election is so irregular as to render the election invalid, then under s 269(6)(b) the Court must declare the election invalid and order a new election.

[62] In terms of the second possible remedy, being the focus of this appeal, Mr Bidois' essential argument is that where an election irregularity is curable, the Court should simply

cure the irregularity and confirm the outcome of the election per s 269(6)(a); if it is incurable, then the Court is required to declare the election invalid and order a new election per s 269(6)(b). Mr Clews essentially argues that even if the irregularity is curable and the correct outcome of the election can be ascertained, the Court is not permitted to provide that cure and is instead required to send the shareholders back to a new election.

[63] For the reasons that follow, we agree with Mr Bidois and the appellant, and conclude that Judge Fox misinterpreted the breadth of the remedies available to her under s 269(6) by not recognising that the Court can give effect to the correct outcome of the election per s 269(6)(a).

[64] The essential purpose of s 269(6) is to enable the Court to investigate a committee of management election and, where there are irregularities, provide an appropriate remedy. While the philosophy of the Act promotes (among other things) the greater autonomy of shareholders and incorporations, the corollary of that greater autonomy is that shareholders are given ready access to the Court to remedy problems with elections (s 269(6)), vacancies in membership of committees of management (s 269(5)), the conduct or performance of members of committees of management (s 269(4)), and the functioning in general of incorporations (ss 280 and 281).

[65] Contrary to Mr Clews' submission, we do not believe the change in legislative philosophy means that we should read-down or restrict the remedies available under s 269(6). Rather, in taking a purposive approach to interpreting s 269(6), the Preamble, ss 2 and 17 of the Act contemplate that the Court should have practical remedies available to it that uphold the autonomy of shareholders of an incorporation. Thus, if there have been irregularities in an election process, but a simple recount that disregards invalid votes will establish the correct election outcome, the Court should be able to provide that remedy without requiring the shareholders to go to a further election. In other words, if it is curable, the Court should be able to administer the cure.

[66] The wording of s 269(6) does indeed contemplate a two-step process. First, if the grounds are made out, the Court conducts an investigation. Second, if irregularities in the election process are identified, the Court must determine what, if any, remedies are appropriate under either s 269(6)(a) or (b).

[67] Mr Clews' analysis of s 269(6) would have us conclude that any irregularity in an election process automatically gives rise to an "invalid" election. That is, if there is an irregularity, the election must be declared invalid (s 269(6)(b)), and the Court cannot undertake the exercise of determining the validly elected persons and confirm their appointment (s 269(6)(a)). Such an interpretation is not supported by the wording of the subsection and is simply too rigid. As was observed in *Rickard v Tukiri – Te Kopua 2B3 Block Incorporated*, "In some cases the breaches complained of may be merely technical and have no bearing on the result of an election."[12] But in other cases the breaches may affect the declared result, yet the correct result can still be ascertained. A key function of the Court under s 269(6) is to assess what remedy is appropriate in the circumstances of the particular irregularity.

[68] Earlier legislative provisions confirm that the distinction in s 269(6) between the election of "a member or members" to the committee of management and the Court's ability to appoint the "person or persons elected" is deliberate. Had s 269(6)(a) been intended to limit the Court to confirming the persons *declared* elected by the chairperson, we would have expected the section to have used the words "member or member elected" in s 269(6)(a) instead of "person or persons elected". It does not.

[69] We therefore disagree that s 269(6)(a) can only be resorted to where there is no irregularity in the election process or that the Court is restricted to confirming the validity of what has already taken place in terms of the chairperson's *declaration*. Such an interpretation does indeed add an unintended gloss to s 269(6)(a).

[70] Fundamentally, s 269(6)(a) empowers the Court to confirm the *correct* outcome of an election. Section 269(6) as a whole is remedial in its purpose. An interpretation that does not allow the Court to confirm the correct outcome of an election runs counter to the subsection's very purpose. In other words, it does not make sense for a chairperson's erroneous declaration to "snooker" the Court from giving effect to the correct outcome.

[71] The flaw in Mr Clews' interpretation is most tellingly demonstrated by the hypothetical example we raised with him of a simple miscount of votes. Mr Clews conceded that on his interpretation of s 269(6), in the situation of a miscount of votes the

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12 *Rickard v Tukiri – Te Kopua 2B3 Incorporated* (2000) 92 Waikato MB 157 (92 W 157) at 161.

Court would not be able to undertake a recount and appoint the persons validly elected, but instead would be required to direct an incorporation to hold a fresh election. Such an outcome is nonsensical and defeats the very purpose of s 269(6) and the philosophy of the Act in promoting owner autonomy.

[72] Accordingly, we conclude that Judge Fox misdirected herself in her decision, and that under s 269(6), when the Court identifies irregularities in the conduct of an election, it does have the ability in appropriate circumstances to confirm the appointment of the person or persons validly elected per s 269(6)(a). The question that we now turn to is whether the grounds existed for Judge Fox to address the irregularities in the 2014 election by appointing Mr Watson and Ms Taku under s 269(6)(a).

Was it open to Judge Fox to appoint Mr Watson and Ms Taku under s 269(6)(a)?

[73] Judge Fox concluded at paragraph [11] of her judgment that because the applicant, Ms Hutchison, acknowledged that there may be other invalid votes (in addition to the 20 identified), Judge Fox could not safely declare Mr Watson or Ms Taku to be validly elected. She was therefore obliged to order a new election under s 269(6)(b).

[74] Mr Bidois contends that Judge Fox's assessment of Ms Hutchison's evidence was wrong, that there was no evidence to suggest that other votes might be invalid, and that Judge Fox was entering into the realm of speculation.

[75] We have carefully reviewed the transcript of the hearing on 9 December 2014 and the evidence and documents filed in the proceeding. The ultimate effect of the evidence was that there were 20 invalid votes cast. That was in accordance with the assessment undertaken by Joshua Watson, which was contained within Mr Bidois' memorandum of 9 December 2014. At the hearing before Judge Fox, Mr Bidois submitted as follows in relation to his memorandum and the evidence contained therein:[13]

> **Mr Bidois:** …This has been prepared following a memorandum received from my learned friend late yesterday afternoon. Now one of the in my submission unusual features of this application Ma'am is that there doesn't appear to be any dispute about which votes were invalid. If there is unanimity as to which votes were invalid, it is my submission that the determination of the election result is simply an

[13] 112 Waiariki MB 124 (112 WAR 124) at 132.

> arithmetic exercise that doesn't require the Court to make a determination between parties who take different views as to which votes were invalid. [sic]

[76] Neither Mr Clews nor any other party challenged Mr Bidois' submission or Joshua Watson's assessment. There is nothing on the record of the hearing to indicate that Judge Fox questioned that assessment or undertook any further enquiry into the validity of the other 78 votes. Therefore, the evidence available to Judge Fox was that there were 20 invalid votes cast at the 2014 election.

[77] However, in her oral judgment the next day Judge Fox was concerned that there may have been other invalid votes cast and referred to Ms Hutchison acknowledging that possibility (paragraph 11).[14] The actual exchange during the hearing is as follows:[15]

> **M Hutchison:** Thank you Your Honour. After hearing both sides of the dilemma, as I see it and what I witnessed myself firsthand, was that in fact the registration of people coming up to vote and those received through the postal balloting system, was what I believe to be appropriate so I feel that the election in the process went really well.
>
> However after finding out how many invalid votes or permitted votes that weren't valid were used, it certainly escalates what I thought was happening. Really I thought there was only minor groups but there is actually quite a number of issues there.
>
> **The Court:** And there maybe more.
>
> **M Hutchison:** Yes definitely, so I still have concerns about what's in there? I don't have all the documentation to do it and I do have a concern further to that, given we have now a Committee that has resigned in total as of this Friday, how does that work now?
>
> We have nobody sitting there to run the election or if that is what you decree, what is the process then and how does the function of the business continue during that time or until such time as a process is to happen given it is now in December and at what stage and how does that happen. Not that I have to worry about that maybe, I don't know.
>
> That is up to you to decide isn't it but I do worry about it because it is part of you know we are a very small community and there are very few people to fill the positions and I do want something that is fair and is transparent and I am not too sure.
>
> I do want it investigated because there may be more to this than meets the eye and I'm not so sure. I'm really not sure now at all to the validity of it all. It seems the deeper you get, the deeper the hole gets as well.

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[14] *Hutchison – Torere 64 Incorporation* (2014) 109 Waiariki MB 260 (109 WAR 260) at [11].
[15] 112 Waiariki MB 124 (112 WAR 124) at 139.

[78] We imagine that Judge Fox did not have the benefit of the transcript of the hearing on 9 December 2014 when she delivered her oral judgment the next day. Nevertheless, we have to agree with Mr Bidois that Ms Hutchison's discussion with Judge Fox did not point to other invalid votes and is of negligible evidential value. Judge Fox offered that there might be more invalid votes; Ms Hutchison replied "Yes definitely", but without any evidential foundation.

[79] In our view, Judge Fox misdirected herself in relation to the evidence. The applicants had originally identified two invalid votes; Mr Clews' clients did an assessment and identified 17 invalid votes; and Mr Bidois' client did a further assessment and identified three further invalid votes. The evidence of 20 invalid votes was unchallenged and Judge Fox did not undertake any further investigation into the remaining votes. Judge Fox had to act on the evidence that there were 20 invalid votes in total. The suggestion that there might be more invalid votes was speculative.

[80] In those circumstances, the proper course for the lower Court was to give effect to the outcome of the election once the 20 invalid votes were set to one side, that is, to issue an order pursuant to s 269(6)(a) confirming the persons elected at the 2014 AGM to be Mr Watson and Ms Taku.

How should the Court remedy there being less than three members of the committee of management?

[81] Judge Fox's intended appointment of Deloitte Rotorua as members of the committee of management did not address the fact that there would be less than three members of the committee of management. Having now concluded that Mr Watson and Ms Taku should have been confirmed as being appointed, the Incorporation will still remain one short of the minimum number of members of the committee of management. That gap needs to be filled.

[82] In our view, it is appropriate that only one further member be appointed to the committee of management to enable the Incorporation to function through to the next AGM. That can be one or other of the two partners of Deloitte Rotorua, if one of them is willing to take on the role. However, the more contentious issue is whether the Court should make that appointment under s 269(5) or s 280(7) of the Act.

[83] Both Mr Bidois and Mr Clews expressed doubt as to whether s 269(5) applies in the present circumstances as they were not satisfied that it could be said that the "shareholders have failed to fill a vacancy in the committee." That is, they effectively argued that s 269(5) can only be relied on where a vacancy has been taken to a shareholders' election and the shareholders have failed to fill that vacancy. Instead, Mr Bidois argues that the Court can rely on its broader powers under s 280(7)(b).

[84] We set out below ss 269(5) and 280(7):

> **269 Committee of management**
>
> ...
>
> (5) The Court may appoint any qualified person to be a member of the committee of management of a Maori incorporation, notwithstanding that that person has not been elected as a member pursuant to subsection (2) of this section, in any case where the shareholders have failed to fill a vacancy in the committee.
>
> **280 Investigation of incorporation's affairs**
>
> ...
>
> (7) Where, as the result of any investigation or examination into the affairs of a Maori incorporation, the Court thinks it necessary to do so, it may, notwithstanding any of the provisions of this Part of this Act, do all or any of the following:
>
> (a) Remove from office any member or members of the committee of management or the secretary of the incorporation:
>
> (b) Appoint, for such period as it thinks fit, some person or persons to hold office as an additional member or additional members of the committee of management:
>
> (c) Suspend for such term as it thinks fit the powers of the members of the committee of management, and appoint one or more competent persons to exercise all the powers of the committee:
>
> (d) Impose such restrictions, conditions, or exceptions as it thinks fit on the powers of the incorporation:
>
> (e) Give such directions as it thinks fit for the conduct of the business of the incorporation:
>
> (f) Suspend for such period as the Court thinks fit all or any of the provisions of the constitution of the incorporation:
>
> (g) Order the winding up of the incorporation:

> (h) Refer any matter to the Attorney-General to consider whether any charging document should be filed or any prosecution commenced against any person or persons.

[85] We agree with counsel that s 269(5) does not seem to be designed for the present situation. Here, instead of the shareholders having "failed" to fill a vacancy in the committee, the vacancies have arisen out of the committee members having resigned en masse as at 12 December 2014. The shareholders have not been given the opportunity to fill the vacancy. Furthermore, s 269(5) is really concerned with appointing a member who will then hold his or her position as an *ordinary* member of the committee of management, which means that such a person would hold that position for a three year term. There is nothing in s 269(5) to give the Court the power to limit the term of appointment.

[86] In contrast, s 280(7) is expressed in broad terms as to when it can be resorted to, the Court can make the appointment for "such period as it thinks fit", the person is an "additional member" of the committee of management, and per s 280(10) that additional member's appointment can be limited by the "terms of the order notwithstanding anything in the constitution of the incorporation". We agree that, taking a purposive approach to the interpretation of s 280(7), its reference to "any investigation or examination" means that it applies not only to s 280 but also to an investigation under s 269(6) or an examination under s 281 (see s 281(2) in particular). Had the Legislature intended the powers in s 280(7) to only be available in relation to an investigation under s 280 itself, then it would not have needed to refer to "any" investigation or examination. Furthermore, if the Court is not able to resort to s 280(7) to provide an appropriate remedy where there is less than the statutory minimum of committee members in the context of an election investigation under s 269(6), then the Court would be bereft of any remedies under the Act.

The special resolutions

[87] Finally, the 16 special resolutions passed at the 2014 AGM were not directly the subject of the application in the lower Court. Nevertheless, the doubt over the votes at the 2014 AGM also casts a shadow over the 16 special resolutions, one of which was to increase the Incorporation's committee membership from five to seven. Thus, given that Mr Watson, Ms Taku and one of the partners of Deloitte Rotorua will be required to arrange the 2015 AGM, including the election of members to the vacancies on the committee of management, they will need to be sure how many vacancies need to be filled.

[88] The outcome of our decision is that we have relied on the uncontested evidence before the lower Court that 78 votes were cast validly at the 2014 AGM and that there were 20 invalid votes. It is the function of the three committee members of the Incorporation to apply that outcome to the 16 special resolutions. Evidence was tendered in the lower Court that the 16 special resolutions had all been passed. It is not for us to issue a ruling on that point. But our ruling on the valid votes should at least allow the committee of management to confirm the final outcome of the votes in relation to those special resolutions.

Outcome

[89] We allow the appeal, revoke the orders issued by the lower Court on 10 December 2014, and pursuant to s 56(1)(f) of Te Ture Whenua Maori Act 1993 make the following orders in substitution:

(a) Section 269(6) of the Act confirming the appointment of Garry Max Watson and Stella Taku as members of the committee of management of the Proprietors of Torere 64 Incorporated as from 30 August 2014;

(b) Sections 280(7) and (10) of the Act appointing either Murray Patchell or John McRae of Deloitte Rotorua as an additional member of the committee of management of the Proprietors of Torere 64 Incorporated until such time as further persons are appointed to the committee of management at the 2015 AGM; and

(c) Section 73 of the Act making the order in (b) conditional upon either Murray Patchell or John McRae consenting to his appointment.

[90] We direct the Registrar at Rotorua to immediately forward this decision to Messers Patchell and McRae and to ascertain whether either of them consent, failing which we will revisit order (b) above. The committee of management will need to arrange the 2015 AGM as a matter of urgency.

[91] If the appellant seeks costs, Mr Bidois is to file a memorandum within 14 days, with Mr Clews to file a response within 7 days thereafter.

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

P J Savage **JUDGE** (Presiding)	D J Ambler **JUDGE**	M J Doogan **JUDGE**