

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

A20090014063

UNDER	Sections 19, 67, 231, 239 and 240, Te Ture Whenua Māori Act 1993.
IN THE MATTER OF	Whakapoungakau 24 block
BETWEEN	JILLIAN NAERA, ERIC HODGE, WARWICK MOREHU, ANAHA MOREHU, BUNNY ORMSBY, KURANGAITUKU FARRELL and KEREAMA PENE Applicants
AND	PIRIHIRA FENWICK, WIREMU KINGI, WINNIE EMERY and HIWINUI HEKE First Respondents
AND	TAI ERU Second Respondent

Hearings: 344 Rotorua MB 176-192 dated 7 September 2009
347 Rotorua MB 50-80 dated 30 September 2009
348 Rotorua MB 253-279 dated 23-24 November 2009
350 Rotorua MB 20-81 dated 23 November 2009
4 Waiariki MB 285-319 dated 2 March 2010
5 Waiariki MB 1-183 dated 3-5 March 2010
7 Waiariki MB 231-337 dated 20-21 April 2010

Appearances: H Aikman QC, H Fagan and N Van der Wal for the Applicants
D Hurd and D Dowthwaite for the First Respondents
N Ingram QC and C La Hatte for the Second Respondent

Judgment: 10 September 2010

RESERVED JUDGMENT OF JUDGE L R HARVEY

Solicitors: Woodward Law, Wellington for the Applicants
Dowthwaite & Co, Rotorua for the First Respondents
Mike Garnham, Auckland for the Second Respondent

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Introduction

[1] The trustees of Whakapoungakau 24, commonly known as the Tikitere Trust, through a subsidiary Tikitere Geothermal Power Limited ("TGL") entered into an agreement on 5 November 2008, the Tikitere Project Agreement, ("TPA") with the intention of establishing a geothermal power station, along with two other ahu whenua trusts, Paehinahina Mourea Trust and Manupirua Ahu Whenua Trust. The agreement refers to a term of 52 years. Several related arrangements relevant to the project were also entered into, including option and royalty agreements.

[2] According to the trustees, the trust is shielded from any liability because the power station will not be built on trust land. In addition, through the use of non-recourse project funding the corpus land of the trust is not being used as security. The trustees say that, if the project proceeds as expected, after a period of 15 years, the trust through TGL will own the geothermal power station and will receive substantial income as a result. The trustees confirm that they received independent professional advice before entering into the various agreements from energy specialists Bruce Carswell, Jeff Williams and from the trust's then solicitor Mr Dowthwaite.

[3] By resolution dated 9 March 2009 the trustees resolved to invest up to \$1.5 million in the Waiora Spa business as a means of enhancing and complimenting the trust's existing activities. Waiora is associated with Graham and Sunisa Hughes. However, for various reasons that proposal was not concluded and during the course of the hearings the offer was withdrawn and the trustees' resolution to invest was to be rescinded.

The Applicants' claims

[4] The applicants object to the trustees' actions and argue that the latter had no power to enter into the TPA and the related agreements. They refer to the trustees' repeated applications to vary the trust order to facilitate the trust's entry into a geothermal power project as evidence of an absence of authority.

[5] The applicants also contend that the trustees have failed in their duties to secure independent advice as to the merits or otherwise of the project, to obtain the support of the owners before entering into the agreement and to keep the owners regularly informed of the trustees' activities. It is claimed that Mr Carswell is not independent as he has a financial



interest in the outcome of the project. The trustees failed to understand or disclose this conflict to the owners before proceeding with the TPA and did not take appropriate steps to mitigate or eliminate this conflict.

[6] In addition, it is claimed that the trustees' abdicated their responsibilities to the trust's secretary, Jim Gray, in breach of the duty of non-delegation and failed to appreciate the conflict between Mr Gray and Mr Hughes. It is further argued that the trustees' also failed to protect the interests of the trust and the beneficial owners by allowing their duties to conflict with their personal interests, particularly in the case of Mrs Fenwick.

[7] It was contended that the trustees failed to act prudently before considering the Waioira investment given the trust's then and current financial position. They again exceeded their authority and failed to protect the interests of the beneficiaries ahead of the interests of the trust secretary, Mr Gray.

[8] According to the applicants' the only appropriate remedy is the removal of the current trustees and the calling of a meeting of beneficial owners to elect replacements. In the meantime, it is argued that the injunction issued on 31 August 2009 must remain in force until the new trustees have had proper opportunity to take advice and consider their position regarding the TPA. The applicants also seek a review of the trust.

The Trustees' responses

[9] The trustees deny the allegations. They say that they have acted within the terms of the trust order, and in particular clause 3, which provides them with the authority of absolute owners. They also contend that the consent of the beneficial owners to enter into the agreement was not required. As to the claims of conflict of interest, the trustees argue that such allegations are unfounded and are not supported by the evidence. On the contrary, the trustees say that any conflicts of interest were appropriately managed in accordance with proper process on advice and with the necessary disclosures being made.

[10] The trustees contend that they have at all times acted in the best interests of the beneficiaries of the trust and have fulfilled their obligations diligently and professionally in the exercise of their office. They say that they have acted appropriately and are confident that the TPA, if brought to fruition, will place the beneficiaries into an enviable position once the geothermal power station is commissioned.



[11] More importantly, the trustees say that Mr Eru, through his current involvement with the Ngāti Rangiteaorere Claims Committee or NRCC ("the NRCC"), has created at least the appearance of conflict. It was argued that he had allowed himself to be guided by the NRCC when that organisation's interests may conflict with those of the trust, thereby breaching his obligations of loyalty and fidelity to the trust.

[12] The trustees allege that it is in fact Mr Eru, the chairman, who has a real conflict of interest with his claims that he puts the interests of the hapū before those of the beneficiaries of the land. Moreover, it was said that Mr Eru was part of the negotiations from the outset, was a willing participant in those discussions and put his name to all of the relevant agreements and supporting documents. The trustees also note that at any time he could have sought directions from the Court if he was concerned with the conduct of his fellow trustees.

Issues

[13] The principal issues for determination are, first, the extent and limitations of clause 3 of the trust order and whether it empowered the trustees to, inter alia, enter into the agreements, taking into account ss 223, 226 and 229 of Te Ture Whenua Māori Act 1993 ("the Act"). Second, whether the trustees needed the consent of the owners to enter in to the TPA. Third, whether the trustees obtained independent advice before doing so. Fourth, is there sufficient evidence of breach of trust or failure to perform duties satisfactorily, in the absence of any tenable defence, to warrant the trustees' removal, per s 240 of the Act? A related issue is whether the trustees' have remained "broadly acceptable" to the owners, per s 222.

[14] For the avoidance of doubt, all counsel confirmed that the question of whether or not the agreement was in the best interests of the owners was not a relevant issue for the Court's determination.¹ Put another way, counsel agreed that I need not consider the merits of the agreement, whether it was a "good or bad deal" and should instead focus on the trustees' conduct in procuring the agreement and the issues identified in the preceding paragraph.

[15] There have also been numerous references made during the course of these proceedings to Treaty settlement negotiations and allegations concerning the conduct of various trustees, beneficiaries and advisers. While those matters have provided something

¹ 7 Waiariki MB 248



of an overarching background to the present proceedings, and go some way to explaining, in part, the events under scrutiny, they are not strictly relevant to the narrow issues before the Court. Similarly, claims that might be described as improper motives, conduct unbecoming and bad faith as they concern the Treaty settlement and internal tribal issues raised in evidence have only peripheral relevance to the issues for determination regarding this ahu whenua trust.²

Background

[16] According to the Court's records Whakapoungakau 24 is a block of Māori freehold land 32.0923 hectares in area. It was created by partition order on 15 December 2003.³ As at 27 August 2009 there were 1,222 owners in the land holding 83.63567 shares. The block is administered by an ahu whenua trust and the current trustees are Hiwinui Heke, Pirihiira Fenwick, Tai Eru or Morehu, Winnie Emery and Wiremu Kingi.⁴ Sadly, Mrs Emery died on 21 June 2010.

[17] 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. The statement of financial performance records that in the 2009 financial year the trust made a profit of \$32,799.

Subsidiary companies

[18] Tikitere Geothermal Power Co Ltd or TGL was formed on 7 July 2004. The current directors are Mr Gray and Wiremu Kingi. Mr Eru was a director from 19 March 2009 but has since resigned. The shareholders of the company as at the date of hearing are Messrs Eru, Heke and Kingi, along with Mrs Fenwick. Mrs Emery as noted has since passed away.

[19] Tikitere Developments Limited was established on 30 April 2009 by Mr Gray with Mrs Fenwick and Mr Kingi as directors, along with the late Mrs Emery. The shareholders are the directors and Messrs Eru and Heke. According to Mr Gray this company is not presently trading.

² *Perenara v Pryor – Matata 930 Rangitahi Marae* (2004) 10 Waiāriki Appellate Court MB 233 at 241 (10 AP 233 at 241)

³ 278 Rotorua MB 128

⁴ 252 Rotorua MB 132

[20] Tikitere Holdings Ltd was formed on 15 January 1996 according to the directory in the company's latest annual accounts. There are 240,000 shares in the company and the directors are Sunisa Hughes (Graham Hughes' wife) and Mr Gray. The shareholders are Tātou Holdings Ltd as to 50% and Tikitere Trust as to 50%. The memorial schedule to the land confirms a lease between the trustees and Tikitere Holdings Limited for a term of 30 years commencing on 18 December 2005.

Meetings of owners 2004-2009

[21] A general meeting of owners was held on 13 September 2004. While there was some confusion at the hearings as to which of the two documents filed were in fact the minutes of the meeting, it seems clear that this hui did discuss the possibility of participating in a geothermal power project using in part some of the trust's existing resources. The quorum was set in the trust order at 10 percent of the owners and based on the attendance list it is evident that this meeting did not pass that threshold. Despite that the trustees, including the chairman elected to continue with the meeting.

[22] Another owners' meeting was called by the trustees and held on 30 November 2008. A power point presentation outlining the project and the parties involved was given to the meeting and Mr Carswell participated in the discussions. According the minutes of that hui there were 11 owners present along with the trustees including the chairman Mr Eru. Those present then resolved to approve the actions of the trustees in entering into the TPA dated 5 November 2008 and the related option and royalty agreements. This meeting was also inquorate, taking into account the number of owners recorded as being present. But despite that the trustees present decided to continue with the meeting.

[23] A meeting was arranged on 11 August 2009 by Mr Eru, with assistance from individuals associated with the NRCC, following receipt of a requisition from owners to convene a general meeting. That notice was made available to the other trustees. They considered that Mr Eru could not convene a meeting without the support of a majority of trustees but the meeting proceeded in any event. Mr Eru spoke at the hui expressing concerns with the TPA and the processes followed by his fellow trustees. The meeting expressed support for Mr Eru while recording majority opposition to the actions of the trustees.



Court ordered meeting 2009

[24] A Court directed meeting of owners was convened on 6 December 2009 facilitated by an independent chairperson, Mr Shane Gibbons, and recorded by staff from Te Puni Kokiri. At the commencement of the hui a presentation was made by the trustees and their advisers regarding the TPA. The meeting was well attended and a quorum was achieved. Following lengthy discussion a resolution was put to the owners present for consideration – that the meeting of shareholders approves the continuation of the Tikitere Geothermal Group. While not worded as precisely the intent of the resolution was clear enough. The independent facilitators advised the Court that the resolution was lost 89 votes to 39.

Variations to the trust order: 2004-2009

[25] A hearing was held on 3 September 2004 to consider an application for variation of trust order filed by Mr Gray. The grounds stated were that the trust had carried out extensive investigations on geothermal power generation and now sought to take advantage of those findings to explore the possibility of establishing a power station. The application was then adjourned to enable a meeting of owners to be held to consider the proposal further.⁵ That hui was held on 13 September 2004 and Mr Gray reported to the Court at a subsequent hearing held on 11 October 2004 that the owners had endorsed the changes sought. Accordingly the Court granted the application to vary the trust order to permit the trust to enter into joint ventures and form companies.⁶

[26] On 4 December 2006 a hearing was held to consider another application to vary the trust order, to provide the trustees with the ability to develop the trust's land as a geothermal tourism park. 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 application was approved and the trust order varied accordingly.⁷ 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.

[27] By application dated 27 November 2008 Mr Gray sought a further variation to the trust order "to purchase a 20 per cent interest in Tātou Holdings Ltd" which he noted on the

⁵ 283 Rotorua MB 169-171

⁶ 284 Rotorua MB 103-105

⁷ 305 Rotorua MB 76-78



application held a 50 per cent interest in Tikitere Holdings Ltd. At a hearing held on 20 February 2009 the Court dismissed the application on the grounds that the trust order already provided the trustees with authority to undertake such a purchase. Judge Savage noted that whether the purchase was a prudent investment was a separate question.⁸ 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.

[28] Another hearing was then held on 3 April 2009 to consider a further application to vary the trust order on the grounds that the trustees sought the power to form a special purpose company so that the trust could join or take up a share in a similar form of company or associated companies. The application was granted and the trust order was varied accordingly.⁹ Once again, no mention was made of any minutes of an owners' meeting to support the variation, nor were any filed with the application.

Tikitere Project Agreement (TPA)

[29] The TPA is between four parties: Paehinahina Mourea, Tikitere, Manupirua and TGL. At the time of signing the trustees for Paehinahina Mourea were Barnett Vercoe, Parehuia Aratema, William Emery, Pirihiira Fenwick and Te Hurihanganui Whata. The trustees for Manupirua who signed were George Epapara, Phillip Curtis, Richard Vercoe, Sam Emery, Stormy Hohepa, Tai Eru and Whakahau Waerea. The term of the agreement is for 52 years commencing from 31 October 2008. The "project" is defined as the ongoing exploration and development of the Tikitere geothermal resource and all minerals associated with that resource on or under the Land, including the planning and investigation, and if economically viable, financing, design, construction, commissioning, operation and maintenance of a facility or facilities on the land.

[30] The purpose of the agreement is to allow TGL to undertake the exploration and if economically viable the development of the Tikitere geothermal resource upon which the various trusts' lands overlay. The recitals to the TPA state that the trustees own and administer certain lands overlying the Tikitere geothermal resource on behalf of the beneficial owners of each respective trust and assert rangatiratanga and kaitiakitanga over the resources of that land.

⁸ 337 Rotorua MB 24-27

⁹ 338 Rotorua MB 45-48

[31] In addition, the trustees have agreed to grant to TGL the exclusive right to develop the Tikitere geothermal resource on or under certain parts of the land described. Further, the parties wish to enter into this agreement for the purpose of setting out their respective rights, interests and obligations in respect of that development.

[32] Clause 4 of the TPA refers to exclusive development rights. It provides that the trustees grant to TGL the exclusive rights during the term of 52 years to undertake the project, and agreed that for this purpose TGL is granted rights necessary or desirable to have access over and under and to remain on the land to undertake the project and carry out exploration and development work. TGL is also to have rights of access over and under and to remain on the land to undertake the project to carry out any ongoing work including operating and maintaining any facilities developed, carrying out such further exploration and associated activities TGL considers necessary or desirable in connection with the project and accessing, extracting and developing the Tikitere geothermal resource in accordance with all consents necessary or desirable in connection with the project.

[33] In the context of confidentiality and access to information, clause 16.2 of the TPA is relevant. It sets out the parameters of accessing confidential information, the restrictions placed on such information and the exceptions to the confidentiality aspects. Those exceptions include reference to beneficial owners, legal proceedings and any disclosure as required by law. Clause 16.2 states:

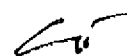
“The parties will at all times during the term of this Agreement use reasonable care to keep confidential and will not disclose (whether directly or indirectly) to any other person the terms of this agreement, any information that they are aware or become aware of through the Project Liaison Committee, the Project Manager’s reports or any other information, data or documents identified by the parties applying them as confidential supplied to or received by one party from the other party except where:

(a) it is necessary for the ordinary business purposes of that party to disclose such information to its beneficial owners, employees, agents and advisors (including auditors) ...;

(e) such disclosure is required in connection of any legal proceedings or arbitration relating to this Agreement;

(f) such disclosure is required by law.

Provided that in this clause 16.2 “reasonable care” will be that degree of care used to protect confidential information of any party.”



Procedural history

[34] By application received on 27 August 2009 the applicants sought various orders for a review of the Tikitere Trust, and directions to make available to the applicants the TPA, along with a written report from the trustees in relation to the administration of the trust. In addition, an injunction was sought to restrain the trustees from making decisions or taking any steps in relation to the geothermal power project and other matters. The applicants also sought orders removing four of the current trustees for failing to carry out the duties of trustees satisfactorily and for the appointment of new trustees.

[35] On 31 August 2009 I convened a conference and hearing with counsel by telephone to consider submissions on the application. I then issued a brief oral decision that evening granting an interim injunction and issuing further orders and directions. A written judgment was issued on 1 September 2009 setting out the basis for the grant of the application for injunction and related orders.¹⁰

[36] A conference and hearing were held on 7 September 2009 to provide the trustees with the opportunity to answer questions through counsel about their report to the Court.¹¹ A continuation of the injunction was also sought and counsel for the applicant asked for the release of the TPA. A second interim judgment was then issued on 9 September 2009 confirming that the injunction would remain in force and holding that there was no lawful basis to refuse disclosure of the TPA filed with the Court.¹² I also issued directions for discovery.

[37] Following that on 30 September 2009 a hearing was held to consider further issues over confidentiality and the TPA.¹³ I adjourned the application to allow counsel to submit evidence in support of their respective positions. A further hearing was held on 23 November 2009 to discuss a proposed meeting of owners to be held on 6 December 2009, along with evidential and confidentiality issues.¹⁴ I adjourned the matter to allow a chambers conference to take place with counsel regarding confidentiality.


¹⁰ 344 Rotorua MB 115

¹¹ Ibid, 176

¹² Ibid, 151

¹³ 347 Rotorua MB 50

¹⁴ 350 Rotorua MB 20



[38] On 26 November 2009 another hearing was held with counsel to consider matters concerning the TPA and confidentiality. Following that on 2 December 2009 I issued a third interim decision directing the trustees to convene a general meeting of beneficial owners on 6 December 2009 and to provide a copy of the presentation summary of the project that they intended to present to the general meeting to counsel for the applicants.¹⁵ The trustees were also directed to provide documents to counsel for the applicants, with the exception of those subject to confidentiality orders.

[39] On 4 December 2009 a letter was received from Martha Siggleko stating that she "had not given my permission to any party to use my name as an applicant in the injunction against the trustees on the above-named block." Accordingly her name has now been deleted from the intituling to these proceedings.

[40] The substantive hearing was then held on 2-5 March 2010 and was subsequently adjourned until 20-21 April 2010.¹⁶ Evidence was formally given by Kereama Pene, Jillian Naera, Tai Eru, Stephen Michener, Pirihira Fenwick, Wiremu Kingi, Hiwinui Heke and Wahiao James Gray. Evidence was received from other witnesses including Mrs Emery who was unavailable to attend the hearings due to illness. Other evidence was ruled inadmissible. The proceedings have occupied eleven days of hearing time, including interlocutories, involved eight principal witnesses, some with lengthy affidavits and exhibits, and have generated almost 500 pages of evidence and submissions recorded in the Court's minute books. It has been a significant case. On Friday 27 August 2010 an oral decision was issued as set out in paragraphs [220] –[235] with reasons to follow.

[41] For completeness I note Ms Aikman reserved her position on various issues and contended that the focus of the hearings had over time become confined to the issues of consent, independent advice and conflicts. Counsel further underscored that, although there had been only limited cross examination of Mr Gray and none of Mr Carswell, this should not be taken as the applicants accepting their evidence. It was she stressed a question of ring fencing the key issues for determination.¹⁷ Mr Hurd argued on the contrary the fact that there had been limited or no cross examination meant that the respondents' evidence should be preferred.

¹⁵ 348 Rotorua MB 297

¹⁶ 4 Waiāriki MB 285-319, 5 Waiāriki MB 1 and 7 Waiāriki MB 231

¹⁷ 7 Waiāriki MB 248



Post hearing events

[42] Since then the parties have, inter alia, renewed their earlier applications for assistance from the Special Aid fund. Given the urgency of those applications a decision was issued on 30 June 2010 confirming grants to all parties as a contribution toward their actual legal costs.¹⁸

[43] A further application for cancellation of the interim injunction was filed on 16 July 2010. This was then followed by an application for variation of trust received on 20 July 2010 which referred in some detail to issues of conflict of interest and indemnities for the trustees. Prior to that, several documents were filed by the trustees including a copy of a letter from the solicitors for Pachinahina Mourea in April 2010 advising that a *force majeure* notice may be issued by the end of August 2010. Copies of these documents have been sent to all counsel.

Ex parte memorandum

[44] On 18 August 2010 a memorandum was filed by Ms Van der Wal, counsel for the applicants, seeking a response from the Court on when a decision will be made since she says that that information is important to the plans of the applicants and the iwi regarding their settlement negotiations. In addition it was claimed that, as Mrs Fenwick was conflicted, Mrs Emery deceased and Mr Heke suffering from ill health, the applicants' requested to have "at least two new trustees appointed" and given the expense of convening an owners' meeting sought to defer it to be called when a decision is to hand. Counsel noted that an indication of when that will happen will then assist all parties to plan suitable meeting dates.

[45] Counsel stressed that urgency is attached to receiving a decision because of "stringent time lines" outlined in the most recent work plan involving geothermal resources of Ngāti Rangiteaorere from the Office of Treaty Settlements. It was said that Tikitere Trust and Hell's Gate were a "critical component of Ngāti Rangiteaorere settlement process" because of the 1992 settlement leaving geothermal as an outstanding claim issue. Even more surprising is the statement that "the work plan is not for circulation to outside parties

¹⁸ 11 Waiāriki MB 191



like Mr Gray and Mr Carswell” and that “we have only provided the Court with copies of the work plan until further direction is received from the Court on this specific request.”

[46] It is well settled that the Court has jurisdiction to consider ex-parte applications particularly in terms of injunctive relief. In this context I note that the first respondents have continued to file documents and applications after hearing but the difference is that they have been circulated to counsel by the Registrar. For example, on 5 May 2010 the letter from the solicitors for Paehinahina Mourea in respect of a possible *force majeure* notice was circulated to all parties. But that is not the case here, however, where I am being asked to consider material not before any other party while judgment has been reserved. While I have read the memorandum of counsel, I confirm that the attachments have not been read and I now direct the Registrar to return those documents to counsel for the applicants and remove any reference to them from the Court file.

[47] For the avoidance of doubt, I also confirm that, apart from noting the request for an indication as to when judgment might issue and the suggestion that one of the trustees may be seriously unwell, I have not considered any of the other points raised by counsel that have not already been dealt with during the hearings. Put simply, while the remaining issues raised in the memorandum are important to the applicants (and I accept that they are) they are not, with respect, central to the determination of the applications presently before the Court. Accordingly the work plan is not relevant to this decision and need not be circulated to the respondents for their comment. The only exception is the possibility of ill health rendering any trustee incapable of performing their duties satisfactorily and in any event that issue is considered later in this judgment.

[48] A more appropriate request would have been for counsel to seek a teleconference with all parties to discuss the matters raised in the memorandum. Whether or not such a request for a conference following the hearing while judgment is reserved would have been granted or declined is a separate question. These comments also apply to the various applications that have been filed post hearing, apart from the renewed requests for special aid, which were granted. It should go without saying that it is inappropriate for any party to attempt to communicate with the Court on any basis in this manner, notwithstanding the orthodox exceptions, unless all other counsel are copied into any such correspondence. A conference of the parties, while unusual after the proceedings have concluded, is not unprecedented.



The claims against the trustees

[49] In summary, Ms Aikman argues that these proceedings seek the removal of the trustees for, inter alia, entering into the TPA which was contrary to the views of the owners, outside of the terms of trust and in conflict with the provisions of the Act. For the trustees Mr Hurd contends that the claims are baseless and unsustainable, and are motivated by separate agendas designed to derail the process, contrary to the best interests of the owners.

[50] Before considering the central claims of breach of trust, the related issues of owner consent and variations to the trust order are discussed first. At the end of the judgment reference is then made to the matter of the broad acceptability of the trustees.

Owners' consent

"Some may argue for one man one vote and others for voting by shares. Both have only dubious validity in Māori tradition. They are both the logical consequence of individualisation of title and ownership by this Court. The very idea of voting and majority rule whether by number or shares has doubtful validity in Polynesian tradition. In a legal sense also, the voting is of doubtful use. Voting by beneficiaries is not orthodox in general trust law. It has been grafted onto the Trust system by this Court to make the structure conform to an extent with the Incorporation mode and to give owners the opportunity to have their say. The result however except in some very specific circumstances does not decide anything. Voting is a device for making the views and the strength of those views known to the Trustees and the Court. It gives the owners a venue and structure for discussion. One only has to look at the Trust order in this particular case. There is provision for voting by show of hands and the use of proxies. The trust order is however silent as to what may be voted on and the effect of that vote. The Trustees must make the decisions of Trust business and cannot be dictated to by the owners. They cannot delegate their decision-making responsibility to a vote at a meeting of owners. This is particularly so in that there are unlikely to be all the owners at the meeting and the Trustees have a duty to all of the owners and not just those present at the meeting. In fact owners present at meetings of Trusts such as this rarely represent by share or number more than a very modest proportion. The same position pertains to the appointment of Trustees by the Court. While the Court is bound to appoint only those it considers qualified and broadly acceptable to the owners, it is the Court that must make the final decision and make the appointment. The voting is a method of indicating to the Court who might be broadly acceptable but in the end the law is the Court must make the decision."

*Hemi v the Proprietors of Mangakino Township Inc – Pouakani No 2*¹⁹

¹⁹ (1999) 73 Taupō MB 30 (73TPO 30) at 32



Applicants' case

[51] Ms Aikman contended that it was necessary for trustees to take careful notice of the wishes of the owners expressed at meetings. Since the trust had been tardy with the holding of regular meetings, it was therefore even more important that they take into account the strongly expressed views of the owners, particularly from the December 2009 meeting. Counsel argued that trustees had an obligation to consult and to give effect to the wishes of the owners in their administration of the trust as this was consistent with the fundamental principles of the Act.

[52] It was said that the trustees were bound to consider not only the interests of the beneficiaries of the trust but also the wider hapū claims since they too would be affected by the TPA, the outcome of the proceedings and the Treaty settlement negotiations. The trustees had simply ignored not only the owners but also the wider tribal interests in their pursuit of the TPA without the support of the beneficiaries let alone the iwi.

Respondents' case

[53] Mr Hurd argued that the trustees have properly exercised their powers in accordance with the trust order. The words used in the 2004 variation are clear. The trustees can take advantage of the findings of an exploration or investigation to exploit the resource. The 2004 annual general meeting clearly discussed the proposal to develop and there was a unanimous resolution that the trustees should proceed. This was also followed up by another meeting held in November 2008 where the trustees' actions in signing the TPA were endorsed by the owners present. Mr Hurd concluded that there is no requirement for owner consent.

Discussion

[54] The statement of principle referred to in *Pouakani No2* is also supported by Appellate Court authority: *Short v Mitchell – Pukeroa Oruawhata Trust*,²⁰ and *Apatu v Trustees of Owahaoko C Trust - Owahaoko C 1 and C 2*.²¹ It is thus trite law that resolutions of beneficial owners cannot bind trustees, unless the trust order makes appropriate provision.

²⁰ (2006) 11 Waiāriki Appellate MB 66 (11 AP 66)

²¹ (2010) Māori Appellate Court MB 34 (2010 AP 34)



[55] This is because inter alia, as Judge Savage identifies, rarely will all of the owners be present at a meeting. That is a complete understatement. Indeed, it is more commonplace for general meetings to attract only a small minority of owners. In practice, it is regularly observed that even the larger and more sophisticated trusts and incorporations struggle to attract the attendance of even a tenth of their owners and shareholders in person.

[56] The reality is that there are practical limitations on what the trustees let alone the Court can achieve in terms of identification of owner addresses, which with continuing succession, is a never ending responsibility. That this is an unsatisfactory situation is beyond doubt. That there is need for some mode of tenurial reform to alleviate this structural constraint is a moot point. In this context, the modest use of the whenua tōpu trust as a means of restoring some semblance of tribal or hapū title while setting aside the administratively problematic aspects of individualisation, is somewhat surprising. However, beyond those observations I can take the issue no further and simply underscore again to those who carry the responsibility in government the potential risk to continuing Māori land development caused by the modest levels of engagement with owners. This is despite trustees' best efforts with the resources available to them to encourage participation from the owners. Such minimalist engagement is caused, in part, by the lack of appropriate systems within the current Māori land tenure system that should include a robust owner address identification and maintenance process.

[57] In summary, having carefully reviewed the trust order, it is difficult to discern, in the absence of authority, how the position can be any different to that expressed by Judge Savage in 1999. My conclusion is that the Appellate Court authorities confirm that votes at meetings of owners, unless provided for in the trust order, cannot bind trustees, though any support for or opposition to the project agreement as expressed at owners' meetings remain matters for the trustees' consideration in arriving at their decisions.

[58] Even so, it is commonly understood that a wise trustee will take careful account of what owners have to say, particularly where that owner opinion is in the majority. That said, prudent trustees will also take into consideration the views of all the owners including the minority before arriving at a decision – a decision that only the trustees can make under the terms of the current trust order. Should the owners wish to make provision in the trust order for mandatory consultation in respect of particular matters that the trustees may consider from time to time then that can be discussed at the next general meeting of owners. Any



proposal to vary the trust order must again comply strictly with s 244 of the Act and where relevant s 231.

Variations to the Trust order

[59] Section 244 of the Act states:

- “(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.”

[60] The sufficiency of notice, of opportunity for discussion and of support tests have been considered in a number of decisions including *Brown – Kairakau 2C5B*,²² *Karu o te whenua B2B5B1*,²³ *Brown v Māori Appellate Court*²⁴ and *Reid v Kaiwaitau*.²⁵ Those authorities make it clear that sufficiency of support will depend on a range of considerations including the nature and importance of the issue being decided, the extent of support and opposition and whether notice has been adequate.

Applicants' case

[61] Ms Aikman argued that the respondents have misapplied the powers given by the 2004 variation to the trust order. More importantly, that variation was granted without the owners' consent. The Court adjourned the application for an owners' hui to be held and that failed for want of a quorum. A motion was passed authorising the trustees to enter into an agreement to develop the geothermal resource. The trust order was then amended to allow the trust to form companies, enter into joint ventures and investigate the possibility of establishing a geothermal power station and to take advantage of the findings.

²² (1996) 11 Taitokerau Appellate MB 143 (11 ACTK 143)

²³ (1996) 19 Waikato Maniapoto Appellate MB 40 (19 APWM 40)

²⁴ [2001] 1 NZLR 87

²⁵ (2006) 34 Gisborne Appellate Court MB 168 (34 APGS 168) at 172

[62] Counsel submitted that the Court had in fact been misled (due to the iniquitous hui of owners) when the orders were made.²⁶ Mr Gray was aware of this deficiency, like the trustees, but took no steps to seek the Court's direction or to otherwise remedy the problem. The trustees ought to have known what was required under the trust order but they appear to have simply relied on whatever Mr Gray had told them.

[63] Counsel also submitted that the words of the 2004 variation are ambiguous and contrary to the Act. They cannot be meant to override the provisions of the Act and the trust order. The phrase "that they could take advantage of the findings" could not have meant that they could proceed on a new venture or to such substantial undertakings without informing the owners and giving them an opportunity to express their views. Moreover, Ms Aikman stressed that there was no support for the variation that sought to recognise that the trustees were entering into a new venture.

Respondents' case

[64] Mr Hurd submitted that the trustees have properly exercised their powers in accordance with the trust order. The words used in the 2004 variation are clear. The trustees can take advantage of findings of an exploration or investigation to exploit the resource. The 2004 annual general meeting clearly discussed the proposal to develop and there was a unanimous resolution that the trustees of the trust should proceed. Similarly, the 2008 meeting of owners also endorsed the trustees' actions and the Court approved the applications for variation. It was unsurprising therefore that the trustees had decided to proceed with the TPA.

Discussion

[65] In *The Trustees of Pukeroa Oruawhata v Mitchell*²⁷ the Court of Appeal underscored the importance of strict adherence to s 244 whenever the Court's discretion to vary a trust order was invoked. A three step process was necessary that included notice to the beneficiaries, of the proposed variation sufficient opportunity to discuss and consider the proposal, and evidence of a sufficient degree of support among the beneficiaries for the variation.

²⁶ 7 Waiariki MB 254

²⁷ [2008] NZCA 518

[66] I consider that whenever a specific variation is proposed, then the beneficiaries are entitled to notice of the proposal with a degree of precision to provide certainty as to what exactly is to be altered. Put another way, it is not sufficient that a notice for a general meeting of beneficiaries states “variation” or “variation to trust order” without providing a clear indication as to the practical effect of the proposed variation. Otherwise the beneficiaries will not have received notice in the strict sense.

[67] For example, where a proposed variation is to alter the manner of voting from show of hands to shares, then the notice to the beneficiaries should make that point plain. It need not refer to the precise clause in the trust order but it should be clear to a lay audience as to what is intended and how it differs from the existing trust order. Another example is where it is proposed that trustees serve finite terms and may offer themselves for re-election. Again the notice need not refer to the relevant clauses and recite them exactly. It should be sufficient that the notice say that a variation is proposed to enable election of trustees by rotation on a triennial basis for example.

[68] Sufficient opportunity to consider the proposed variation and to discuss it is an obvious requirement in the legislation. The minutes of the general meeting of beneficiaries should record the discussion and any resolutions in support of or in opposition to the variation. The minutes should also record, where there is dissent or abstention, the number of owners who voted in opposition to the proposed variation and those whom abstained. This will then assist the Court in its consideration of whether the third element of the process has been satisfied, namely the extent to which there is evidence of sufficiency of support for the proposed variation.

[69] In my assessment, taking into account the cases cited earlier on the sufficiency tests and the notification for the meetings, the four applications for variation in 2004, 2006, 2008 and 2009 could be subject to challenge. While I have determined that at the relevant time the trustees did possess the power to enter into the TPA, for completeness I observe 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.

[70] That the trustees, as foreshadowed, will have taken comfort from the Court’s orders for variation when proceeding with the TPA is undoubted. More importantly, it is likely that at the next general meeting of beneficiaries, a more detailed review of the trust order will be appropriate.



[71] I note the reference by counsel to the hearing held in April 2009 for variation and the claim that this was in fact a review per s 231 of the Act. I cannot agree. While the judge referred to a review in the minutes, neither the application nor the orders refer to s231 or to a formal review. The review application sought by the applicants thus remains extant. It is through that application that the owners are now able to consider any further variations to the trust order they consider appropriate for discussion at the next general meeting if necessary.


[72] For example the owners may wish to consider whether an ahū whenua model still remains relevant or whether a whenua tōpu trust might suit their current needs. That said, I also note the statement that this land is of cultural and historic significance to more than one iwi. If that were proven to be correct or at least arguable, then a whenua tōpu trust will be unsuitable. An equally important consideration is the rights of the beneficial owners themselves who may seek to retain their shareholding and the status quo. Any decision will need to be carefully considered and the subject of considerable discussion to ensure that the interests of the more significant shareholders are properly protected.

[73] Alternatively, the owners may decide that the status quo is perfectly acceptable, subject to some amendment to the trust order to ensure it remains current and applicable to modern practices. Those matters are the subject of further directions at the end of this judgment.

[74] Finally on this issue I note the recent applications for variation of trust that have been filed on behalf of the trustees. Given the strict provisions of s 244 of the Act and their application in accordance with superior court authority, for the avoidance of doubt, 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. The sufficiency of opportunity for discussion and support requirements must also be satisfied.

[75] As the Appellate Court noted in *Pukeroa Oruawhata* the ability of this Court to vary trust orders of its own motion was removed by Parliament.²⁸ Careful adherence to s 244 remains essential on any future applications for variation.

²⁸ (2006) 11 Waiāriki Appellate MB 66 (11AP 66) at [21]



Breach of trust

"Breaches of trust are of many different kinds. A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers; it may consist of a failure to carry out a positive obligation of the trustees or merely a want of skill and care on their part in the management of the trust property, it may be injurious to the interests of the beneficiaries or be actually for their benefit. By consciously acting beyond their powers as for example in making an investment which they know to be unauthorised the trustees may deliberately commit a breach of trust but if they do so in good faith and in the honest belief they are acting in the interests of the beneficiaries their conduct is not fraudulent."²⁹

[76] It is well settled that the principal duty of trustees is to obey their terms of trust. They have equally crucial duties of protecting the assets of the trust and acting prudently when investing trust funds. When so investing they must avoid hazardous or speculative ventures. This is because the custodianship of the existing corpus lands remains paramount.

[77] The leading authorities on breach of trust and removal of trustees are *Ellis v Faulkner - Poripori Farm A Block*,³⁰ and the judgments of the Māori Appellate Court in *Perenara v Pryor - Matata 930*,³¹ *Marino v Horsfall - Repongaere 4G (Part)*³² and *Apatu v Trustees of Owhaoko C Trust - Owhaoko C 1 and C 2*.³³ I adopt the principles set out in these decisions, in particular:

- (a) while an application for removal of trustees is unnecessary for the Court to exercise its discretion, notice to the affected trustees is mandatory;
- (b) the rules of natural justice must be followed and opportunity given to the trustees to seek advice and respond to any allegations made concerning their conduct and performance;
- (c) the Court must consider whether or not a trustee has fulfilled the duties of that office satisfactorily and this will invariably involve an assessment of the trustee's performance and adherence to basic duties and responsibilities;

²⁹ *Armitage v Nurse* [1997] 2 All ER 705

³⁰ (1996) 57 Tauranga MB 7 (57 T 7)

³¹ (2004) 10 Waiariki Appellate MB 233 (10 AP 233)

³² (2004) 34 Tairāwhiti Appellate MB 98 (34 APGS 98)

³³ (2010) Māori Appellate Court MB 34 (2010 AP 34)

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- (d) where investments result in losses, the Court is primarily concerned with process – whether the trustees took appropriate advice before making investment decisions, considered that advice and acted as prudent persons. Such advice will be crucial where the trustees may not have that expertise themselves;
- (e) where there is evidence of abuse, failure or malfeasance, and in the absence of any tenable defence, the Court has a duty to act swiftly to safeguard the interests of the owners;
- (f) while relief is possible per s 73 of the Trustee Act 1956, trustees who have failed to seek directions before taking steps ultimately found to be in breach of trust must account for that additional failure to apply for directions before relief can be considered;
- (g) from time to time it may be appropriate to assess whether or not trustees remain “broadly acceptable” to the owners per s 222 of the Act.

[78] In addition, the Māori Appellate Court in *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc*³⁴ (in the context of a Māori incorporation) also underscored the importance of assessing whether or not there was evidence of any real risk to assets held in trust before the Court’s intervention could be contemplated.

[79] In that case the committee of management had entered into an 80 year lease with a developer over approximately 25 hectares of land with an overall transaction value exceeding \$100 million. The appellant made serious allegations and was critical not only of that decision but of the committee’s failure to inform shareholders, convene meetings as required annually and for other “technical” breaches of the Act and the Māori Incorporations Constitution Regulations 1994.³⁵

[80] She argued for the wholesale removal of all members of the committee for the claimed breaches of the Act and regulations and for their lack of authority when purportedly entering into the lease because of the irregularities over elections and meetings. In response

³⁴ (2006) 11 Waiāriki Appellate MB 144 (11 AP 144)

³⁵ Ibid



the Appellate Court noted the importance of the principles of retention of land in the hands of the owners, the utilisation and development of land and the control of land by the owners through their representatives.³⁶

“ [9] Whether governance performance has been satisfactory or not must depend then on whether there is a clear and present apprehension of risk to the incorporation asset or to the wider interests of the incorporation shareholders as a result of action or inaction of the committee. It is not every unsatisfactory act or omission which should lead to removal, but those that go to the principles of the Act. To adopt any other approach, would lead to removal being the primary remedy available for any technical breach of the Act. We do not think that wholesale removal of Māori governance members is consistent with the principles of the Act or the intentions of the legislature.”

[81] When assessing claims of breach of trust and unsatisfactory performance the Court must carefully examine the allegations and evidence to ensure that the appropriate legal tests have been met, that natural justice has been observed by giving the trustees an opportunity to be heard and that no tenable defence exists. In the absence of any such defence the Court must then consider whether or not, the case having been made out, a negative finding is justified and the removal of trustees the appropriate remedy.

Applicants' case

[82] Ms Aikman submitted that the respondents should be removed as trustees of the Tikitere Trust pursuant to s 240 of the Act for failure to carry out their duties satisfactorily.³⁷ Counsel argued that the trustees are bound in their administration of this trust by the trust order, by the Act and by trust law in general. The Court in its review, in line with the principles enunciated in the *Mangakino* case, should pay some regard to the trust's performance and competence, and how well or badly the trust's affairs have been running.

[83] Counsel argued that the respondents have failed to act in the best interests of the beneficiaries. They have, over a prolonged period, failed to keep the beneficial owners adequately informed of the geothermal project and the proposal to buy into Hell's Gate, along with the Waiora proposal, which has never been considered by the owners at a properly convened meeting.

³⁶ Ibid, 146 at [9]

³⁷ 7 Waiāriki MB 237 (7 War 237)

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[84] Ms Aikman further contended that the respondents have a duty to serve not only the owners of the land but also wider interests such as whānau and hapū. This duty is evidenced by the preamble and s 2(2) of the Act, to which the trust order is subject. In any case, as Ms Aikman correctly notes, a breach of trust need not have occurred for a trustee to be removed since the test under s 240 of the Act is much broader than that under the common law or the Trustee Act 1956.³⁸ All that needs to happen, she argues, is that the trustee's conduct amounts to a failure to carry out the duties of that office satisfactorily.

Respondents' case

[85] In reply Mr Hurd underscored that the trustees deny that they have performed their duties as trustees unsatisfactorily or are guilty of misfeasance that would justify their removal. They have acted diligently, prudently and satisfactorily. While he acknowledged that there had been some lapses in the filing of accounts and related administrative oversights, overall he argued that the trustees had fulfilled their duties more than satisfactorily.

[86] In addition, counsel submitted that the allegations made by the applicants and Mr Eru when analysed lack any significant substance and certainly do not justify an order for removal. The failure to collect and distribute income is minor in the scheme of things. Conversely, the expenditure of trust funds on legal proceedings is proper. The trust cannot be put in a position where it is unable to properly defend its actions.

[87] Mr Hurd stressed that a primary duty is owed to the beneficiaries or beneficial owners of the land. The duty in the legislation to take account of the interests of whānau and hapū is within a broad framework. But when there are conflicts between these groups, the trustees must act in the best interests of the owners.

[88] He went on to say that the obligation to obtain owner consent does not arise from the duty to act in the best interests of the owners or indeed to keep them informed. There is nothing in the Act's general objectives which suggest that trustees can only enter into transactions with specific owner consent. Owner involvement and benefit is the whole premise of the Act but that falls short of requiring owner consent before significant transactions are entered into by trustees.

³⁸ Ibid

[89] Counsel also contended that trustees cannot compel owners to attend meetings or take an interest in the affairs of the trust. There is an obligation on owners to make it their business to take some interest as well. The respondents have done everything they reasonably could have done with the trust's limited resources. They have made a concerted effort to keep those owners who expressed an interest informed.

Trustees' powers

[90] Clause 3 of the trust order states:

" 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.

b Specific

Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the powers of the Trustees it is declared that the Trustees are empowered: "

(Emphasis added)

[91] Clause 3 (b)(i)-(v) sets out some specific powers for the trustees enabling them to buy land, to subdivide and otherwise improve the corpus land of the trust and to borrow for the purposes of improvement:

" i To buy

To acquire any land or interest in land whether by way of lease purchase exchange or otherwise **PROVIDED HOWEVER** that no purchase or exchange shall be effected except through the agency of the Maori Trustee or by such other means as shall ensure that the land so acquired can be vested in the appropriate beneficiaries as Maori freehold land and be made subject to the trusts hereof.

ii To subdivide

To subdivide the land in any manner permitted by law into such subdivisions or parts as may seem expedient to them, and to bring applications before the Court for partition orders to allocate such allotments amongst the owners in accordance with their entitlement



iii To improve

To develop and improve the Trust lands and to erect thereon such buildings fences yards and other constructions or erections of whatsoever nature as may seem necessary or desirable.

iv To employ

To engage employ and dismiss managers secretaries servants agents workmen solicitors accountants consultants surveyors engineers valuers and other professional advisers required to carry out the powers of the Trustees and to fix their remuneration.

v To borrow

To borrow money for the purpose of the furtherance of any of the trusts or powers herein contained whether or not with security over all or any real or personal property of the Trust"

[92] The power to lease is set out in clause 3(b)(xiv) which states:

"xiv To lease

To lease the whole or any part or parts of the said lands from year to year and for any term of years at such rent and upon such covenants and conditions as the Trustees shall think reasonable and to any person, corporate body and/or Her Majesty the Queen and to accept surrenders of and vary the leases thereof."

Applicants' case

[93] Ms Aikman argues that the trustees did not possess the power to enter into the TPA and nor did they have the authority to entertain the \$1.5 million investment in Waiora.³⁹ She refers to the trustees' several applications for variation of trust made in 2004, 2006, 2008 and 2009 as evidence of the trustees' acknowledgement that they did not at the relevant time have the authority under the trust order to enter into the agreement. In other words, if the trustees already had the authority, it would have been unnecessary to go back to Court seeking approval to vary the trust order to enable them to enter into the agreement.

[94] It was further contended that, as s 244 of the Act was not properly observed, in that the owners were never given notice of the proposed variations let alone sufficient opportunity to discuss them and to express their support or opposition to such proposals, any purported variations were void because of a lack of compliance with the legislation. Accordingly any agreements entered into by the trustees were now capable of challenge and at the very least the trustees ought to be held to account for their incompetence and failure to adhere to the trust order.

³⁹ 7 Waiāriki MB 320-323 (7 War 320-323)



[95] Ms Aikman submitted that the trustees had failed to discern their obligations in terms of ss 223 and 229 of the Act. They had a duty, it was claimed, to both carry out the terms of trust and to seek approval for the entry into a new venture. The trustees again failed to garner a sufficient degree of support from the owners for this new venture. The reality was, it was argued, that the trustees had never sought the owners' views let alone their consent.

Respondents' case

[96] Mr Hurd responds that clause 3 of the trust order provides the trustees with the necessary authority. He maintains that while there were applications for variation of trust made to and granted by the Court that process was undertaken simply out of an abundance of caution on the part of the trustees.

[97] It was their intention, he submitted, that to avoid the very allegations now being made, it was appropriate for the trustees to ensure any potential lack of clarity over their power was resolved by the variations that were approved. Counsel underscored the fact that the variations had been approved by the Court and so the trustees considered that they were acting appropriately and within their authority.


Discussion

[98] The judgment of the Māori Appellate Court *Karena v Apatu – Owhaoko C1, C2, C4, C5 & C7*⁴⁰ is the relevant authority. That decision concerned a claim that trustees of an ahu whenua trust could not enter into a licence, even though the trust order enabled them to enter into a lease. The Appellate Court held:⁴¹

“...The principal issue for determination therefore is whether or not the Trustees have power to enter into a licence with Heli Sika. We consider the Lower Court was correct in holding that the Trustees were so empowered. Put simply, the Trustees have the powers of absolute owners. They can do anything an absolute owner is entitled to do except sell the land. Subclauses 3(b)(i) to (xviii) provide an inclusive rather than exclusive list of powers “for emphasis and clarification”. In other words, the inclusion of the phrases “without limiting the generality” and “to extend the powers” underscores the need for a broad interpretation.” (Emphasis added)

⁴⁰ (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4)

⁴¹ Ibid, 13-14



[99] As to the issue of whether or not the trustees understood that they were possessed of such a power the Appellate Court held:⁴²

“That the Trustees’ might have been unsure on reflection as to whether or not they had the power does not affect the fact that at the relevant time they did. Equally importantly, and to put the matter beyond doubt, the owners’ hui resolved to support a variation to the trust order to enable the grant of a licence to Heli Sika. The judge then acted in accordance with Section 244 of the Act to vary the trust order as sought. Once again, however, even that act does not affect the power of the Trustees’ to enter into a licence – a power they possessed when the licence was first granted. That the wide powers trust order used by the Māori land Court might require minor amendment to remove any doubts is a moot point. Our conclusion is that for the reasons stated the Trustees’ did have the power to enter into the licence, notwithstanding uncertainties with the parties’ understandings or any perceived ambiguities with the trust order.” (Emphasis added)

[100] The Appellate Court then went on to dismiss the ground of appeal that the trustees did not possess the power to enter into a licence, even though it was accepted they could enter into a lease. For present purposes, the key point is that, according to this authority, where a trust order provides trustees’ with the powers of absolute owners, with the exception of alienation of the land – and I understand alienation of the land in this context to mean the permanent alienation of the corpus by way of sale, gift or exchange – the trustees are able to enter into arrangements like the agreement in the present case.

[101] It is irrelevant whether or not trustees believe or understand that they possess such a power. The point is that they did at the relevant time. It is equally irrelevant that they may have harboured doubt as to their authority and sought to amend the trust order to provide further comfort as to their ability to proceed with the project and the agreement. My conclusion is that, notwithstanding the applications for variation, the trustees did have the authority to enter into the agreement dated 5 November 2008. Moreover, it is not unreasonable to suggest that the decisions of the Court to vary the trust order would have created a reasonable belief amongst the trustees that they could proceed.

New ventures: section 229

[102] As to the arguments that s 229 acts, in effect, as a fetter and that the trustees could not proceed with the TPA without the Court invoking that section following consideration of the proposal by the owners, again I refer to the Appellate Court authority cited. That

⁴² Ibid, at 14



authority confirms that clause 3 of the standard wide powers trust order gives trustees the powers of absolute owners to do anything except alienate the fee simple land by sale or gift. The balance of the trust order is provided, not to limit the generality of the order, but by way of emphasis and clarification, to extend the powers of the trustees.

[103] Ms Aikman argues, in effect, that context is everything and that if the trust had been primarily involved in farming activities then a shift into geothermal power was outside its normal business activities which meant s 229 was relevant because this was in fact a new venture, one that had never been undertaken before. It was a dramatic departure from the trust's ordinary activities.⁴³ She also stressed that the trust order needed to be read as a whole and against the background of the Act.

[104] Section 229(1) refers to "an extension of the activities of any trust" but there is no mandatory requirement that the trustees or the owners need avail themselves of that provision if they already possessed the necessary authority. Sections 223, 226 and 229 when read together with the trust order place no obligation on these trustees to apply to the Court per s 229 if they wish to participate in a geothermal power project. If the trust order had limited or confined the trustees' powers in clause 3 then this argument would carry greater weight but on the contrary it is expressed in very broad terms.

[105] While it is correct to state the geothermal power exploitation had not been attempted before, the land clearly has geothermal potential, which had long been recognised by the owners and the iwi when the claims issues that have been raised are considered. Indeed, it is evident that the applicants and their supporters are not averse to the notion of using the geothermal resources for the benefit of the owners and the iwi, provided the appropriate and relevant processes have been followed and the concerns of the owners have been taken into account.

[106] I note that some of the argument centred on the structure of the proposal rather than complete opposition to any suggestion of using the trust's resources for geothermal power development. While some owners were opposed others were more willing to at least consider proposals and possibilities. The real issue for many was the absence of sufficient consultation, discussion and approval from within the ownership. While it is a separate point, it is not as if there is no support at all from the owners for geothermal resource use –

⁴³ 7 Waiariki MB 249-251 (7 War 249-251)



even the December 2009 meeting confirmed minority support. In short, the prospect of geothermal exploration by the beneficiaries of the trust is not without some history or beyond reasonable contemplation.

[107] In addition, the power exercised is effectively that of entering into a lease. If the trustees were intending to enter into a 50 year lease for say forestry purposes, I do not see how that outcome would be thwarted by a claim of acting ultra vires the trust order, given its current wording. If on the other hand the trustees wanted to establish a share investment business then that may be argued as to be totally outside the trust order since that enterprise would have nothing at all to do with the land. In this case, what is proposed involves use of the trust's existing asset base for an activity that is directly connected with the land.

[108] In this context, I also note counsel's submissions concerning the proposed investment in the Waiora business and her argument that this too was both outside the framework of the trust order and beyond the traditional rohe of the iwi.⁴⁴ That said, counsel did accept that the trust was not prohibited from making an investment in a tourism venture like the Waiora Spa. It was first, a matter of process in varying the trust order and second, a question of the scale of the investment, not its nature.⁴⁵

[109] It is common for trusts and incorporations to make investments in activities both outside the tribal domain and that are unconnected with the corpus lands. One need only think of the well publicised Deka Farmers venture of the 1990s where several significant trusts and incorporations exercised control of that group for a period and made significant profits for their owners. There are many other examples, not all of which were successful, that highlight how commonplace such investments have been. An investment therefore need not be confined to the existing iwi rohe and I am confident many trusts would regard such a restriction as an unreasonable and unacceptable inference with trustees' duties to diversify and seek out low to medium risk investments. They will not be limited by any notion of investing only in assets that fall within the traditional tribal domain of the owners. What matters is whether the trustees have acted as prudent persons before taking the decision to proceed.

⁴⁴

Ibid

⁴⁵

Ibid, 252-253

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[110] It should also be remembered that extending the activities of a trust could be effected by ss 231, 244 or 351, which are often used in practice for that purpose. In any case, while both ss 244 and 229 refer to opportunity for discussion and evidence of support for any proposed change, my conclusion is that the trustees already had the authority to enter into the agreement without the need for any change to the trust order. They also believed that the variations made in 2004, 2006, 2008 and 2009 specifically authorised entry into the TPA. Whether or not that belief was honest and taken on advice and after direction from the Court will be relevant to the issue of relief under s 73 of the Trustee Act 1956.

[111] So in response to the principal question - did the trustees have power under the trust order to enter into the TPA - the answer is yes. An equally important question is - before entering into the agreements, did the trustees undertake a proper process of investigation and inquiry involving the procuring of independent advice? That issue is considered separately below.

Independent advice

[112] That trustee law, in the context of investments, is premised in conduct rather than outcomes is well settled: *Jones v AMP Perpetual Trustee Co NZ Ltd*.⁴⁶ Thomas J underscored a central principle of general relevance:⁴⁷

“...[I]t is clear that a trustee is neither an insurer nor guarantor of the value of a trust’s assets and that the trustee’s performance is not to be judged by success or failure, that is, whether he or she was right or wrong. While negligence may result in liability, a mere error of judgment will not.”

[113] The learned judge also accepted the notion that prudent trustees have to consider the prospects of the yield of income and capital appreciation in judging the return from the investment. Equally relevant is whether or not the trustees have followed process. A crucial element of any investment decision making, especially where considerable values or risks are involved, is the requirement of independent advice. This will be even more important where it is evident that the trustees themselves do not possess the appropriate expertise. It will also be remembered that when considering investments a trustee must act as a prudent person who has a duty to provide for others.⁴⁸ Hazardous, speculative or wasting investments are also to be avoided.

⁴⁶ [1994] 1 NZLR 690

⁴⁷ Ibid, 707

⁴⁸ *in re Whitely* (1886) 33 Ch D 347

Applicants' case

[114] Ms Aikman contended that respondents' actions over the geothermal proposal have been contrary to the Trustee Act 1956 which requires trustees to exercise the care, diligence and skill that a prudent person or business would exercise in managing the affairs of others and to take appropriate advice.

[115] They have, counsel argued, entered into agreements with Green Energy, a company associated with Mr Carswell, and two neighbouring trusts without seeking any independent advice contrary to their obligations as trustees. The key agreements were signed on 5 November 2008. The trustees entered into them without the knowledge or consent of the owners or of any wider hapū interests in the geothermal resource. The undertakings are not in the normal course of business as they are large investments and quite outside normal bounds.

[116] Equally importantly, counsel argued, the owners voted against the geothermal proposal at the meeting held on 6 December 2009. It was a widely attended hui and so those are the views that must be considered.

[117] More crucially, it was said, the trustees did not seek independent advice on the proposal. Mr Gray and the solicitor Mr Dowthwaite who did give advice were not experts in geothermal matters. Mr Carswell may well be an expert but he was also an interested party. The trustees did not get independent advice on the area of risk. Their total reliance on what Mr Gray recommended calls into doubt whether they should remain as trustees.

Respondents' case

[118] In response Mr Hurd argued that there was no lack of independent advice on the geothermal proposal. Independent legal advice was given by Mr Dowthwaite. Mr Carswell, despite being involved in the Paehinahina deal, is still independent.⁴⁹ Advice was also obtained from Mr Williams who was the specialist advisor to the Tikitere Geothermal Group which included this trust.⁵⁰

⁴⁹ 7 Waiāriki MB 300-305 (7 War 300-305)
⁵⁰ Ibid 298-311



[119] Counsel submitted that prudent trustees would have acted in the same manner as these trustees. They were of the view that they had enough information. The trustees thought they had adopted a robust approach. The process they went through, the nature of this project and its apparent viability they considered to be clear and the advice they had sufficient. In summary, Mr Hurd submitted that the trustees have acted prudently and sensibly. They had not put the trust assets to any risk and so there was no question of the trustees being removed.

Discussion

[120] In his evidence Mr Carswell confirms that Green Energy Limited, the project manager and a company in which he has an important interest, has entitlement to take an equity stake in the project - the Green Energy option.⁵¹ Part of the reason for this, he says, was the requirement of Paehinahina Mourea to receive royalty fees upfront if it elected to take that particular option. This could amount to up to \$2 million. Mr Carswell goes on to state that under the terms of the various agreements Paehinahina Mourea would be able to call on that payment long before funding arrangements would be in place for the project and before confirmation that resource consent had been approved. He notes that TGL will not have the resources to make such a payment and nor would the trust.

[121] Mr Carswell says to overcome the difficulty Green Energy offered to accept responsibility for paying the upfront royalty fees, by way of a guarantee, knowing that the project may not proceed. In that event there would be no prospect of Green Energy recovering the money it was agreeing to pay to Paehinahina Mourea. He also stressed that Green Energy had provided countless hours of advice and input to the project without remuneration and so the Green Energy option reflected those two important considerations. Mr Carswell estimated that over a 20 year period Green Energy stood to make a return of \$2.4 million for the work it had carried out together with accepting liability for an upfront payment of at least \$500,000 and possibly as much as \$2 million.

[122] Mr Gray says that it would be entirely uncommercial and unrealistic for some third party expert to have been engaged to review the advice provided by Mr Carswell. He also rejects the suggestion that because Mr Carswell and Green Energy are being paid, they are

⁵¹ Affidavit of Bruce Richard Carswell affirmed 26 February 2010, 35-47



then unable to provide independent advice.⁵² But Mr Carswell and Green Energy are more than advisers like lawyers, accountants, valuers and related professionals who simply render a fee for services. In this case Green Energy will be project manager and has an option that enables them to obtain a share of the venture itself. Contrast that with the role of Mr Dowthwaite in providing legal advice and rendering a fee. Both are advisers but each has a quite distinct contractual relationship with TGL that is understandably perceived differently by the owners.

[123] In any event, while there may be no actual conflict, or if there is a conflict it has been appropriately managed, it is the appearance of conflict that has not been managed. Mr Carswell is saying both he and his company are undertaking work without fee to the value of doubtless several hundred thousand dollars and accepting liability for up to \$2 million when there is no guarantee they will be recompensed for their work or reimbursed for the upfront royalty payment to Paehinahina Mourea. Put another way, Mr Carswell and Green Energy are taking a significant risk.

[124] While I acknowledge that this practice may be common place, to the lay audience of the beneficiaries of the trust, it might give the impression that Mr Carswell has an interest in giving advice to the trustees and to TGL that the project ought to proceed, when that may not be in the best interests of the owners. In other words, an uninformed observer might suggest that Mr Carswell's advice may not be entirely independent since he and his company have a direct financial interest in the outcome of the project. The reality is that lay persons will not always understand the distinction between actual conflict and the appearance of conflict or whether such conflict has been appropriately managed. With hindsight it is easy to see how if an independent review of Mr Carswell's advice had been undertaken and that advice affirmed his recommendations then this ground of objection by the applicants would have little if any force.

[125] In my assessment, Mr Carswell could not be described as independent. He is directly involved in the project and has a financial interest in its outcome. It could also be contended that Mr Williams is not wholly independent either since he eventually aligned himself to Paehinahina Mourea. While the professional credentials of both advisers are well known in energy development circles, the potential for conflict when considering the position of Mr Carswell in particular is at least arguable.

⁵²

Affidavit of Wahiao James Gray sworn 26 February 2010, 15-17

[126] Mr Dowthwaite was responsible for the provision of legal advice to the trust and his input was no doubt considered by the trustees. However, he is not an expert in the field of geothermal projects or investments. Legal advice, while being a necessary element of the process of deciding upon whether or not to invest, was no substitute for independent expert advice on the agreement as a whole and in particular those aspects that concern use of the geothermal resource and the overall structure of the proposal.

[127] The trustees appeared to have relied on the advice and expertise of Mr Williams initially and, once he had moved to support Paehinahina Mourea, they then sought to rely on Mr Carswell. While his advice was described as professional and expert, it could not fit a definition of independent. As foreshadowed, the trustees should have discerned that his interest in the project had the potential to create at least an appearance or perception of a conflict. One way to manage that perception was to obtain truly independent advice from an expert unconnected with the proposal. In the overall scheme of these events, and of the proposal itself, the cost of so doing in both money and time would have been inconsequential.

[128] Given the implications of the TPA for the present and future owners of the land and the potential effects on the geothermal resource, the necessity for independent advice could not be more obvious. I readily accept that Mr Carswell is an experienced and highly regarded professional with specific expertise in the field of geothermal energy development. It is simply a question of the appearance of conflict not being managed adequately by the provision of an independent review of his advice. In short, I am not persuaded by counsel's submissions that the trustees obtained what could be described as independent advice before they entered into the TPA. This is a deficiency in the process that will need a remedy if the agreement is to remain relevant.

Conflicts of interest

[129] Section 227A of the Act states:

- " (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. (Emphasis added)

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[130] Noting again s 226 of the Act, clause 4 of the trust order states:

“ 4 Personal Interest of Trustees

Notwithstanding any general rule of law to the contrary no person shall be disqualified from being appointed or from holding office as a Trustee or as a representative of the Trust by reason of his employment as a servant or officer of the Trust or by his being interested or concerned in any contract made by the Trustees **PROVIDED THAT** he shall not vote or take part in the discussion on any matter that directly or indirectly affects his remuneration or the terms of his employment as a servant or officer of the Trust or that directly or indirectly affects any contract in which he may be interested or concerned...” (Emphasis added)

[131] Clause 5 provides as follows:

“ 5 Protection of Trustees

In any case where any Trustee is of the opinion that any direction determination or resolution of a meeting of the Trustees or general meeting of beneficial owners conflicts or is likely to cause conflict with the terms of this Trust or with any rule of law or otherwise to expose it to any personal liability or is otherwise objectionable then, and in reliance upon section 238 of Te Ture Whenua Act 1993 and of the Trustee Act 1956 he may apply to the Court for directions in the matter **PROVIDED HOWEVER** that nothing herein shall make it necessary for him to apply to the Court for any such directions. “

Applicants' case

[132] Ms Aikman submitted that Mrs Fenwick has an actual conflict because she has significant interests in Paehinahina Mourea, along with her family, and that trust will receive substantial benefit from the proposal. She is also a member of the NRCC. Mrs Fenwick should have made sure that the owners of both trusts were fully informed of these interests. She should have disclosed her positions before she signed the agreements and should have withdrawn from NRCC or Tikitere once she became aware that the two were on the same course.

[133] Mrs Fenwick, it was said, stands to benefit financially from the project and this has placed her in an impossible position as trustee since her duties and interests are now in conflict. At the very least counsel argued she should have sought directions since she could not rely solely on legal advice, given the circumstances, citing *Wong v Burt*.⁵³ It was also claimed that the late Mrs Emery was conflicted by the fact that there is a potential bias where anybody has a close family member involved in the same transaction. There is according to counsel a presumption of bias which does not require actual bias.

⁵³ [2005] 1 NZLR 91



[134] It was also alleged that Mr Gray as secretary and CEO was in a conflict because he put his own interests ahead of those of his principals, the trustees and more importantly the owners. As a contractor of the trust he owes obligations of loyalty and fidelity to his principals and must disclose any potential conflicts that might arise. His involvement with Mr Hughes was never properly disclosed to the owners and this omission must taint the advice he has given to the trustees, particularly regarding the proposed purchase of part of the Hughes' interests in Waiora Spa.

Respondents' case

[135] Mr Hurd argued that the issue of conflicts has to be considered in the context of whether or not they have been managed properly. Mrs Fenwick's family interests in the land did not give rise to actual conflict. Her ownership interest does not alter matters. Her co-trustees and the owners of Paehinahina Mourea were aware of her interests as were many of the owners. Mrs Fenwick did however eventually withdraw from active involvement in the geothermal project as it concerned Paehinahina Mourea and she also resigned from NRCC.

[136] Counsel also underscored that the late Mrs Emery did not have a conflict despite her husband being a trustee of Paehinahina Mourea and that the suggestion was unsustainable. Mr Hurd submitted that Mr Carswell rejects the claims made against him. He also stressed that their evidence was not cross-examined and should therefore be accepted. Opportunity was made available for cross examination but the applicants elected not to question Mrs Emery or Mr Carswell and the effect of that decision was that their evidence remained unchallenged.

[137] Regarding Mr Gray, counsel contended that the allegations against him were baseless. Mr Gray it was said was an independent professional diligently, for the most part, undertaking his duties for the trustees. His personal passive investment with Mr Hughes played no part in his role as secretary and CEO to the trust. Mr Hurd emphasised that Mr Gray could not be removed by the Court and was answerable to the trustees, all of whom had expressed full confidence in his continuing with his existing roles with the recent exception of Mr Eru.

[138] Conversely, it was argued that Mr Eru is a trustee on Tikitere and Manupirua and chairman of NRCC. He sees his primary duty is to hapū rather than the beneficial owners and his evidence makes this clear. There is actual conflict and preferment of duty to others



to whom he thinks he owes a responsibility over and above his duty as trustee. There is no evidence of any issues or concerns being raised by the applicants or Mr Eru prior to 2009 so it is not a long simmering concern according to counsel. Mr Eru signed the agreements even though he received advice and despite not understanding them he now claims. More surprisingly, it appears that the applicants are content for him to remain a trustee despite his conflict and conduct.

Discussion

[139] The law is well settled that a trustee cannot profit from that office: *Robinson v Pett*.⁵⁴ It is a breach of fiduciary duty regardless of whether the profit is made directly or indirectly: *Rouchefoucauld v Boustead*.⁵⁵ In addition, it will be a breach even where the profit is made by a third party, including children of the trustee: *Willis v Barron*.⁵⁶ A profit made honestly or dishonestly will still amount to a breach of fiduciary duty. As a fiduciary a trustee cannot permit any conflict between personal interests and the trustee's duties to the beneficiaries: *Boardman v Phipps*.⁵⁷ Where trustees profit from that role they must then account to the trust for the unauthorised retention of trust capital: in *re Macadam*.⁵⁸

[140] The Act and the trust order make it plain that a trustee interested in a contract will not be disqualified from continuing to hold that office. The affected trustee need only ensure that they have no influence over the decision to agree the contract, its terms and conditions. An interested trustee must not vote or participate in the decision making process and the rationale for that is obvious. However, there appears to be no explicit requirement that the affected trustee must be absent from that part of the meeting where the discussion occurs and a decision is taken. Yet simply declaring a conflict and remaining during the discussion is likely to be unsatisfactory.

[141] Best practice would suggest that it is implicit that a trustee interested in a contract should be absent at the relevant time since the mere presence of that trustee may still influence the outcome of the discussion even if the trustee does not say anything. For example, the other trustees may feel inhibited in having a frank exchange if the interested

⁵⁴ (1734) 3P Wms 249. See also Butler et al *Equity and Trusts in New Zealand* (2009) Thomson Reuters, Wellington, at 497-502

⁵⁵ [1898] 1 Ch 550 (CA)

⁵⁶ [1902] AC 271 (HL)

⁵⁷ [1967] 2 AC 134

⁵⁸ [1945] 2 All ER 644



trustee is present. To protect all trustees the individuals with an interest should absent themselves from the meeting thus reducing if not eliminating altogether any suggestion of conflict of interest. Only through consistent observance of robust and transparent processes will the duties owed to the beneficiaries remain paramount and the interests of the trustees affected be properly managed.

The involvement of Mrs Emery

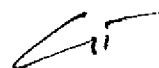
[142] The position of the late Mrs Emery can be dealt with in short order. The fact that Mrs Emery's husband is a trustee of Paehinahina Mourea on its face gives rise to the presumption of a potential conflict or at least the appearance of one. However, that presumption can be rebutted. On the evidence before the Court I am not persuaded that there was a real risk of an actual conflict arising, given the composition of the trustees for both trusts and taking into account the processes they followed leading up to the TPA. I am confident that the trustees of Tikitere and Paehinahina Mourea have acted by majority to ensure that the interests of their respective owners have remained paramount.

[143] Again, from a practical perspective it is not as if the votes of Mrs Emery or her husband were crucial to the decision for either trust. Moreover, even if both Mrs Fenwick and the late Mrs Emery both voted against the proposal as Tikitere trustees or absented themselves, the votes of the remaining trustees would have been sufficient. While there may have been a presumption of bias there is no evidence to confirm any actual bias or conflict.

[144] In the circumstances, (including the fact that Paehinahina Mourea were separately advised and included trustees who were not conflicted), I am satisfied that the relationship between Mrs Emery and her husband, both in their personal capacities and as trustees of Paehinahina Mourea and Tikitere respectively, did not give rise to any conflict sufficient to excite the suspicion of the Court and to irretrievably taint the decision to proceed.

The positions of Mrs Fenwick and Mr Eru

[145] Mrs Fenwick owns 1.57991 shares in Whakapoungakau 24 out of a total shareholding of 83.63567 and 93,187.322 out of 1,977,351 shares in Paehinahina Mourea. Like Mr Eru and many of the owners, she has interests in more than one of the trusts involved in the TPA. Mrs Fenwick also accepted that her family owned at least 20 per cent



of the shares in Paehinahina Mourea.⁵⁹ As foreshadowed, Mrs Fenwick further noted that this fact was well known to the owners generally.⁶⁰

Acting by majority: section 227

[146] Section 227 of the Act enables trustees to make decisions and execute documents by majority.⁶¹ Mrs Fenwick and Mr Eru could have availed themselves of that protection and declined to sign the TPA and related agreements and absented themselves from the trustees' and owners' meetings when this issue was discussed. That would have confirmed their distance from the decision making process. The use of s 227 would have meant the trust could have still proceeded with the TPA without Mrs Fenwick and Mr Eru being involved at all in the formal decision making and the executing of documents.

[147] After the decisions had been taken Mrs Fenwick could have then resumed her attendance at trustee meetings where the minutes would have recorded her non participation in the key decisions. Ideally that is what should have happened and, according to the evidence, to some extent such steps were taken. However, there were occasions when strict adherence to a transparent process to identify and disclose potential and actual conflicts was not followed thus provoking adverse comment that Mrs Fenwick has put her personal interests ahead of her duties to the owners. Mr Gray said as much in his evidence when he confirmed that she had sat in on the decisions, which he considered she was fully entitled to do.⁶²

[148] For the protection of all parties, especially the owners of both Tikitere and Paehinahina Mourea, a preferred process might have involved both trusts, as well as Mrs Fenwick and Mr Eru, obtaining separate legal advice. Mrs Fenwick should have absented herself or should have been required to be absent by her fellow trustees from all trustees' and owners' meetings where discussion on entry into the agreement took place, except where she might have been available to explain her position and answer questions. Mrs Fenwick should have then absented herself from any further discussion on whether to enter into the agreements and again her colleagues should have insisted on this. Even so, it is also evident that her vote either way was immaterial to the actual decision, given the unanimous

⁵⁹ 5 Waiāriki MB 139 (5 War 139)

⁶⁰ Ibid 141

⁶¹ *Wall v Karaitiana - Tauhara Middle 15* (2007) 85 Taupō MB 225 (85 TPO 225)

⁶² Affidavit of Wahiao James Gray sworn 13 November 2009, at 101

support of her colleagues, unlike the situation in *Wall v Karaitiana* where the votes of the conflicted trustees were crucial.⁶³

[149] While I accept that Mrs Fenwick did not deliberately set out to benefit herself and her family, it was inappropriate for her to participate in the decision making. With respect, she ought have known better, given that only five days before the TPA was signed, as counsel has mentioned, the Māori Appellate Court issued a decision involving the Te Ngae Farm Trust where Mrs Fenwick had been accused of placing herself in a position of conflict. But in attempting to manage any appearance of conflict it should have been obvious to her that she should not have participated in the decision. The trust order is perfectly plain on this point. It was unwise for her to be involved and, as foreshadowed, she should have been absent from those parts of the meetings where the decision to enter into the TPA was made.

[150] But even then, does the conduct of Mrs Fenwick mean that she was fatally conflicted to such an extent that she can no longer act as a trustee or that her involvement in the process has resulted in the decision to enter into the TPA being irredeemably tainted? The trustees of both Paehinahina Mourea and Tikitere were aware of her large holding in the former. It was not as if this was somehow a secret. With respect, I struggle to accept the suggestion that experienced individuals like Mr Kingi and even Mr Eru would have made a decision that was dependant, wholly or in part, on whether or not Mrs Fenwick might stand to gain personally or that somehow they were unaware of her interests. Moreover, while it is acknowledged that she took advice, both trusts had their own independent advice and in any event her vote, like that of Mrs Emery, was immaterial to the final outcome and decision.

[151] Having considered her evidence and assessed her demeanour, I do not accept the suggestion that Mrs Fenwick's conduct was driven by personal financial considerations. It was clear that she unsurprisingly found the suggestion grotesque. She is a well known kaumatua in this district with a long history of service and community involvement. That she should have been more upfront to the meeting of Tikitere owners in 2008 about the potential for personal gain and conflict is obvious. Yet that does not eliminate the responsibility of the other trustees, including Mr Eru, to ensure that overall the TPA proposal would be in the best interests of the Tikitere owners. Clearly they considered that it was and proceeded accordingly, notwithstanding Mr Eru's claims of being misled.

⁶³ (2008) 87 Taupō MB 107 (87 TPO 107)

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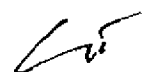
[152] In any case, there is also no guarantee that a dividend will be paid from any monies received by Paehinahina Mourea which might opt instead for grants for Māori community purposes under s 218 of the Act. I understand from the latest accounts for that trust dividend payments are not issued on an annual basis. Dividends were paid in 2009 and 2006 but not in 2005, 2007, 2008 or 2010.

[153] In summary, with the benefit of hindsight, it is easy to see how, in a counsel of perfection, it would have been preferable for both Mrs Fenwick and Mr Eru to have either resigned as trustees or ensured their interests external to their roles as trustees were properly managed. That would have required full and complete disclosure to meetings of owners of all trusts involved in this project where they retained interests and their exclusion from the decision making processes. For both Mrs Fenwick and Mr Eru, retaining their leadership roles with the NRCC while the interests of that body and the trust may have diverged, as they have done, has created the appearance of conflict. As trustees their paramount duty is to the owners.

[154] My conclusion is that Mrs Fenwick, like all her fellow trustees, did not follow proper process to ensure that she remained completely disconnected from the decision making at every relevant point and in that failure has created an appearance of conflict which has not been properly managed. The trust order prohibited her from taking any part in the decision making. Her actions in creating the appearance of conflict have excited the suspicions of the owners. I am not persuaded however that such appearance has rendered the decision to enter into the TPA nugatory. Nor do I accept that Mrs Fenwick's actions in this context are sufficient to warrant her removal. Her fellow trustees made the decision and their consent without her involvement would have been sufficient to confirm the decision. I also acknowledge for completeness Mr Hurd's submissions on the words of s 227A(2) and in particular "other than as a trustee of another trust", which arguably also provides Mrs Fenwick with some comfort in the present context.

The role of Mr Eru

[155] A whānau trust in which Mr Eru is both a trustee and beneficiary holds 0.0964 shares in Whakapoungakau 24 and 894.90 in Paehinahina Mourea. Mr Eru is a trustee of Manupirua and beneficiary of Whakapoungakau 24, a beneficiary of Paehinahina Mourea, and an executive member of NRCC. So like many other Māori owners and trustees with close whakapapa connections, he is unsurprisingly involved in all three trusts that are linked



to the TPA. That is simply a reality of kinship and obligation to the wider collective inherent in traditional communal ownership. All parties involved in the TPA would have been aware of his multiple overlapping roles and links. No issue appears to have been taken with these overlapping roles until the present application was filed in August 2009.

[156] It will be remembered that Mr Eru endorsed the TPA and commended it to the owners at the meeting held on 30 November 2008. He also accepted that it was his role to understand what was going on during the negotiations and that he had received advice from Messrs Gray, Dowthwaite and Carswell before signing the TPA.⁶⁴ Mr Eru agreed that he would not have signed the related agreements including that with Green Energy unless he understood them.⁶⁵ His fellow trustees say that he was an enthusiastic supporter of the proposal and was involved in the entire negotiation and discussion process as part of the negotiating subcommittee, along with Messrs Carswell and Gray.

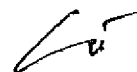
[157] Prior to that there is little evidence of his opposition to the proposal. Indeed, the first formal notice of concern does not arrive until June 2009 in the form of correspondence to Mr Gray, well over six months following the signing of the TPA. Mr Eru does say that his concerns were increasing over that period while Mr Gray had either given him assurances not to worry or was refusing to provide suitable responses to information requests.⁶⁶ Mr Eru says he was misled and did not fully appreciate what the TPA proposal entailed for the owners of Tikitere, contrary to what he accepted during cross examination. He also says that he considers his duty is primarily to the iwi, a stance readily understood, given the overlap between members of the iwi and the owners.

[158] If Mr Eru was concerned with the actions of his fellow trustees he should have sought directions. To wait over six months before seeking advice when he had concerns seems inexplicable. As chairman it is arguable that his responsibility to do so was greater than that of his fellow trustees who were content to proceed with the project in any event. The short point is that Mr Eru could have halted the process much earlier than he eventually did by seeking directions from the Court sooner. A conference of all the trustees might then have been held early in 2009 and uncovered many of the facts that have now been revealed with greater clarity in the present case. In fairness, it should also be underscored that all of the trustees should have sought directions much earlier on the issue of a lack of quorum for

⁶⁴ 5 Waiariki MB 89-91 (5 War 89-91)

⁶⁵ Ibid 93

⁶⁶ Ibid 114-116



the general meetings and related matters. For whatever reason they did not do so. That was a mistake and one that experienced trustees should not have made.

[159] It will be remembered that Mr Eru went ahead and signed documents which he now says he did not fully understand, given the trust and confidence he said he had reposed in Mr Gray. The issue of trustees signing documents that they later claim they did not understand has recently been considered by the High Court in *Dorchester Finance Ltd v Maniapoto & Ors*.⁶⁷ But Mr Eru's position is even more tenuous than that of the trustees involved in *Dorchester* since those trustees did not receive advice and denied any claims that they did. They also signed the relevant documents without any of the processes followed in the present case. If Mr Eru now contends that, in the circumstances of this case, he signed documents not understanding what they were, then his ability to remain a trustee may have been compromised.

[160] Mr Eru says he was supportive of the 11 August 2009 meeting and made a speech there endorsing the applicants' position and reiterating his earlier concerns which had been conveyed to the trustees. The applicants have endorsed his position and support Mr Eru remaining as a trustee. Given his role as chairperson, as a member of the negotiating subcommittee and his actions in signing documents that he now claims he did not understand, support for his retention seems curious. Mr Eru, like his fellow trustees, has committed the trust to the project in signing the TPA and related supporting agreements. And while the proposal may never proceed in the manner originally intended, it is simply not credible, with respect, for Mr Eru to now attempt to dissociate himself from the TPA on the basis of a claimed lack of understanding. As chairperson he was at the centre on the process of negotiation for the TPA. It was his responsibility, like that of his colleagues, to know what was going on and if he had any doubts and had received unsatisfactory responses from Mr Gray or even Mr Carswell then he should have sought directions.

[161] Regarding the applicants' claims over a lack of compliance with the trust order over meeting the trust's quorum requirements, as Mr Hurd points out, Mr Eru was present at the meetings held in 2004 and 2008 and acted as chairman, as would be expected. While clearly a quorum was not present Mr Eru elected to proceed. He saw no difficulty in continuing and did not raise any concerns with Mr Gray or his fellow trustees over the quorum requirements

⁶⁷ HC Auckland CIV- 2009-404-2529, 8 February 2010 at [32]-[45], [50]-[57], per Associate Judge Doogue



not being met. He also accepted under cross examination that it was his role to chair the meetings of both trustees and owners.⁶⁸

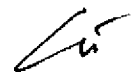
[162] I agree with Mr Hurd that, with respect, it is rather late in the day for Mr Eru to now question the validity of the owners' meetings that he himself chaired. The trust order is clear as to the quorum and yet Mr Eru, like the rest of the trustees, proceeded with the meetings. He could have sought directions from the Court if he harboured any doubts but like his colleagues he did not take that step. In this context it will be remembered that Mr Eru is an experienced trustee and a regional councillor. He ought to have a more than passing knowledge of meeting procedures and quorum requirements. Once again it must be stressed that like the other trustees if Mr Eru had any doubt about any of the activities of the trust and its employees he might have sought directions from the Court.

[163] In summary, Mr Eru, like his colleagues, has connections to more than one trust involved in the TPA. He also retains a leadership role with the NRCC and has advocated for that body and its supporters. While on the face of these relationships conflicts will be presumed, Mr Eru, like Mrs Fenwick is entitled to participate in the various entities because of their whakapapa. They are connected to the land and are entitled to nomination and appointment. As Mr Hurd and also Mr Gray submitted, it would be impossible to appoint anyone to a trust if whakapapa gave rise to insurmountable conflicts. What matters more is how those actual and perceived conflicts are managed and whether or not the affected trustees have participated in any decisions that directly concern their interests. If they have then the failure to seek directions will be a relevant consideration.

[164] Actual conflict of course will always be subject to the Act and in this case to the terms of the trust order. Both make it clear that involvement or interest in a contract is no bar to retaining the position of trustee. The affected individual must simply absent themselves from any hint of influencing an outcome in which they are interested. While like Mrs Fenwick, I find aspects of Mr Eru's conduct a cause for concern, including the issues surrounding the execution of the TPA, it falls short of surpassing the threshold required for removal. What is more disconcerting, no doubt for the owners as well as the trustees, is Mr Eru's claims that he did not understand what he was signing when committing the trust to the TPA. With respect, it is surprising that experienced trustees who ought to have been aware of the nature of the proposal now say that they signed without understanding.

⁶⁸

Ibid 87



The position of Mr Gray

[165] Ms Aikman suggested that Mr Gray's answers before Judge Savage in the earlier variation proceedings were disingenuous to the point of bordering on evasive and even misleading. She notes that under cross examination Mr Gray made it plain that he only gave answers to the questions asked and saw no reason to proffer any further evidence beyond the confines of the answers to the judge's questions. This counsel suggested was a deliberate attempt to downplay the issue of conflict and was a clear example of Mr Gray's conflict or at least failing to manage the appearance of conflict. On reflection no doubt Mr Gray would agree that the presentation of the case before Judge Savage might have been more comprehensive.

[166] Mr Gray says that Tātou Experiences Ltd is owned as to 48 shares by his family trust, one share each to himself and Mrs Gray, while the remaining 50 per cent is owned by Mr & Mrs Hughes.⁶⁹ He states that this company is separate and distinct from the trust and is in the business of transporting visitors to Mokoia Island. Mr Gray also says that he is merely a silent investor with no involvement in operational matters.

[167] It is, however, easy to understand the concerns of the owners over the appearance of conflict. The Waiora purchase was resolved, not merely suggested. That it was subsequently withdrawn misses the point being made by the applicants: the decision to proceed was made on the recommendation of Mr Gray. He says he was acting in the best interests of the trust and the owners in making the recommendation. The trustees, with the exception of Mr Eru, support Mr Gray's position and endorse his actions in bringing the proposal to them for consideration. Mr Gray is also an investor, silent or otherwise, with Mr and Mrs Hughes. They have therefore a professional relationship as partners in Tikitere Holdings Ltd and as fellow investors in Tātou Experiences Ltd.

[168] But as Mr Hurd submits, Mr Gray is not a trustee. The Court has no jurisdiction over him while he remains a trust employee, except through the trustees. If anyone is to be held to account it is the trustees, and not Mr Gray, assuming there is anything to require an explanation from the trustees. In that context, I note that the appearance of conflict involving Mr Gray and Mr and Mrs Hughes has not been properly managed by the trustees. It was their duty to ensure any appearance of conflict was appropriately dealt with the

⁶⁹ Affidavit of Wahiao James Gray sworn 13 November 2009, paras 82-92



necessary explanations made to the owners in general meeting. If there had been more regular meetings of owners where such issues might have been volunteered then much of the suspicion that has been fomenting may have been dissipated through more detailed information on the various relationships. This issue is considered further later in this decision.

[169] While it might be said in the observance of his duties of loyalty as an employee or contractor of the trust and his relationship with Mr Hughes might cause suspicion within the ownership, I remain unconvinced that there are any issues of substance based on the evidence currently before the Court. In short, there is simply insufficient evidence to justify censure of the trustees over the personal investment arrangements of Mr Gray on the one hand, and his obligations as an employee to the trust on the other. He gave evidence on oath and I found little in his presentation that might arouse the concerns of the Court that would compel criticism of Mr Gray or support a claim that he has a fatal conflict of interest because of his investment with Mr and Mrs Hughes. As foreshadowed, that he and the trustees might have explained matters more clearly to the beneficiaries and thereby minimise the risk of criticism is obvious: if the owners had been properly and regularly informed as to the nature of the relationships then some of the present criticisms might have diminished.

[170] For completeness, I note Mr Gray's submission attached to his most recent application for variation of trust received on 16 July 2010 where he states "...there is nothing in the Trustee Act 1956 or Te Ture Whenua Māori Act 1993 that prevents a trustee who has an interest in a transaction from full participation in any meeting discussion or debate on the matter at hand." Clause 4 of the trust order unequivocally *prohibits* such participation. The case law on this point is equally unambiguous.⁷⁰

Delegation of duties

[171] Clause 3(b) (iv) of the trust order states:

"iv To employ

⁷⁰ See *Robinson v Pett* (1734) 3P Wms 249, *Boardman v Phipps* [1967] 2 AC 134 and *Polamalu v Te Ngāe Farm Trust - Te Ngāe Farm* (2008) 12 Waiariki Appellate MB 120 (12 AP 120) and *Pont & Chalmers Equity and Trusts in Australia* (2007) Lawbook Co, Sydney, 91-95

To engage employ and dismiss managers secretaries servants agents workmen solicitors accountants consultants surveyors engineers valuers and other professional advisers required to carry out the powers of the Trustees and to fix their remuneration.”

Applicants' case

[172] Ms Aikman submitted that the respondents must not delegate, they must be active and they must seek advice and make decisions and keep proper accounts and give the owners information. The respondents have acted contrary to their obligations under s 223 of the Act to carry out the terms of the trust, in particular failing to administer and manage the business of the trust, to preserve its assets or to collect and distribute trust income.

[173] It was said that the respondents have abdicated their role as trustees to Mr Gray and have acted as “rubber stamps” for decisions made by the secretary and the trust’s other advisors without understanding sufficiently what they were doing. This has then led to the failure by the trustees to properly protect the interests of the beneficiaries.

Respondents' case

[174] Mr Hurd responded that there is an important line to be drawn between abdicating your responsibility as a trustee and doing what a responsible trustee should do; that is to engage people who have some proficiency and expertise to undertake the detailed work. There is no evidence that Mr Gray acts as the sole trustee of the trust. The trustees are making a proper use of Mr Gray who has significant knowledge and experience both in trusts generally and this trust.

[175] Counsel stressed that the evidence shows that decisions have been made throughout by the trustees. As foreshadowed, Mr Hurd submitted that Mr Gray is not a trustee and so any question of conflict would be a matter for the trustees to take up with Mr Gray not for the Court to deal with. Although there has been a delay in filing the accounts that should not justify removal.

Discussion

[176] Mr Gray is an employee of or independent contractor to the trust. As foreshadowed, he is not a trustee and has no power to act except as permitted by the trustees. Once again, where there may be criticisms then they should properly be directed at the trustees, including



Mr Eru. That Mr Gray is an experienced professional trustee with expertise in both a governance and management role is undisputed.

[177] It was however of concern to note the apparent lack of knowledge of some of the trustees including Mr Heke and Mrs Fenwick over several aspects of the trust's operations including the basic workings of Tikitere Holdings Limited and their accounts. Mrs Fenwick did not seem to fully understand how the purchase of the 50 per cent interest in Tātou Experiences Ltd would be financed.⁷¹ That said, Mr Kingi stated that since the proposal would not prove to be viable there was no point in taking it further.⁷² At one point in reference to the TPA Mr Heke emphasised that he relied on Mr Eru as chairman and that he had considerable faith in his abilities given his central involvement in the negotiations.⁷³ But once again, these are properly concerns to be levelled at the trustees, not Mr Gray.

[178] That some of the trustees were not as familiar with the workings of the trust and in particular the loan to Mrs Hughes while far from ideal, was not surprising. I would not expect lay trustees to understand that level of detail without being provided with detailed questions in advance. If all trustees were to be removed for, *inter alia*, lack of familiarity with the detail of their accounts then there would be many more cases for removal before the Court. I would be more concerned however if the chairperson was not aware of such matters since that person is in a leadership role and has a duty to fulfil that responsibility by maintaining a good understand of the trust's financial position. Similarly, I was concerned at the quality of answers provided by Mr Kingi on this point. As a professional person in private practice as an accountant, I expected a higher degree of familiarity from him regarding the accounts.

[179] That said, while these criticisms of the trustees by counsel for the applicants are not wholly unjustified, I am not persuaded by the principal submission – that the trustees had completely abdicated their roles as governors to Mr Gray and had let themselves be led by him and Mr Carswell, to say nothing of Mr and Mrs Hughes, so that the trust might be convinced to enter into deals that were not in its best interests. The trustees are and remain responsible for the business of the trust. That they rely in large part on the experience of Mr Gray is undisputed. But I see no wholesale abandonment of their roles in favour of Mr

⁷¹ For example, see 5 Waiariki MB 131

⁷² Ibid 154

⁷³ Ibid 157



Gray. He is and remains their servant, and by extension and through the office of the trustees, at the service of the owners.

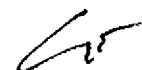
[180] Even so, if the trustees wish to remain in their present roles then they need to improve their performance, lest they give credence to the claims that it is Mr Gray who is the de-facto trustee who understands all that occurs whereas they do not. At the next general meeting of owners I would expect their knowledge of the trust and all of its operations, including the implications of the TPA, to be significantly improved compared to their performances on the witness stand. Otherwise, how might the owners, let alone the Court, retain confidence in trustees who may not appear to understand the financial position of the property and taonga belonging to others over which they are custodians.

Trustee conduct

Keeping the owners informed

[181] It is evident that the trustees did not keep the owners informed in a manner appropriate to the circumstances, notwithstanding the requirements of the trust order for a meeting once every five years or by requisition of the owners. Put another way, they should have done more to share information on the project with the beneficiaries. In the age of email, internet and websites, the costs of so doing would not have been prohibitive and might have drawn the current concerns to the surface much earlier.

[182] In this context, I note by way of example that Paehinahina Mourea, through their accountants, have all of the minutes of general meetings, annual accounts and related documentation available on line. The references to the TPA recorded in the minutes of those meetings are doubtless illuminating and informative to the Paehinahina Mourea owners. There would be nothing to stop this trust from doing the same and it would seem a sensible suggestion that the trustees explore this possibility. Even if the minutes of owners meetings and the annual accounts were summarised and presented in a consolidated form without all of the detail contained in the notes to the accounts, that would provide the owners who do not live locally with regular information and updates on the activities of the trust. The short point is that the trust can and should do more using available technology to make the owners more aware of its business.



[183] The project agreement outlines a proposal that is of significance for this trust when viewed against its history of operations. It is likely to be the single largest set of transactions for this land for the foreseeable future. This was not simply by way of example, a lease of the land to a local farmer, the entry into a share-milking agreement or even the creation of a forestry licence for two crop rotations. By the trustees' own admission, this is a major project involving significant joint venture partners and the construction of a power station valued at in excess of \$100 million. The project does of course, affect and concern the land and the geothermal resources contained therein. It is a project of significance without doubt, but one that is directly connected to the land.

[184] It was therefore not unreasonable for the owners to expect that they would be consulted more regularly than as currently required under the trust order. This is consistent with s 17 of the Act – providing a means by which owners may be kept informed of any proposals relating to any land. Given the scale of the project and the implications for the owners, more regular information and consultation hui should have been mandatory, at least on an annual basis. I suggest that the trustees consider a variation to the trust order to provide for annual general meetings as a formal means, at least once a year, for the trustees and owners to meet together and discuss the business of the trust, its present and future activities.

[185] That the trustees held meetings is acknowledged but the advertising was at times confused, for reasons that have been explained in the evidence, and the level of information provided was not always as informative as it might have been in the circumstances. One need only review the information that was disclosed as a result of decisions of this Court to note that not all of it could properly be described as commercially sensitive.

[186] The frequency of hui is only part of the equation: providing information sufficient to keep the owners informed, while respecting any relevant and actual confidences, was also necessary.⁷⁴ Much is often made of commercial confidentiality and for good reason. Trustees have a duty to protect the interests of the trust which from time to time may involve entering into commercial relationships that include agreements for confidentiality, noting that in this case confidentiality could be waived under the TPA for example in connection with litigation. Owners are entitled to know what is going on with their land. It is simply a

⁷⁴ *Foreman v Kingstone* [2004] 1 NZLR 841



question of achieving the correct balance between beneficiaries' rights and trustees' obligations to protect and preserve the assets of the trust – including its good name.

[187] In my assessment, the trustees have not provided sufficient information to the degree necessary for a project of this size to keep the owners properly informed. It was only through these proceedings that more detailed information was made available, notwithstanding the trustees' subsequent claims that that information has now been misused by some of the applicants. Indeed one need only consider the minutes of the Paehinahina Mourea special general meeting held in June 2007 regarding this very project to see an example of how such a hui might have been conducted and recorded.

[188] That said, as Mr Hurd points out, owners also have some responsibility to seek out information themselves from the trustees. It was always open to any owner to ask the trustees or Mr Gray for information long before these proceedings were commenced. In other words, the last meeting of owners prior to 2008 was in 2004. If owners were as concerned as the applicants say they were about the operation of the trust then they too could have made enquiries with the trustees, requisitioned a meeting or sought assistance from the Court. They did not do so until, as has been pointed out, Mr Eru wrote to Mr Gray in June 2009 expressing concerns.

[189] With respect, it is no answer to say that the owners could not ask the trustees because they did not know who they were or did not know how to go about the process of obtaining information. As is commonly understood, any owner can approach the Court at any time for assistance in seeking information about their lands from trustees. The Court's records are full of such enquiries and requests. It seems curious that owners would attend a hui in 2004, including individuals associated with the applicants, agree in principle to explore geothermal power proposals and then make no further requests of either the trustees or the owners for information.

[190] When owners are concerned about the administration of their lands then the Court is always available to assist them in their efforts to obtain information. Usually, if there is disquiet from within the ownership the Court would have been made aware of such concerns before formal proceedings are commenced.

[191] In summary, I find that the trustees have not kept the beneficial owners properly and fully informed and did not provide information on a more regular basis to a level of detail



that would not breach confidentiality. They should have engaged the owners more regularly and provided more detailed information on the TPA. The costs of holding an annual hui of owners and maintaining even a simple website would not have been prohibitive.

Filing of accounts

[192] The trustees acknowledged that the most recent accounts had not been filed on time and that there had been lapses over arranging suitable audits, which they accepted was contrary to the terms of the trust order. Once identified those deficiencies were corrected and the accounts are now in order. If trustees were removed every time they did not file accounts on time or arrange for appropriate audits then there would be many more cases of this kind before the Court. That is not to say that this conduct should be ignored or that the trustees should be treated gently.

[193] It was clear that the trustees and Mr Gray were embarrassed by this lapse. I am confident that there will be no reoccurrence and that the accounts will be filed on time in future. If there was any repeat of this then questions over the fitness of the trustees to remain in office would inevitably arise. For completeness, I note the accounts have been carefully reviewed by counsel and questions were put to Mr Gray and the trustees over their contents.

Inquorate meetings of owners

[194] By way of background, I note that when a new trust order for the predecessor block to Whakapoungakau 24 was issued on 5 August 1991 clause 6(iii) stated 25 beneficial owners was the quorum for general meetings.⁷⁵ That was altered on 9 November 1999 when the current trustees were appointed responsible trustees. In accordance with the then standard trust order, the 10 percent threshold was included.⁷⁶ It is not clear from the Court file as to whether there had been a meeting of beneficiaries to comply with s 244 of the Act. It may be that, in the absence of a review per s 351, the Court simply availed itself of the review provisions which included the power to vary the trust order without reference to the owners.

⁷⁵ 229 Rotorua MB 105

⁷⁶ 252 Rotorua MB 132



[195] It is the trustees' duty to know their terms of trust and to obey them. If they have doubts then they have a duty to seek directions. The trust order states that the quorum is 10 per cent of the owners. Once the trustees held their first meeting and it failed for want of a quorum they could have then approached the Court for directions on how to proceed further. They might have then received directions to call a further meeting, or ask the Registrar to arrange a hui, properly notified, to seek a variation of trust to reduce the quorum from 10 per cent to say 20 owners. It is likely that the quorum would have then been reduced to something more practical. If that had have occurred then the current criticisms of the lack of a quorum for meetings to approve both variations to the trust order and to endorse the TPA would have no force.

[196] The meeting of December 2009 was probably the only quorate hui of owners in many years. But it should be remembered that that was no ordinary meeting.⁷⁷ I understand that the date was selected to coincide with another meeting held that weekend where detailed arrangements involving notice and travel were made by the applicants and their supporters. A high degree of organisation was involved to ensure a significant turn out, hence the numbers in excess of the quorum requirements. The overlay of these proceedings and the settlement negotiations no doubt played their part in raising the interest of the owners to attend the meeting. The numbers attending were certainly at the higher level for ahu whenua trusts in this district. For example, at the 2009 annual hui for Paehinahina Mourea, which has more than double the number of owners of Tikitere and holds over 45 % of owner addresses, only 74 owners attended.

[197] This is not a criticism – if only all meetings were so well organised and attended. It is merely an observation that if all owners meetings for this trust had been so well organised in terms of notice and attendance, with a high degree of cooperation from the owners and the trustees, then some of the issues presently before the court might have had less relevance. More importantly, the organisation required to achieve this result was clearly extraordinary and underscores the reality that the quorum requirement for this trust, which has only ever been met once and in unique circumstances, has been set too high. A change to the trust order might properly be considered at the next general meeting of owners to reduce the quorum to a more practical level.

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[198] The key point is that the trustees knew that a quorum was not being achieved, yet they did not seek direction from the Court or apply for variation to reduce the quorum from 10 per cent of the owners to a more practical minimum level of attendance. After all, as Ms Aikman points out, the trustees were applying regularly to the Court for variations of trust. They did so on at least four occasions but those applications were all about the extent of the trustees' authority rather than whether or not they were complying with the quorum requirements for general meetings of owners. The quorum requirement is included in a trust order for good reason and it should not be seen as an optional or peripheral requirement. Like the filing of accounts, achieving a 10 per cent of owner attendance at general meetings is necessary, not simply desirable. The trustees did not appear to discern that the meetings of owners were inquorate and, more importantly, failed to seek direction from the Court on how to remedy that problem.

Waiora investment proposal

[199] The proposed Waiora investment on its face seemed surprising in that the trust did not at the time of the resolution have anything like \$1.5 million to invest, notwithstanding that there was an intention to stagger payments over a period of ten years. Even then, an upfront payment of \$750,000 would have been required on signing. According to the trustees' resolution the evidence suggests that a loan would have been possible. While it is acknowledged that the trustees were attempting to position the trust to forestall any future takeover by outside interests, that protection might have also been achieved by seeking a right of first refusal from Mr Hughes.

[200] The real difficulty was that at the time the resolution was agreed to according to the trust balance sheet, it was not in a position to honour such a commitment without substantial borrowings, even over a 10 year period unless its income was going to increase significantly. That was no doubt to occur as the trust's business interests improved over time. The trust did not have the \$750,000 purchase price of the 50 per cent interest even though it was said that this sum could have been borrowed. No "due diligence" had been completed, in the general sense of that phrase that would be acceptable to a prudent person in business. The report attached to the trustees' resolution to proceed would not withstand scrutiny as "due diligence". While Mr Kingi says the proposal proceeded no further which meant that no further work was required, it was unwise for the trustees to have passed such a resolution without heavy qualification that any such investment would be at the very least subject to finance and due diligence.



[201] What the trustees have done, as foreshadowed, is to create the appearance of conflict between the advice of Mr Gray and his interests with Mr and Mrs Hughes. While I accept his evidence that the advice he gave was offered from both a practical and prudent perspective, in the circumstances and given the relationships, a second opinion on the potential viability of such an investment should have been obtained if the trustees were serious about proceeding. Clearly they were because they took the step of passing a formal resolution. If this was merely a possibility then the resolution should have been worded more correctly to reflect that.

[202] The short point is that the trustees' handling of the Waiora Spa investment proposal was, with respect, inappropriate. It was naïve to think that the suspicions of the owners would not be aroused because of the links between Mr Gray and the Hughes interests. That ultimately such concerns were, in my assessment, unfounded is only part of the answer. The best way for sensible and prudent trustees to manage that perception and appearance of conflict would have been to ensure an independent adviser was procured to protect the position of the trust. If the costs of doing so were prohibitive then the trustees should have applied for directions on how to proceed.

[203] Another consideration when assessing the trustees' performance was the loan to the Hughes' interests referred to in the annual accounts for Tikitere Holdings Ltd. If the loan is secured then no issues will arise as to prudence unless it can be demonstrated that the investment offended trust principles. It has been held that a loan secured by merely a promise to repay without security is no investment at all.⁷⁸ I note however that Mrs Hughes refrained from taking profits according to Mr Gray as a means of supporting the company's activities and that if she had taken profits as she was entitled rather than letting those amounts remain in the business then its viability would be affected due to the seasonal nature of tourism. Once again, however, it is the management of the appearance of conflict that I find most wanting.

Relief

[204] Section 73 of the Trustee Act 1956 states:

If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a

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Khoo Tek Keong v Ch'ng Joo Tuan Neoh [1934] AC 529



breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for the same.

[205] While there is legislative authority enabling the Court to grant relief, that remedy is not lightly given: *Tauhara Middle 4A2B2 C - Opepe Farm Trust*.⁷⁹ In this decision Judge Savage criticised trustees who had improperly used trust assets even though they had relied on advice. The judge noted with concern the attempt by trustees to stand behind a legal opinion provided to them confirming that their proposed actions would not be in breach of trust. He also said that in such cases trustees had the responsibility of establishing that they have acted honestly and reasonably. His Honour then emphasised that trustees in such circumstances have the option of seeking directions from the Court and when they fail to do so they must be excused for that omission if relief is to be granted. This approach is consistent with that set out in *Wong v Burt*.

[206] I accept the general contention that, as the Court had approved the variations, the trustees relied on such approval before proceeding with the proposal. I also accept the submission that Mrs Fenwick sought her own advice, as did the two trusts, before the TPA was finally concluded. As lay trustees it is unsurprising therefore that they believed honestly that they had taken appropriate steps to deal with issues of authority to enter into the TPA and over actual and potential conflicts or circumstances that created the appearance of conflict. In hindsight, as I have stressed throughout this decision, it would have been more appropriate for the trustees to have sought directions at several crucial points through this saga before proceeding. The TPA is a significant project and the trustees should have discerned the need to ensure that everything they were doing was lawful, prudent and reasonable. More importantly, they should also have been more open with the sharing of information with the owners to keep them informed. After all, Paehinahina Mourea did just that without too much difficulty it would seem and their owners are unsurprisingly more able to make informed decisions on whether or not to support their trustees.

[207] Having reviewed the evidence I accept that the trustees acted honestly. I have some discomfort over whether or not their actions from time to time were reasonable but am prepared to accept their claims. They are accordingly entitled to relief per s 73 of the Trust Act 1956 for the various failings and breaches of trust identified previously in this judgment.

⁷⁹ (1996) 68 Taupō MB 27 (68 TPO 27)

Broad acceptability

[208] The leading authority on the importance of trustees maintaining the support of the owners in the exercise of their office is *Poripori Farm A* which has been endorsed by the Māori Appellate Court. Judge Carter summed up the key point thus:⁸⁰

“Under the new Act section 222 provides that a trustee must be broadly acceptable to the beneficiaries. The provisions of Section 240 on removal of trustees are much wider than before. In all walks of life people are now required to be accountable and those that serve can readily change their minds and seek to have other representatives. I cannot see that it should be any different in the case of trustees who serve beneficial owners. If a trustee ceases to have the confidence of the beneficial owners then it is time that the trustee should stand down. As beneficial owners strive to have the performance of their Trusts improved there will be more and more calls for trustees to stand aside so that people with more drive or competence can be appointed. The Court believes that it is in the interest of the owners that the provisions of the Act allowing removal of trustees should be widely interpreted and that it should not be regarded as any stigma or loss in mana when a trustee is asked to stand down” (Emphasis added)

Applicants’ case

[209] Ms Aikman argued that the trustees through their actions had lost the confidence of the owners. They had failed to keep them informed, to act as prudent persons and to act in the best interests of the owners. The meeting of owners held in December 2009 made the point plainly that the owners did not support the project. Counsel contended that the trustees had therefore lost their mandate to continue in office and that this was another ground that supported the application for removal.

Respondents’ case

[210] Mr Hurd submitted on the contrary the trustees were indeed acting in the best interests of the owners by ensuring that the land was not used as security for any borrowings and would ultimately provide substantial benefits to those owners. They had consulted the owners from time to time and had received their support over the years. The trustees had used their best endeavours to ensure that the owners’ interests were protected. While the

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Supra, fn30 at 15

recent meeting did not support the project by majority there was nonetheless significant minority endorsement for the proposal and by implication for the trustees.

Discussion

[211] Judge Carter's reference to s 222 of the Act and "broad acceptability" was confined to the specific circumstances of the *Poripori A* decision. A recalcitrant trustee had refused to execute documents supported by both his two fellow trustees, legal advice and the owners. The effect of his refusal was to halt progress of a major project central to the business of the trust. He was clearly in the minority at every relevant point of the process yet he refused to accede to the decision of the majority of the trustees and of the owners. But that is not the case here.

[212] Even the "vote" at the December 2009 owners' hui was not unanimous, and while it confirmed clear majority opposition to the project, the trustees retained a significant minority owner support. It was not as if there was no support at all for the trustees. Put another way, the unanimity of owner opposition to the trustee in *Poripori A* has not been repeated here. Moreover, in this case Mr Eru is in the minority among the trustees - the reverse of the situation in *Poripori A*.

[213] The evidence discloses that lay trustees are not always conversant with all of the duties of trusteeship. However, if the Court does not appoint lay trustees and instead insists on those with a professional background in governance, management and related disciplines, it will be criticised for not acceding to the wishes of the owners. Conversely, when lay trustees do not live up to widely accepted expectations, then it is the Court that is blamed by the owners for appointing them in the first place, allegedly without proper scrutiny and without regular monitoring. When trustees' actions are scrutinised and found wanting invariably trustees and their supporters feel aggrieved and consider the Court to be patronising and paternalistic, even where there has been serious even flagrant breach of trust occasioning loss to the owners and no tenable defence.

[214] When faced with an applicant who is very experienced but less than broadly acceptable, should the Court instead favour the clearly inexperienced trustee who has garnered, at that point in time, more support? The Court is sometimes placed in an invidious position. It must carefully balance the broad acceptability of nominees to the owners and their expertise and experience.



[215] The proper course for any reassessment of trustee mandate where there is insufficient evidence to justify removal for cause or near unanimous owner opposition as in *Poripori A*, is for the owners to seek a variation of the trust order to provide for more regular trustee elections.

[216] The decision of the Māori Appellate Court in *Pukeroa Oruawhata Trust v Mitchell*⁸¹ is the relevant authority in this context. That court held that rotation of trustees by way of regular elections is a concept consistent with the underlying principles of the Act, including the control of management of the lands by the owners:⁸²

“ In our view we are well past the time when the role of Māori land owners is merely to receive dividends and be occasionally consulted by otherwise unaccountable trustees. Owners must now be seen as having a right to participate directly and regularly in the choice of their representatives at trustee level, and by that means, to contribute to the strategic direction of the business. ”

[217] As to the claim that regular elections might politicise the process, in short, rendering the operation of a complex business susceptible to the whim of popularity contests, the Appellate Court stated:⁸³

“ We think the risk of overly politicising governance through elections is minimal for two reasons. First, trustees have obligations in law of fidelity to the trust asset. The fact that they may be elected does not modify that legal obligation and they are ultimately accountable to the court for the discharge of it. Second, there is just as great a risk that unelected trustees, can, over time, become out of touch with landowners, unaccountable to them or even arrogant in the discharge of their duties as trustees. Rotation discourages this. ”

[218] On the risks of the election of unskilled and inexperienced trustees the Appellate Court affirmed that it is the Court that makes the appointment. In addition, it is also evident that s 222 of the Act requires consideration of two important and sometimes competing considerations – mandate and ability. One means of ensuring the maintenance of expertise is to include minimal levels of qualification and experience.⁸⁴

⁸¹ (2006) 11 Waiāriki Appellate MB 66 (11 AP 66)

⁸² Ibid, 34

⁸³ Ibid, 37

⁸⁴ Ibid, 38

“ Potential instability through the election of unskilled or inexperienced trustees can be a real risk. But it is to be remembered that even if elections are held, ultimately appointments are made by Court order. While the Court will always be guided by the collective voice of the beneficial owners, it is not bound by their view. There may be rare cases where the Court considers it imprudent to accede to the expressed wishes of beneficial owners in their choice of trustees. In any event such risks can be adequately guarded against by imposing basic qualification requirements on those seeking office. By this means, the owners can exercise effective control in selecting their representatives without putting the land or the business of the trust at risk. The larger or more complex the business of the trust, the more onerous the qualification standard should be. ”

[219] There remain two schools of thought over the necessity for the use of the rotation mechanism – those who consider it essential and those taking the contrary view, that rotation causes instability and risk to the assets of the owners. For completeness, I note that the Pukeroa Oruawhata Trust has now been operating under a rotation regime for almost three years and that without exception the existing trustees have been returned to office on each occasion where an election has been held. Rotation has not, for that trust at least, introduced the uncertainty and instability originally feared. The real point is that, ultimately, the issue is one for the owners to assess what is appropriate to their particular circumstances, taking into account a range of relevant matters.

Conclusion

[220] That the conduct of the trustees and their advisers has been less than satisfactory, and indeed contrary to the trust order from time to time has been acknowledged. While relief from liability is appropriate for what might be described as minor or less serious breaches of the trust order and trustees’ duties generally, it is clear that some of the trustees’ actions have been subject to justified criticisms in several instances. The failure to file accounts according to the terms of the trust order, the omission in securing independent advice before signing the agreement and the deficiencies in keeping the owners more regularly informed, given the nature and scale of the project, are illustrative examples.

[221] Even so, in my assessment, they fall some distance from the threshold required for the drastic step of intervention by the Court and removal. The trust has not suffered significant financial loss and its assets have not been put at risk. While a 52 year lease is certainly at the higher end of the scale, compare that with forestry leases and licenses in excess of 70 years, leases that are common place in this district. While these are not exact



comparisons in the absence of independent evidence claims of risk to trust assets remain speculation. Ironically, the trust's most significant expenditure in recent months has been the costs of this litigation. More importantly, the project may not then proceed since there are a number of important hurdles that will need to be addressed.

[222] That certain remedial steps will be necessary, whatever the outcome of the TPA, is readily apparent. The late Mrs Emery's position has created a vacancy and the owners may wish to elect a replacement. Given the submissions and evidence on the role of the trustees, some owners may wish to progress the review of trust and include proposals to vary the trust order. Ms Aikman submitted as much during the hearings. One possibility is that the owners might wish to consider what has been labelled "rotation" of trustees, or a mechanism included in the trust order whereby elections are held on a regular basis. Terms of four-five years are not uncommon for trusts with significant assets.⁸⁵

[223] As foreshadowed, another more fundamental matter for consideration by the beneficiaries is whether or not the ahu whenua model remains relevant as a management structure for this particular group of owners. Put another way, it is suggested that the whenua tōpu trust might prove a more suitable form of trust.⁸⁶ The trustees and beneficiaries may also wish to consider the quorum requirements for this trust since 10 per cent of the owners seems both impractical and outdated. This is borne out by the fact that there is no evidence before the Court confirming that any general meeting of owners apart from that held in December 2009 has ever achieved a quorum.

[224] That said, any variations to the trust order should properly be a matter for the trustees and owners to consider and discuss at their next general meeting. As the Court of Appeal has stated strict adherence to s 244 of the Act must be observed on any proposed variation.⁸⁷

[225] In conclusion, the realisation of the agreement and the construction of a geothermal power station are outcomes that remain to be fulfilled. In recent years with the examples of Tuaropaki, Kawerau and Tauhara in mind, the ability of geothermal resources to yield

⁸⁵ See for example *Short v Mitchell – Pukeroa Oruawhata Trust* (2006) supra fn61 and *Simpson - Rotoehu Forest Trust* (2008) 119 Whakatāne MB 131 where a term of five years for trustees on a rotating basis was included in the trust order.

⁸⁶ See for example *Matuku– Ngāti Maru Wharanui Pukehou Trust* (2009) 245 Aotea MB 15 (245 Aot 15)

⁸⁷ *The Trustees of Pukeroa Oruawhata v Mitchell* [2008] NZCA 518



substantial financial benefits to owners and their communities has been made perfectly clear. In short, the harnessing of geothermal power by Māori land owners may yet provide the stepping stones for vastly increased economic activity and benefits of seismic proportions.

[226] While even now some sensible outcomes that benefit the owners of this land may yet be found, as foreshadowed the reality is that this project is far from concluded. As the trustees will acknowledge there is no guarantee that the proposal will proceed to fruition in its current or in any form. The resource consent process alone is complex and uncertain, notwithstanding new fast track procedures. Given the opposition to date, it is evident that the trustees and their partners have several steps to climb. No doubt they will already anticipate some of the challenges that lie ahead, the obstacles that they may need to overcome and will make appropriate provision for the responses that will be needed.

[227] For those owners and their supporters opposed to the project, according to the evidence there are several critical points in the process where their actions may assist, constrain, deter or possibly even derail the construction of the power station altogether. Obviously the Court does not encourage litigation and should comment no further. I simply observe that the owners whom either support or oppose the agreement still have remedies available to them should they remain dissatisfied with the outcome of this case.

Decision

[228] The trustees had the authority, per clause 3 of the trust order, to enter into the project agreement dated 5 November 2008. While they should have kept the owners better informed than they did the trustees did not need the consent of the owners to execute the agreement.

[229] The trustees believed that they had obtained independent advice before entering into the agreement. By virtue of his involvement in the process leading up to the concluding of the agreement, and due to his financial interest in the project, Mr Bruce Carswell was not an independent adviser to the trust. The trustees therefore did not therefore obtain independent technical advice before signing the agreement. If they wish to continue with the project they must secure appropriate independent advice within 60 days.

[230] The trustees did not adhere strictly to the trust order and general trust law principles from time to time, but those breaches are insufficient to warrant their removal per s 240 the



Act. For the breaches that have been identified they are granted relief per s 73 of the Trustee Act 1956. The application for the removal of the trustees is dismissed.

[231] The number of trustees is reduced by one on account of the passing of Mrs Emery, per s 239 of the Act.

Injunction

[232] The interim injunction was issued on 1 September 2009 to preserve the applicants' position, pending determination of the substantive application for removal of trustees. As that application has been unsuccessful there is no reason why the injunction should remain in place. Indeed, given the dismissal of the removal application and the findings on the trustees' authority to enter into the TPA the retention of the injunction would be inappropriate. The interim injunction granted on 31 August 2009 is cancelled, per r 83, Māori Land Court Rules 1994.

Directions

[233] The following directions are now issued:

- (a) Mr Heke will confirm in writing to the Registrar that he is able to fulfil his duties as a trustee and that any conditions for which he is currently receiving treatment will not impair his ability to remain as an active trustee and participate in the business of the trust. If he is able, I require him to attend Court and answer questions on the continuing administration management of the trust, per s 238 of the Act within 30 days. The Registrar in concert with Mr Heke will arrange a judicial conference as soon as possible for this purpose.
- (b) If he cannot attend Court and confirm in writing that he is able to fulfil his duties then he must immediately resign and an election to replace him will be conducted at a general meeting of owners.
- (c) The trustees will procure within 60 days an independent expert report on the agreement, consider its contents and with the agreement of the parties to that document make any amendments to the agreement that may be necessary following



the receipt of appropriate legal advice. A summary of that advice will be made available to the owners at a properly convened general meeting.

- (d) The Registrar will convene a meeting of owners within 60 days. That hui will consider the independent report obtained by the trustees. The meeting will also decide whether or not variations to the trust order are appropriate. Counsel for the applicants and second respondent may wish to liaise with the Registrar over what variations are sought to assist with preparation of the agenda for the meeting.
- (e) The meeting may consider suitable nominees for election as a trustee to replace the late Mrs Emery. An election will take place at the next general meeting and voting will be conducted by way of secret ballot. Nominees must be submitted to the Registrar at least three clear working days prior to the meeting. With the approval of the owners at the meeting nominees may be accepted at the hui. The Registrar will notify the meeting at least three weeks from the date of the hui in a local and national newspaper on two occasions seven days apart and on iwi radio.
- (f) The general meeting will be open to owners and their duly appointed attorneys and only owners will be permitted to vote. With the consent of the owners present, descendants of owners may speak at the meeting but cannot vote.

[234] Leave is reserved for any party to apply for further directions at any time. These orders are for immediate release, per r 66, Māori Land Court Rules 1994.

Costs

[235] Counsel may wish to submit memoranda in respect of costs, noting that all parties have now been in receipt of assistance from the Special Aid Fund in part payment of their costs. Counsel for the first respondents have 14 days to file any memorandum and counsel for the applicants will have a further 14 days to respond.

Pronounced in open Court at

4.25 am/pm in ROTORUA
on FRIDAY this 10TH day of SEPTEMBER 2010

L R Harvey
JUDGE