

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CIV-2017-463-000098
[2018] NZHC 2623**

BETWEEN TRACY HILLIER, MURIWAI JONES,
DAVE PETERS, ARAPETA MIO and
TE AURURANGI DAVIS
Applicants

AND VINCENT WHITEWOOD,
RAELYN RIKA, GARRY WATSON and
STELLA TAKU
Respondents

Hearing: [On the Papers]

Counsel: C G Beaumont for the Applicants
C M Bidois for the Respondents
R E Schmidt-McCleave for Te Ohu Kai Moana Trustee Ltd

Judgment: 9 October 2018

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 9 October 2018 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Te Haa Legal Ltd, Otaki
East Brewster Ltd, Rotorua
R E Schmidt-McCleave, Wellington

[1] Ngaitai is a coastal iwi whose ancestral home extends from the seaside settlement of Torere in the Eastern Bay of Plenty inland to the heart of the Raukumara ranges.¹ All parties to this proceeding are members of Ngaitai.

[2] This proceeding arose out of the purported removal of trustees of the Ngaitai Iwi Authority, and the appointment of replacement trustees, in December 2015. Toogood J made orders by consent for a question to be determined before trial,² and for a case stated to be filed.³ The case stated question to be determined is:

Does the Trust Deed for the Ngaitai Iwi Authority provide for beneficiaries to remove and appoint trustees outside the three-yearly election process provided for in Part 12 of the Trust Deed?

[3] The parties agreed to have this question determined on the papers.

Events leading to the dispute

[4] The Ngaitai Iwi Authority is a charitable trust established to pursue redress for breaches of the Treaty of Waitangi. It is also the mandated iwi organisation under the Maori Fisheries Act 2004, responsible for administering Ngaitai's fisheries settlement assets.

[5] The relevant facts agreed between the parties are as follows:

- 2.1 On 10 June 2015, the respondents were appointed as trustees of Ngaitai Iwi Authority ("the Trust"). Those appointments have not been challenged.
- 2.2 On 19 December 2015, a minority of the Trust's beneficiaries met at Torere and passed resolutions that purported to remove the respondents as trustees and to appoint replacement trustees.
- 2.4. The respondents deny that the resolutions passed at the said meeting were valid in terms of the Trust Deed for the Ngaitai Iwi Authority dated 27 August 2006.

¹ Ngaitai has been recorded as Ngai Tai in various court documents. I have adopted the spelling set out in the Ngaitai Iwi Authority Trust Deed.

² High Court Rules 2016, r 10.15.

³ High Court Rules 2016, r 10.20.

- 2.5 On or about February 2016, the ANZ Bank and the Westpac Bank suspended access to the Trust's bank accounts following receipt of conflicting instructions from the respondents on the one hand, and from the Trust's Chief Executive Officer under direction of the replacement trustees on the other.
- 2.6 The ANZ Bank and the Westpac Bank have agreed that they will lift the suspension on the Trust's bank accounts only upon the dispute between the parties being resolved, either by agreement or by Court order.
- 2.7 On 4 September 2016, the Trust's beneficiaries met at Torere and affirmed the resolutions passed on 19 December 2015 that purported to remove the respondents as trustees and to appoint replacement trustees.

Relevant provisions of the Trust Deed

[6] The Trust Deed is dated 27 August 2006. It is a comprehensive, 35-page document which sets out the aims, objects and powers of the Ngaitai Iwi Authority. It also provides for the constitution and election of "Board Members" who are the trustees under the Trust Deed. I will refer to the Board Members as trustees in this judgment, unless the context otherwise requires.

[7] The trustees hold the trust assets subject to the powers and discretions contained or implied in the Trust Deed. Although there is no specific reference to "beneficiaries" in the Trust Deed, it is clear from its aims and objects that the Trust is to be administered for the benefit of registered members of Ngaitai.

[8] Parts 10 and 12 of the Trust Deed are particularly relevant to the case stated question. Those clauses provide for the constitution of, and election to, the Board. In particular, cls 10.2 and 10.3 provide:

10.2 Members of the Board

- a) The signatories to this Deed are to be the first Board Members under the terms of this Deed and subsequently the Board Members shall be elected in accordance with clauses 10 and 12.
- b) The Board shall be maintained at 7 members, provided that the continuing members of the Board may act notwithstanding any vacancy in their number.

- c) The composition of the Board must comprise Ngaitai Uri who shall be elected at the Annual General Meeting in accordance with the terms and conditions as set out in clause 12.
- d) The term of office for elected Board Members shall be a maximum of 3 years from the date of their election subject to clause 10.5

...

10.3 Rotation of Board Members

- a) The Board Members must hold the first election of Board Members under this Deed no later than 12 months from the date this Deed is ratified by the Iwi
- b) At the first election of Board Members under clause 10.3a) of this Deed, 4 Board Members, who have been longest serving in office since their last election, shall retire and their positions shall be open for election.
- c) At the following Annual General Meeting, an election shall be held and the remaining 3 longest serving Board Members since the last election shall retire and their positions shall be open for election.
- d) At each Annual General Meeting thereafter where an election of Board Members is required, 3 or 4 Board Members, whichever applies to comply with the maximum 3 year term set under clause 10.2d), shall retire from office and new Board Members shall be elected.
- e) For the avoidance of doubt, every 3rd General Meeting shall not require an election.
- f) Retiring Board Members shall be eligible for re-election.

[9] These provisions operate so as to provide for a rotation of trustees. The Trust Deed provides for seven trustees, each of whom holds his or her office for a maximum of three years. The effect of the rotational cycle in cl 10.3 is that those trustees who have held their positions for a period of three years (which will be either three or four of them) will vacate their positions, and will be replaced by new trustees at an Annual General Meeting (AGM). The other trustees, who will have held the position for two years, will remain. The following year, the trustees who remained will vacate their positions, having held those positions for three years. As recognised in cl 10.3(e), this rotational cycle means that no election is required at every third AGM.

[10] Clause 10.4 provides for the nomination of persons for election as trustee. Notice of the election must be given two months prior to the AGM in any year that an election of trustees is required. The remaining sub-clauses govern the form in which nominations must be made and the date upon which a successful member is deemed to be elected.

[11] Clause 10.5 governs the disqualification of trustees, and cl 10.6 governs the procedure to be adopted in that eventuality. Those clauses provide:

10.5 Disqualification of Board Members

The office of Board Member shall become vacant if he or she:

- a) resigns office by giving written notice to the Runanga; or
- b) shall have been in office for more than three years once his or her election; or
- c) becomes of unsound mind, becomes a person in respect of whose affairs an order under the Protection of Personal and Property Rights Act 1988 is made, or otherwise becomes unfit or unable to act as a Board Member; or
- d) dies; or
- e) is or becomes a bankrupt who has not obtained a final order of discharge, or whose order of discharge has been suspended for a term not yet expired, or is subject to a condition not yet fulfilled; or
- f) fails or neglects to attend three consecutive meetings of the Board without leave or absence, unless it appears to the other Board Members at their first meeting after the last of such absences that there is a proper reason for such non-attendance; or
- g) is or has ever been convicted of an offence involving dishonesty as defined in section 2(1) of the Crimes Act 1961, or an offence under section 373(4) of the Companies Act 1993; or
- h) is found by a majority of the Board, where appropriate with advice from Te Kaunihera Pakeke o Ngaitai, to be acting in manner amounting to a breach of trust or ceases to be sympathetic to the purposes, aims and objects of the Runanga and Iwi.

10.6 Procedure

- a)** The office of Board Member shall not be terminated under clause 10.5 until the Board Member charged is first notified in writing of the breaches or allegations complained of and is given the opportunity to respond to such breaches or allegations before the Board and Te Kaunihera Pakeke o Ngaitai.
- b)** The Board Member charged may elect to have the matter heard before the Iwi at a hui duly constituted for that purpose.

[12] Clause 10.5(h) refers to advice given by Te Kaunihera Pakeke o Ngaitai, the council of elders. Te Kaunihera Pakeke o Ngaitai is defined in the Trust Deed to mean “those pakeke appointed in accordance with nga tikanga o Ngaitai to advise the Board Members on matters pertaining to nga tikanga o Ngaitai”. Clause 9.1 of the Trust Deed provides that on matters pertaining to nga Tikanga o Ngaitai, the Trustees shall give due consideration to the advice of Te Kaunihera Pakeke o Ngaitai.

[13] Part 12 of the Trust Deed governs elections of trustees. Clause 12.1 provides for the election of Board Members at the AGM in any year that is required. That clause provides as follows:

12. ELECTIONS

12.1 Election Day

- a)** Elections of Board Members shall take place at the Annual General Meeting of the Board in any year that an election of Board Members is required (“Election Day”). Candidates for nomination to the Board must be present in person on Election Day.
- b)** Only Adult Iwi Members are eligible to vote in the election of Board Members at any Annual General Meeting and any Special General Meeting of the Runanga.

...

[14] “Election Day” is also defined in the interpretation section of the Trust Deed to mean “the day an election of Board Members shall take place at an Annual General Meeting where an election is required in accordance with clause 10.3”.

[15] Clause 14.2 of the Trust Deed provides that the AGM shall be held no later than the last day of October in each year or such other month as the trustees may from

time to time determine. That clause also lists the business to be transacted at an AGM which includes confirming the appointment of trustees (cl 14.2(g)).

[16] Finally, part 15 of the Trust Deed sets out provisions relating to a General Meeting or Special General Meeting (SGM). Under cl 15.1, an SGM “may be called at any time by notice in writing to the Secretary of the Runanga”, and any such meeting shall be called and held within 28 days of receipt by the Secretary of a requisition signed by two trustees or 50 registered iwi members. The requisition must be accompanied by a copy of the resolution to be proposed, and no other business is to be transacted at the meeting other than that set out in the notice of meeting. Clause 15.2 sets out the voting thresholds which must be met for a resolution to be passed. Nothing in that clause refers to the removal of trustees.

The parties’ submissions

[17] The applicants submit that the Trust Deed provides for the removal of trustees through cl 10 and in particular, cl 10.5(h) of the Trust Deed. The applicants say the purpose of the Ngaitai Iwi Authority is to act in the best interests of its beneficiaries. So, if a trustee acts in breach of trust or ceases to be sympathetic to that purpose, then activation of cl 10.5(h) could be influenced by the views of beneficiaries.

[18] The applicants also place reliance on the SGM provisions in the Deed. They submit that Board Members and beneficiaries can pass resolutions at an SGM to remove and replace trustees as long as the SGM is held in accordance with parts 15, 16 and 18 of the Trust Deed. The applicants accept that the hui on 19 October 2015 was not a SGM, but they say that the resolutions passed at that hui were subsequently re-affirmed at the SGM on 4 September 2016, and that this was a valid means by which trustees could be removed.

[19] Finally, the applicants submit that the Court may remove trustees under s 51 of the Trustee Act 1956, and the Court should do so in this case if the beneficiaries are found not to have a power to remove under the Trust Deed.

[20] In response, the respondents say the Trust Deed contains no power of removal exercisable by the beneficiaries. They also say that the beneficiaries' power of appointment is exercisable only by way of election in accordance with cl 12. The only provision in the Trust Deed resembling a power of removal is cl 10.5, but that clause simply declares the circumstances in which a trustee's position will be vacated, and does not create a power of removal exercisable by beneficiaries.

[21] In response to the applicants' submissions regarding cl 10.5(h), the respondents say that this clause only enables the trustees, *on advice* from Te Kaunihera Pakeke o Ngaitai, to remove a trustee. It is not Te Kaunihera Pakeke o Ngaitai, nor the beneficiaries, who are entitled to exercise this power.

The approach to interpretation of the Trust Deed

[22] The answer to the case stated question turns on the interpretation of the Trust Deed.

[23] As Kós J observed in *New Zealand Māori Council v Foulkes*, similar principles should apply to the construction of trust deeds as to the construction of contracts.⁴ In particular, as is the case for contracts, the search for "intention" is only a search for intention as revealed in the words the parties used, amplified by the facts known to both parties.⁵

[24] The relevant contract interpretation principles in New Zealand were set out by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.⁶

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

⁴ *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [71]; citing *Gosper v Sawyer* (1985) 160 CLR 548 at 568–569; and *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 at 286–290.

⁵ *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 at 286.

⁶ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

Does the Trust Deed for the Ngaitai Iwi Authority provide for beneficiaries to remove and appoint trustees outside the three-yearly election process provided for in Part 12 of the Trust Deed?

[25] The answer to the case stated question may be found in the plain and ordinary meaning of the clauses in the Trust Deed itself. When those clauses are construed in the context of the Trust Deed as a whole, it is clear that the Trust Deed does not provide a power of removal for beneficiaries outside the three-yearly election process prescribed in the Trust Deed. My reasons for reaching that conclusion are as follows.

[26] First, the Trust Deed is a comprehensive document containing carefully constructed clauses which govern the election and removal of trustees. If it had been intended to provide for the removal of trustees by beneficiaries then it is reasonable to expect that there would be a clause providing for that power expressly. There is no such clause.

[27] Second, to interpret or otherwise imply a power for beneficiaries to remove trustees would be inconsistent with the express clauses of the Trust Deed. In particular, cl 10.5 lists the particular circumstances in which the office of a trustee shall become vacant. Those circumstances do not include a decision by the beneficiaries to remove the trustee.

[28] Furthermore, the plain meaning of cl 10.5(h) is that the decision about whether there has been a breach of trust, or other conduct which is unsympathetic to the purposes, aims and objects of the runanga and iwi, rests with a majority of the trustees. The trustees may take advice from Te Kaunihera Pakeke o Ngaitai but are not obliged to follow that advice. The vesting of the powers of removal under cl 10.5(h) in the trustees is inconsistent with an implied power exercisable by beneficiaries to remove trustees.

[29] In addition, removal by the beneficiaries would be inconsistent with the procedure for terminating the office of a trustee provided for in cl 10.6. That clause is designed to protect basic rights of natural justice, and it cannot be circumvented by the beneficiaries taking it upon themselves to terminate the office of a trustee.

[30] Third, to imply such a power of removal would also be inconsistent with the process for the election of trustees set out in the following clauses in the Trust Deed:

- (a) Clause 10.2(c) provides that the composition of trustees must comprise Ngaitai Uri, “who shall be elected at the Annual General Meeting in accordance with the terms and conditions as set out in clause 12”.
- (b) Clause 10.3 also provides for the election of trustees at an AGM.
- (c) Clause 12.1 provides that elections of trustees “shall take place at the Annual General Meeting of the Board” in any year that an election is required. This is defined as “Election Day”. This mandatory provision is reflected in the definition of “Election Day” in the interpretation section of the Trust Deed.

[31] The effect of these clauses is to mandate the election of trustees at an AGM, and set out a process by which the trustees are to be replaced on a rotating basis. They ensure a democratic election and a process of renewal in those who govern the Trust. The appointment of replacement trustees outside of an AGM by a majority of beneficiaries is not only inconsistent with these express provisions, but undermines the purpose which underpins them. Such a result cannot have been intended by the settlors of the Trust.

[32] Fourth, whilst the powers to call an SGM are not limited in any way, they also do not contain an express power enabling the beneficiaries to remove a trustee by resolution passed at an SGM. I accept that cl 12.1(b) is not well drafted, and the meaning is not entirely clear. But that clause has to be interpreted in the context of the Trust Deed as a whole, and in particular the clauses which mandate elections to take place at an AGM. Construed in light of those clauses, I consider cl 12.1(b) governs the *eligibility* to vote at an AGM and/or an SGM, rather than a right to remove or appoint trustees at an SGM. But even if that interpretation is wrong, the clause cannot be interpreted as giving rise to a right exercisable by the beneficiaries to remove the trustees.

[33] Fifth, the powers to remove trustees under the Trust Deed must also be considered in light of the powers of the Court under s 51 of the Trustee Act 1956 to remove and replace trustees. The power to remove a trustee is exercised by the Court with a view to the interests of the beneficiaries.⁷ Section 51 of the Trustee Act provides a route by which beneficiaries might seek to remove trustees in the absence of an express power to do so in the Trust Deed. In light of that available pathway for relief, it is not necessary to adopt a strained interpretation of the Trust Deed to provide a separate power vested in the beneficiaries.

[34] In summary, I consider the Trust Deed is clear in its terms. It provides a system for the election of trustees which must be at an AGM. It also sets out the circumstances in which the office of a trustee might become vacant, and the procedure to be followed in the event a trustee faces allegations of breach of trust. There is no express power for beneficiaries to remove trustees, and the implication of such a power would be contrary to the express provisions of the Trust Deed. Accordingly, the answer to the case stated question must be no.

Next steps

[35] The parties agreed by joint memorandum dated 8 May 2017 that this determination would finally dispose of the proceeding, and an order in those terms was sought by consent.

[36] However, the applicants appear to resile from that position in their written submissions, suggesting that if it is found that the Trust Deed does not give beneficiaries the power to remove trustees, then the Court can remove the trustees in question provided their conduct is sufficient to warrant removal.

[37] Removal of trustees under s 51 of the Trustee Act 1956 plainly falls outside the scope of the case stated question which is limited to the beneficiaries' power to remove under the Trust Deed. Furthermore, a claim to remove the trustees under s 51 falls outside the scope of the proceeding in its entirety. This proceeding was commenced

⁷ See *Attorney-General v Ngati Karewa and Ngati Tahinga Trust* (2001) 1 NZTR 11-012 (HC) at [65]; citing *Miller v Cameron* (1936) 54 CLR 572 at 580.

by way of originating application. The only orders sought in that originating application are orders lifting the freeze on the Ngaitai Iwi Authority's bank account. There is no application for relief under s 51 of the Trustee Act 1956 or in relation to the removal of trustees generally.

[38] The applicants filed their proceeding on the basis that they had been validly appointed as trustees in substitution for the respondents. But it flows from my determination of the case stated question that this is not correct. Accordingly, on its face the applicants do not have standing to bring this proceeding.

[39] In the circumstances, I am inclined to hold the applicants to their original agreement that a negative answer to the case stated question would finally dispose of the proceedings, and an order to that effect should be made under r 10.19.

[40] However, as this matter has been determined on the papers, it is appropriate to afford the parties a right to be heard on the consequences for the proceedings once they have had a chance to consider this judgment. A telephone conference will be convened for that purpose.

Result

[41] The answer to the case stated question is no. The Trust Deed for the Ngaitai Iwi Authority does not provide for beneficiaries to remove and appoint trustees outside the three-yearly election process provided for in cl 12 of the Trust Deed.

[42] I direct a telephone conference to be convened at the next available date after 23 October 2018 to address the disposition of the proceedings and the question of costs.

Edwards J