

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O AOTEA**

*In the Māori Land Court of New Zealand
Aotea District*

A20220007128

WĀHANGA
Under

Section 238, Te Ture Whenua Māori Act 1993

MŌ TE TAKE
In the matter of

Horowhenua 11 (Lake)

I WAENGA I A
Between

CHARLES RUDD
Te kaitono
Applicant

ME
And

CLINTON HEMANA, PAMELA ANAHERA
WINIATA, DEAN JAMES WILSON, DEANNA
MERE HANITA PAKI AS TRUSTEES OF THE
HOROWHENUA 11 PART RESERVATION
Ngā kaiurupare
Respondents

Nohoanga: 20 July 2022, 451 Aotea MB 82-112
Hearing (Heard at Levin)

Whakataunga: 23 August 2022
Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ A H C WARREN
Judgment of Judge A H C Warren

He aha te kai a te rangatira? He korero, he korero, he korero¹

Hei tīmatanga kōrero

Introduction

[1] By a decision dated 11 May 2020, Judge Harvey (as he then was) made orders concerning lengthy proceedings relating to the Horowhenua 11 Part Reservation Trust (“the Trust”).

[2] In a subsequent related decision dated 10 September 2021, Judge Harvey made the following direction with respect to the Trust:

Mr Hemana is directed to conduct an election for the remaining trust vacancies in accordance with the procedure set out in the trust order so as to ensure the appointment of additional trustees on or before 28 February 2022.

[3] Mr Hemana, as the interim Court appointed responsible trustee and chairperson of the Trust, duly complied with Judge Harvey’s direction and held an election for additional trustees. The Trust claims this meeting was held in accordance with the trust order. Mr Hemana subsequently filed an application (“the appointment application”) to appoint the newly elected trustees per s 239 of Te Ture Whenua Māori Land Act 1993 (“the Act”).

[4] As part of the election process, a hui was held on 26 February 2022 that enabled trustee candidates to address beneficiaries, it was also the last day for votes to be cast for the election of additional trustees (“the election hui”). Judge Harvey had also instructed that a special general meeting was to be held to approve the 2021 financial reports. The meeting on 26 February 2022 also included this special general meeting (“the SGM”). The Trust claims that the SGM was for the specific purpose of approving the 2021 financial reports, and not as part of the election process as such.

[5] Mr Rudd, a trustee candidate and beneficiary of the Trust, now challenges the outcome of the election process and SGM on a number of specific bases, via an application per s 238 of the Act to enforce the obligations of trust (“the enforcement application”). This decision determines the enforcement application.

¹ Reflecting the theme of the need to seek direction in times of doubt.

Take Hukihuki*Preliminary Matters*

[6] The enforcement application gave rise to two preliminary matters. Firstly, an application was made by the Trust seeking security for costs per s 79 of the Act. For various reasons, I directed that this application would be heard and determined immediately before the enforcement application was to be heard.²

[7] Mr Hockly for the Trust sought leave to withdraw the security for costs application at the hearing. There were no issues as to costs, given that Mr Rudd was not legally represented. I therefore dismissed the application.

[8] Secondly, Mr Hockly also sought leave to withdraw as counsel, at the hearing. Leave was granted for reasons that do not need to be repeated here, given that they are captured in a separate Minute recording the oral decision I gave at the hearing.³

[9] The sudden withdrawal of counsel raised an issue of whether the trustees were in a position to proceed with defending the enforcement application. I explored this issue with all parties at the hearing and I was advised by Mr Hemana that the trustees had met the night before the hearing and had resolved to proceed without legal counsel. I was assured by Mr Hemana that all trustees were supportive of the decision to proceed without counsel. This full support was an important consideration, as I needed to ensure that all trustees had considered the implications of not having counsel at the hearing of the enforcement application. Mr Rudd took no issue with the Trust proceeding.

[10] Based on the assurances by Mr Hemana, I decided to proceed with the enforcement application, but I indicated that if I thought that the parties were in need of legal advice, at any point during proceedings, I may adjourn the applications to allow legal advice to be sought.⁴ Mr Rudd was also not legally represented at the hearing.

² 451 Aotea MB 73-81 (451 AOT 73).

³ 451 Aotea MB 73-81 (451 AOT 73).

⁴ 451 Aotea MB 73-81 (451 AOT 73).

Whakataunga*Summary of Outcome*

[11] Having heard from the parties and for the reasons set out below, I find that there is an insufficient basis to set aside the results of the election. On that basis the appointment application may proceed to be determined.

[12] I have not yet determined whether the SGM should be set aside, given that it is not clear on the evidence before me, if the quorum was met or not.

[13] Overall, I find that there are insufficient grounds to remove some or all of the current trustees and to direct a further full election of trustees.

Horopaki*Context*

[14] The enforcement application must be considered in context of the lengthy and complex proceedings relating to the Trust that preceded the enforcement application. This context involves several comprehensive decisions by Judge Harvey. These decisions led to:

- (a) the appointment of Clinton Hemana as an interim independent responsible trustee and chairperson of the Trust;⁵
- (b) the appointment of lawyer Cameron Hockly to advise the Trust on specific matters including the election process;⁶
- (c) the need for an election of trustees to be held before 28 February 2022;⁷ and
- (d) the need to hold a special general meeting to consider and resolve the 2021 Trust financials.⁸

[15] The trustees of the Trust as at the date of the election hui and SGM were:

⁵ *Rudd v The former trustees - Horowhenua 11 Part Reservation Trust and Horowhenua 11 (Lake)* (2018) 392 Aotea MB 179 (392 AOT 179) at [26].

⁶ 433 Aotea MB 300 (433 AOT 300).

⁷ *Taueki v Sword - Horowhenua 11 Lake Block* (2021) 437 Aotea MB 86 (437 AOT 86) at [92].

⁸ *Taueki v Taueki - Horowhenua No 11B Subdivision No 14 and Other Blocks* (2021) 437 Aotea MB 134 (437 AOT 134) at [41].

Responsible Trustees

Clinton Hemana
 Dean James Wilson
 Deanna Mere Hanita Paki
 Pamela Anahera Winiata

Advisory Trustees

Ned Nahona
 Jonathon Proctor
 Kelly Tahiwī
 Kerehi Wi Warena
 Keri Hori Te Pa
 Wayne Hurunui
 Marakopa Wiremu Matakatea

[16] With respect to the election of additional trustees, Judge Harvey made the following direction in a decision dated 11 May 2020:⁹

[264] **The Registrar, in concert with Mr Hemana, is directed to hold an election to fill any remaining vacancies,** once any application for relief is finally determined. Any such election is to be held within three months of that decision. To avoid doubt, Mr Hemana is to remain as independent trustee until further order of the Court or until all aspects of the extant proceedings are concluded.

[17] The election was to await the outcome of an application for relief, which was finally determined by decision dated 10 September 2021. The relevant direction relating to the election stated:¹⁰

[92] **Mr Hemana is directed to conduct an election** for the remaining trust vacancies in accordance with the procedure set out in the trust order so as to ensure the appointment of additional trustees on or before 28 February 2022.

[93] The applications are now concluded and dismissed. The registrar will file a fresh application for the completion of the audit of the trust's accounts.

[18] With that context in mind, I now turn to the specific facts relating to the election process and the SGM.

The Trust Order Requirements for the Election and SGM

[19] The relevant clauses of the trust order of the Trust are:¹¹

⁹ 415 Aotea MB 1-100 (415 AOT 1-100) at [264] (emphasis added).

¹⁰ 437 Aotea MB 86-115 (437 AOT 86) at [92]-[93] (emphasis added).

¹¹ 293 Aotea MB 165-174 (293 AOT 165-174).

3. INTERPRETATION

3.1 In this trust order:

“Trustees” means the Initial Trustees and the trustees elected from time to time in accordance with the First Schedule of this trust order to represent the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe and to act as the trustees for the time being of the Trust and Trustee shall mean any one of those persons.

10.3 Notice of special meetings

In addition to the annual general meeting of the Trust, the Trust shall convene a special general meeting of the Trust on the requisition of:

- (a) the Chairperson and Deputy Chairperson for the time being of the Trust; or
- (b) Any three (3) trustees; or
- (c) Twenty (20) owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe

Subject to the specific notice requirements described in the Third Schedule, notice of such a meeting shall be given in the same manner as for a notice of the annual general meeting and those requisitioning the meeting shall be required to provide a statement to the Trust setting out the purposes for which the meeting has been requisitioned and the specific agenda items proposed for such a meeting. The Trust shall not be required to give notice calling the meeting until such a statement with agenda items has been received.

10.8 Quorum

The quorum required for any annual or special general meeting of the Trust shall be 30 beneficiaries in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe present in person including among those owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe no less than six (6) trustees.

10.11 Adjourned meetings

If within one hour of the time appointed for an annual or special general meeting a quorum is not present, the meeting will stand adjourned to be reconvened twenty-one days after the date of the meeting. On that later day, the meeting will be held again at the same time and in the same place as the adjourned meeting. If a quorum is not present within one hour from the time appointed for the adjourned meeting, the owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe present will constitute a quorum.

FIRST SCHEDULE: ELECTION OF TRUSTEES

1.1 This Schedule to apply

The Trustees shall be elected to office in accordance with the rules and procedures set out in this Schedule.

5.1 Mode of voting at elections

Subject to rule 6.3 of this Schedule, voting at all elections shall be by way of secret ballot, inclusive of secret postal ballot.

5.3 Eligibility to vote

Each owner in Horowhenua 11 (the Lake) block whom is also of the Muaupoko Tribe is eligible to vote in an election, provided that each such owner in Horowhenua 11 (the Lake) block whom is also of the Muaupoko Tribe will only be eligible to cast one vote in an election

6.2 Method of giving notice

Notice shall be given by:

- (a) Posting notice (or sent by electronic means, if requested) to each owner in Horowhenua 11 (the Lake block whom are also of the Muaupoko Tribe;
- (b) Inserting a prominent advertisement on at least two (2) separate days in appropriate major metropolitan newspapers and any provincial newspapers circulating in regions where the Trust considers that a significant number of the owners in Horowhenua 11 (the Lake block whom as also of the Muaupoko tribe reside

6.3 General Content of notices

Every notice given in accordance with rule 6.3(a) and (b) of this schedule shall contain;

- (a) a list of the candidates for election as Trustees; and
- (b) the method by which votes may be cast as set out in rule 5.1 of this Schedule

7.1 Other details to accompany vote

Each voting form must contain information that is sufficient to identify the elector and the voting documents issued to that elector

7.2 Timing of postal votes

Votes must be made no later than the closing date for the election of the trustees to which the postal vote relates. Votes otherwise validly cast are valid and able to be counted if they are received by the Chief Returning Officer no later than three days after the closing date for the submission of postal votes, but only if the envelope containing the voting form is date stamped on or before the closing date for the election.

7.3 Appointment of Chief Returning Officer

For the purposes of elections the Trust shall appoint as required a Chief Returning Officer who shall not be a Trustee, or an employee of the Trust, and whom shall be a person of standing in the community. The Chief Returning Officer shall be responsible for co-ordinating Trustee elections and may appoint such other persons as he or she considers necessary to assist with that task provided that such persons shall also not be trustees of employees of the Trust.

Advertising the Election and SGM

[20] A call for nomination of additional trustees to be elected to the Trust, as directed by Judge Harvey, was advertised in the New Zealand Herald on 18 November 2021 (“the nomination pānui”). The nomination pānui stated:

He Pānui

Horowhenua 11 Part Reservation Trust

Call for Nomination of trustees

The Horowhenua 11 Part Reservation Trust calls for nominations for trustees for a 3 year term beginning in 2022, the election will be tentatively held in February 2022. There are 7 trustee positions vacant from a maximum 11.

- A) Nomination forms are available at the Muaūpoko Tribal Authority office; can be downloaded from the Trust website or Facebook page or sent by email on request
- B) All updates will be by our Trust Facebook page
- C) All nomination forms must be signed by at least two beneficial owners of Horowhenua 11 Part reservation Trust who are also members of Muaūpoko iwi.

Completed nomination forms need to be with the Trust by the 5pm, 19th of December, 2022. Can be sent by post, email or to the Muaūpoko Tribal Authority Office.

Office: c/- 306 Oxford St, Levin
Postal Address: C/- Postal Box, PO Box 225, Levin
Website: horowhenualaketrust.org
Facebook.com/LakeHorowhenuaTrust
Email: horowhenualaketrust@gmail.com

Any queries please contact the:

C Hemana
Chairperson
horowhenualaketrust@gmail.com

[21] A notice of the election hui and the SGM was advertised in the Dominion Post and the New Zealand Herald on 29 January 2022. The same notice was also put on the Trust’s Facebook page and website (“the election and SGM notice”). The election and SGM notice provided the following information, including confirmation that Mr Hockly had been appointed the Returning Officer.

He Pānui

**Horowhenua 11 Part Reservation Trust
Notice of election for trustees and SGM
Saturday the 26th of February 2022**

Special General Meeting of owners to elect 7 trustees for a 3-year term beginning in February 2022; and receive confirmed annual accounts to 2021 financial year.

Venue 1: Kohuturoa Marae, Hoko Beach Road, Levin

11am registration – VACCINE PASS REQUIRED

Venue 2: MTA Office 306 Oxford Street, Levin

11am registration – NO VACCINE PASS REQUIRED 25 attendee limit

Venue 3: Virtual hui- Zoom, will begin at 10:30am

<https://us02web.zoom.us/j/858991379587>

pwd: 51VueFRPV1JNZW5rRmRJbER2SExsZz00

There are four incumbent Trustees whose terms last until May 2022:

The Trust received the following 9 nominations for 7 current vacant positions:

1. Deanna Rudd
2. Adrian Henare
3. Marokopa Wiremu-Matakatea
4. Brenton Tukapua
5. Kelly Tahiwī
6. Keri Hori Te Pa
7. Hayden Dempsey
8. Charles Rudd
9. Selena (Nahona) Hunt

- Voting forms can be downloaded from the Trust's website or Facebook page or collected from the office
- Owners may vote by email, post, delivery to the office or in person at the hui
- Mr Cameron Hockly will be the Independent Returning Officer for this election
- The voting period closes 5pm 26 February 2022
- Email votes are to be cast by scanning and emailing the form directly to the Independent Returning Officer for this election
- Postal votes are to be sent to C/- MTA PO Box 225, Levin or 306 Oxford St, Levin
- Owners that attend the hui at Venues 1 or 2 will receive voting forms upon registration
- Owners must register with valid ID – representatives of Whanau trusts must have ID and the Whanau Trust will only receive one voting form
- Incorrect/invalid votes, late votes, and votes on duplicate voting forms will not be counted
- Due to COVID protocol the hui will also be livestreamed and have zoom connections.

For further information, voting forms or any updates contact the trust at:

Office: c/- 306 Oxford St, Levin

Postal Address: C/- Postal Box, PO Box 225, Levin

Website: horowhenualaketrust.org

Facebook.com/LakeHorowhenuaTrust

Email: horowhenualaketrust@gmail.com

Holding the Election and SGM

[22] As per the election and SGM notice, voting for the trustee candidates could be done online, by mail or in person at the Trusts office, all in advance of the election hui and SGM date. Votes could also be cast in person at the election hui and SGM, which was the last date for voting for the election of trustees.

[23] The voting form gave beneficiaries two options to mark who they wanted to vote for, as follows:

Part 3 – Your Vote

You may vote for as many as 7 of the following nominees

Place a tick or X in the box alongside the name of those you wish to vote for:

Hayden Dempsey	
Adrian Henare	
Keri Hori Te Pa	
Selena (Nahona) Hunt	
Deanna Rudd	
Kelly Tahiwī	
Brenton Tukapua	
Marokoa Wiremu-Matakatea	

[24] The election hui and the SGM was held at Kohutūroa Marae. The Scrutineer's Report (the report prepared by Mr Hockly as the Returning Officer) records that there were 23 attendees present at Kohutūroa Marae, and another 10 attending remotely from the Muaūpoko Tribal Authority offices.

[25] Mr Hemana, Ms Paki, Ms Winiata (responsible trustees) and Mr Hockly were present at Kohutūroa Marae during the election hui and the SGM.

[26] Mr Rudd and Mr Wilson (responsible trustee) were present at the Muaūpoko Tribal Authority Office.

[27] After the hearing, I directed that the Pae Tukutuku to conduct an internal review of the attendance list of those who attended the election hui and SGM, to check issues raised by Mr Rudd that some people on the list were not beneficiaries of the Trust. The findings of the Pae Tukutuku were circulated to Mr Rudd and the Trust for comment. Their replies were subsequently exchanged for any final comments.¹² As a result, the following points are relevant:

- (a) It is uncertain exactly how many members who attended the election hui and SGM were owners, and therefore able to make up the quorum numbers required for the SGM to be properly constituted. It is possible that some of the owners signed into the meeting under different names than those recorded in MLIS (the Māori Land Information System).
- (b) There are at least two proposed trustees (Selena Hunt and Kelly Tahiwī) who are not owners in the block. A third proposed trustee, Brenton Tukapua, does not appear to be an owner, but could have a similar alias to an owner.¹³
- (c) Finally, it is clear that six incumbent responsible trustees were not present as required by clause 10.8 of the trust order, given that there are only four responsible trustees currently appointed by the Court and seven advisory trustees.

[28] The draft minutes of the election hui and SGM filed with the Court record that the proceedings opened at 11:15am on 26 February 2022 and that Mr Hemana noted that the required quorum had not been reached. The hui was adjourned until 11:40am and a quorum was announced and the election hui and the SGM proceeded.

12 The trustees and Mr Hockly in his capacity as Returning Officer did not comment on the review of the attendance list.

13 This poses an issue for the Trust moving forward, should the trustees be appointed, in being able to meet quorum requirements in accordance with their trust order.

The Election and SGM Results

[29] Between the in-person voting, post, email and hand delivery, 70 votes were cast for the election of trustees. Ten votes were declared invalid by Mr Hockly, in his capacity as Returning Officer. In the Scrutineer's Report, he addresses this issue:¹⁴

29. Early voting requires voters to take greater responsibility to ensure they provide the correct details and identify themselves as an owner or trustee of a Whānau Trust that has interests in the Trust
30. While the registration of voters for those attending and voting in person adds some certification of the voter's details, it is not standard procedure for the voter to detail what their ownership number is. That makes the tallying of votes somewhat more cumbersome, but also leaves risk that a non-owner is registering to vote or that an owner has not identified themselves in a way that aligns with their registered details as shown on the Māori Land Court records.
31. Unfortunately, that was the case for ten invalid votes. Despite checking the names of owners in the list, the names of whānau trusts (and their trustees), the form did not correctly identify a registered owner and rendered the vote invalid.

[30] The results of the election, based on Mr Hockly's report were:

Successful candidates

Selena (Nahona) Hunt	56
Hayden Dempsey	55
Keri (Hori) Te Pa	48
Kelly Tahiwī	45
Marokopa Wiremu-Matakatea	44
Brenton Tukapua	41
Adrian Henare	37

Unsuccessful Candidates

Deanna Rudd	22
Charles Rudd	13

[31] These results did not include the ten invalid votes. However, Mr Hockly noted in the Scrutineer's Report that, even if these votes were valid, it would not have changed the ultimate outcome.¹⁵ Mr Rudd took no issue with this position at the hearing.

¹⁴ Hockly, Cameron *Scrutineer's Report to the Lake Horowhenua Trust 2022 SGM and Election result* (11 March 2022).

¹⁵ Above n 14 at [27].

[32] It was decided at the election hui and SGM that the results would be publicly announced, and the Court notified within 5 working days of the hui.¹⁶

[33] On 4 March 2022, a notice of the election result was posted in the Dominion Post and the New Zealand Herald as follows:

**He Pānui – Notice of election result
Horowhenua 11 Part Reservation Trust**

The election of trustees took place at the SGM held Saturday 26th of February 2022

The results of the election are:

Selena (Nahona) Hunt	56
Hayden Dempsey	55
Keri (Hori) Te Pa	48
Kelly Tahiwī,	45
Marokopa Wiremu-Matakatea	44
Brenton Tukapua	41
<u>Adrian Henare</u>	<u>37</u>
Deanna Rudd	22
Charles Rudd	13

There were 10 invalid votes

An application will be made to the Māori Land Court for the appointment of those 7 nominees with the highest number of votes.

They will join the four current trustees Clinton Hemana, Deanna Paki, Dean Wilson & Anahera Winiata.

Results released by the Independent Returning Officer – Cameron Hockly.

lakehorowhenuatrust.org
Facebook.com/LakeHorowhenuaTrust
Horowhenualaketrust@gmail.com

[34] In July 2022, the appointment application was filed with the Court to add Haden Dempsey, Adrian Henare, Keri Te Pa, Selena Hunt, Kelly Tahiwī, Brenton Tukapua and Marokopa Wiremu-Matakatea as responsible trustees of the Trust.

[35] With respect to the resolution to approve the 2021 financials the draft minutes of the election hui and SGM reflect that a resolution was passed as follows:

¹⁶ Horowhenua 11 Part reservation Trust *Minutes of Special General Meeting of owners elect 7 new trustees for a 3-year term beginning in February 2022; and receive confirmed annual account to 2021 financial year (26 February 2022)* at 2.

Motion: That the owners receive the 2021 annual accounts as presented noting that the audit of the Trust accounts ordered by the Māori land court

Moved: Sandra Williams

Seconded: Deana Paki

Passed: Majority – 6 objecting

Matters of contest

[36] Mr Rudd raises the following specific complaints about the election and SGM processes:

- (a) The election hui and the SGM was not quorate;
- (b) Mr Hockly was not permitted to be appointed as the Independent Returning Officer;
- (c) The voting form was flawed because it allowed for a tick or a cross which would have confused voters; and
- (d) Overall that the Trust did not seek appropriate directions of the Court with respect to the above issues and because of this and flaws in the election and SGM processes, he now wants all trustees removed and a fresh election held.

(“the Rudd complaints”)

[37] Mr Rudd records his reasons for the enforcement application as follows:

“...The grounds rely on the Trust Order, varied in 2017, and on the Judgement of the Court (and underlying record) on 5 May 2020 and 10 September 2021. The annual or special general meeting held on 26 February 2022 was inquorate and did not otherwise comply with the trust order’s provisions relating to meeting attendance. The Chief Returning Officer of the election at that meeting was the lawyer for the trust and therefore non-compliant with Trust order provisions concerning the Chief Returning Officer.”

[38] In the enforcement application, Mr Rudd specifically refers to clauses 10.8 and 10.11 of the trust order regarding quorum, clause 7.3 of Schedule 1 of the trust order

regarding the Returning Officer and the trust's alleged failure to seek instructions from the Court.

[39] Mr Rudd has filed copies of the attendance lists for the election hui and SGM as attachments to his affirmed affidavit and states that a number of the persons recorded on the lists are not recorded as owners in Horowhenua 11 (the Lake) block. He contends that the meeting was therefore inquorate. He further states that only three of the four responsible trustees of the reservation trust were present. He concedes that while there were not the required six responsible trustees needed for quorum to be met appointed to the trust at the time of the election, the remaining trustees ought to have sought a direction from the Court regarding this issue.

[40] Mr Rudd deposes that he regards the appointment of Cameron Hockly as the Returning Officer to be in breach of the trust order as Mr Hockly is counsel acting for the trust and due to this, Mr Rudd regards him as an employee of the trust. Mr Rudd also states that he objected to the choice of venues, due to size and alleged non-neutrality, and to the appointment of Mr Hockly as Returning Officer and that these objections were rejected by the trust.

[41] Mr Rudd seeks that the Court direct the trustees to hold a new annual general meeting or special general meeting for the purposes of electing responsible trustees at a neutral venue with sufficient capacity and in accordance with the trust order.

[42] The Trust filed a Notice of Intention to Appear upon the enforcement application, which was served on Mr Rudd.

[43] Because Mr Rudd does not have access to the internet each time a pre or post hearing issue arose, I directed the Pae Tukutuku to make phone contact with Mr Rudd to explain a direction I had issued and/or that the Trust had filed something that he needed to be aware of. At the same time, all directions and filed material was posted to Mr Rudd. As a result of this process, Mr Rudd filed a number of written responses:

- (a) Submissions of Charles Rudd dated 2 August 2022;

- (b) Submissions of Charles Rudd dated 11 August 2022; and
- (c) Submissions of Charles Rudd dated 12 August 2022.

Te Ture

The Law

[44] Section 238 of Te Ture Whenua Māori Act sets out the powers of this Court to enforce obligations of trust:

238 Enforcement of obligations of trust

- (1) The court may at any time require any trustee of a trust to file in the court a written report, and to appear before the court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.
- (2) The court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

[45] In *Maruera v Te Rūnanga o Ngāti Maru (Taranaki) Trust* the Court of Appeal confirmed that the Māori Land Court has extensive supervisory powers.¹⁷ In *Clarke v Karaitiana* the Court of Appeal commented on the extent of the Court's jurisdiction under s 238 of the Act:¹⁸

“Apart from the inherent jurisdiction enjoyed by the High Court and conferred on the Māori Land Court by s 237, the Māori Land Court has wide supervisory and enforcement powers under s 238. These include the power to require any trustee to provide a written report to the Court and to appear before the Court in any matter relating to the administration of the trust or the performance of his or her duties as a trustee. In addition, the Court may, at any time, in respect of any trustee, enforce the obligations of the trust whether by injunction or otherwise. As well, the Court has the power, at any time, to add, reduce, replace or remove trustees under ss 239 and 240.”

[46] The relevant part of section 240 of the Act states:

¹⁷ *Maruera v Te Rūnanga o Ngāti Maru (Taranaki) Trust* (2018) 385 Aotea MB 7 (385 AOT 7) at [14]-[vv] citing *Puketapu v Puketapu — Arohanui ki te Tangara Cultural Centre Trust* (2009) 240 Aotea MB 213 (240 AOT 213), *The Proprietors of Mangakino Township v Maori Land Court* [1999] CA65/99 at [24] and [27], and *Dellabarca v Northern Storeman and Packers Union* [1989] 2 NZLR 734 (HC) at 765.

¹⁸ *Clarke v Karaitiana* [2011] NZCA 154 at [36].

Removal of trustee

- (1) The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied that—
- (a) the trustee has lost the capacity to perform the functions of a trustee; or
 - (b) the removal is desirable for the proper execution of the trust, and 1 or more of the following grounds for removal are met:
 - (i) the trustee repeatedly refuses or fails to act as trustee:
 - (ii) the trustee becomes an undischarged bankrupt:
 - (iii) the trustee is a corporate trustee that is subject to an insolvency event:
 - (iv) the trustee is no longer suitable to hold office as trustee because of the trustee's conduct or circumstances.

...

Ngā take*The Issues*

[47] The overarching issue is whether the Rudd complaints justify the setting aside of the election and SGM outcomes and/or any other relief, including removal of trustees.

[48] More specifically the issues are:

- (a) Was the election of additional trustees part of the SGM dictating that there was a quorum requirement for the election hui and SGM? If there was a quorum requirement, was it met, and if not, what does this mean for the election and SGM outcomes?
- (b) Was the appointment of Mr Hockly as the Returning Officer for the election in breach of the trust order or if not in breach, was it otherwise inappropriate, enough to justify the setting aside of the election outcomes?
- (c) Did the election voting form, which stated that voters should use either a cross or a tick to select their preferred candidates, cause confusion for voters? If so, does this justify the setting aside of the election outcomes?
- (d) Was there an obligation on the trustees to seek directions about the above matters and if there was, have the trustees breached that obligation?

- (e) If any or all of the above Rudd complaints are upheld, does it justify the removal of some or all trustees and/or fresh elections?

Te Wewete

Analysis

Was the election part of the SGM?

[49] Mr Rudd argues that the election hui and thus the election of trustees was formally part of the SGM. This means that requirements for a special general meeting, including quorum requirements, under the trust order must be met in order for it to be valid. Mr Rudd argues that the quorum was not met at the election hui and SGM, meaning that the election results cannot stand.

[50] The trust order does not require that an election of trustees or an election hui as conducted here, is to be held via a properly convened special general meeting. Rather, Schedule 1 of the trust order states “the trustees shall be elected to office in accordance with the rules and procedures set out in this Schedule”. There is no requirement in Schedule 1 for a special general meeting for any part of the election process.

[51] Mr Hemana argued that the SGM was for the specific purpose of approving the 2021 Trust financials as directed by Judge Harvey and not for the election of trustees. I understand the rationale for holding the SGM and the election hui part of the election process on the same date, that in itself is not an issue. I also accept that Judge Harvey only directed the 2021 financials to be dealt with at a special general meeting and not the election of additional trustees.

[52] However, when trustees choose to merge processes for pragmatic or other reasons, in this case the SGM and the election hui, then they must ensure that there is clarity and a distinction between the two processes, including when they are notified and conducted. Unfortunately, this did not occur and there is, at first blush, legitimate confusion as to whether the election process was in fact formally part of the SGM or not.

[53] There are a number of irrefutable examples that demonstrate this confusion. The election and SGM pānui clearly stated that the SGM was to be held for the purposes of

electing trustees.¹⁹ Further, Mr Hockly’s report as the Returning Officer was structured in a manner that would suggest the election hui was part of the SGM²⁰ and finally the draft minutes of the election hui and SGM hui were also structured and written in a manner so as to suggest that the election was part of the SGM.²¹ I accept that the latter two examples were produced after the fact.

[54] Mr Hemana accepted in evidence that there was a lack of clarity when these examples were put to him.²²

The Court: It is quite clear: “Special General Meeting of owners to elect seven new trustees.”

C Hemana: Yes Sir.

The Court: That is the pānui that went to the owners.

C Hemana: Yes Sir. So, I guess I can say that that is definitely an error and obviously conflicts those two together, but I don’t think that that circumvents the trust order as it stands in terms of the first schedule and the rules around election versus hui.

[55] Given this, does this state of confusion make the election process and the subsequent results invalid?

[56] I accept the evidence of Mr Hemana that there was no intention for the specific election hui to be held as part of the SGM. That said, because of the confusing state of the notices and related material, has the Trust created a situation where the election hui is part of the SGM?

[57] The starting point is that Judge Harvey was explicit that the election must be held in accordance with the provisions of the trust order and the election provisions in the trust order do not require a special general meeting to be held for any part of the process.

¹⁹ “Notice of Election of Trustees and SGM ... Special general meeting of owners to elect 7 new trustees” *The Dominion Post* (New Zealand, 29 January 2022).

²⁰ Hockly, Cameron “Scrutineer’s Report to the Lake Horowhenua Trust 2022 SGM and Election Result” 11 March 2022.

²¹ Horowhenua 11 Part reservation Trust *Minutes of Special General Meeting of owners elect 7 new trustees for a 3-year term beginning in February 2022; and receive confirmed annual account to 2021 financial year* (26 February 2022).

²² 451 Aotea MB 82-112 (451 AOT 82-112) at 92.

[58] Although very untidy, the election hui on 26 February 2022 was only a part of the election process, not the full election. The SGM date was selected as the final voting date for the election, not the only date for voting. It is important that the voting process opened well before the election hui and SGM was actually held. If in fact the election hui and SGM date was the only day that beneficiaries could vote, then I may have come to a different view, given the confused state of the election/SGM material referenced above.

[59] Further, I give weight to the fact that the election hui and SGM notice provided sufficient information as to the purpose of the hui, when and where it was to be held and how people could vote as well as information about the overall election process. It is also relevant that there were no decisions to be made at the election hui (as distinct from the financial matters to be addressed at the SGM) that in fact required a resolution where a quorum would be relevant. In fact, because the election hui was focussed on trustee candidates presenting to the beneficiaries, there was no requirement for beneficiaries to attend the election hui at all. Further, there was no need for beneficiaries to attend the election hui to enable them to vote, given that voting had been open for some time and there was an online option to vote.²³

[60] There was no evidence before me that other beneficiaries took issue with the lack of a distinction between election hui and the SGM or that it affected how they voted. Whilst the lack of protest cannot be the sole measure of whether the Court can rely of the election results, it is difficult to understand how beneficiaries casting their votes could have been affected by the fact that the election process was advertised as being part of the SGM.

[61] For those reasons, I find that the election hui was not required to be part of the SGM and therefore the quorum requirements in the trust order do not apply to the election hui or the overall election process. I also find that despite the way in which the election hui and SGM were advertised, that the trustees were not compelled to run the election hui per the special general meeting requirements in the trust order.

²³ According to the Scrutineer's Report (at [21]), there were 70 completed voting forms received in total. Forty-seven votes were cast in person on the day of the election hui, six votes were posted, one vote was placed early in the MTA ballot box, and sixteen votes were cast online

Was the SGM quorate?

[62] I now turn to the issue of whether the SGM was quorate. There is no dispute that a quorum per the trust order was required for the SGM. The quorum requirements are:

10.8 Quorum

The quorum required for any annual or special general meeting of the Trust shall be 30 beneficiaries in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe present in person including among those owners in Horowhenua 11 (the Lake) block whom are also of the Muaupoko Tribe no less than six (6) trustees.

[63] There was some debate at the hearing about those who attended the SGM and whether at least 30 were in fact beneficiaries of the Trust. The issue to determine is whether 30 attendees were in fact beneficiaries as per the trust order, with at least 6 of them being responsible trustees.

[64] Despite the review by the Pae Tukutuku, it remains uncertain about whether the quorum was met and in the absence of direct evidence from individuals that attended the SGM, I cannot be absolutely sure whether some attendees, who cannot be identified on MLIS, are in fact beneficiaries as defined in the trust order. I am not prepared to make a call on the status on some attendees, in the absence of further evidence.

[65] Then there is the issue of the trust order requiring at least six trustees to be present at the SGM. There is no dispute that this could not be met because there were only four responsible trustees appointed at the time. This can probably be classified as a technical breach, given that the evidence suggests that all four responsible trustees were present at the SGM. In normal circumstances, I would probably have no issue approving the SGM outcome, but these are not normal circumstances, and I am required to double check whether the quorum was met. Therefore, I need to firstly establish whether at least 30 beneficiaries were present and then decide, whether the trustee quorum issue requires me to set the SGM outcome aside or not.

[66] On that basis, I am not yet in a position to determine whether the SGM was quorate. I will address the approach to this issue at the end of my decision.

The appointment of Mr Hockly as Returning Officer

[67] I find that the appointment of Mr Hockly as the Returning Officer for the election process was not in breach of the clause 7.3 of the trust order. Mr Hockly is not a trustee nor is he an employee of the Trust. There was no major issue raised by Mr Rudd about the standing of Mr Hockly, although he argued that the person appointed needed to be from the Horowhenua takiwā and that Mr Hockly did not meet that requirement. I do not accept that argument, given that the relevant clause in the trust order does not make a geographical reference in relation to the Returning Officer.

[68] Mr Rudd made some valiant attempts to convince me that Mr Hockly could be considered an employee of the Trust. For example, he stated in his affidavit that since Mr Hockly is the trust's lawyer, he regards him as an employee of the trust, but none of his arguments meet the plain interpretation of "employee" as referenced in the trust order. A lawyer engaged by retainer and by direction of the Court, as is the case here, is not an employee of their client, but rather it is a lawyer-client relationship not an employment one.

[69] The greater issue for me however was the appropriateness of the lawyer for the Trust being appointed to effectively run these elections. To be fair, the decision to appoint Mr Hockly in this role was an error in judgment by the trustees and Mr Hockly should not have accepted the appointment and continued to act as counsel for the Trust. The circumstances leading into the election were such that complete independence was required. However, it is not contrary to the trust order. Furthermore, I struggle to see how beneficiaries, including Mr Rudd, were in fact prejudiced by having Mr Hockly as the Returning Officer. Any issues arising, relate, in reality, to a trustee performance issue and the fact that it seems that the trustees were no longer getting independent legal advice, which was required in the lead up to the elections.

[70] There is evidence that Mr Hemana, Court staff and Mr Hockly were made aware of Mr Rudd's concerns about this appointment before the election hui and SGM. But the timing of these concerns was only 11 days before the actual election hui and SGM, when advertisements confirming Mr Hockly's appointment were already public.²⁴

²⁴ Concern raised by email through Mr Rudd's Counsel at the time, Linda Thornton dated 15 February 2022

[71] In the absence of evidence that would lead to a different election result or that voters were prejudiced in any material way by virtue of Mr Hockly's appointment, I find that there is no basis to set aside the election results due to the appointment. Mr Hemana provided evidence that the numbers voting at the election are similar to those that have previously voted. This was not disputed by Mr Rudd at the hearing and therefore, I have no evidence to suggest that Mr Hockly's appointment in and of itself prevented people from voting or affected the way in which they voted.

[72] Mr Rudd argued that Mr Hockly's appointment was a matter of perception and I agree that a perception of independence is important, particularly in the context where there have been multiple hearings about the operation of this Trust. However, I repeat that there is no concrete evidence to suggest that voters were affected by Mr Hockly's appointment and no suggestion that Mr Hockly has done anything untoward in his role as Returning Officer. Save for the voting form issue that I address below, Mr Rudd has not raised any other specific election process issues that would suggest Mr Hockly's dual role, as counsel and Returning Officer, somehow affected the process. I find that Mr Hockly's post-election report fairly sets out the process and outcomes of the elections.

[73] On that basis, Mr Hockly's appointment and performance as Returning Officer does not in of itself justify the setting aside of the election results.

The Voting Form

[74] Mr Rudd argues that the voting form used for the election of additional trustees may have created confusion for voters.

[75] This relates to the option in the voting form of using a tick or cross to vote for the candidates. I accept that this approach is probably not the best approach, but there is no evidence that this in fact caused any confusion for voters. I was advised by Mr Hemana that no votes were invalidated because of the option to place a tick or cross next to the candidates.²⁵ Mr Rudd himself conceded that he was not confused by the voting form.²⁶

²⁵ 451 Aotea MB 82-112 at 100.

²⁶ 451 Aotea MB 82-112 at 99.

[76] Given this, I find that the voting form did not cause any irregular results and this is no basis for the election results to be set aside as result.

Failure to seek directions from the Court

[77] Mr Rudd alleges that the Trust did not seek directions from the Court when it was clear that it needed to, in advance of the election process commencing and before the SGM. Specifically, Mr Rudd claims that the Trust should have sought directions with respect to Mr Hockly's role as the Returning Officer and the quorum requirements for the SGM. There was also the issue that I raised during the hearing, as to whether direction should have been sought about who was to actually run the election, Mr Hemana solely or the Registrar in concert with Mr Hemana, as outlined in the two separate judgments issued by Judge Harvey noted above.

[78] At the hearing Mr Hemana was adamant that he did in fact seek some directions, but that the Court had failed to respond. As a result of this position, and because I did not have all information before me, I directed the Pae Tukutuku to conduct a review of the Court file to assess what, if any emails, the Court received prior to the election hui and SGM from Mr Hemana or any other party. Mr Carter, a Deputy Registrar of the Court, undertook this review and prepared an email addressing the communications the Court had in advance of the election hui and SGM with the trustees and anyone else. These email communications were sent to all parties for comment before I finalised my decision.

[79] The information I received from Mr Carter confirms that Mr Hemana and Mr Rudd were in fact raising issues about the election and SGM processes with the Court, before they occurred. Whether the communications by Mr Hemana could be classified as the Trust seeking formal directions of the Court is debatable, but ultimately does not need to be determined, given that I have determined that the specific Rudd complaints do not justify the setting aside of the election results.

[80] I acknowledge that Mr Hemana was keeping the Court informed of developments leading into the election hui and SGM. What probably needed to happen is for counsel for the Trust to seek directions in a formal manner, so as avoid the very situation now before me. I also mindful that all relevant communications received by the Court, in whatever form, should have been elevated to a Judge for consideration, especially in circumstances

where the Court is playing a supervisory role, as it is here. Importantly, however, it is clear to me that the Trust was not blatantly ignoring the Court and was in good faith trying to adhere to previous directions of the Court. Mr Rudd does make a fair point on this issue, but it does not justify, on the facts as I have found, any sanctions including the serious step of removing of trustees, that I will now address.

[81] For completeness, I confirm that even if I find that the SGM was not quorate, it will not change my conclusions in this judgment, for the reasons given in paragraph 80 above.

Removal of Trustees

[82] Mr Rudd did not specifically address me at the hearing about the possibility of me removing the trustees, nor was it specifically referenced in his original application. That said, he did raise the removal of all trustees after the hearing in a statement to the Court dated 2 August 2022. Whilst I did not hear from the trustees on this issue, and whilst it was not specifically sought by Mr Rudd in the enforcement application, I have wide powers per s 238 of the Act to order removal, so in some respects, it matters little that it was not specifically asked for in the enforcement application.

[83] That said, I would not make such a determination without giving the trustees an opportunity to address me on removal, if it became an option. Firstly, I would determine whether I accepted the Rudd complaints and if upheld (in full or part), then the focus would turn to relief, including removal of trustees per s 240 of the Act if justified.

[84] Because I have found that the Rudd complaints do not justify the setting aside of the election results, removal is also not justified, despite my findings that some errors of judgment were made and things could have been managed better by the trustees. There is no evidence that beneficiaries have been seriously impacted as a result of errors of judgment and lack of clarity, nor is there evidence that the trustees made decisions in bad faith, by deliberately ignoring Court directions or requirements in the trust order and the Act.

[85] Removing a trustee is a serious matter, and is a remedy of last resort given the implications of removal. Having considered my findings on the Rudd complaints as a whole, the attitude of the trustees that appeared before me, where the Trust is at following various Court proceedings, the various arguments raised by Mr Rudd (orally and in writing), the

principles of the Act as found in the Preamble, and as reinforced by ss2 and 17, I find that removal of some or all trustees is not warranted.

[86] Put simply, the evidence and context here does not lead to a conclusion that the trustees are no longer suitable to hold office as trustees because of the trustee's conduct or circumstances.

Whakataunga
Overall Outcome

[87] I want to be clear that the Rudd complaints were appropriately raised. In many respects they were issues that required scrutiny by the Court and there is no basis to question the bona fides of Mr Rudd raising them.

[88] The examination of the Rudd complaints has now been completed and I have found that they do not individually or collectively meet the threshold of taking the serious step of setting aside the election outcomes and starting again. Whether the elected trustees ultimately get appointed is yet to be determined by me. That is a separate process I must work through in due course.

[89] Therefore, the enforcement application as it relates to the election process and outcomes is dismissed and the appointment application may proceed in the manner that I will direct in due course.

[90] With respect to the SGM, I direct the Registrar to convene a judicial conference per s 67 of the Act, by zoom, within the three weeks of the date of this decision to progress this take. All current responsible trustees must attend. If in the meantime, the Trust wishes to file further evidence about the status of the SGM attendees at issue, then they are invited to do so.

[91] For the avoidance of doubt, the Rudd application is not fully disposed of and whether the SGM was quorate or not remains a live issue before me.

[92] Finally, I will issue a separate minute addressing:

- (a) The next steps for the appointment application; and
- (b) The suggestion of a review of the trust order and how to manage future disputes that continue to hamper the Trust, that were discussed at the end of the hearing.

Mauri ora

I whakapuaki i te 2:00pm i Hamilton, 23 o ngā rā o Here-turi-kōkā i te tau 2022.

A H C Warren
JUDGE