

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

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

AP-20240000011899

WEHENG
Under

Section 239, Te Ture Whenua Māori Act 1993

MŌ TE TAKE
In the matter of

TE PUKE Z

I WAENGA I A
Between

PATRICIA JOHNSTON
Te kaitono
Applicant

ME
And

TIPENE TAMIHANA
Te kaiurupare
Respondent

Kōtitanga:
Hearing

29 January 2025, 330 Waiariki MB 126
27 May 2025, 344 Waiariki MB 225-229
9 September 2025, 352 Waiariki MB 39-55
(Heard at Whakatāne)

Kanohi kitea:
Appearances

T Boynton

Whakataunga:
Judgment date

25 September 2026

TE WHAKATAUNGA A KAIWHAKAWĀ T M WARA
Judgment of Judge T M Wara

Copies to:

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Hei tīmatanga kōrero*Introduction*

[1] Patricia Johnston and Rosina Taniwha are the trustees of Te Puke Z Ahu Whenua Trust, also known as the Putoko Tamihana Trust (the Trust).

[2] Patricia applied to the Court seeking the appointment of Tipene Tamihana as a trustee following an election process. Both trustees now oppose his appointment on the grounds of suitability. Tipene maintains that he is suitable and seeks appointment.

[3] This decision concerns whether Tipene should be appointed as a trustee and, if not, what should be done about the vacancy created by the death of Wihau Tamihana.

He aha te aronga mō te kēhi nei?*What is this case about?*

[4] The Trust administers 11.1592 ha of Māori freehold land known as Te Puke Z located on Manoeka Road near Te Puke. The Trust runs a successful kiwifruit orchard on the land.

[5] There were three responsible trustees. One of them, Wihau Tamihana, passed away in early 2021. This created a vacancy, which was discussed at the 2022 annual general meeting, where it was decided that the Trust would initiate a process to fill that vacancy.

[6] At the 2023 annual general meeting, the beneficial owners were advised that a special general meeting would be held in May 2024 to address the election process.

[7] Independent Election Services Ltd (Election Services) was engaged to run the election process and attended the special general meeting to explain the process to the beneficial owners. The nomination process commenced prior to the May meeting and closed on 7 June 2024. Voting was to commence on 21 June 2024, online only, and remain open for four weeks until 19 July 2024.

[8] As only one nomination was received, Election Services declared that candidate, Tipene Tamihana, successful on 21 June 2024. No vote was held.

[9] Patricia and Rosina are concerned about Tipene's suitability and oppose his appointment as a responsible trustee. Tipene considers that he is suitable and seeks appointment.

He aha te ture mō te kopou tarahitī?

What is the law regarding trustee appointments?

[10] The Court has jurisdiction to appoint a trustee pursuant to s 222 of Te Ture Whenua Māori Act 1993. In deciding whether to appoint a trustee I must have regard to the ability, experience and knowledge of the person concerned.¹ In other words, I must consider whether he or she is suitable for appointment as a trustee. In addition, I must not appoint a person unless I am satisfied that the appointment will be broadly acceptable to the beneficiaries.² I must also be satisfied that the proposed appointee consents to the appointment.³ Although s 222(2) lists the first two matters in that order, the second is a precondition to any appointment, and it is convenient to address it first.

[11] The Court of Appeal decision *Clarke v Karaitiana* is the leading authority on the appointment of trustees.⁴ In that case the Court confirmed that substantial weight will ordinarily be given to the views of the beneficial owners, but that the Court is not bound to appoint a candidate they support where there are relevant disqualifying considerations.⁵

[51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by s 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.

[52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court would ordinarily give

¹ Section 222(2)(a).

² Section 222(2)(b).

³ Section 222(3).

⁴ *Clarke v Karaitiana* [2011] NZCA 154.

⁵ At [51]–[52].

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substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint the leading candidates as elected by the owners, it must still be satisfied the requirements of s 222(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

[12] The issue of suitability has been examined by this Court in the context of criminal convictions.⁶ I was not referred to any decision addressing other aspects of suitability. Some guidance is available from s 240, which since 2021 has provided that a trustee may be removed where he or she is no longer suitable to hold office because of the trustee's conduct or circumstances and gives examples that include conviction of an offence involving dishonesty.⁷ Conduct or circumstances that would justify removal are plainly relevant to whether a person should be appointed in the first place. Beyond that, I approach the question by reference to the general principles in *Clarke v Karaitiana*.

Ka whakaaetia whānuitia e te hunga whaipānga te kopou i a Tipene?

Is Tipene broadly acceptable to the beneficial owners?

[13] The first question is whether I can be satisfied that Tipene's appointment would be broadly acceptable to the beneficial owners. Counsel for Patricia and Rosina, Ms Boynton, submits that there is no evidence that Tipene is broadly acceptable to the beneficial owners.

[14] The outcome of an election at a meeting of owners is the usual means by which the Court obtains evidence of the owners' views. The results of an online voting process would serve the same purpose. The difficulty in the present case is that Tipene was not elected at all. He was the only nominee, and Election Services declared him the successful candidate on that basis, without any vote or resolution of the owners. As a result, I have no evidence from which to assess whether his appointment is broadly acceptable to the beneficial owners for the purpose of s 222(2)(b). His acceptability could have been confirmed at a subsequent meeting of owners, but there is no evidence that this occurred.

⁶ See *Tautari – Succession to Wairuaora Hinerupe Fairburn* (2019) 200 Taitokerau MB 1 (200 TTK 1) for discussion of the relevance of a criminal conviction to a person's suitability for appointment as a trustee. See also *Cutforth v Dudley – Omapere Taraire E and Rangihāmama X3A Ahu Whenua Trust* (2017) 157 Taitokerau MB 7 (157 TTK 7) and *Oneroa v Kerehoma – Okahukura 8M 2C 2A* (2019) 401 Aotea MB 35 (401 AOT 35) on this point.

⁷ Section 240(1)(b)(iv) and (3).

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[15] The process was flawed, but not because it was online. The results of an online vote are evidence of the owners' views and a means of assessing broad acceptability for the purpose of s 222(2)(b). The difficulty is what happens in an online process when only one nomination is received. At a meeting of owners, an unopposed nominee can be put to the owners present and confirmed by resolution. In an online process there is no meeting. Where the sole nominee is simply declared successful, the process is truncated at the very point at which the owners' views would otherwise have been obtained, and nothing takes the place of the vote.

[16] The answer is not to call for further nominations. It is to ensure that the owners are still asked. Where only one nomination is received in an online process, the candidate should still be put to the owners for confirmation, whether by an online vote for or against the appointment or by resolution at the next meeting of owners. The Court of Appeal has emphasised the need to design procedures that are likely to secure the widest possible input from the owners.⁸ I do not level this criticism at the trustees, who appear to have followed the advice of Election Services. It is something Election Services needs to be cognisant of when designing online election processes for Part 12 trusts.

[17] There was a second flaw. The process gave the owners no opportunity to assess the candidate. There was no meeting at which nominees could speak to the owners and answer their questions, and there is no evidence that Tipene's candidate profile or other information was circulated. Broad acceptability under s 222(2)(b) presumes that the owners are in a position to form an informed view about the person they are being asked to accept. The views of the owners carry the weight they do in *Clarke v Karaitiana* because they are the owners' own assessment of the candidate.⁹ Where nominations and voting are conducted online, the process should build in a means for candidates to put information about themselves before the owners, and for owners to ask questions of them, before any vote is taken. That is also the point at which any matter bearing on suitability should be disclosed.

[18] The result is that I cannot be satisfied that Tipene's appointment is broadly acceptable to the beneficial owners pursuant to s 222(2)(b), and the application, insofar as it seeks his appointment, must be declined on that basis. In *Clarke v Karaitiana*, having found the

⁸ *Clarke v Karaitiana*, above n 4, at [53].

⁹ *Clarke v Karaitiana*, above n 4, at [51]– [53].

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election flawed, the Court of Appeal directed that a further meeting of owners be convened rather than deciding the appointment itself, and this Court has taken the same course where the owners had not been properly informed about a candidate.¹⁰ I considered whether to adjourn this application, or to direct a meeting of owners, for that purpose. For the reasons that follow, that would serve no purpose in this case. As the question of suitability was fully argued and is likely to arise again, I address it for completeness.

[19] There is a further point under s 222(2)(b). At the hearing Tipene referred to criminal matters in his past.¹¹ A conviction, particularly for an offence involving dishonesty, is relevant to suitability, although it is not of itself disqualifying.¹² It is also relevant to broad acceptability. This Court has consistently taken the view that a candidate's convictions should be disclosed to the owners so that they can decide whether they support the appointment notwithstanding them, and where that has not occurred the Court has adjourned the appointment to a further meeting of owners at which full disclosure is made.¹³ Here there is no evidence that the convictions Tipene referred to were disclosed to the owners. Given my finding above I need not decide what weight they would carry, but they reinforce the need for the owners to be properly informed before they are asked to confirm any candidate.

He pai a Tipene ki te noho hei tarahitī?

Is Tipene suitable for appointment as a trustee?

[20] Ms Boynton submits that Tipene is not a suitable appointment because he demonstrates a lack of ability, experience and knowledge required for the Trust.

[21] A candidate's suitability is assessed by reference to their ability, experience and knowledge. Those attributes cannot be assessed without context. As the Court of Appeal observed in *Clarke v Karaitiana*, regard must be had to the nature and scale of the assets of the trust and the issues it faces. It is therefore necessary to begin with the business and operations of the Trust.

¹⁰ *Clarke v Karaitiana*, above n 4, at [55]; *Cutforth v Dudley*, above n 6, at [53]; and *Oneroa v Kerehoma*, above n 6, at [24]–[26].

¹¹ 352 Waiariki MB 39-55 (352 WAR 39-55) at 45–47.

¹² *Cutforth v Dudley*, above n 6, at [50]; *Tautari*, above n 6, at [16].

¹³ *Cutforth v Dudley*, above n 6, at [52]–[53]; *Oneroa v Kerehoma*, above n 6, at [21] and [24]–[26]; and see *Tautari*, above n 6, at [15].

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[22] The Trust manages a kiwifruit orchard. Patricia says that in 2012 the Trust was reviewed by the Māori Land Court, and a decision was made to reduce the number of trustees due to the Trust's underperformance. She says the Trust then carried a significant debt of \$850,000.00. This is not contested. Tipene himself has acknowledged the mahi of Patricia, Rosina and Wihau in turning an underperforming orchard into a successful one.¹⁴ The evidence is that the Trust's performance has significantly improved, and in 2024 a resolution was passed at the special general meeting to release \$100,000.00 to the owners' account for distribution.

[23] At the hearing, Patricia also gave evidence about the processes that the Trust had to go through to turn its performance around. This included years of working with Inland Revenue, obtaining loans and working with Seeka. She said that the orchard has gone from a loss to a \$5,000,000.00 asset, and that this has taken a lot of "blood, sweat and tears".¹⁵

[24] The Trust is a high performing trust with a substantial commercial operation. In that context, a proposed trustee needs a proper understanding of business practices, including the Trust's business relationships and the roles its expert advisers play, and a sound understanding of the roles, responsibilities and powers of trustees. That is the standard against which I assess Tipene's suitability.

[25] Patricia and Rosina say that the difficulties with Tipene started immediately following Election Services' declaration that he was the successful candidate. He did not complete the consent form required to support an application for the appointment of a trustee,¹⁶ despite multiple requests from both Patricia and Rosina. The trustees had to instruct Hamertons, at a cost to the Trust, to follow him up, and a completed form was provided two months after the declaration. Tipene responded to this at the hearing and advised that he didn't understand the requirement, and didn't know how to fill out the form.

[26] Patricia says that Tipene is also unsuitable due to his inability to understand the business of the Trust. She says that she has talked to Tipene about contractual arrangements, loans, and reinvestment, but that he "has not been able to grasp just that basic way of doing business".¹⁷ At the hearing Patricia talked about the business of the Trust, the need to

¹⁴ Letter from Tipene Tamihana to Hamertons lawyers Limited dated 18 June 2025.

¹⁵ 352 Waiariki MB 39-55 (352 WAR 39-55) at 43.

¹⁶ Document B1: Consent to be appointed trustee.

¹⁷ 352 Waiariki MB 39-55 (352 WAR 39-55) at 43.

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understand business operations, and the liabilities that exist for trustees when mistakes are made. She talked about the various experts that are involved, including the accountant for the general accounts, the chartered accountant for the pūtea account, the lawyers, and dealings with Inland Revenue. She says that both she and Rosina have been in business, and that Rosina has been involved in kiwifruit industry bodies. What concerns her is Tipene's "lack of knowledge, lack of understanding, and lack of willingness to learn".¹⁸

[27] Patricia and Rosina say that Tipene's actions demonstrate his lack of willingness to understand or learn. For example, Patricia says that Tipene and his cousin approached the CEO of Seeka to discuss the Trust's contracts. The trustees became aware of this only when the CEO advised them. The trustees permitted the CEO to meet with Tipene and provide non-confidential information but say that the approach was an attempt to circumvent the trustees. Tipene did not address this evidence, and I accept it.

[28] Another example raised by Patricia was Tipene's assertion that trust land was willed to him by his father. She says that despite her providing evidence to the contrary, Tipene sought an injunction against a third party on the basis that the land, being part of Te Puke Z, belonged to him and his whānau. Tipene filed that application in his capacity as a beneficial owner and pursued it despite the trustees, Patricia and Rosina, having given the third-party permission to use the land for hua whenua and māra kai. I dismissed the application because the trustees had consented to that use.¹⁹ Patricia and Rosina say that this is a further example of his lack of understanding of process, and of the role and functions of trustees.

[29] Tipene has not responded to the specific concerns raised by Patricia and Rosina. Rather, he focuses on the qualities he would bring to the Trust, and why he is suitable to be appointed as a trustee. These include his being a trustee of Hei Marae, having completed trustee training, and having completed a Bachelor of Arts majoring in Te Reo Māori.

[30] Tipene's positive attributes are relevant, and I take them into account. But they do not answer the specific concerns raised by the trustees, and the question is not whether his qualities outweigh those concerns in some general sense. The question is whether I am satisfied that he has the ability, experience and knowledge to act as a trustee of this Trust, having regard to its business and the demands it places on its trustees.

¹⁸ 352 Waiariki MB 39-55 (352 WAR 39-55) at 44.

¹⁹ 360 Waiariki MB 56-82 (360 WAR 56-82) at 80-82.

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[31] In my view there are two barriers to Tipene's appointment, and either would be sufficient on its own. The first is his disruptive behaviour. A trust running a commercial orchard of this scale depends on its trustees being able to work together, speak with one voice to the Trust's commercial partners and advisers, and get on with the business of the Trust without distraction. Conduct that undermines that is a danger to the Trust and a proper reason for declining to appoint a person, whatever his other qualities. The Court of Appeal in *Clarke v Karaitiana* recognised that a candidate may be unsuitable *for other reasons* beyond ability, experience and knowledge,²⁰ and s 240 now treats a trustee's conduct as a ground on which he or she may be no longer suitable to hold office.²¹

[32] The first red flag was Tipene's failure to sign the trustee consent form when asked. That is not a formality: the Court cannot appoint a trustee unless it is satisfied that he consents.²² The fact that he had to be pursued by lawyers, at a cost to the Trust and therefore to the beneficial owners, delayed the trustees' ability to file the application with the Court and shows little regard for process. The second was his approach, as a beneficial owner, to the CEO of Seeka about the business of the Trust. The trustees are the Trust's voice in its commercial relationships. An approach of that kind risks confusion about who speaks for the Trust and the disclosure of commercially sensitive information. The third was his pursuit of an injunction over a matter that clearly sat within the mana of the trustees, which took the trustees away from the real business of the Trust. Tipene has not sought to explain any of these episodes, and I infer that he does not appreciate why they were inappropriate.

[33] The second barrier is knowledge. Under s 222(2)(a) I must have regard to a candidate's ability, experience and knowledge, and I have said at [22] what this Trust requires of its trustees. I accept Patricia's evidence that Tipene has not shown a grasp of the Trust's contractual, financial and reinvestment arrangements. A lack of knowledge can be remedied, and Tipene has completed trustee training. The evidence however, which Tipene did not challenge, is Patricia's attempts to explain the business to him and his conduct since each of the three episodes described above shows that he does not understand the role, responsibilities and powers of trustees and has not sought to. A trustee who does not

²⁰ *Clarke v Karaitiana*, above n 4, at [52].

²¹ Section 240(1)(b)(iv) and (3).

²² Section 222(3).

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understand the business and will not learn it is a danger to the Trust, because the liabilities that follow from mistakes fall on the trustees, and the losses on the owners.

[34] For these reasons, had it been necessary to decide the point, I would have found that Tipene is not suitable for appointment as a trustee of this Trust. Either barrier would have led me to that conclusion on its own. Together they reinforce each other.

Kupu Whakatau

Decision

[35] For the reasons I have outlined, I decline to appoint Tipene Tamihana as a trustee in place of Wihau Tamihana. However, I will reduce the number of trustees due to the passing of Wihau. It follows that the trustees ought to run another election process to give effect to the owners' resolution in 2022.

[36] Pursuant to s 239(2), I grant an order reducing the number of responsible trustees due to the death of Wihau Tamihana.

[37] Pursuant to s 239(3), I vest the land and other assets of the Trust vest in Patricia Johnston and Rosina Taniwha as the trustees of Te Puke Z Ahu Whenua Trust, also known as the Putoko Tamihana Trust, upon the terms of the trust.

[38] A copy of this judgment is to be sent to the applicant, the respondent and interested parties.

I whakapuakina i te 3:30pm i Rotorua, i te tekau mā rima o ngā rā o Hepetema i te tau 2026.
Pronounced at 3:30pm in Rotorua, this 25th day of September 2026.



T M Wara
KAIWHAKAWĀ