

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

In the Māori Land Court of New Zealand
Aotea District

AP-2024000005232

WĀHANGA
Under

Section 239, Te Ture Whenua Māori Act 1993

MŌ TE TAKE
In the matter of

Waihaha 4

I WAENGA I A
Between

HARIATA HAZEL CAIRNS-WILLIAMSEN AS
 TRUSTEE OF WAIHAHA 4
 Te kaitono
Applicant

ME
And

PAPANUI STACEY HAKARAIA AS TRUSTEE
 OF WAIHAHA 4
 Te kaiurupare
Respondent

Nohoanga: 14 March 2025
Hearing (Heard at Whanganui (via Zoom))

Kanohi kitea: D Stovelaar for Applicant
Appearances M Insley for Respondent

Whakataunga: 17 April 2025
Judgment date

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

Copies to:
 D Stovelaar, Le Pine and Co, PO Box 140, Taupō 3351, dstovelaar@lepine.co.nz
 M Insley, Rotorua District Community Law Centre, PO Box 879, Rotorua 3040, marcia.insley@rdclc.co.nz

He taonga nui te tūpato!

Hei tīmatanga

Introduction

[1] A straightforward replacement of trustee application for the Hurakia Trust (Trust) is opposed by Trust chairperson, Stacey Hakaraia, because he considers that 61 proxy forms used at the trustee election were invalid; primarily because the trust order says that he must validate all proxies and he was not given the opportunity to do this. These proxy votes were validated by a non-trustee without his knowledge. The election result is materially different if the 61 votes are invalid.

[2] Other trustees say that the proxy form verification process involving an independent accountant was agreed to by the trustees, including the chairperson, and that the proxy form process was such that the court can rely on the election results to make the relevant appointments. They argue that any defects in the process are technical in nature.

[3] I disagree, and for the reasons below, the election results must be set aside and a new election held.

Kua ahatia?

What has happened?

[4] The Trust held an election of trustees as part of its annual general meeting on 20 April 2024 (AGM). There were 5 trustee positions to fill at the AGM with 9 nominees.¹

[5] In preparation for the AGM, a trustee meeting was held on 10 February 2024, where the unsigned minutes of the meeting record that the trustees resolved that Sheree Malaquin, an accountant and non-trustee, be appointed to receive and manage the proxy votes for the election at the AGM. There is no dispute that Ms Malaquin was to play a role, the issue is the nature and extent of that role and specifically whether she had the ability to validate the proxy forms, and if not, what does that mean for the election results.

¹ Statutory Declaration of Papanui Stacey Hakaraia in Response to the Application, Marcia Insley, 30 August 2024 at [21] and [22].

[6] Ms Malaquin says that she received 61 proxy forms in total before the AGM.² Mr Hakaraia tabled 37 proxy forms on the day of the AGM.³ Walter Rika tabled two and Valerie Tamati tabled five, again on the day of the AGM.⁴

[7] The voting for the new trustees was conducted on the basis that all the proxy forms outlined above were valid, save for two forms, where relevant owners turned up and voted in person at the AGM.

[8] Following the conclusion of the voting process at the AGM, the successful candidates declared were Hazel Cairns, Dion Cairns, William Adams, Stacey Hakaraia, and Mihi Totoro. The unsuccessful candidates were Vanessa Hakaraia, Michael Hakaraia, Tukino Kingi, and Valerie Ellen Tamati.⁵

[9] If the 61 proxy votes received and validated by Ms Malaquin are invalid, the successful candidates of the election would have been: Stacey Hakaraia, Vanessa Hakaraia, Michael Hakaraia, Tukino Kingi and Valerie Ellen Tamati.⁶

[10] Mr Hakaraia contends that as chairperson, he was not aware of the 61 proxy forms held by Ms Malaquin before the voting took place and that it was only after the election results were read out at the AGM that he was made aware of this fact.

[11] Ms Malaquin accepts that she did not provide Mr Hakaraia with the 61 proxy forms before the election took place, because it was her understanding that she was to validate them. Mr Hakaraia also says that he asked Ms Malaquin at the AGM and before it started whether she had received any proxy forms. He says she said she had not received any proxy forms. Ms Malaquin denies that this question was ever asked of her. Furthermore, Mr Hakaraia now claims that the trust order of the Trust requires him as chairperson to validate the proxy forms and that this was not done with respect to the 61 forms received by Ms Malaquin.

² Above n 1, at [12].

³ Above n 1, at [6].

⁴ Above n 1, at [7] and [8].

⁵ Above n 1, at [21] and [22].

⁶ Above n 1, at [23].

[12] To complicate matters further, Ms Malaquin returned all proxy forms to the appropriate people in advance of the AGM and did not have these physically with her at the AGM. Mr Hakaraia contends that this is also a breach of the trust order.

[13] On 29 April 2024, trustee Hariata Cairns filed an application per s 239 of the Te Ture Whenua Maori Act 1993 (Act) to replace and appoint trustees based on the AGM election results (the appointment application).

[14] The appointment application was then opposed by Mr Hakaraia for the reasons above.

Kōrerorero

Discussion

[15] Considering the above, the key issues to determine are:

1. Did Ms Malaquin have delegated authority to receive and validate the proxy forms?
2. Are the trustees able to delegate the proxy form process to a non-trustee?
3. If the trustees had no ability to delegate the proxy form process to a non-trustee, is their decision to delegate it a technical or a more fundamental breach of their trustee duties and powers?
4. If it is a breach, technical or fundamental, what is the remedy, if any?

Did Sheree Malaquin have delegated authority?

[16] Unsigned minutes from two key Trust meetings held before the AGM on 10 February 2024 and 18 April 2024 are clear that Ms Malaquin's role included verifying the proxy forms against the list of owners and not just collating them. The specific wording of the unanimously passed resolution from the meeting on 10 February 2024 states:⁷

⁷ Closing Submission on Behalf of the Applicant, David Stoevelaar, 27 February 2025 at exhibit a.

Sheree Malaquin have delegated authority to approve proxies emailed to her prior to AGM and any present on the agm day.

[17] This resolution is also supported by the discussion at the 18 April 2024 meeting.⁸

Registrations will be taken care of by Sheree Malaquin and Fiona Barker. Process owner register and if any proxies arrive must be 1 hour before hui, Sheree to vet as per delegated authority from hui February 10th. Allowing Trustees to focus on meeting and owners.

[18] Based on these minutes alone, I would have little trouble finding that the trustees did indeed delegate the entire proxy form management and verification process to Ms Malaquin. However, to complicate matters, Mr Hakaraia says that he has never seen these minutes and only saw them after the appointment application was lodged with the court by Ms Cairns. He says he never agreed to the resolution.

[19] To support his position that Ms Malaquin was not mandated to validate the proxy forms, Mr Hakaraia says he ratified the proxy forms he received before the AGM and then handed the forms to Ms Malaquin the morning of the AGM. Mr Hakaraia says the trust order requires these to be held and made available at the AGM so that beneficiaries and the chairperson can check on any issues with their validity.⁹

[20] I am somewhat at a loss as to where the truth lies in respect of the role Ms Malaquin was to play, given Mr Hakaraia's version of events. It may be that I do not need to resolve the issue, because there is a more fundamental legal question, that is, whether the trustees had the ability to delegate the proxy form role to a non-trustee. If there is no ability, then I may not need to resolve the factual contest.

Can the trustees delegate the proxy form process to a non-trustee?

[21] It is trite law that a responsible trustee cannot delegate his or her powers to a non-trustee, without court approval. In this context, there is no ability under the trust order to delegate any powers to a non-trustee. Clause 20.3 of the trust order is clear that allowable delegations are internal ones for trustee committees only. Even that power is not absolute, as trustees must ensure they are appraised of decisions that the committees are making.

⁸ Email on behalf of Stacey Hakaraia regarding the Confidential Meeting Minutes for Hurakia Trust, 16 April 2025.

⁹ Trust order as recorded at 140 Waiariki MB 102-121 at cl 15.2.

There is no express provision in the Act or any other legislation that allows for such a delegation.¹⁰

[22] There is no doubt that the validation of proxy forms is a process whereby trustees are exercising a power under the trust order, and that power is vested in the chairperson. Therefore, in a strict sense the delegation to Ms Malaquin, although done in good faith and for understandable reasons, is contrary to the trust order.

[23] I draw a clear distinction between the role of receiving proxy forms and the process of validation. Performing the administrative task of receiving, collating, and even conducting an initial review is not an exercise of trustee powers per se. In real terms, the power to be exercised is the validation process. That requires a decision and judgment that has a material effect on the status of proxy form and in turn the voting process. In accordance with the trust order, that must be undertaken by a trustee and more specifically the chairperson (unless of course as directed by the court).

Is this a technical or fundamental breach?

[24] Mr Stoevelaar argued that any failure to comply with the trust order in this respect may be considered a technical breach because there is no material prejudice to the election process and outcomes. To assess the merits of this argument, I need to set out the actual role Ms Malaquin played.

[25] There is no dispute that Ms Malaquin was appointed to, at the very least, receive the proxy forms. Regardless of whether the minutes of the two meetings are correct or not, the advertisement for the AGM confirms this fact:¹¹

Proxy voting forms & Trustee nomination forms available on website <https://www.hurakiatrust.co.nz/> and when completed must be lodged with Accounting Solutions BOP Ltd... by 10.00 am Monday 8th April 2024.

¹⁰ The trust order also references the powers conferred by the Trustee Act 1956, which of course has been overtaken by the Trusts Act 2019 and was in force at the time of the resolution to delegate the proxy role to Ms Malaquin. There are no provisions giving the trustees the ability to delegate any powers to non-trustees.

¹¹ Above n 7, at exhibit b.

[26] Further, Ms Malaquin says she received 61 proxy forms in advance of the election. These were all posted or emailed to her. On receipt of the proxy forms, Ms Malaquin says she verified each of them against the owners list and returned the forms to the submitters once verified.

[27] There is no evidence that she formally advised the trustees of how many proxy forms were received, but some trustees advised during the hearing that they were aware of the number of proxy forms received and the process undertaken before the AGM. I am not sure why Mr Hakaraia says he did not know this. There is no evidence Mr Hakaraia or any of his supporters approached Ms Malaquin shortly after the date for lodging proxy forms closed, asking about how many forms were lodged. It seems odd to leave this question to the day of the AGM, in what seems to have been a hotly contested election (if in fact it was asked).

[28] Ms Malaquin attended the AGM and was appointed along with Rob Gallen to be the independent voting scrutineers for the election. There is no dispute that she received proxy forms from Mr Hakaraia on the day of the AGM. She says she verified them all. There is a debate as to whether these proxy forms were in fact received at least one hour before the start of the AGM, as required by the trust order.¹² Ms Malaquin says they were late, but accepted them and verified them all, with only two rejected on the basis that two owners who had appointed proxies turned up to vote in person, as noted above.

[29] Given the claim of the late submission of the proxy forms by Mr Hakaraia, there was a question as to whether they too were valid or not. Mr Stoevelaar did not push the issue, but rather used it as an example of a technical breach being accepted by his trustee client.

[30] That may be right, but what puzzled me was the fact that the notice of the AGM states that all proxies **must** be submitted by 10am on 8 April 2024 to Ms Malaquin, and yet Mr Hakaraia submitted his proxy forms on the day of the AGM, well after the advertised cut-off date. Of course, this is allowed by the trust order, but having a different date in the advertisement confused the position. What was the actual cut-off date, 8 April 2024 or an hour before the AGM commenced? Is this another technical breach?

¹² Above n 9, at cl 15.1(c).

[31] The issue of the likely prejudice and/or safety of the voting process is also relevant to the question of whether it is a technical or more fundamental breach. Ms Insley's theory was that we will never know whether Ms Malaquin's validation process was tika because the forms have never been sighted by anyone but her and those that exercised the vote. Ms Insley suggested, by way of example, that there could have been deceased owners named as owners for the proxies and because Ms Malaquin was a non-trustee she would not have the same in-depth knowledge that Mr Hakaraia would have had, had he verified the proxy forms. A fair point, but one not supported by any evidence. In fact, the only direct evidence was given by Mr Rauhina, who acted as a proxy at the AGM, he confirmed that he had no issues with the proxy form process and importantly, the uncontested evidence was that the owner he was representing was alive and on the owners list.

[32] There are also issues with the validation process undertaken by Mr Hakaraia. Yes, the trust order requires the chairperson to validate proxy forms, but it was highly inappropriate for Mr Hakaraia to do this on this occasion because he was standing for re-election. That point seemed to have been lost in the arguments put to me, but I find it a very relevant one, because his actions are arguably of a more serious nature, given the clear conflict of interest. Of course, no such conflict existed for Ms Malaquin who had no vested interest in the outcome of the election.

[33] Ironically, the proxy forms Mr Hakaraia tabled, were also validated by Ms Malaquin at the AGM and she says they were all in order. But two wrongs normally do not make a right.

[34] I have some sympathy for those that want the election results upheld, but it does seem to me, in taking a helicopter view, that the overall process has been tainted by more than a single technical error.

Te whakarāpopoto
My overall findings

[35] I do not need to resolve the factual disputes about the minutes and what was discussed between Mr Hakaraia and Ms Malaquin at the AGM, because I find that there was no trustee ability to delegate the power to validate proxy voting forms to Ms Malaquin, in the absence of a clear direction by the court.

[36] The trustees ignored the clear, explicit, and mandatory provisions of their trust order, and by doing so, the proxy forms validated by Ms Malaquin must be invalid. I also find that the proxy forms validated by Mr Hakaraia as chairperson to be invalid as he was in a clear conflict-of-interest position. The simple solution was to seek direction of the court, when faced with a context such as this, and the trustees failed to do that.

[37] I find that the delegation and related defects that I have identified to be more fundamental errors and not merely technical ones. I did consider whether s 17 of the Act, requiring me to be practical in seeking to achieve the principles of the Act, could provide an outcome to avoid setting aside the election results, but I cannot get to that outcome unfortunately.

[38] The fact that over 100 proxy voting forms have now been invalidated, I have no choice but to set aside the election results and direct that the election be held again on a proper footing.

Whakataunga *Decision*

[39] I find for the respondents and dismiss the application made under s 239 of the Act. In making my findings and this decision, I want to be clear that the trustees were not acting in bad faith, as it was clear to me that they were trying to run a fair and independent process. As noted earlier, it is understandable why they appointed Ms Malaquin. The fact of the matter is, they had no power to do what they did.

[40] Mr Hakaraia needs to reflect on his role, as chairperson and should not place himself in a conflict-of-interest position as he did here. No further orders are required in this respect.

[41] I direct that the trustees file an application for directions per s 133 of the Trusts Act 2019 on how to manage the proxy form process. The election will be a rerun for the same candidates as last time. I will convene a judicial conference to discuss the application, once filed.

[42] There will be no order of costs as there is fault on both sides.

[43] As a final comment, I note for the benefit of this trust and other trustees of Part 12 trusts, that seeking direction of the court when in doubt or when trustees seek to depart from the clear provisions of their trust order are part and parcel of being a responsible trustee. I accept that there can be delays and a cost in making such applications, but compared to most other trusts who need to apply to the High Court, the process and costs in this court are relatively modest. At the very least legal advice should be acquired.

[44] If one compares the costs (time and money) of getting legal advice and/or direction of the court, and the costs that are now incurred by having a contested court hearing and the rerunning of an election, it hopefully illustrates the point I am making.

Mauri ora

I whakapuaki i te 9:00am i Kirikiriroa, i te 17th o ngā rā o Aperira i te tau 2025.

A H C Warren
JUDGE