

**IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT**

A20170003173

UNDER Section 239, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Lot 1 Deposited Plan 15331 (part Claim 61), Lot 1
and Lot 3-5 Deposited Plan 8310 (part Claim 61)
and Lot 2 Deposited Plan 15331 (part Claim 61)

BY LAWRENCE THOMAS CAMERON
Applicant

Hearing: 27 July 2018, 53 Te Waipounamu MB 31-48
27 July 2017, 46 Te Waipounamu MB 118-126
(Heard at Invercargill)

Judgment: 15 April 2019

JUDGMENT OF JUDGE S F REEVES

Introduction

[1] This decision concerns applications for replacement and appointment of trustees on the Hedgehope Ahu Whenua Trust (the trust). Following the election of trustees at the trust's 2017 AGM, objections were filed in relation to the appointments.

[2] The two issues in this case are whether to replace Houston Norton and Lisa Rickus as trustees, and whether to appoint the persons elected at the AGM on 2 December 2017.

Background

[3] The trust manages three land blocks in Southland, close to Invercargill. These blocks were returned by Crown grant as part of the Ngai Tahu ancillary claims and were vested in the trust in 2004. They are more commonly known as the Waimumu Sites.¹

[4] According to Court records, the original trustees appointed in 2004 were Lawrence Cameron, Moananui Hawea, John Colling, Houston Norton, and his son Hori Norton. Mr Colling resigned in 2010 and was replaced by Lisa Rickus who was appointed in 2011.²

[5] Clause 21(b) of the trust order provides that the business of an AGM shall include electing persons to fill vacancies in the membership of the trustees. In relation to voting, Clause 27(d) provides:

(d) On any resolution submitted to a vote of beneficial owners the resolution shall be deemed to be carried if the beneficial owners who either personally or by proxy vote in favour of the resolution are the beneficial owners of the larger aggregate share of the equitable interest on the land than the beneficial owners who vote either personally or by proxy against the resolution.

Procedural history

[6] In July 2017, Mr Cameron applied to replace Houston Norton (Mr Norton) and Ms Rickus as trustees with Frances Mary Ruston. Mr Norton was present at Court and confirmed his intention to resign, but Ms Rickus was not present, nor had she formally resigned either by writing or in person at a trustee meeting.³

¹ 109 South Island MB 119-122 (109 SI 119-122).

² 8 Te Waipounamu MB 132-133 (8 TWP 132-133).

³ 46 Te Waipounamu MB 118-126 (46 TWP 118-126).

[7] Mr Cameron filed an email that indicated Ms Rickus intended to resign her position in writing at a future date, and when I noted that the email was not sufficient notice of resignation, Mr Cameron made it clear he would seek to remove Ms Rickus under s 240 of Te Ture Whenua Māori Act 1993 (the Act) for failure to attend trustee meetings.

[8] It also became clear that Ms Ruston, the sister of Mr Cameron, had never been elected by the beneficiaries. Mr Cameron noted that Ms Ruston had been brought in as the trust's minute taker and had been made a trustee by a resolution of the trustees.

[9] I told the parties that any trustee appointment requires broad support of the beneficiaries, usually through an election, and an order of the Court. I directed that Court staff write to Ms Rickus giving notice of the application to remove her and inviting her to respond. I also issued some directions to the trustees concerning election of trustees as follows:

1. As to “refreshing the mandate” all trustees (who wish to remain) are to make themselves available for re-election. *Therefore, they do not automatically remain as trustees.*

2. The trustees must advertise the AGM agenda in Te Pānui Rūnaka and Southland Times; and by any other means possible such as email, Facebook page, post. (*See trust order attached re minimum notification.*)

(a) Agenda to include calling for nomination of trustees and state that this may be from the floor during the meeting or in writing prior to the meeting.

(b) Nominations filed in writing must be received by the trustees by a set date and must be signed by the nominee consenting to their nomination. There must also be consent by nominees if nominations are taken from the floor during the course of the meeting.

Consideration may be put into varying the trust order to include a clause which has trustees appointed on a rotational basis.

Submissions for the applicant

Replacement of trustees

[10] In relation to Mr Norton, Mr Cameron submitted that he had confirmed his resignation as a trustee at the hearing on 27 July 2017 and should be replaced as a trustee pursuant to s 239 of the Act.

[11] It was submitted that Ms Rickus should be removed as a trustee under s 240 of the Act for failure to attend trustee meetings.

2017 AGM

[12] Mr Cameron submitted that as directed by the Court the AGM was held on 2 December 2017 at the Ascot Park Hotel in Invercargill. The meeting was advertised in the Southland Times and Pānui Rūnaka and approximately 350 written notices were posted to beneficiaries personally. The agenda included nomination of trustees and stated that nominations would not be accepted on the day.

[13] Mr Cameron, who chaired the AGM, filed a chairperson's report verifying the election process, and the relevant parts of the report state:

There were five nominations for Trustees. They were: Allan MacDonald, Hori Norton, Frances Ruston, Hawea Moananui, Lawrence Cameron.

There were 14 owners present to vote at the meeting. There were two owners' representatives with proxy votes present to vote ... There were three, however Tony Pohio was disqualified as he is not an owner and did not qualify to vote under s 28(a) of the Trust Deed ... There were 21 proxy votes presented to the meeting, of these, three were not eligible and so were disqualified by me, giving a total of 16 proxy votes ...

The voting commenced with a show of hands by the respective attendees. The results were:

Lawrence Cameron – 16 votes for, two votes against, 11 abstentions;

Hawea Moananui – 24 votes for, two votes against, one abstention;

Frances Ruston – 16 votes for, no votes against, 13 abstentions;

Hori Norton – 14 votes for, 14 votes against, one abstention;

Allan MacDonald – 13 votes for, 16 votes against, one abstention ...

[14] Mr Cameron confirmed that the trust used a 2016 list of owners supplied by Court staff to confirm eligibility to vote. He confirmed the voting results are a simple majority of the combined show of hands and proxy votes for each candidate. He submitted that the vote did not proceed by aggregation of shareholding to avoid a miscalculation. The reason for this was said to be because the trustees did not have the most up-to-date shareholdings from the Court.

[15] Mr Cameron also filed letters of support from Norma Kennard, Vivienne Abernathy, Ms Ruston and Noeline MacLeod who had all attended the 2017 AGM. These letters stated that Mr Manning, Mr Pohio and Mr MacDonald had been disruptive at the AGM and threatening to those in attendance, and that they have previously behaved this way at meetings.

[16] In accordance with the election results, Mr Cameron seeks appointment of himself, Mr Moananui and Ms Ruston as trustees, and that Hori Norton and Allan MacDonald not be appointed.

Submissions in opposition

Richard Manning

[17] Mr Manning filed two letters with the Court detailing his opposition to the trustee election but did not appear to speak to his submissions. He notes that attendees at the hui were informed by the Chairperson voting would be by aggregation, as set out in the trust deed and that despite Court direction, no nominations would be taken from the floor. Mr Manning takes issue with the lack of information circulated to owners prior to the meeting and with the location of the meeting, which he believes excludes most owners due to travel requirements.

[18] Mr Manning alleges that the Chairperson manipulated the voting system and the proxies to exclude Allan MacDonald for personal reasons. Mr Manning states the process for voting and the final aggregated vote were not “validated or conveyed to those in attendance on the day”.

Allan MacDonald

[19] Mr MacDonald filed two letters with the Court to register his opposition to the trustee election process and appeared at the hearing on 27 July 2018 to speak to his submissions. Mr MacDonald noted his belief that the AGM and voting process was flawed.

[20] Mr MacDonald states that the proxy forms had to be requested from Mr Cameron, but that Mr Cameron did not provide an adequate number. It was also necessary to request

nomination forms as these were not sent out with the agenda. Initially, it appeared that the proxy forms could only be used once as they were numbered. It was only three days before the AGM that Mr MacDonald was told the forms could be photocopied by which time it was too late for many of the beneficial owners to organise proxies.

[21] Mr MacDonald supports Mr Manning's position that the nomination process was in breach of the trust deed and nominations from the floor ought to have been allowed.

[22] At the hearing, Mr MacDonald expressed his concern that Ms Ruston was presented as an appointed trustee to the beneficiaries and as a signatory to the trust accounts when no orders had been issued by the Court. He asked the Court to set aside the results of the 2017 AGM and to order a new meeting with the assistance of the Court.

[23] Mr MacDonald also filed correspondence on 14 December 2018 alleging that the trust had held a further AGM on 1 December 2018. He was removed from the trust for not being an owner despite appearing on behalf of his mother and with a letter in support from her. It is also claimed that the trust did not properly inform all owners that the 2018 AGM would be happening.

Tony Pohio

[24] Mr Pohio appeared in Court on 27 July 2018 and also filed letters with the Court detailing his opposition. He states that he was not allowed to be nominated for a trustee position from the floor on the day of the 2017 AGM nor was he able to nominate any others from the floor. This is despite an allowance for this type of nomination in the trust deed.

[25] During the AGM, he was prevented from expressing his views by other attendees who talked over him and threatened him. Mr Pohio submits the Chairperson did nothing to prevent this disruptive behaviour. Furthermore, Ms Ruston was presented as a trustee at the AGM despite no evidence of her nomination or election. Mr Pohio believes Ms Ruston is acting as a trustee despite orders yet to issue appointing her and should not be a signatory to the Trust bank account.

[26] Mr Pohio states that the recorded votes are not an accurate reflection of the voting at the election. Despite nine votes being recorded against Hori Norton, in fact only Mr Cameron

and Mr Hawea voted against him on the day. As votes and election results were not announced on the day, Mr Pohio was unaware of this issue until the minutes were issued – he believed that tallying the votes according to shareholding would occur following the AGM.

[27] The Court received further correspondence from Mr Pohio about the AGM dated 1 December 2018. Given the matter of trustee election is still before the Court, he does not believe the meeting ought to have been held.

Hori Norton

[28] Hori Norton filed a letter with the Court dated 15 November 2018 stating the recorded minutes for the 2017 AGM are not correct. He notes the following inaccuracies: he was not late to the meeting, there were only three votes against him and he received the most votes in favour of his nomination, and the voting process for the trustees was not as recorded.

Jeanette Norton

[29] Ms Norton supports her father's concerns about the minutes of the 2017 AGM. She and her father arrived at the meeting together before it had been called to order – they were not late as was recorded. Ms Norton believes the minutes were amended between the 2017 AGM and the 2018 AGM as voting had been by aggregation but was recorded as being a show of hands by the time the matter came to Court. Finally, Ms Ruston's introduction as a new trustee at the 2017 AGM is alleged to be a breach of process.

Law

[30] Addition reduction and replacement of trustees is set out at s 239 of the Act:

239 Addition, reduction, and replacement of trustees

(1) The court may at any time, on application, in respect of any trust to which this Part applies, add to or reduce the number of trustees or replace 1 or more of the trustees.

(2) The court may amend the court's records for a trust if a trustee dies and the court receives a death certificate for the deceased trustee.

(3) In exercising the powers in subsections (1) and (2), the court may order the vesting of land or other assets of the trust in any person or persons (with the consent

of that person or those persons) upon the terms of the trust, whether or not that person was previously a trustee.

240 Removal of trustee

The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—

- (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
- (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[31] The principles for appointment of trustees are well settled:⁴

- (a) The Court will have regard to the ability, experience and knowledge of the nominated trustee with reference to the nature of the trust and its assets.
- (b) A trustee cannot be appointed unless the Court is satisfied that they will be broadly acceptable to the beneficiaries.
- (c) The Court may use its discretion not to appoint the candidate as elected by the beneficiaries but only under rare circumstances such as a lack of relevant qualifications or a conflict of interest.
- (d) If the Court determines not to appoint the elected candidate, it must still be satisfied the requirements of s 222(2)(b) have been met by assessment of appropriate evidence.

[32] Application of s 240 of the Act has previously been summarised by the Court:⁵

The settled approach in applying s 240 is to make an assessment of the standard trustees' duties together with an assessment of the trustee's performance. The prerequisite for removal of a trustee is not a simple failure or neglect of duties, but a failure to perform them satisfactorily. In determining whether removal is appropriate I will also need to consider the impact of the trustee's actions on the beneficiaries and any apprehension of risk to the assets.

⁴ *Clarke v Karaitiana* [2011] NZCA 154 at [51]-[52].

⁵ *Te Awe Awe v Te Awe Awe-Bevan – Pt Rangitikei Manawatu Pt B4* (2016) 354 Aotea MB 213 (354 AOT 213) at [51].

Discussion

Removal of trustees

[33] Mr Norton resigned in person at the Court hearing on 24 July 2017.⁶ There is no need to remove him as a trustee, and his replacement will be completed under s 239 of the Act.

[34] In relation to Ms Rickus, the Court has pointed to the impact of trustee absence as a decisive factor in removal of a trustee.⁷ The evidence before me indicates that Ms Rickus was not attempting to neglect her duties but was unable to attend trustee meetings. Despite correspondence from Court staff, no further response has been received from her.

[35] Although Ms Rickus' absence does not appear to have impacted the trust's ability to carry out its business, the situation cannot be allowed to continue. She has indicated she does not see herself continuing in the position and she is no longer responding to correspondence from the trustees or the Court. I do not see that the circumstances are likely to change. The trust would be better served by a trustee who will regularly attend meetings and participate in decision making. For that reason, I am satisfied that an order for removal under s 240 is necessary.

[36] To better provide for trustees living outside Southland I also recommend that the trustees consider amending the trust deed to provide for meetings to be held by telephone or other AVL technologies such as Skype.

Ability and experience of the proposed trustees

[37] In general, those putting themselves forward as trustees have shown they have experience as trustees or dealing with property. Ms Ruston has experience as a trustee and some legal training which satisfy me she is suitably qualified.

Broad acceptability to the beneficiaries

[38] To the extent that the Court can ascertain whether a candidate is broadly acceptable to the beneficial owners, it is possible to overlook procedural defects in meetings. It is only

⁶ Above n 3 at 122.

⁷ Above, n 5 at [49]-[51].

where the procedural defects are of such a degree that the view of the beneficial owners cannot be made out that the outcome of a meeting might not be accepted.

[39] The applicant has stated that the 2017 AGM was run according to the process set out in the trust deed and in line with my directions. Those in opposition do not believe the minutes are an accurate representation of hui nor the results of the voting.

[40] The minutes filed list 21 people who attended the AGM and a further eight apologies received. The minutes also show that Mr Cameron, Mr Moananui, Hori Norton and Ms Ruston were in attendance. Mr Cameron stated that of those in attendance, 14 were owners present and eligible to vote, 2 were proxies on behalf of absent owners, and a further 16 proxy votes were admitted as eligible.

[41] Clause 27(d) provides for voting on any resolution to be carried out by shareholding, the intention being that the greater share of the equitable ownership will carry a resolution. This is the method of voting required by the trust order. Importantly, the trust order does not contain any other option for voting process, such as by one vote per beneficial owner.

[42] Despite this the results provided to the Court were a simple majority of votes and proxies which was not according to the process set out in the trust order as has been asserted by Mr Cameron. The reason given was that confusion over who had succeeded to land and the currency of the ownership records led him to believe it would be better to wait to apply the aggregate until Court confirmation.

[43] This is not sufficient or proper justification for departing from the process set out in the trust order. The trustees and owners are entitled to rely on the current list of owners as determinative of who is entitled to vote, as well as the number of shares held by each beneficial owner. In fact, Mr Cameron told us that the list of owners provided by the Court was used to verify who was entitled to vote at the 2017 AGM.

[44] The minutes also show that while Mr Cameron initially intended the vote to proceed by an aggregate vote, following an objection by Mr Manning, the vote then proceeded by simple majority. The minutes do not record the shareholding associated with each individual vote, and there is no record of what the result of the vote was on an aggregate basis.

[45] If the trust order requires voting to be by aggregated shareholding and beneficiaries were expecting as such, it is not sufficient for the applicant to provide the Court with the results of a show of hands. The outcomes have not been specified to allow the aggregation to be applied by the Court, nor has it been detailed for whom proxies are held and how those votes landed.

[46] I am also concerned that the results provided to the Court do not tally. The hui minutes on file state 16 eligible voters were present yet most of the results sum to 15 total votes and only one sums to 16 votes. The results as recorded in the minutes do not include the proxy votes. In his submission to the Court, Mr Cameron stated there were in fact 14 eligible voters as well as 16 proxies which were accepted. In his tally, which includes the proxy votes, the total votes for each nominee variously sum to 27, 29 and 30. These differences have not been explained.

[47] However, I cannot accept the submission the minutes have been doctored to show different results from the election. The minutes of a meeting are a formal record and I accept that they are more reliable than an unsubstantiated account. Nevertheless, there are clear inaccuracies. The numbers do not tally as may be expected, they do not record the proxies and each individual vote is not recorded to allow for the subsequent aggregation promised.

[48] The election process at the 2017 AGM was not in accordance with the trust order and in my view did not determine who is broadly acceptable to the beneficiaries. This was not merely a procedural defect. The trustees are obliged to know and adhere to their terms of trust, and yet they followed an election process that was not open to them in the trust order.

[49] The trust has had several issues with appointing trustees in recent years. On the one hand the current trustees do not appear to appreciate the decisive role of beneficiaries in electing new trustees, or of the processes that must be followed. On the other hand, there is a group of owners and interested parties who appear set on being disruptive. For these reasons, I will direct the Registrar to convene and chair a meeting of the owners to elect new trustees.

Other issues

[50] At the hearing, Mr Pohio argued that his vote ought to have been accepted because he had succeeded in Court to his mother's interests in Māori land in October 2017.⁸ The Court record shows that even though Mr Pohio did indeed succeed to a number of his mother's Māori land interests, there are still interests that remain in her name, including those of the Waimumu Sites. I am unsure why these were not included in the succession application, and I can see how this would lead to confusion for the parties. However, Mr Pohio is not currently eligible to vote as a beneficial owner until he succeeds to those interests, and there will need to be a further interests application for that purpose.

[51] Whether nominations should have been allowed from the floor I do not see to be a sufficient defect. That nominations would not be accepted on the day was made clear in the advertisement and therefore all beneficiaries were provided the same notice and opportunity to nominate candidates for trusteeship. That said, the advertisement of the AGM stated that proxy forms would be made available on request, and forms should have been made available in sufficient quantity, to those who requested them.

Management of the trust

[52] There appears to be some neglect by trustees of their duties to act without personal profit and to declare conflict of interests; the duties not to delegate and to act jointly could also be highlighted. Any trustee or beneficiary may bring an application for review of trust provided no other review has been requested within the same 24-month period. In addition, the Court is available to give advice to trustees where they require it.

Decision

[53] Mr Norton will be replaced as a trustee under s 239 of the Act, and Ms Rickus will be removed as a trustee under s 240 of the Act.

[54] I decline to appoint the trustees elected at the December 2017 AGM, and I confirm that the remaining trustees of the trust are Mr Cameron, Mr Moananui, and Mr Hori Norton.

⁸ 47 Te Waipounamu MB 189-193 (47 TWP 189-193).

[55] I direct the Registrar to convene and chair a meeting of the owners to elect new trustees. That election is to take place within 6 months of this decision.

Orders

[56] There is an order under s 239 for replacement of Houston Norton as a trustee of the Hedgehope Ahu Whenua Trust.

[57] There is an order under s 240 for removal of Lisa Rickus as a trustee of the Hedgehope Ahu Whenua Trust.

[58] There is an order dismissing the application for appointment of trustees.

[59] There is no order as to costs.

[60] A copy of this decision is to be provided to all parties.

Pronounced at 1:00pm in Christchurch on this 15th day of April 2019.

S F Reeves
JUDGE