IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20180009039

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal against an order of the Māori Land Court made on 18 September 2018 at 197 Waiariki MB 141-164 in respect of Ngāti Tarāwhai Iwi Trust
BETWEEN	EVA MOKE Appellant
AND	TRUSTEES OF NGĀTI TARĀWHAI IWI TRUST Respondents

Hearing:	13 May 2019 (Heard at Rotorua)
Court:	Deputy Chief Judge C L Fox Judge M J Doogan Judge M P Armstrong
Appearances:	J Pou for the Appellant N Tahana for the Respondents
Judgment:	25 June 2019

JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] This appeal raises a short but important point. Does the Māori Land Court have jurisdiction over a common law trust established to receive Treaty settlement assets?

[2] Eva Moke appeals a decision of His Honour Judge Coxhead which found the Court did not have jurisdiction over such a trust.[1]

[3] Ms Moke's appeal was filed out of time. The application for leave to file out of time was opposed. By minute dated 1 May 2019, we granted leave for the appeal to be lodged out of time and we include in this decision our reasons for doing so.[2]

Background

[4] In November 2017, Eva Moke sought an urgent judicial conference to determine what application could be lodged under Te Ture Whenua Māori Act 1993 (the Act) concerning the Ngati Tarāwhai Iwi Trust. Ms Moke was seeking a review of that trust due to concerns over governance and expenditure.

[5] On 13 November 2017, directions were issued to Ms Moke in the following terms:

> It is unclear what (if any) jurisdiction the Court has with regard to the Ngāti Tarāwhai Iwi Trust. The applicant will need to show what (if any) jurisdiction this Court has to hear the matter – before matters are to be progressed any further.

[6] Ms Moke filed legal advice which said that the Māori Land Court did have jurisdiction.

[7] Following a judicial conference on 6 September 2018, the matter was set down for a special hearing to hear argument on jurisdiction.[3]

[8] That special hearing took place on 18 September 2018 and Judge Coxhead issued an oral decision that day finding he did not have jurisdiction.[4]

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[1] 197 Waiariki MB 141-217 (197 WAR 141-217) at 158-217.
[2] [2019] Maori Appellate Court MB 210-212 (2019 APPEAL 210-212).
[3] 196 Waiariki MB 208-217 (196 WAR 208-217).
[4] Above n 1.

The decision under appeal

[9] It was common ground that for the Māori Land Court to have jurisdiction, the trust would need to come within the definition of s 236(1)(c) of the Act. That provision gives the Court jurisdiction over "every other trust constituted in respect of any general land owned by Māori".

[10] Judge Coxhead identified the issue as being whether the trust can be considered "constituted", or as counsel submitted "lawfully established" in respect of general land owned by Māori. His Honour found that in this case the constitution of the trust was primarily for the holding and administration of settlement assets which included properties. The primary purpose of the trust, unlike most trusts which come before the Court, was to hold and administer settlement assets which included property, money or other types of assets. Therefore: [5]

> I do not think it matters whether receiving properties is the primary purpose or secondary purpose of the trust, the point being that I think it stretches the wording and the intention of s 236 to read it in a very wide way to apply to a trust that was constituted for settlement purposes and one of those purposes included receiving properties.

Leave to appeal out of time

[11] Section 58(3) of the Act requires an appeal to be commenced by notice of appeal filed within two months after the date of minute or order appealed from, "or within such further period as the Māori Appellate Court may allow".

[12] Rule 8.14 of the Māori Land Court Rules 2011 (the Rules), sets out the procedure by which an application for leave to appeal out of time is to be considered. An applicant is required to seek an extension of time for filing a notice of appeal, to set out the reasons for the delay and the grounds on which an extension is sought. The rule is similar to r 29A of the Court of Appeal (Civil) Rules 2005. That rule and the applicable principles have recently been considered by the Supreme Court.[6]

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[5] Above n 1 at [41].
[6] *Almond v Read* [2017] NZSC 80, [2017] NZLR 801.

[13] The Supreme Court's summary of the applicable principles has been applied by the Māori Appellate Court and we adopt the summary of the relevant principles set out in that decision as follows:[7]

> [7] Rule 8.14 is similar (although not identical) in its principles to r 29A of the Court of Appeal (Civil) Rules 2005 (the COA Rules). The principles on which that rule is to be applied have recently been summarised by the Supreme Court:[8]
>
> (a) There is a right to a first appeal. There is no explicit power to strike out timely appeals summarily on their merits. This is important background against which extension applications must be determined.[9]
>
> (b) Where there has been a minor slip up of an appeal right, that should not necessarily entitle the Court to look closely at the merits of the proposed appeal. In those circumstances, an extension of time should generally be granted.[10]
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> (c) The ultimate question is what the interests of justice require, requiring an assessment of the particular circumstances of the case. Factors to consider include the length of delay and the reasons for it, the conduct of the parties (particularly the applicant), any hardship to the respondent or others with a legitimate interest in the outcome and the significance of the issues raised by the proposed appeal.[11]
>
> (d) The merits of a proposed appeal may, in principle, be relevant to the exercise of the discretion to extend time, subject to the certain qualifications. One such qualification is that a decision to refuse an extension of time in this context should only be made if the appeal is "clearly hopeless", for example if it could not possibly succeed. Lack of merit must be "readily apparent, and the discretion should not be used as a mechanism to dismiss "apparently weak appeals summarily".[12]

[14] The order complained of was pronounced by way of oral decision on 18 September 2018. The written minute recording the dismissal of the application was not distributed to the parties until 4 October 2018. The notice of appeal was filed on 10 December 2018.

A minor slip up?

[15] Counsel for Ms Moke (Mr Pou), submits that while the decision was read out in Court on 18 September 2018 the actual written record of the decision was not provided to counsel until 15 November 2018. The appeal was then filed less than a month later. This is not a

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[7] *Ngakoti v Department of Conservation* [2019] Maori Appellate Court MB 213 (2019 APPEAL 213).
[8] Above n 6.
[9] Above n 6 at [36].
[10] Above n 6 at [37].
[11] Above n 6 at [38].
[12] Above n 6 at [39].

case of an inordinate amount of time passing between the decision and the appeal. Furthermore, awareness of the terms of the order is required to shape the appeal and the transcript was necessary so that some precision could be taken in the drafting of the appeal.

[16] Counsel for the trust, Ms Tahana, acknowledges that the length of delay in this case is relatively short, however she argues that Ms Moke was represented by experienced counsel who was well aware of the two-month time limit. Ms Tahana notes that counsel for Ms Moke has acknowledged she ought to have been more vigilant and checked the minute received on 4 October 2018. She also notes that the decision was read out at the hearing on 18 September and counsel could have recorded key findings at that time. Furthermore, having received the transcript on 15 November 2018, there was still time to file an appeal or at least alert the Court to late receipt of the minute/transcript.

[17] There are close parallels with the circumstances considered by this Court in the recent Ngakoti decision. In that case an applicant for leave to appeal out of time had also waited for the minutes of the hearing before lodging the appeal. The Māori Appellate Court found that the steps taken were reasonable and based upon discussions with the Chief Registrar. The Appellate Court accordingly found the delay in filing the appeal was one that could be categorised as a minor slip up. We come to the same view on the facts of this case. The substantive issue is what the interests of justice require and we now turn to that matter.

The interests of justice in this case

[18] Ms Tahana points to prejudice arising from the fact that serious allegations have been directed at trustees and the resultant uncertainty since these proceedings have commenced. The appeal has re-opened issues of uncertainty, angst and frustration for the trust. They have attempted to resolve matters with Ms Moke, but she is unwilling to engage. She also has the option to proceed in the High Court.

[19] As to the merits, Ms Tahana argues that Judge Coxhead's conclusion that the trust was not constituted in respect of any general land owned by Māori was available on the evidence and the merits of the appeal are insufficient to warrant granting leave to appeal out of time.

[20] Mr Pou does not accept the assertion that undue prejudice would arise if leave to appeal out of time is granted. He points out that if his client pursued an alternative avenue in the High Court the same issues complained of could crystalise, the only difference being that it would be in a different forum. Furthermore, in that forum prejudice would be exacerbated for all parties because of the unavailability of assistance from this Court's special aid fund (which has been assisting the trust in the proceedings thus far). Mr Pou says his client has been attempting to resolve the matters out of Court but the trust has rejected her efforts to do so. He also notes the potential prejudice of having sensitive and potentially private issues raised at a public AGM.

[21] Mr Pou argues that the overall interests of justice favour the granting of leave to appeal. His client has tried for eight months to have issues addressed privately through the trusts dispute resolution provisions, but these attempts have been rejected. While the appeal itself might fail, Mr Pou argues that if this is to occur it should be on the merits of the appeal rather than on a technicality relating to a three-week delay in filing.

[22] As to the merits of the case on appeal, Mr Pou notes that the trust does not characterise the appeal as one that comes within the category of those described as a hopeless case or an abuse of process likely to cause prejudice or embarrassment. Mr Pou also notes the finding made by His Honour Judge Coxhead noting that there are no cases in the Māori Land Court or the Māori Appellate Court on point. Judge Coxhead goes on to say:[13]

> [36] This is a unique situation which is clearly why this application is lodged given it is not absolutely clear as to whether this trust does or does not fall under the jurisdiction of the Māori Land Court.

Decision on leave

[23] We agree with Mr Pou that this is a situation where the interests of justice require the granting of leave.

[24] As we noted at the commencement of this decision, the appeal raises an important point concerning the jurisdiction of the Māori Land Court over common law trusts established for receipt of Treaty settlement assets.

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[13] Above n 1 at [36].

[25] From the outset it seems to us that Ms Moke has done the right thing in seeking to clarify the Court's jurisdiction. Her preference to proceed in this jurisdiction rather than the High Court due to the relative costs involved, is not unreasonable.

[26] We also note that the Court of Appeal has observed that the interests of justice may require that leave be granted "not necessarily simply because the merits appear strong, but where there is insufficient material before the Court to exclude the possibility that there is merit".[14]

[27] Having regard to all these matters, we are of the view that the interests of justice require that leave to appeal out of time be granted in this instance.

The appeal

[28] Ms Moke appeals on two grounds:

(a) The Court erred in applying an unnecessarily narrow and restrictive interpretation of s 236 of the Act to find that it had no jurisdiction with respect to the Ngāti Tarāwhai Iwi Trust by placing significant weight on the fact that the Ngāti Tarāwhai Iwi Trust was constituted for settlement purposes; and

(b) The Court erred in fact finding that the Ngāti Tarāwhai Iwi Trust was not constituted in respect of general land owned by Māori. This finding was not open to the Court on the evidence before it.

[29] In his submissions in support, Mr Pou notes that there was no debate in the lower Court that the trust was established to receive properties. He notes the finding of the lower Court because a majority of the trustees of the trust are Māori, prima facie the General land received by the trust can now be considered General land owned by Māori.

[30] Mr Pou argues that it should follow therefore that the trust was established to hold land that is General owned by Māori. He argues that it matters not that the land was Crown land when the trust was established as it would be irrational to presume that land would

[14] *Robertson v Gilbert* [2010] NZCA 429 at [24].

continue to be Crown land once transferred out of Crown ownership. Once out of Crown ownership the land was only ever going to be Māori land or General land.

[31] Notwithstanding findings that the trust was constituted to receive and administer land that Judge Coxhead found to be now General land owned by Māori, he nevertheless went on to find that the trust was not constituted in respect of it. Mr Pou submits that this finding is not one open to a rational decision maker given the explicit wording of s 236 which provides that ss 237 to 245 shall apply to every other trust constituted in respect of any General land owned by Māori.

[32] Mr Pou argues that what Judge Coxhead refers to as a very wide way to interpret s 236 (as including a trust established for settlement purposes), is in fact just the plain meaning of the text of the Act. Section 236 applies to every trust constituted in respect of any General land owned by Māori. It does not provide an exclusion or refer to the whakapapa of the General land. The only qualification is that it be owned by Māori. To read down the express wording of s 236 is to deny the ability of the Māori owners of General land from seeking practical remedies to disputes that can arise. It would also prevent the Māori Land Court from achieving its general objectives set out in s 17 of the Act. Mr Pou says that given the history of these lands, the assistance of the Māori Land Court should be even more readily provided and he refers to the preamble of the Act in support. He also notes the following observation made by Judge Harvey in the *Haira* case:[15]

> The preamble to the Act also refers to "land", making no distinction between Māori and other forms of land. This is especially relevant where a conversion from Māori land to General land occurred by operation of law and not with the consent of the owners – contrary to the guarantees of Te Tiriti o Waitangi.

Submissions on behalf of the trust

[33] Ms Tahana submits that Judge Coxhead's interpretation of s 236 is correct on its plain and ordinary meaning. The intention of s 236 is with regard to trusts constituted in respect of land, albeit Māori land or General land owned by Māori. The focus remains on land. She says that as Judge Coxhead articulated the issue it is whether the trust can be considered *"*constituted*"* in respect of General land owned by Māori.

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[15] *Haira v Haira* (2016) 149 Waiarki MB 259 (149 WAR 259) at [36].

[34] Ms Tahana says that s 236 must be interpreted in light of the statutory framework which includes the preamble, the interpretation and objectives set out in ss 2 and 17, all of which are clearly focussed on the retention, effective use, development and management of Māori land and General land owned by Māori.

[35] Taking these provisions into account, it is submitted that the land has to be the primary reason for a trust's establishment before s 236 can apply. In this case, the Ngāti Tarāwhai Iwi Trust was not established pursuant to the Act. Neither was the trust formed for Ngāti Tarāwhai to own land. The genesis for the creation of the trust was the settlement of Treaty grievances for the affiliate Te Arawa Iwi. Ms Tahana notes the following provision in the introduction section of the trust deed:

> D. This trust deed and **the trust created by this trust deed** hereafter referred to the Ngāti Tarawhai Iwi Trust were ratified as the affiliate iwi entity **to receive all benefits, monies or property due, payable or transferable to the Ngāti Tarawhai Iwi** at a meeting held at Waikohatu Marae on the 25th day of August 2007.

[36] Ms Tahana says that this provision along with clause three of the trust deed make it clear on a plain and ordinary meaning that the trust was established for settlement purposes, to receive, hold and administer settlement assets. The lands were not the primary focus in the trust's creation. The primary purpose of the trust was to hold and administer settlement assets which is unlike most trusts which come under the jurisdiction of the Māori Land Court. Judge Coxhead's interpretation of s 236 therefore reflects the overall policy of the Act.

[37] Ms Tahana argues that if the legislature had intended to give the Court jurisdiction in respect of settlement entities then it would have done so by way of an express provision in the Act as it has done with respect to disputes arising under the Māori Fisheries Act 2004. Therefore, other than in the fisheries context there is no statutory basis for the Māori Land Court to consider issues relating to settlement entities.

[38] Ms Tahana submits that the trust deed itself cannot extend the Court's jurisdiction. The Court's jurisdiction is statute-based and the trust deed does not and cannot support a significant extension to the Court's jurisdiction over trusts constituted for settlement purposes as contended for by Ms Moke. She argues that this could result in a perverse

outcome with all Te Arawa affiliate iwi and other settlement entities who receive redress properties coming within the jurisdiction of the Māori Land Court. This, it is argued was not the intention of Parliament when the settlement legislation was passed.

[39] Ms Tahana notes that trustee conduct remains a matter that is subject to the oversight of the High Court and it is open to Ms Moke to apply to the High Court for directions pursuant to s 66 of the Trustee Act 1956.

The Statutory Framework

[40] The jurisdiction of the Māori Land Court over trusts is statutory. Section 236 of the Act provides:

> **236 Application of sections 237 to 245**
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> (1) Subject to subsection (2), sections 237 to 245 shall apply to the following trusts:
> (a) every trust constituted under this Part:
> (b) every other trust constituted in respect of any Maori land:
> (c) every other trust constituted in respect of any General land owned by Maori.
>
> (2) Nothing in sections 237 to 245 applies to any trust created by section 250(4).

[41] Section 237 provides:

> **237 Jurisdiction of court generally**
>
> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Maori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.
>
> (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.

[42] Also, of relevance is s 2 which records the intention of Parliament that the provisions of the Act be interpreted in a manner that best furthers the principles set out in the preamble. The preamble (among other things) recognises land as taonga tuku iho of special significance to Māori people and goes on to say:

> …for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the

occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu.

[43] The preamble concludes with the following:

And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

[44] Sections 2(2) and 2(3) of the Act provide:

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

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

[45] The term "Māori land" used in s 2(2) is defined in s 4 as meaning "Māori customary land and Māori Freehold land". Those terms are themselves defined as meaning "land that has that has the status of Māori customary land under part 6 of the Act or land that has the status of Māori Freehold land under part 6 of the Act".

[46] Land is defined in s 4 as follows:

(a) means—

(i) Māori land, General land, and Crown land that is on the landward side of mean high water springs; and

(ii) Māori freehold land that is on the seaward side of mean high water springs; but

(b) does not include the common marine and coastal area

[47] Section 17(1) of the Act provides as follows:

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

> (b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

[48] Section 17(2) gives further guidance to the Court in the application of the principles set out in s 17(1) and does so by reference to "any land to which the proceedings relate".

[49] It is noteworthy that subsequent provisions which set out the Court's general jurisdiction (s 18), its jurisdiction in respect of injunctions (s 19), for recovery of land (s 20), jurisdiction to grant relief against forfeiture and relief against refusal to grant renewal and with respect to performance of leases, powers to authorise entry and to grant relief against encroachment (ss 23 and 24), largely confine the Court's jurisdiction to Māori Freehold land. There are exceptions with respect to matters such as determining descent or membership of the preferred class of alienees (18(1)(e) and (f)), status declarations concerning land and whether it is held in a fiduciary capacity (18(1)(g),(h) and (i)), and with respect to specific performance over leases of General land owned by Māori (s 22A).

[50] By comparison s 26 of the Act confers exclusive jurisdiction on the Court under the Fencing Act 1978 where the dispute or question relates to Māori freehold land or General land owned by Māori.

Discussion

[51] The relationship between the jurisdiction of the Māori Land Court and the High Court with respect to trusts was given detailed consideration by the Court of Appeal in *Grace v Grace.*[16] The Court of Appeal found that the High Court clearly had concurrent jurisdiction, enabling it to exercise its inherent jurisdiction in relation to trusts even those effecting Māori Freehold land. The Court of Appeal noted that the 1993 Act no longer contained an equivalent provision to s 30(1) of the Māori Affairs Act 1953. Section 30(1)(a) of that Act provided the Māori Land Court with general jurisdiction in the following terms:

> To hear and determine any claim, whether at law or in equity to the ownership or possession of Māori Freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation thereof.

[52] Subsection 2 of that provision went on to provide:

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[16] *Grace v Grace* [1995] 1 NZLR 1.

> Nothing in the foregoing provisions of this section shall be construed to limit the jurisdiction of any other Court, but no matter that has been heard and determined by the Māori Land Court or the Appellate Court shall thereafter be heard in any other Court.

[53] Section 30(3) of the 1953 Act conferred a power on a Māori Land Court Judge to remove into any other Court of competent jurisdiction a proceeding commenced in the Māori Land Court on the agreement of the parties. Section 18(2) of the 1993 Act provides the Court with the same power. The consent of the parties is not required.

[54] Justice Richardson in *Grace v Grace* reviewed the nature of the Māori Land Court's jurisdiction in some detail:[17]

> It is not immediately apparent why s 30(2) [of the 1953 Act] was dropped. However its omission cannot justify the conclusion that the existing jurisdiction of the High Court was to cease. That would be inconsistent with s 18(2). A possible explanation for the omission is that the 1993 Act is more explicit than its predecessor in stating where the jurisdiction of the Maori Land Court is exclusive and where either expressly or by implication it is non-exclusive.
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> Section 211 provides for that Court to have exclusive jurisdiction to constitute putea trusts, whanau trusts, ahu whenua trusts, whenua topu trusts, and kai tiaki trusts in accordance with the provisions of Part XII of the Act. Under s 287(1) the Court has "exclusive jurisdiction" to make partition orders, amalgamation orders, aggregation orders, and exchange orders in respect of Maori land, and to grant easements and lay out roadways over Maori land. And s 26(1) confers exclusive jurisdiction on the Court to determine Fencing Act 1978 disputes where every parcel of land to which the dispute relates is Maori freehold land or general land owned by Maori.
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> In short, in those cases where the legislature considered it appropriate to do so, it has stated that the Maori Land Court has exclusive jurisdiction. By contrast s 26(2) provides for the jurisdiction of the Maori Land Court to be "concurrent with that of any other court of competent jurisdiction" where lands affected are in part Maori freehold land (or general land owned by Maori) and in part non-Maori land. Importantly too the immediately preceding sections confer jurisdiction on the Maori Land Court which is neither expressed to be exclusive nor could reasonably be read as exclusive. That non-exclusive jurisdiction is in respect of injunctions relating to Maori freehold land (s 19), in actions for recovery of land (s 20), to grant relief against forfeiture (s 21), to grant relief against refusal of a lessor to grant renewal of a lease (s 22), to authorise entry for erecting or repairing buildings (s 23), to grant relief in cases of encroachment (s 24) and to make orders to restore the effect of lost instruments of alienation (s 25). And s 163 provides that the High Court shall continue to have jurisdiction to order the rectification of an instrument in accordance with the true intent of the parties where the instrument has already been confirmed or noted in the records of the Maori Land Court.

[17] Above n 15 at [15].

[55] We concur that the 1993 Act has a discernible statutory scheme, identifying where the jurisdiction of the Māori Land Court is to be exclusive and where either expressly or by implication it is to have a non-exclusive jurisdiction. This includes the Court's jurisdiction over trusts at Part 12 of the Act.

[56] Part 12 of the Act is titled "Trusts". Section 210 concerns interpretation, ss 211 to 221 are headed "Constitution of Trusts", and provide the Māori Land Court with exclusive jurisdiction to constitute Putea Trusts, Whānau Trusts, Ahu Whenua Trusts, Whenua Topu Trusts and Kaitiaki Trusts. Sections 222 to 235 are headed "Appointment and Powers of Trustees", and provide the Court with powers of appointment with respect to any trusts constituted under Part 12 of the Act. There are also provisions concerning the general power of trustees.

[57] The provision at issue in this appeal is s 236. Section 236 to s 245 come under the heading "Provisions relating to trusts generally". These provisions describe the extent of the Court's jurisdiction over every trust constituted under Part 12 of the Act and also expressly include "every other trust constituted in respect of any Māori land" and "every other trust constituted in respect of any General land owned by Māori".[18]

[58] Section 237 confers upon the Māori Land Court the same powers and authorities as the High Court with respect to those trusts coming within the Court's jurisdiction. The jurisdiction of the High Court is expressly preserved in s 237(2). Section 238 concerns jurisdiction to enforce the obligations of a trust. Section 239 concerns addition, reduction and replacement of trustees. Section 240 concerns power to remove a trustee. The remaining provisions ss 241 to 245 concern termination of trust, orders for payment of money held in trust, acquisition of land, variation of trust, and power to approve a charitable trust.

[59] What emerges from this overview of Part 12 is the absence of any clear limitation on the extent of the Court's jurisdiction with respect to a trust constituted in respect of any General land owned by Māori. Section 236 confers jurisdiction over "every other trust constituted in respect of any General land owned by Māori".

[18] Te Ture Whenua Māori Act 1993, s 236(1).

[60] In the absence of clear words excluding the Court's jurisdiction we asked Counsel for the trust what legislative or policy objective was promoted by a finding that we lacked jurisdiction over a trust established for receipt of Treaty settlement assets that might include General land owned by Māori.

[61] Ms Tahana said that while there was no particular mischief arising if the Māori Land Court held concurrent jurisdiction with the High Court over such a trust, there were significant practical difficulties. She argued that such a finding would potentially lead to a significant increase in applications to the Māori Land Court relating to such trusts (a flood gates argument).

[62] In essence, Ms Tahana was pointing to the fact that until this case there was a widely shared assumption that the Court lacked jurisdiction over such settlement trusts. She therefore argued that Judge Coxhead was right to conclude that it stretches the wording and the intention of s 236 to read it so widely as to include a trust constituted for settlement purposes.

What does the word 'constituted' mean in the context of s 236?

[63] Adopting, as we are required to do, a purposive approach to interpretation of the relevant provisions, we can find little support for such an implied restriction on jurisdiction. We must start with the ordinary meaning of the words used. In this instance "every other trust constituted in respect of any General land owned by Māori".

[64] On a plain and grammatical meaning, the Court would have jurisdiction over "every other trust", meaning all common law or statutory trusts other than those established under Part 12 of the 1993 Act. The only proviso being that those trusts were "constituted" in respect of any General land owned by Māori.

[65] The word "constitute" is defined in the Concise Oxford Dictionary as "be a part of a whole, or "established by law".

[66] In a Nineteenth century English case, the word "constituted" was described in the following way: [19]

> The term "constituted" (as applied to a company) is not equivalent to "incorporated";
>
> It is of wider import. It seems to be equivalent to "established".

Who is the class of people referred to by the term 'General Land owned by Māori'?

[67] The phrase "General land owned by Māori" is a defined term in the 1993 Act. It "means General land that is owned for a beneficial estate in fee simple by a Māori or a group of persons of whom a majority are Māori".[20]

[68] Māori is defined as follows: "Māori means a person of the Māori race of New Zealand; and includes a descendent of any such person."

[69] It was common ground that the Ngāti Tarāwhai Iwi Trust holds some General land blocks. There was evidence before the Court below of two blocks referred to as the Okataina lands. The first is a block of 3.1230 hectares known as section 1 survey OP384521 and the second is a block of 1.5260 hectares know as section 7 Block XV1 Rotoiti survey district. The title for both blocks records the proprietors as; Joseph Poroa Malcolm, Ngamanu Karauria Malcolm, Angela Ritohou Malcolm, Manu Hughes Pene and Matiu Matthew Rikihana.

[70] The Okataina lands were the subject of the Wai 675 claim filed by Te Poroa Malcolm. This was one of the claims settled as part of the affiliate Te Arawa iwi/hapu settlement. These sites were identified as cultural redress properties in the Agreement in Principle leading to the settlement between the Crown and Te Pumautanga o Te Arawa in 2009. In affidavit evidence before the Court below Ms Moke deposes that the reservation status of these properties under the Reserves Act 1977 has been revoked and the titles transferred on or about the 5th of September 2013 to the Trustees of the Ngāti Tarāwhai Iwi Trust.

[71] A question arises as to whether to look to the trustees or to the beneficial owners in order to determine whether the general land is owned by a Māori or a group of persons of

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[19] Re East and West India Dock Co (1888) 38ChD576 at 582, per Chitty J.
[20] Section 4.

whom a majority are Māori. Judge Coxhead found that as the majority of the trustees are Māori, the land would come within the definition of General land owned by Māori. That is true with respect to the legal estate, however, beneficial ownership in the land remains with the shareholder/beneficiaries. The beneficiaries of the Ngāti Tarāwhai Iwi Trust are defined as "every person of Ngāti Tarāwhai Iwi descent."

[72] On the facts of this case, whether one looks to the trustees or the beneficiaries it is clear that these parcels of general land are owned by a group of persons of whom a majority are Māori.

[73] The question remains however, as to what the correct approach is. We note that the term 'beneficial estate' and 'beneficial interest' are defined at s 4 of the Act to make it clear that those terms do 'not include an estate or interest vested in any person by way of trust, mortgage, or charge'.

[74] The relevant words from the definition of 'general land owned by Māori' are 'owned for a beneficial estate in fee simple'. Because the term 'beneficial estate' is defined as excluding an estate vested in any person by way of trust it is necessary to look beyond the trustees to the underlying beneficial ownership, in order to determine whether ownership resides with a Māori or group of persons that majority of whom are Māori. While not a live issue in this case, the underlying question is an important one as it is conceivable that there may be circumstances where a majority of trustees who are not Māori nonetheless hold the fee simple title on behalf of beneficial owners the majority of whom are Māori.

[75] We also note here that the phrase is "any" general land owned by Māori, which would also imply on an ordinary meaning that just one parcel of General land would be sufficient to trigger jurisdiction.

What is the clear and obvious purpose of the legislation?

[76] The purposive approach also requires consideration of the possibility that the grammatical meaning does not give effect to the purpose of the legislation: [21]

> […] grammatical meaning must yield to sufficiently obvious purpose.

[21] *McKenzie v Attorney General* [1992] 2 NZLR 14 at 17, per Cooke P.

[77] We can discern nothing from Part 12 of the overall statutory scheme which would lead us to conclude that there is a clear legislative purpose to limit the Court's jurisdiction when it comes to trusts that may have been established for receipt of Treaty settlement assets.

[78] If the Court's jurisdiction is limited in the way argued for by the trust, we would have expected a much clearer legislative indication to that effect. In the absence of any such express, or implied restriction we find that, on the facts established in the Court below, the Court does have jurisdiction to hear Ms Moke's application.

[79] For completeness, we note that this jurisdiction is concurrent with that of the High Court. Pursuant to s 18(2) of the Act the Court retains a discretion to transfer a proceeding commended in the Māori Land Court to the High Court. If there are genuine issues as to the appropriate forum for a particular application this discretion provides a means to consider them, on a case by case basis.

Decision

[80] The appeal is allowed. Pursuant to s 56(1)(b) of Te Ture Whenua Māori Act 1993, there is an order revoking the order made at 197 Waiariki MB 163, para 44 and reinstating the application.

[81] On ordinary principles, Ms Moke would be entitled to costs. If the parties cannot agree, Counsel for Ms Moke may submit a memorandum within fourteen days. Counsel for the trust may respond within fourteen days.

Pronounced at 4:00pm in Wellington on Tuesday this 25th day of June 2019.

Deputy Chief Judge C L Fox	M J Doogan	M P Armstrong
JUDGE	**JUDGE**	**JUDGE**