IN THE COURT OF APPEAL OF NEW ZEALAND **CA 542/2011**

IN THE MATTER OF Whakapoungakau 24 Block (Tikitere Trust)

BETWEEN **ERIC HODGE**
Appellant

AND **PIRIHIRA FENWICK, WIREMU KINGI, and HIWINUI HEKE**
First Respondents

AND **TAI ERU**
Second Respondent

Written submissions for the appellant

Dated: 1 March 2013

Counsel
Felix Geiringer
Barrister
PO Box 10-201
Wellington 6143
(04) 909 7297
(04) 909 7298

Donna Hall
Barrister and Solicitor
P O Box 30-411
Lower Hutt
Telephone: (04) 560 3680
Fax No: (04) 560 3681

Written submissions for the appellant

May it please the Court:

INTRODUCTION

1. This case involves the Whakapoungakau 24 Ahu Whenua Trust, commonly known as the Tikitere Trust. Some of the beneficial owners of the Tikitere Trust have brought these proceedings against some of the trustees.

2. The behaviour of the trustees came to the attention of the beneficial owners in relation to a series of agreements entered into by the trustees with the intention of establishing a geothermal power station. Investigating those agreements, the owners uncovered a series of actions taken by the trustees, or in the name of the Trust by its officers. Those actions included actions that were unlawful, were taken without the owners being properly informed or consulted, were tainted by conflicts of interests, and which the owners believe were outside of the powers of the trustees or in breach of the trustees' obligations to the owners.

3. The owners seek remedies to protect their interests.

SUMMARY OF THE ARGUMENT

4. Three trustees had conflicts of interests. The secretary and the geothermal advisors had conflicts of interest. The trustees delegated their decision making to their secretary. The trustees failed to consult with the owners. The trustees and the secretary sought and obtained variations of the trust order in breach of the Act. Properly interpreted, the trust order does not permit the geothermal power station project without these variations. The variations should be quashed and the trustees should be removed. Declaration should be made as sought so as to protect the interests of the owners in the future.

BACKGROUND FACTS

5. A chronology is attached as Appendix 1.

The Trust, owners and trustees

6. Whakapoungakau 24 is a block of Māori freehold land 32.0923 hectares in area.[1] The Trust was created under Te Ture Whenua Māori Act 1993 (the "**Act**") by trust order dated 9 November 1999.[2] However, the land in its current form dates from a partition order made on 15 December 2003.[3]

7. As at 27 August 2009, there were 1,222 owners.[4]

8. The Trust land is part of the traditional lands of Ngati Rangiteaorere. It contains the geothermal feature known as Hell's Gate, a surface expression of the Tikitere geothermal resource, a taonga of Ngati Rangiteaorere.[5]

9. The trustees during the relevant period were Pirihira Fenwick, Hiwinui Heke, Wiremu Kingi, Winnie Emery and Tai Eru.[6] Mrs Emery passed away on 21 June 2010 and was replaced on 5 November 2011 by George Habib. Mr Eru has taken a different position to his fellow trustees since June 2009 and was therefore not named as a respondent.

The geothermal power project

10. To facilitate the geothermal power station project, a new company was incorporated on 7 July 2004 called Tikitere Geothermal Power Limited ("**TGP**").[7] This was three months before the trust order was varied to empower the trustees to form companies. On 5 November 2008, the

---

[1] MLC Judgment at para [16] **(COA Vol 1 p 20)**.
[2] MLC Judgment at para [194] **(COA Vol 1 p 68)**; and the original Trust Order **(COA Vol 4 p 658)**.
[3] MLC Judgment at para [16] **(COA Vol 1 p 20)**; and the partition order **(COA Vol 4 p 673)**.
[4] MLC Judgment at para [16] **(COA Vol 1 p 20)**.
[5] Affidavit of Wahiao Raymond James Gray at para [16] **(COA Vol 2 p 160)**.
[6] MLC Judgment at para [16] **(COA Vol 1 p 20)** using some variants of these names; and the vesting order **(COA Vol 4 p 668)**.
[7] Certificate of incorporation **(COA Vol 5 p 712)**.

Tikitere Trust entered into an agreement with two other trusts and TGP.[8] Those two other trusts were Paehinahina Mourea Trust ("**PMT**") and Manupirua Ahu Whenua Trust ("**MAWT**"). That agreement was known as the Tikitere Project Agreement ("**TPA**").

11. Mrs Fenwick is also a trustee of PMT.[9] Tai Eru is a trustee on the MAWT.[10] Mrs Emery was the wife of a trustee of PMT, William Graham Emery.

12. Mrs Fenwick and her immediate family are the beneficial owners of at least 20% of PMT.[11] PMT was able to receive $2,000,000 in up-front payments and other benefits under the TPA.[12]

13. On 26 February 2009, TGP appointed Green Energy Limited to manage the Tikitere Project.[13]

14. During the proceedings at first instance, witnesses discussed the existence of an anonymous benefactor who was providing funding but failed to name that benefactor.[14] The appellant understands that since those proceedings, a build operate and transfer agreement has been entered into between TGP and a special purpose vehicle created by Ormat International Incorporated ("**Ormat**"), with Ormat acting as guarantor. Ormat is believed to be the mysterious benefactor, but there is no evidence before the Court expressly confirming that suspicion.

15. While this broad outline of the geothermal power station projected will assist the Court to understand the relationships between the relevant parties, the issue of whether or not the agreement was ultimately a good

---

[8] MLC Judgment at para [1] **(COA Vol 1 p 17)**; the agreement **(COA Vol 7 p 1168)**.
[9] MLC Judgment at para [29] **(COA Vol 1 p 23)**.
[10] Ibid.
[11] MLC Judgment at para [145] **(COA Vol 1 p 54-55)**; affidavit of Kereama Pene at para 40 **(COA Vol 2 p 230)**.
[12] Affidavit of Kereama Pene at para [40]-[41] **(COA Vol 2 p 230)**.
[13] Management agreement **(COA Vol 7 p 1263)**.
[14] Affidavit of Stephen Michener at para [184] **(COA Vol 2 p 286)**.

one for the Trust is not before the Court. This was a result of an agreement between the parties in an effort to narrow the issues for consideration at first instance.[15] One complaint the appellant has with the decisions below is that they appear to be based on reasoning that is inconsistent with this arrangement.

16. In any case, counsel for the appellants is not in a position to fully assess the quality of the agreement. Parts of documents containing details needed to assess the agreements were provided to counsel in the Court below, Helen Aikman QC, on the basis that they were not distributed to anyone else including expert witnesses. Ms Aikman was very unwell when this file was passed to present counsel and, sadly, she passed away before she was able to hand over any documents. The confidential documents remain with her estate and the respondents have refused to provide new counsel with copies.

17. However, the appellant has reason to be concerned about the trustees' decision making and the merit of the agreement for the Trust. There was before the Court an affidavit of an independent expert, David John Ross, on behalf of the second respondent. Mr Ross, as well as highlighting the lack of independent advice, lack of adequate due diligence and clear conflicts of interest, was able to conclude on the face of some of the agreements forming part geothermal power station project that those agreements were commercially unsound.[16]

The other relevant parties

18. The evidence names a number of different parties who have a complex set of interrelationships. The interrelationships give rise to further claimed conflicts and therefore a breach of duty by the trustees. To assist the Court, these parties are set out here with a brief explanation of the

[15] MLC Judgment at para [14] **(COA Vol 1 p 19)**.
[16] Affidavit of David John Ross at para [50] (COA Vol 2 p 319-320). The COA version of this affidavit is difficult to read so a clearer version is to be provided with thee submissions.

relevant relationships. To assist, a diagram setting out these interrelationships is attached as Appendix 2. This diagram is a modified version of one that appeared in evidence.

19. To the extent that the evidence shows the existence of conflicts of interests for people other than the trustees, the Māori Land Court (the "**MLC**") held that that evidence was "not strictly relevant to the narrow issues before the Court".[17] As set out below, the appellant challenges that reasoning on the basis that the trustees bear the responsibility of entering into arrangements where the interests of the beneficiaries were endangered by these conflicts.

20. Wahiao Raymond James Gray (aka Jim Gray) was appointed by the Court as the Trust's sole initial trustee in or about 1993.[18] He was later appointed by the Court as the secretary of the Trust and at some point, he assumed the designation of Chief Executive Officer.[19]

21. Bryan and Lisa Hughes own 100% of two companies in the "Waiora" group of companies, and are also equal shareholders with Mr Gray, in his personal capacity, on another company, Tatou Experience Limited. Mr and Mrs Hughes are also 100% owners of Tatou Holdings Limited. Tatou Holdings Limited and the Tikitere Trust are each 50% owners of Tikitere Holdings Limited, the company operating the Hell's Gate tourist facility on Trust land.

22. Mr Gray is a director of Tatou Experience Limited, Tikitere Holdings Limited and TGP. He is the sole director representing the Trust's interests on the board of Tikitere Holdings Limited. The operations at Hell's Gate has been the only source of funds for the Trust.[20] Tikitere Holdings

[17] MLC Judgment at para [15] **(COA Vol 1 p 19-20)**.
[18] Affidavit of Wahiao Raymond James Gray at para [4] **(COA Vol 2 p 157)**.
[19] Oral testimony of Wahiao Raymond James Gray **(COA Vol 4 p 633-635)**.
[20] Affidavit of Wahiao Raymond James Gray at para [16] **(COA Vol 2 p 160)**.

Limited reported total sales of $3,041,269 in 2009.[21] According to the annual accounts to the year ending 31 March 2009 the Trust has assets of $1,167,796 and liabilities of $9,897 with net assets of $1,157,899.[22] The statement of financial performance records that in the 2009 financial year the trust made a profit of $32,799.[23]

23. Bruce Carswell was the advisor to the trust in relation to the proposed geothermal power station project and in particular advised the trustees during the negotiating period of the TPA and the management agreement. His family are the beneficial owners of 50% shareholder of Green Energy Limited, the company appointed as manager by the management agreement.[24] Green Energy Limited was appointed the manager of the operations of TGP for the same term as the TPA, a period of 50 years.[25] Green Energy Limited also received a 10% option in TGP.[26] Mr Carswell is also an agent for Ormat.[27]

Amendments to the trust order

24. In 2004, the trustees applied for a variation of Trust to allow the Trust to investigate the establishment and possibly build a geothermal power station.[28]

25. The application was adjourned to allow for the holding of an AGM of the Trust. An AGM was held and was attended by some 17 people (it is not clear if this number included the trustees or not). This was well short of 10% of beneficiaries required for quorum for a general meeting by the

---

[21] Tikitere Holdings Limited accounts of 2009 **(COA Vol 6 p 1145)**.
[22] MLC Judgment at para [17] **(COA Vol 1 p 22)**.
[23] Ibid.
[24] Rebuttal affidavit of Stephen Michener at paras [132.2] and [132.3] **(COA Vol 2 p 349)**; and the management agreement **(COA Vol 7 p 1263)**.
[25] Management agreement at para 12.1 **(COA Vol 7 p 1271)**.
[26] MLC Judgment at para [120] **(COA Vol 1 p 48)**; and the option agreement **(COA Vol 7 p 1249)**.
[27] Affidavit of Wahiao Raymond James Gray at para[128] (COA Vol 2 p 197) ; and rebuttal affidavit of Stephen Michener at para [132.3] **(COA Vol 2 p 349)**.
[28] MLC Judgment at para [25] **(COA Vol 1 p 22)**; and Minute Book 283 ROT 169 **(COA Vol 5 p 845)**.

trust order.[29] By comparison, a quorum on 27 August 2009 would have required the attendance of 123 owners.[30] In relation to this meeting and the one in 2008, the appellant submitted that notification of the meeting and the proposed amendment to be considered at the meeting was inadequate. This bases upon which the MLC decided this case did not turn on this issue, but the Court observed that "with respect, now that the variation applications have been scrutinised and subject to challenge, on reflection some of counsel's criticisms are not without foundation."[31]

26. The respondents claim that the inquorate meeting gave approval to proceed. However, there is significant doubt as to what actually transpired at the meeting. During the MLC hearing, it became apparent that Mr Gray had prepared at least 3 different versions of the minutes of this meeting.

27. The version discovered to the appellants stated that a motion had been passed by the meeting "[t]hat the variation take place and if the evidence stacks up to proceed with the erection of a geothermal power station, either on Trust property or adjourning [sic] property".[32] Mr Gray also recorded under "Matters Arising", "unequivocal support to proceed with a variation of the trust order and to proceed with the erection of a geothermal power station if that be the case." This version of the minutes was not signed.

28. However, there was a second version of the minutes that was on the Court file and which appears to be the one presented to the Court in 2004 and therefore the one the Court relied upon at the hearing of the variation. That version was signed by the Chairman and made no

[29] The Trust Order at clause 7(a)(iii) **(COA Vol 5 p 842).**
[30] MLC Judgment at para [16] **(COA Vol 1 p 20)**.
[31] MLC Judgment at para [69] **(COA Vol 1 p 34)**.
[32] Minutes of AGM 13 September 2004 **(COA Vol 7 p 1389)**.

mention of support by owners under Matters Arising and the motion read simply "that the variation take place".[33]

29. A third version was handed up during the MLC hearing which it is understood came from Mr Gray's own records. That version was initialled by someone unknown but not signed. It records a further motion not present in either of the previous versions of the minutes. Namely, "that the beneficial owners authorise the trustees to negotiate and enter into agreements with appropriate parties for the development of the geothermal resource."[34]

30. Mr Gray was unable to explain the three different minutes nor why or when he had added the additional comments. It does however indicate that, even if this meeting had been quorate, little regard can be taken for the validity of any of the sets of minutes from that meeting and significant doubt remains about what exactly was discussed or agreed.

31. Counsel's copies of the first and third of these minutes have become confused and Ms Aikman's notes on which is which (the basis of the above submissions) does not match a note attached to these documents by persons unknown. It is possible that the first is the one handed up by Mr Gray and the third is the one discovered, but the ultimate source of both is a mystery so little can be drawn from that difference.

32. At the subsequent MLC hearing, Mr Gray requested a variation "to allow the Trust to enter into joint ventures and form companies".[35] The resulting amended trust order allowed the Trust to "investigate the possibility of establishing a geothermal power station and to take advantage of the findings".[36] In answer to the Court's question as to how the AGM went Mr Gray responded "Very well sire, very friendly people. No difficult

---

[33] Minutes of AGM 13 September 2004 **(COA Vol 7 p 1392).**
[34] Minutes of AGM 13 September 2004 **(COA Vol 5 p 859)**.
[35] Minute Book 284 ROT 104 **(COA Vol 5 p 849).**
[36] Amended Trust Order at clause xviii **(COA Vol 5 p 855)**.

questions. Total support of what the trustees were doing and everything that had been carried out sir."[37]

33. Another successful application to vary the trust order on 4 December 2006. Mr Gray advised the Court that the use of the land for farming purposes was not optimal and more practical alternatives needed to be explored. The variation to the trust order provided the trustees with the ability to develop the trust's land as a geothermal tourism park and removed the purpose of using the land for farming. No mention was made of any supporting meeting of owners and nor were any minutes filed with the application or a copy of any notice of meeting that included a reference to variation.[38]

34. In November 2008, another application to vary the trust order was made, this time without any reference to a general meeting or other form of notice to the owners. It sought a variation to allow a 20% investment in Tatou Holdings Ltd.[39] Mr Gray told the Court that the Trust recognised that this was exposing the Trust to considerable risk. No independent due diligence report had been sought. The application was not accompanied by any minutes, or notice that mentioned variation and no reference was made to a meeting in support of the application during the hearing.[40]

35. The Court ordered no variation was required as the judge considered that the trust order already contained the necessary powers for such a transaction but the Court added that "whether that investment is prudent or reasonable is a separate matter altogether".[41] The Trust however passed a resolution to invest $1.5 million in the Waiora Spa business

---

[37] Minute Book 284 ROT 104 **(COA Vol 5 p 849).**
[38] MLC Judgment at para [26] **(COA Vol 1 p 22)**; Minute Book 305 Rotorua 76 **(COA Vol 5 p 868).**
[39] MLC Judgment at para [27] **(COA Vol 1 p 23)**; Minute Book 337 Rotorua 24 **(COA Vol 4 p 696).**
[40] MLC Judgment at para [27] **(COA Vol 1 p 23)**.
[41] Ibid.

owned principally by Graham and Lisa Hughes.[42] In the event that investment did not proceed. However, a loan of over $300,000 was made to Lisa Hughes as a Director of Tatou Holdings, again without any notice to the owners.[43] Even some of the trustees appeared to know little about the loan.[44]

36. In April 2009, yet another application for variation was made to set up a special purpose company to isolate the trustees from any liability. Again this application was made without any reference to or knowledge by the owners. However when asked by the Court, Mr Gray on behalf of the trustees, assured the Court the owners supported the proposal. The Court issued the variation as requested.[45]

Meetings subsequent to the TPA

37. After the TPA was signed, on 30 November 2008, the trustees called an AGM.[46] The meeting was attended by the trustees and eleven (11) owners. Once again, attendance was well below a quorum of 10% (in fact it would have been less than 1%). The meeting had been advertised in the local paper but for 2 different dates thus creating considerable confusion among owners.[47] There was no attempt to notify owners through the Marae or other hapu networks.[48]

38. Although a presentation on the geothermal power station project was given, it was too late to question it as the agreement had already been signed. The trustees therefore made no attempt to honour their obligations under Te Ture Whenua Māori Act to consult with owners under ss 229 or 244(3) or the general principles of the Act under s 17(2).

---

[42] MLC Judgment at para [3] **(COA Vol 1 p 17)**.
[43] Transcript of oral evidence (**COA Vol 4 p 644)**.
[44] Transcript of oral evidence (**COA Vol 4 p 602, 626 and 644)**.
[45] MLC Judgment at para [28] **(COA Vol 1 p 23)**; and Minute Book 338 Rotorua 45 **(COA Vol 5 p 748)**.
[46] MLC Judgment at para [22] **(COA Vol 1 p 21).**
[47] Adverts **(COA Vol 5 p 721-723)**.
[48]Oral testimony of Pirihira Fenwick **(COA Vol 4 p 611)**.

39. As a result of the present proceedings the MLC did order that another meeting be held under an independent chairperson. This occurred on 6 December 2009, and had a quorum.[49] A vote to approve the geothermal power station project was resoundingly defeated (89 votes to 39).

40. Details of all documents relating to the geothermal power station project were kept confidential and only released to counsel for the applicants in December 2009 on the order of the Court. All requests by the applicants for access to the documents were denied, despite the respondents later arguing that there was an onus on the beneficiaries to seek out information, and that the trustees tried to keep interested owners informed.[50]

Jurisdiction of this Court

41. Section 58A of the Act confers a general right of appeal with wide and unfettered power for this Court as follows:

> Further appeal to Court of Appeal from Māori Appellate Court
>
> (1) A party to an appeal under section 58 may appeal to the Court of Appeal against all or part of the determination of the Māori Appellate Court on the appeal.
>
> (2) On an appeal under subsection (1), the Court of Appeal may make any order or determination it thinks fit.

42. However, this Court has previously noted the specialist jurisdiction of the MLC and the Māori Appellate Court (the "**MAC**") and therefore the specialist skills for which its members are appointed, in particular their knowledge and experience of te reo Māori, tikanga Māori and the Treaty of Waitangi.[51] For this reason, while this Court retains the ultimate responsibility for making its own assessment on the merits of all issues,

[49] MLC Judgment at para [24] **(COA Vol 1 p 22)**.
[50] MLC Judgment at para 89 **(COA Vol 1 p 40)**.
[51] *Kameta v Nichols* [2012] NZCA 350 at [9] per Harrison J for the Court.

the Court may be hesitant to interfere where the lower courts have enjoyed the benefit of their specialist expertise.[52]

43. This case largely turns on questions of statutory interpretation, interpretation of the trust order, and on general principles of trust law. It is submitted that in relation to these matters this Court enjoys specialist skills that are certainly no lesser than those of the Courts below. The appellant also submits that, in this case, there are reasons why the normal hesitancy to interfere with findings of the lower courts does not apply.

44. As is set out above, several unlawful variations of the trust order were obtained by the trustees from the Māori Land Court. Criticism for this must, first and foremost, be levelled at the trustees and the trust secretary, Mr Gray. They knew that their applications lacked support from the owners and were therefore unlawful. In at least one case, Mr Gray made misleading comments to the Court in support of the variation applications.

45. However, some criticism can also be levelled at the Māori Land Court. At no time did the Court make adequate inquiry of the applicants so as to reveal whether the applications were being made with the support of the owners, nor did the Court always require that the applicants even claim that such consultations had taken place. In relation to some of the applications, the applicants did not claim to have consulted the owners, the Court did not ask whether the owners had been consulted, and the owners had in fact not been consulted at all.

Tai Eru

46. Mr Eru has been a trustee through all of the relevant period. As with Mrs Fenwick and Mrs Emery, Mr Eru had a conflict of interest and

[52] Ibid citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].

nevertheless participated in the trust's decision making in relation to the geothermal power station project.

47. Since June 2009, his position has diverged from that of the other trustees, he has been critical of the process that has been followed by the trustees including himself and he has, to use a colloquial term, been a whistle-blower of the trustees' activities to the owners.

48. The applicants before the MLC elected not to seek orders against Mr Eru. In the courts below, the respondents have, with some success, tried to use this against the appellant. Such an attack is devoid of any logical relevance. The fact that, for understandable reasons, the applicants in this case have chosen not to seek orders against Mr Eru does not invalidate their complaint against the other trustees.

49. The only relevance of Mr Eru in these proceedings is that the findings of conflict against him in the MLC directly contradict the MLC's suggestion that, even if Mrs Emery and Mrs Fenwick were conflicted, a majority of the trustees (and therefore the decisions of the trustees as a whole) were free from such taint.[53]

GROUND OF APPEAL A - Misinterpretation of Clause 3(a) of trust order

50. The MLC found that cl 3(a) of the trust order allowed the trustees to proceed with the geothermal power station project without reference either to the owners or the Court.[54] That finding was upheld in the MAC.[55] This finding diminished the consequences of the unlawful variations to the trust order that had been obtained between 2004 and 2008. The appellant contends that this finding was in error.

---

[53] MLC judgment cf paras [143] and [155]-[164] (COA Vol 1 p 54 and 57-60).
[54] MLC Judgment at para [100] and [101] **(COA Vol 1 p 43)**.
[55] MAC Judgment at para [29] **(COA Vol 1 p 89)**.

51. The starting point for interpreting a trust deed (and therefore the trust order) is, of course, the plain ordinary meaning of the words used.[56] However, the order must be interpreted as a whole and therefore the Court should seek to avoid interpreting one clause to undermine another.[57] Also, whether the Court gives a clause a narrow or broad interpretation will depend on context and the subject matter of the clause.[58]

52. Clause 3(a) of the trust order provides:

> 3 Powers
>
> The Trustees are empowered:
>
> a General
>
> In furtherance of the objects of the Trust and except as hereinafter may be limited to do all or any of the things which they would be entitled to do if they were the absolute owners of the land PROVIDED HOWEVER that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

53. Clause 3(b) of the trust order then lists a series of specific powers of the trustees "without limiting the generality of the foregoing but by way of emphasising and clarifying as well to extend the powers of the trustees." The listed powers are headed "to buy", "to subdivide", "to improve", "to employ", "to borrow", "to set aside case reserves", "to lend", "to pay own costs", "to promote title improvement projects", "to distribute", "to permit occupation and enjoyment by the owners",

---

[56] Butler *Equity and Trusts in New Zealand* (2nd ed) at 3.3 citing *Trustee Executors & Agency Co of NZ Ltd v Maple Tree Orchard (Canterbury) Ltd* 20 July 1999 Wild J High Court Wellington CP53/99, p 8.
[57] Ibid.
[58] Butler at 3.3.

"to make other special provisions for beneficiaries", "to consent to the erecting of dwellings", "to lease", "to take over existing leases", "to farm", and "to represent owners".

54. Section 229 of the Act provides:

> Court may authorise new ventures
>
> (1) Subject to subsection (2), the court may approve an extension of the activities of any trust constituted under this Part, whether by the trustees alone or in concert with any other person or body, and whether or not the proposed activities relate directly to the property of the trust.
>
> (2) The court shall not exercise its powers under subsection (1) unless it is satisfied that the beneficial owners have had sufficient opportunity to consider the proposal and that there is a sufficient degree of support among the owners.

55. Section 226 of the Act provides:

> General powers of trustees
>
> (1) The court may, in the trust order, confer on the trustees such powers, whether absolute or conditional, as the court thinks appropriate having regard to the nature and purposes of the trust.
>
> (2) Subject to any express limitations or restrictions imposed by the court in the trust order, the trustees shall have all such powers and authorities as may be necessary for the effective management of the trust and the achievement of its purposes.

56. The objectives of the Act include:[59]

> (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:

[59] At s 17(2).

> (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: Such a wide interpretation is not consistent with the Act or the duties of trustees.

57. Lastly, a trust order can be varied in accordance with s 244 of the Act:

> Variation of trust
>
> (1) The trustees of a trust to which this Part applies may apply to the court to vary the trust.
>
> (2) The court may vary the trust by varying or replacing the order constituting the trust, or in any other manner the court considers appropriate.
>
> (3) The court may not exercise its powers under this section unless it is satisfied—
>
> > (a) that the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and sufficient opportunity to discuss and consider it; and
> >
> > (b) that there is a sufficient degree of support for the variation among the beneficiaries.

58. Clause 3(a) uses broad language, and cl 3(b) states that it is not intended to limit the generality of 3(a). However, it is submitted that that broad language must be interpreted in the context of the rest of the document, in light of the relevant legislation and with a mind to the purpose of the trust order.

59. In effect, the MLC found that the trust order (which states that the objects of the Trust are to provide for the "use management and alienation of the land" (cl 2)) allowed the trustees to do almost anything they liked in relation to the land as long as they did not sell the fee

simple. The Court held that the fact the trustees did not think they had the power without a variation was irrelevant.

60. This interpretation makes entirely otiose all of clause 3(b). It also completely defeats the protection mechanism provided in s 229 which would otherwise require owner support for something that amounted to a new venture. It gives the trustees powers in excess of those the Court could grant under s 226. By permitting the trustees to act without reference to the owners, it also defeats some of the purposes of the Act.

61. While the specific powers in cl 3(b) do not directly limit the power in cl 3(a), it is necessary to give 3(a) a *ejusdem generis* interpretation that links it back to the nature of structure of the trust order as a whole. It is submitted that under such an interpretation cl 3(a) serves as a machinery provision, which ensures that if a particular power is left out of the specific powers under cl 3(b) (as occurred in *Karena v Apatu*[60]), the trustees will still be able to execute the necessary documents. As such, it exists primarily so that third parties dealing with the trust cannot challenge the validity of contracts on the grounds of *vires*. All powers must however relate to the objects of the Trust and are subject to the duties of the trustees.

62. As the trust order was originally drafted, the geothermal power station project was sufficiently connected with the objects of the Trust to allow the trustees to proceed without getting the sanction of the owners and the Court. Geothermal steam is not "land or an interest in land", so the commercial exploitation of this resource is nowhere contemplated in the trust order.

63. The trustees themselves recognised this when they sought to amend the trust order in 2004 and 2006 (the lawfulness of which is addressed

[60] (2004) 14 Takitimu Appellate MB 4.

below). It was also the view of the MLC in granting those variations as compared with the MLC decision in 2008, dismissing a similar application as unnecessary. Before those variations, the object of the Trust was primarily to farm the land and possibly allow owners to live on the land. All of the specific powers are directed to this and to assisting the owners. Any general powers must be construed in light of these objects and powers.

64. It is submitted that the geothermal power station project was so radically different from what was contemplated in the Trust order as to require either compliance with s 229 or a variation under s 244. This venture is very different from the example of a forestry lease referred to by the MLC.[61]

65. If correct, the interpretation of the courts below means that it does not matter how speculative a venture the trustees decide upon, they can proceed without informing the owners or gaining sufficient support, just as long as the venture has some remote connection with the Trust land.

66. The broad interpretation favoured by the Court below means in effect there will often be no sanction against irresponsible or misguided trustees until it is too late. The owners will be the ones to suffer without ever being given a chance to approve or not to approve the venture. There are already many examples of trustees who have embarked on such ventures which have ended in disaster. The requirement to get owner and court approval for new ventures is some protection for the owners against such disasters. It is also fundamental to the principles of the Act requiring owner involvement. It is, after all, their assets at risk.

[61] MLC Judgment at para [107] **(COA Vol 1 p 45)**.

67. It is a fundamental rule of statutory interpretation that general words such as those found in cl 3(a) cannot override specific requirements such as s 229.[62]

68. In addition, anything in a trust order is subordinate to legislation and the general law:[63]

> Besides the duties expressly imposed by the terms of the Trust instrument, a trustee is subject to many general duties which are implied by law and which have for the most part been established by case law.

69. Trust orders are made under Te Ture Whenua Māori Act (s 219) and must comply with the Act. They may give trustees certain powers not spelt out in the Act but they cannot contradict the Act.

70. The MLC did not address any of the limitations on their powers present in either the Trust order itself, the Act, the Trustee Act or the common law, all of which apply to the powers of trustees. Nor is there anything in the *Karena v Apatu* that suggests otherwise. In that case the trustees already had the power to lease the land for that purpose. Although there was no specific power to grant a lesser interest (a licence), this was implicit and covered by the same cl 3(a). However, in that case there had been a meeting of owners which supported the move. The Court was therefore dealing with a technical objection by a rival contender for the licence.

71. The proper interpretation contended for above gives a purpose the remainder of the trust order. It also leaves intact the protections mechanisms in ss 229 and 244 that will be engaged when the trustees seek to undertake an entirely new venture or to vary the trust order. Those protection mechanisms require consultation and approval from

---

[62] See Burrows *Statute Law in New Zealand* (3rd ed) 307, 317 and the maxim generalia specialibus non derogant.
[63] Garrow and Kelly *Law of Trusts and Trustees* (6th ed) 503.

the owners and give oversight to the Court, thereby requiring the trust to be administered in a manner that achieves the objectives of the Act.

GROUND OF APPEAL B and C – Refusal to set aside the variations

72. As set out above, s 244(3) of the Act provides that before the Court may vary a Trust deed it must be satisfied that the beneficiaries of the Trust have had sufficient notice of the application and sufficient opportunity to discuss the proposal, and that there is a sufficient degree of support among the beneficiaries.

73. In this case the order was purportedly varied in 2004 after a meeting of only 17 people, and in 2006 and 2009 after no meeting at all. There was therefore clearly a failure to comply with s 244.

74. The MLC correctly noted at [65] that the Court of Appeal in *Pukeroa Oruawhato v Mitchell*[64] had held "underscored the importance of strict adherence to s 244 whenever the Court's discretion to vary a Trust order was invoked." Judge Harvey added that this involved a 3 step process of notice, sufficient opportunity to discuss the proposal and evidence of a sufficient degree of support.

75. Given those tests he held "the four applications for variation in 2004, 2006, 2008 and 2009 could be subject to challenge".[65] At paras [74]-[75], the Judge added "applications for variation can only be made by the trustees once the proposed variations have been considered by the beneficiaries at a properly notified meeting" and that as noted by the MAC in *Pukeroa Orouwhata*, the Court could no longer vary orders of its own motion. "Careful adherence to s 244 remains essential on any future applications for variation."

76. However, the Judge did not formally set aside the existing unlawful variations. Instead he stated that at the next meeting of beneficiaries a

[64] [2008] NZCA 518.
[65] MLC Judgment at para [69] **(COA Vol 1 p 34)**.

more detailed review of the Trust order will be appropriate.[66] It is submitted that in dodging the issue of the validity of the variations, the MLC has acted contrary to its own findings and to the law. As it had already found, s 244 is couched in mandatory terms. The three steps must be taken before the variation, and it is not appropriate for such a complete non-compliance to be excused.

77. Section 244 is an important protection for the owners and is a means by which the objects of the Act, in particular s 17(2)(a) are achieved. The Court in this case in 2008 was falsely and deliberately told by the trustees' agent, the Trust secretary, that the beneficiaries supported the action when in fact no meeting had been held. The statements to the Court by Mr Gray in 2004 were also highly misleading given that the AGM had consisted of only 17 people. In view of the total failure to comply with the requirements of s 244, the variations should be quashed.

78. When these submissions were made to the MAC, that Court's response was:[67]

> If the appellants had concerns about the validity of those variations, the appropriate action was to challenge those orders through an appeal with 2 months of the order. This cannot be raised now, more than four years later.

79. The MAC's response is a reference to s 58 of the Act:

> Appeals from Māori Land Court
>
> (1) Except as expressly provided to the contrary in this Act or any other enactment, the Māori Appellate Court shall have jurisdiction to hear and determine appeals from any final order of the Māori Land Court, whether made under this Act or otherwise.

[66] MLC Judgment at para [70] **(COA Vol 1 p 34)**.
[67] MAC Judgment at para [38] **(COA Vol 1 p 91)**.

> (2) Any such appeal may be brought by or on behalf of any party to the proceedings in which the order is made, or any other person bound by the order or materially affected by it.
>
> (3) Every such appeal shall be commenced by notice of appeal given in the form and manner prescribed by the rules of court within 2 months after the date of the minute of the order appealed from or within such further period as the Māori Appellate Court may allow.

80. The time limit for bringing an appeal is therefore not 2 months, but 2 months or such further period as the MAC may allow. The Court gave no consideration to whether an extension is justified in this case.

81. The problem with the MAC's reasoning is that the default complained of also means that the applicants were entirely ignorant of the variations until 2009, when they brought these proceedings. Given the shortcomings in the notification of the proposed variations and the lack of meetings, the owners cannot reasonably be criticised for failing to being an action in the default time frame.

GROUND OF APPEAL D – Failure to consult with owners

82. It is submitted that whether ss 229 or 244 or the common law is applied, the trustees were under a legal obligation to refer this major transaction to the owners.

83. The MLC correctly held at [54] to [58] that trustees are not required to get the consent of the owners, unless the Trust order so provides, but added at [58] "Even so, a wise trustee will take careful account of what the owners have to say, particularly where that owner opinion is the majority."

84. In this case, the trustees took no account of the views of owners before signing up to a 52 year lease, because they did not ask or inform them. The only time a few of them may have been informed at all was back in 2004. The meeting held in September of that year had 17 attendees, but it

is not known who they were or whether they were all owners. It is also unclear exactly what took place at the meeting. Whether they also agreed to the trustees taking "advantage of the findings" is highly doubtful given the signed minutes that were originally presented to the Court. Even then, these words are not specific and the caution expressed by the few owners who were consulted in 2004 indicates that there was no way they were authorising the trustees to sign them up for a 52 year deal without any further reference to them as owners.

85. These submissions do not go as far as to suggest that the trustees were obliged to determine the majority view of the owners and to abide by that view. The submissions therefore do not contradict any of the authorities relied in by the MLC at [54]. However, this is not a case about whether the trustees can be compelled to bow to owner majoritarian rule. It is a case about a set of trustees who wholly failed to consult with owners at all, and who obtained variations of the trust order in breach of the Act by misleading the court as to what consultations had taken place.

GROUND OF APPEAL E – Conflicts of interest

86. Throughout the judgment in the MLC, there is reference to "potential conflicts", or the "appearance of conflict", as opposed to "actual conflicts". It is submitted that the Judges use of these terms shows a misunderstanding of their meaning and of the law of conflict of interest in general.

87. A conflict of interest exists whenever one has duty and an interest that conflicts with that duty. A potential conflict exists when one has a duty and an interest that might in the future conflict with that duty.

88. Instead, Judge Harvey appears to use the terms "potential conflicts", or an "appearance of conflict", to mean a conflict of interest where it has not been proven that the conflicted person acted improperly or in bad faith by

favouring their interest over their duty. The Judge therefore appears to limit a finding of an "actual conflict" to circumstance of an improper action has been shown.

89. Proving such improper conduct would be very difficult and, in part for this reason, it is not a necessary element of establishing a conflict of interest. In fact, for a fiduciary there is an active obligation to avoid conflicts (both between duties and personal interests and divided loyalties).[68]

90. The appellant has two more concerns with these findings. First, the appellant contends that the Judge can only be reaching these conclusions by assessing the quality of the geothermal power station project agreements. As recorded above, that is an issue that the parties agreed to park in these proceedings. Secondly, it is submitted that in making these findings the Court has shown too much credulity. The claims of acting in the owners best interests have been too readily received, especially from Messrs Gray and Carswell. A finding that they were acting for the best interests of the owners ignores the significant personal interests both have had in the matter for which they have been offering their advice and assistance to the trustees. In any case, it is clear from the extent of the conflicting interests that in following the advice of those men, the trustees placed the interests of the owners at significant risk.

91. As set out above, three trustees had significant conflicting interests in entering into the project agreement as they (or close family members) owned shares in more than one trust involved.

92. Also as set out above, evidence given in the Court below showed that the secretary of the Trust, Mr Gray, had personal interests in the Waiora chain of companies, yet the trustees relied on his advice in deciding to invest in that group of companies without obtaining independent advice, and the

[68] Butler 17.2.2.

trustees also relied on the advice of Mr Carswell in entering into the geothermal power station project agreements despite the fact that he stood personally to gain from those arrangements.

93. In the courts below, reference has been made to the nature of the Māori world and the reality that conflicts of this type are too common to be avoided. However, accommodation for this reality is already made in the Act. Section 227A provides

> Interested trustees
>
> (1) A person is not disqualified from being elected or from holding office as a trustee because of that person's employment as a servant or officer of the trust, or interest or concern in any contract made by the trust.
>
> (2) A trustee must not vote or participate in the discussion on any matter before the trust that directly or indirectly affects that person's remuneration or the terms of that person's employment as a servant or officer of the trust, or that directly or indirectly affects any contract in which that person may be interested or concerned other than as a trustee of another trust.

94. This lowers the common law positions for a trustee which, as set out above, is that the trustee has a duty to avoid conflicts. Instead, a trustee is merely required not to vote or participate in discussions in relation to contracts where they have a conflicting interests. Nevertheless, it was found that the trustees in this case had failed to abide by this requirement.[69]

95. When considering the two conflicted trustees against whom orders were sought, the Court found that although they should have stepped aside from the decision, this conflict did not invalidate the Trust's decision to proceed with the geothermal project because the remaining trustees were not conflicted.[70] However, as pointed out above, the Court also found

[69] MLC Judgment at paras [146]-[149] **(COA Vol 1 p 55-56)**.
[70] MLC Judgment at para [143] **(COA Vol 1 p 54)**.

that Mr Eru also had conflicting interests. A majority (3 of 5) of the trustees were therefore found to have conflicting interests.

96. It is submitted that the even were only a minority of the trustees conflicted the decision of the whole could still be invalid. The Act bars conflicted trustees from participating in discussions, not just from voting. The reason for this is obvious. A conflicted trustee can taint a decision by participating in the discussion and thereby convincing the other trustees to make a decision that favours the conflicted trustees conflicting interests.

97. In *Wall v Karaitiana*[71] the Court made the trustees involved in both trusts stand down and face re-election, even when they had openly presented their position to a meeting of owners and the owners were prepared to waive that conflict. In this case the Judge has proposed no sanction against trustees who have not even divulged their competing interests.

98. It is submitted that the latitude shown in the case before the Court is inconsistent with the same Judge's decision in *Wall v Karaitiana* and is wrong in law. Had the conflicted trustees called a quorate meeting of owners and disclosed their interest, the owners could have decided whether or not they wished to proceed with the proposal in the full knowledge of the facts.

99. As this was not done, the conflict of interest should be a reason for invalidating the decision to proceed with the geothermal project, and any subsequent decision to proceed or not should only be taken once the current trustees have been stood down.

GROUND OF APPEAL F – Removal of trustees

100. Although the MLC found numerous defaults on the part of the trustees, it did not remove them. Despite the application for removal, the Court did

[71] Re Tauhara Middle 15 (2008) 87 Taupo MB 107.

not test their conduct against the tests provided in the Trust order, the Act or the common law.

101. Section 240 of Act provides for the removal of trustees if the Court is satisfied that the trustees have failed to carry out their duties satisfactorily (s 240(a)). This is echoed in cl 8(b)(ii) of the Trust order.

102. In particular cl 8(b)(ii) of the Trust order provides "in addition to the grounds upon which a trustee might be removed by the court, it shall be sufficient cause for removal that a trustee has not complied with the provisions of clause 7(b) and 7(c)(i)". The latter relates to a failure to file accounts and is a stand-alone reason for removal.

103. The evidence in this case showed that most of the trustees had only the vaguest idea of their obligations as trustees and the details of the Trust and its finances. Tested against the common law duties of trustees, they failed on a significant number of fronts. Instead, most things were left to the Secretary, Mr Gray, to deal with. Their actions were therefore clearly contrary to the requirement to be acquainted with the Trust's terms and to be active and not to delegate.

104. As at least three of the trustees had major interests in other trusts which stood to benefit significantly from the geothermal project. This interest was not declared to the owners. Mrs Fenwick in particular, stood to profit from the transaction. The trustees also failed to get any independent advice on the transaction.

105. Not only did the advice the trustees receive lack independence, but the agreements entered into on the back of that advice provided significant personal benefit to the advisors. As stated above, the MLC appears to regard this as irrelevant to the matters before it. However, it is submitted that the trustees are under a duty to protect the interests of the owners.

Consistent with such a duty the trustees ought to not to have entered into arrangements that put the owners property at such risk.

106. The trustees failed to keep proper accounts, leaving this to their secretary who "forgot" to file them for 2 years.[72] Then when the beneficiaries sought information about the geothermal project, the trustees refused to reveal anything, claiming commercial sensitivity over the entire transaction (other than some glossy self-serving overheads presented to the AGM after the deal was signed). In the event, only very small portions of the documents were held by the court to be confidential and could have easily been redacted at the outset. This and the trustees' failure to hold proper meetings of the owners was a major breach of their duty to inform beneficiaries.

107. It is submitted that the numerous failures on the part of these trustees amounted to a failure to carry out their duties satisfactorily and that they should have been removed. In the alternative, the Court could have adopted the approach it used in *Wall v Karaitiana* to require the trustees to stand down and face a new election at a properly convened and quorate AGM or court-convened meeting of owners.

108. The MLC noted that in *Bromley v Hiruharama Ponul Inc*[73] the MAC had stated that "not every unsatisfactory act or omission should lead to removal but those that go the principles of the Act". The MLC also notes at [84] that "a breach of Trust need not have occurred for a trustee to be removed since the test under s 240 of the Act is broader than that under the common law or the Trustee Act 1956".

109. While it is accepted these are correct statements of the law, it is submitted that the MLC fails to go on to apply these tests. The trustees have not been guilty of one or two minor omissions but have committed the Trust to a

[72] Transcript of oral evidence **(COA Vol 4 p 635)**.
[73] (2006) 11 Waiariki Appellate MB 144 (11 AP 144).

major development without any independent advice and without consulting with the owners. Their omissions go to the very heart of their obligations as trustees. At best they should be removed; at very least they should be required to stand down and face a new election at a meeting to be called promptly.

COSTS

110. The appellant owner is legally aided. The trustees are funded from the trust. The appellant does not seek costs, and submits that there is no basis for awarding costs against him as a legally aided litigant irrespective of the outcome of the appeal.

Dated: 1 March 2013

Felix Geiringer

Counsel for the appellants