

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

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

A20220003804

WĀHANGA <i>Under</i>	Sections 67 and 237, Te Ture Whenua Māori Act 1993 Section 133, Trusts Act 2019
MŌ TE TAKE <i>In the matter of</i>	Lake Taupo Forest Trust
I WAENGA I A <i>Between</i>	MANAIA BLAIKIE, HEEMI BIDDLE, TINA POROU, JUDITH HARRIS, JOHN TUPARA, DANICA SEARANCKE-TIPENE, TANGONUI KINGI, NGAHERE WALL, DAVID O’ROURKE AND CLINTON ELLIS AS TRUSTEES OF THE LAKE TAUPŌ FOREST TRUST Ngā kaitono <i>Applicants</i>
ME <i>And</i>	TANE LAWLESS Te kaiurupare <i>Respondent</i>

Nohoanga: 17 May 2022, 449 Aotea MB 237-245 (Judicial Conference)
Hearing 10 June 2022, 450 Aotea MB 87-110
(Heard at Whanganui via Zoom)

Kanohi kitea: A Tapsell and T Paki for Applicants
Appearances M Hunia for Respondent

Whakataunga: 21 July 2022
Judgment date

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

Copies to:

A Tapsell and T Paki, Kāhui Legal, P O Box 1177, Rotorua 3040 adam@kahuilegal.co.nz
tyler@kahuilegal.co.nz

M Hunia, Holland Beckett, Private Bag 12011, Tauranga 3143 Melissa.Hunia@hobec.co.nz

Nā ngā tūpuna i houroatia te maru o te tangata¹

Hei tīmatanga kōrero

Introduction

[1] This decision determines an application for directions by the trustees of the Lake Taupō Forest Trust (“the Trust”). This application has been made per s 237 of Te Ture Whenua Māori Land Act 1993 (“the Act”) and s 133 of the Trust Act 2019 (“the Trust Act”).

He aha te whakataunga rapua ana?

What is sought?

[2] The Trust seeks the following outcome:²

On behalf of the Trustees, we respectfully seek directions of the Court pursuant to section 237 of the Act and section 133(1)(b) of the Trusts Act, confirming that the Trustees are acting in accordance with the 2019 Trust Order by not replacing the Trustee position of the deceased trustee, Ms Kelly Te Heuheu, prior to the 2022 Trustee Election.

[3] More specifically, the trustees are seeking a determination as to whether the casual vacancy provisions in their trust order are triggered, and if they are triggered, are they then compelled to replace Ms Te Heuheu.

[4] In effect, the trustees are seeking the Court’s interpretation of their new 2019 trust order (“2019 Trust Order”). The trustees set out clearly in their application why Court intervention was necessary, and I agree.³

Ko wai ngā tangata e hāngai ana ki tēnei kaupapa?

Who is involved?

[5] The application is brought and supported by all trustees of the Trust.

[6] Mr Lawless, a beneficiary of the Trust, appeared as an interested party/respondent to the application. He has a direct interest in the outcome, as the person that is entitled to

¹ An acknowledgment of those trustees that have passed away in recent times, including Kelly Te Heuheu - e ngā rangatira moe mai ra.

² Amended application of Lake Taupō Forest Trust dated 20 May 2022, at [13].

³ Ibid.

replace Ms Te Heuheu if I find that the casual vacancy provisions are triggered and the trustees are compelled to follow them.

[7] The Taruna Te Wano Whānau Trust, also filed a written submission in support of Mr Lawless. The trustees of this trust did not appear at the hearing.

Whakataunga

Outcome

[8] Having considered the arguments raised by the parties and for the reasons set out below, I find that the trustees have correctly interpreted and applied the relevant provisions of the 2019 Trust Order.

Whaimana

Jurisdiction

[9] The Trust submitted that I had jurisdiction to determine an application of this nature:⁴

Section 237(1) of the Act refers to the jurisdiction of the Court, and provides that the Court has and may exercise all the same powers and authorities as the High Court in respect of Trusts generally. These are wide powers and extend to Court's ability to consider an application from the Trustees under the Trusts Act.

As such, the Trustees make this application for directions pursuant to section 133(1)(b) of the Trusts Act about "the exercise of any power or performance of any function by the Trustees."

[10] Originally the Trust filed an application per s 67 of the Act seeking directions in the same terms. This s 67 application was not accompanied by a substantive application. At the s 67 judicial conference held on 17 May 2022, I invited the Trust to file a substantive application, given the nature of what I was being asked to determine.

[11] I took the view that I did not have jurisdiction per s 67 of the Act to make a substantive determination as to the legal position of a trust order and to determine whether the trustees have complied with its terms. Section 67 is a procedural tool and not a substantive one. It can be used for seeking directions about an actual or pending substantive application, but it is not a substantial application in of itself.⁵

⁴ Amended Application of Lake Taupō Forest Trust dated 20 May 2022, at [2].

⁵ *Keepa v Vercoe - Ruatoki B92* [2015] Maori Appellate Court MB 189 (2015 APPEAL 189) at [13].

[12] When a trustee seeks directions of the nature sought here, the prudent approach would be to file an application for a s 67 judicial conference either together with a substantive application or without, on the basis that the applicants wish to discuss how the Court might deal with such an application, if there was any jurisdictional or procedural doubt. In that instance, the Court then has the ability to either invite a substantive application to be filed, or may use s 37(3) of the Act and amend the application of its own motion, subject of course to the rules of Court, such as notice and service.

[13] In any case, I find that I now have a substantive application before me.

[14] For completeness, I confirm my ability to rely on s 133 of the Trusts Act below.

[15] Section 237 of the Act gives the Māori Land Court the jurisdiction of the High Court in relation to trusts, including its inherent jurisdiction and supervisory powers.

237 Jurisdiction of court generally

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

[16] There is little doubt that the Māori Land Court has extensive supervisory powers as it relates to Part 12 trusts.⁶

[17] I have the same powers of the High Court except as expressly provided for in Part 12 of the Act. The Māori Appellate Court noted, in relation to s 237, that “where there is an express provision in Part 12 of the Act, to use another authority through s 237 for the same task would be an obvious inconsistency.”⁷

⁶ *Maruera v Te Rūnanga o Ngāti Maru (Taranaki) Trust* (2018) 385 Aotea MB 7 (385 AOT 7) at [14]–[16] 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* CA65/99, 16 June 1999 at [24] and [27], and *Dellabarca v Northern Storeman and Packers Union* [1989] 2 NZLR 734 (HC) at 765.

⁷ *Tito – Mangakahia 2B2 No 2A1A* [2011] Maori Appellate Court MB 86 (2011 APPEAL 86) at [28].

[18] I find that I have jurisdiction to use s 133 of the Trusts Act because our Act does not provide an express provision in Part 12 of the Act, similar to s 133 of the Trusts Act. Whilst ss 231 and 238 of the Act are broad in their scope, I find that the most appropriate provision here to address the determinations sought is s 133(1)(b) of the Trusts Act.

[19] Section 133 of the Trust Act provides that:

133 Trustee may apply to court for directions

- (1) A trustee may apply to the court for directions about—
 - (a) the trust property; or
 - (b) the exercise of any power or performance of any function by the trustee.
- (2) The application must be served, in accordance with the rules of court, on each person interested in the application or any of them as the court thinks fit.
- (3) On an application under this section, the court may give any direction it thinks fit.
- (4) This section does not restrict the availability of alternative proceedings within the court's jurisdiction, including a declaration interpreting the terms of the trust.

[20] This section mirrors the, now repealed, s 66 of the Trustee Act 1956 and the authorities under that repealed provision reflect the main elements regarding an application for directions of this kind.⁸

- (a) There must be good reason for putting the trust and the beneficiaries to the trouble and expense.
- (b) A trustee need not hesitate to apply where there are factual or legal difficulties and sufficient at stake to warrant the cost.
- (c) Questions of substance or importance, in particular involving matters of controversy or contest between trustees, do not lend themselves to application under s 66.

⁸ *The New Zealand Guardian Trust Company Ltd v Hewitt* (1998) 1 NZTR 8-001; *Melville v NRMA Insurance NZ Ltd* (2002) 1 NZTR 12-002; and *Holland v Jonkers* [2021] NZHC 3469.

- (d) It has always been, and remains, inappropriate where there are substantial factual disputes and/or possibility of a breach of trust. It is certainly inappropriate where there is, explicitly or implicitly, an allegation of breach of trust.
- (e) An application under s 66 must be made upon agreed facts. Such facts cannot be inquired into and, if not agreed, should be established in the normal manner.

[21] I find that based on these elements, I have clear jurisdiction to determine this application per s 133 of the Trusts Act. It is an application by the trustees dealing with an exercise of their powers (per s 133(1)(b) of the Trusts Act) and there is clearly a need for a determination that justifies the costs in bringing this application. The facts, as I will set out below, are not in dispute.

[22] I accept that there was an allegation made by Mr Lawless that the incumbent trustees are trying to keep him from being appointed as a trustee. In other words, Mr Lawless argues that their decisions and interpretations have been tailored to that end. That is a serious allegation, and one that I find was not supported by the evidence before me.

[23] The fact that a beneficiary has raised these allegations does not in my view impact of the appropriateness of an application per s 133 of the Trusts Act. They are unproven allegations, by a person directly interested in the outcome. That is not to whakahē Mr Lawless and his well-held views, but simply to say that the evidence, on its face, does not support these allegations and they cannot be determined via an application per s 133 of the Trusts Act. This is simply a matter of interpretation as applied to the relevant facts.

[24] That said, I do however review whether the material decisions made by the trustees on the casual vacancy issue were made in accordance with the law, including the 2019 Trust Order. That is as far as I can take this issue, based on the application before me.

Ngā meka
The facts

[25] The facts are not in dispute and are critical in determining this application.

[26] The two affidavits of Trust Chairperson Mr Ellis, filed on behalf of the Trust, helpfully set out the facts relevant to the issues I must determine. I summarise these below:⁹

[27] The Trust is an Ahu Whenua Trust constituted by Court order on 11 December 1968.

[28] Trustee elections for the Trust last occurred in November 2019 (“the 2019 Trustee Election”).

[29] The Trustees elected and appointed by the Court following the 2019 Trustee Election were (in order of their polling results):

- (a) Heemi Biddle;
- (b) Clinton Ellis;
- (c) Kelly Te Heuheu; and
- (d) Tangonui Kingi.

[30] The 2019 Trust Order was confirmed by order of the Court on 16 December 2019.¹⁰

[31] In accordance with the Kawenata that is attached to the 2019 Trust Deed, the next trustee election must be held between 3 October – 30 November 2022 (“the 2022 Trustee Election”). At the 2022 Trustee Election:¹¹

- (a) Three (3) of the Trustees elected at the 2019 Trustee Election shall retire, such that four (4) of the Trustees elected at the 2019 Trustee Election shall remain in office;
 - (b) All trustees who were elected prior to the 2019 Trustee Election shall retire; and
 - (c) An election shall be held for three (3) trustee positions.
- (“the transitional provisions”)

⁹ Affidavits of C Ellis dated 9 and 22 June 2022

¹⁰ 412 Aotea MB 122-128 (412 AOT 122-128).

¹¹ 2019 Trust Order, Sch 2 of the Kawenata, cl 4.2.

[32] The transitional provisions are captured in the Kawenata. The Kawenata has the status of a contract between the trustees and the owners and between each owner. It is stated that it is also enforceable by law by the trustees and the owners.¹²

[33] The Kawenata also provides that the order of retirement for the trustees under the transitional provisions will be “determined by agreement among the Trustees failing which the determination will be made by lot.”¹³

[34] The transitional provisions were included as part of a process of review, which was approved by beneficial owners, and confirmed by amendments made by the Court in the 2019 Trust Order. The transitional provisions were included in the 2019 Trust Order to reduce the number of trustees from eleven to seven following the 2022 Trustee Election.

[35] In particular, the transitional provisions allow for four trustees to remain on the Trust following the 2022 Trustee Election. This was intended to ensure continuity of office, whereby over half the Trustees remaining on the Trust have at least three years’ experience of being a trustee.

[36] The Trustees agreed at a meeting held on 9 November 2021 (“the November Decision”), that the process to identify retiring trustees for the 2022 Trustees election be as follows:

- (a) That, of the seven trustees appointed in the 2019 election, a call for volunteers to retire is made first; and
- (b) Should there be none, or less than three volunteers, then the lowest polling of the seven to make three will retire.
- (c) There were no volunteers to retire and, on that basis, the three trustees who were the lowest polling members were to retire at the 2022 Trustees Election. The four highest polling trustees to remain in office were:
 - (i) Heemi Biddle;

¹² 2019 Trust Order, Sch 2 of the Kawenata, cl 4.3.

¹³ Ibid

- (ii) Clinton Ellis;
- (iii) Kelly Te Heuheu; and
- (iv) Tangonui Kingi.

[37] Given the November Decision, Ms Te Heuheu was to remain as a trustee and did not need to re-stand at the 2022 Trustee Election, but would have to retire in 2025. No one challenged this decision at the time.

[38] On 27 November 2021, Ms Te Heuheu passed away.

[39] Following the death of Ms Te Heuheu the trustees were required to consider if the casual vacancy provisions in the 2019 Trust Order apply:

4.6 Casual vacancies:

Should:

- (a) there be no person elected to replace a Trustee following that Trustee's retirement; or
- (b) any casual vacancy arises prior to the expiry of any Trustee's term of office; and
- (c) the term to run for that vacant position in either 4.6(a) or 4.6(b) exceeds twelve (12) months; then that vacancy shall be filled
- (d) in the first instance, by appointing the next highest polling candidate in the most recently held Trustee election who is already not a Trustee; and
- (e) if no person is able to be appointed pursuant to rule 4.6(d), by the holding of a further election in accordance with this Schedule.

4.7 Term of casual appointments:

In the case of an appointment made pursuant to *rule 4.6* of this Schedule the Trustee thereby appointed shall, as the case may be, hold office:

- (a) In the case of a Trustee appointed pursuant to *rule 4.6(a)* of this schedule, for the same term as that Trustee would have been appointed had he or she been appointed, immediately following the retirement of the previous Trustee, under *rule 4.4* of this Schedule; or
- (b) In the case of a Trustee appointed pursuant to *rule 4.6(b)* of this Schedule, for the balance of the term of office of the Trustee that he or she has replaced.

[40] Following Ms Te Heuheu's death, the trustees considered the vacant Trustee position at the trustee meeting on 14 December 2021 ("the December 2021 Meeting"). At that meeting, the trustees asked the Group Manager of the Trust ("GM") to clarify the vacancy left by Ms Te Heuheu's passing. At the hui, the GM advised:

[T]hat out of respect, the vacant position would normally remain vacant. In view of the upcoming 2022 election, there is no step-up for a replacement for Trustee Te Heuheu and we will be looking to elect four Trustees rather than three. The four highest polling candidates from the 2019 election are Heemi Biddle, Binky Ellis, Tangonui Kingi and Tina Porou.

[41] At the December 2021 Meeting, it was agreed that the GM would check and provide an update on any change in the advice. A trustee meeting was not held in January 2022.

[42] On 3 February 2022, the GM confirmed to the Trust's lawyer that the election voting for the 2022 Trustee Election would be held on 3 October 2022 and close on 7 November 2022.

[43] At the 8 February 2022 Trust meeting ("the February 2022 Meeting"), the GM provided an update on the 2022 Trustee election, including legal advice from Kāhui Legal and a draft application to the Court, which would seek directions to confirm they would be acting in accordance with the 2019 Trust Order in not replacing Ms Te Heuheu prior to the 2022 Trustee Election.

[44] The application on behalf of the Trust seeking directions from the Court was filed on 4 March 2022.

[45] The trustees did not discuss the matter at the Trust meeting on 8 March 2022.

[46] Mr Lawless contacted the trustees in March 2022 seeking clarification on how Ms Te Heuheu's trustee position might be filled.

[47] At the 12 April 2022 Trust meeting ("the April 2022 Meeting"), the trustees were provided an outline of the preparation for the 2022 Trustee Election. The trustees agreed to await the outcome from the Court on the application seeking directions.

[48] At the 10 May 2022 Trust meeting (“the May 2022 Meeting”), the trustees received an update from Kāhui Legal confirming that the Court hearing would be held on 17 May 2022. The trustees also confirmed that the trustee election process and timelines would be reported to the next meeting.

[49] At a Trust meeting on 14 June 2022, the Trust confirmed to hold the voting for the 2022 Trustee Election between 3 October 2022 and 7 November 2022, with the Returning Officer to advise the GM of the election results on or by 10 November 2022 (“the June 2022 Decision”).

[50] I heard arguments by the parties via zoom on 17 May 2022.¹⁴ I also received subsequent submissions and evidence on specific issues that arose at the hearing and subsequent to that.¹⁵

Ngā take

The Issues

[51] The issues for determination are:

- (a) Are the casual vacancy provisions in the 2019 Trust Order for appointing replacement trustees triggered as a result of Ms Te Heuheu’s death?
- (b) More specifically;
 - 1. When was Ms Te Heuheu due to retire as a trustee?
 - 2. Was the term of office remaining for Ms Te Heuheu at the time of her death more or less than 12 months?
- (c) Is there a basis to not follow the casual vacancy provisions in the 2019 Trust Order, even if they are triggered?

¹⁴ 449 Aotea MB 237-245 (449 AOT 237-245).

¹⁵ Submissions for the Applicants dated 23 June 2022, submissions for the Respondent dated 30 June 2022, an affidavit of C Ellis dated 23 June 2022 and a Memorandum of Counsel for the Applicants dated 8 July 2022.

Te Wewete*Analysis*

[52] This application requires an interpretation of the 2019 Trust Order, as applied to the material facts.

[53] There is one matter of fact that does require clarification so that I can properly determine whether Ms Te Heuheu is required to be replaced. It is a matter of interpretation, as opposed to a disputed fact as such.

[54] There is some confusion as to whether the November Decision, relating to who was to retire and who was to roll over at the 2022 Trustee Election, following the death of Ms Te Heuheu, was confirmed or altered by the Trustees. As a result, I sought further information from the Trustees. I summarise their response below:¹⁶

At all times, the Trustees have maintained their decision from the 9 November 2022 Trustee meeting where a Trustee resolution was passed confirming that the four highest polling Trustees will remain in office following the 2022 trustee election.

Following the November 2021 Trustee meeting, the Trustees did not make any further decision or resolution to change the November Resolution.

At the December 2021 Trustee meeting, the Trustees asked the Group Manager of the Trust (the GM) to clarify the vacancy left by Ms Te Heuheu. The GM confirmed that she would check and provide an update on any change in the advice.

At the following Trustee meeting (8 February 2022), the GM presented an update on the 2022 election setting out the legal advice that had been sought and the draft application to the Court seeking directions on whether the Trustees should appoint someone.

The Trustees received the GM's update and affirmed the application to go to the Court.

At the April 2022 Trustee meeting the Chief Executive Officer of the Trust (the **CEO**), through the CEO report, provided an update on the 2022 Trustee election. The CEO report notes:¹⁷

To recap: that the four trustees who will remain are Binky Ellis, Heemi Biddle, Tangonui Kingi and Tina Porou (the next highest polling candidate from the 2019 election).

¹⁶ Memorandum of counsel on behalf of the Trustees of the Lake Taupō Forest Trust dated 8 July 2022, at [4].

¹⁷ Second affidavit of C Ellis dated 23 June 2022, at CJE-3.

The Trustees endorsed the recap provided by the CEO. This is reflected in the April 2022 Trustee minutes where the Trustees endorsed the outline of where the Trust was at and the work done to prepare for the upcoming Trustees election.¹⁸

The Trustees did not make any resolutions at the April 2022 meeting confirming that the four highest polling Trustees will remain in office following the 2022 trustee election given this decision had already been made at the November 2021 Trustee meeting.

[55] Having read and understood the contents of the CEO report and the explanation provided, I am satisfied that the trustees did not change the November Decision. It remained their position after Ms Te Heuheu passed away, and the trustees were in fact addressing the concerns raised by Mr Lawless. The fact that these matters were not specifically referenced in the April 2022 Meeting minutes is therefore not overly material, although it would be best practice for the trustees to record the key matters discussed and resolved, so as to avoid the need to rely on other documents to reconstruct the position.

[56] I now turn to address the main issues.

When was Ms Te Heuheu due to retire?

[57] I find that Ms Te Heuheu's term of office was to end in 2022 and not in 2025 as argued by Mr Lawless.

[58] I accept that the original position was that Ms Te Heuheu was to retire in 2025, as determined by the November Decision, when she was still alive. I find, however, that the November Decision was not premised on selecting specific individual trustees *per se*, but rather based on a criteria that the four highest polling trustees from the 2019 Trustee Elections would remain in office until 2025, whoever they may be. Once Ms Te Heuheu passed away, it is clear and logical, that she would not continue to be considered within the four to remain as trustees until 2025. That is because four existing trustees were required to remain in office as at the 2022 Trustee Election.

[59] I find that the November Decision was an appropriate decision and consistent with the 2019 Trust Order.

¹⁸ Second affidavit of C Ellis dated 23 June 2022, at CJE-3.

[60] Importantly, the November Decision, as it currently stands, in no way undermines the main goal of the Trust as determined by the review, which was to reduce the trustee group from 11 to seven at the 2022 Trustee Election.

[61] The exact date in 2022 when Ms Te Heuheu was to retire is the next issue. This is an issue because that determines whether her term of office was more or less than 12 months.

[62] The 2019 Trust Order does not specify the exact date of retirement for those trustees required to retire at the 2022 Trustee Election. In the normal course of events, the exact date of retirement would not be material, because pragmatism would usually prevail. However, it is an issue here, given that the period between Ms Te Heuheu's date of death and when the 2022 Trustee Election must be held can be interpreted as being both less and more than 12 months. And of course, whether the casual vacancy provisions are triggered or not, is determined by whether the term of office left was more or less than 12 months.

[63] I am also mindful that the Kawenata that houses the relevant clauses, is a contract as between the Trustees and the owners. This fact alone suggests my ability to make a pragmatic call on this issue is limited, in the absence of consent of the contracting parties. In that respect, I agree with the submissions made by Ms Hunia that the trustees are bound by the Kawenata and must comply with its contents.

[64] The relevant wording in cl 4.2 of the Kawenata states:

The Trustees shall retire from office with elections to be held for their respective positions as Trustees....

[65] I received evidence after the hearing that the GM advised the Trust's lawyers that the election voting period for the 2022 Trustee Election would be between 3 October 2022 and 7 November 2022.¹⁹ I am told that this is consistent with the election voting period for previous elections. I now understand that the trustees confirmed their approach by the June 2022 Decision.

¹⁹ Affidavit of C Ellis dated 9 June 2022 at [5].

[66] Because there is no specific clause in the 2019 Trust Order confirming the exact date for the end of term for those trustees who must retire at the 2022 Trustee Election, it must be construed from the relevant clauses and the context.

[67] The wording of the 2019 Trust Order provides a range of possible interpretation options for the date of retirement, including:

- (a) The last date of the stipulated election period, i.e. 30 November 2022; or
- (b) The day before date of the actual election, whichever date is chosen by the trustees between 1 October and 30 November 2022; or
- (c) The day before the stipulated election period opens, i.e. 30 September 2022.

[68] Only the first option above, would lead to a position where Ms Te Heuheu's term of office would be greater than 12 months, given that her date of death was 27 November 2021, and her term of office ending on 30 November 2022, i.e. 3 days over 12 months. That option would however create a nonsensical outcome, whereby, those retiring trustees would still be in office, after the formal election, if the election was held on a date before 30 November 2022. This is of course the case, given that the confirmed voting period for the 2022 Trustee Election ends on 7 November 2022, with results being confirmed on or by 10 November 2022.

[69] There is a further and better option, that I find is the most appropriate and logical in the circumstances. It requires an interpretation of Schedule 2 of the Kawenata.

[70] Clause 4.4 states that a newly or re-elected trustee's term of office (being six years) commences on the date they were elected or re-elected, as the case may be. Their official appointment is when they are formally appointed by order of the Māori Land Court, but their term of office commences when they were elected, not when they are confirmed by the Court.

[71] So when are these trustees considered elected, when the trustee election voting period is between 3 October 2022 to 7 November 2022? The answer lies in the provisions in the 2019 Trust Order that cover how votes are counted and approved, as applied to the

June 2022 Decision to adopt the voting period approach (as opposed to one fixed election date).

[72] Clause 11.1 states that upon the expiry of the date for the receipt of postal dates, the Returning Officer shall record and count all votes validly cast. Per cl 11.2, once all votes are counted and the result of the election is determined by the Returning Officer, the Returning Officer shall certify the result of the election and communicate the result to the Trustees.

[73] Clause 9.2 provides that 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 Returning Officer no later than three (3) days after the closing date for the election.

[74] Based on the June 2022 Decision, the closing date for the election is 7 November 2022. The Returning Officer is then to report the results to the GM of the Trust on or by 10 November 2022, which is three days after the closing date for the 2022 Trustee Election (per clause 9.2 above). On that basis, I find that the date the new trustees are elected (or put another way, the election date) is the date the certified results are communicated to the GM of the Trust, being 10 November 2022.

[75] On that analysis, the term of office for Ms Te Heuheu and any other trustee that is required to retire at the 2022 Trustee Election is to end the day before that election date i.e. 9 November 2022.

[76] The term of office left for Ms Te Heuheu is therefore less than 12 months, given her date of death was 27 November 2021 and because I have found that her term was to end on 9 November 2022.

[77] On that basis, per cl 4.6 of the 2019 Trust Order, there is no need to invite Mr Lawless, as the next highest polling candidate from the 2019 Trustee Election, to replace Ms Te Heuheu.

[78] I am mindful that the timing of the June 2022 Decision may be viewed as a convenient decision, because it was determined after the issues were raised by Mr Lawless. However, it is consistent with the approach adopted in previous trustee elections and there is evidence that the GM of the Trust advised Kāhui Legal that this was to be the approach, earlier in the process. There is no evidence that the trustees have engineered things to prevent Mr Lawless from being appointed and I am satisfied that the decisions were made in good faith.

Claims made by Mr Lawless and the status of the Kawenata

[79] Given my conclusions above, there is no need to determine the final issue. For completeness, I do however respond to some specific matters raised by Mr Lawless as well as the issue as to the status of the Kawenata.

[80] As already noted, I do not agree, based on the evidence before me, that there is even a prima facie case that the trustees have breached their obligations under the Act, the Trusts Act and the 2019 Trust Order. I find that this was a necessary application and, given the facts here, equally, Mr Lawless was justified in putting his arguments before me as to the interpretation of the 2019 Trust Order.

[81] In regard to the criticisms of the Trust, in not providing Mr Lawless with documents including the Trust's legal advice, I do not need to determine the issues raised, save to say that the Court is always available to address applications for requests for information by beneficiaries, where such requests are rejected or not responded to by the trustees. Each application will be dealt with on its merits.

[82] I do agree, to some extent, that the redacted minutes of trustee meetings relevant to the issues before me, were not overly comprehensive or clear as to what the position of the trustees was post Ms Te Heuheu's death. I do invite the trustees to reflect on their minutes and how much detail should be included. A unique feature of trusts under the Act is that the beneficiaries are treated more as owners in a way that goes beyond the usual understanding of the equitable rights of beneficial owners.²⁰ That reality does lead to a view that minutes of the trust may require some more depth.

²⁰ Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis New Zealand 2022) at [29.7]

[83] Finally, I find that the Kawenata forms part of the 2019 Trust Order and is to be treated in the same manner as the other terms of trust. Whether the Kawenata being a contract, gives rise to contractual remedies, is not required to be determined, but its status as a contract does not change how I have interpreted the Kawenata, as distinct from the other clauses of the 2019 Trust Order.

Whakataunga

Outcome

[84] Having reviewed the 2019 Trust Order and the decisions of the trustees relating to the issues of the 2022 Trustee Election and all matters related, I make the following determinations as to the exercise of the relevant trustee's powers:

- (a) That the Trustees of the Lake Taupō Forest Trust have acted in accordance with the 2019 Trust Order by not replacing the trustee position of the deceased trustee, Ms Kelly Te Heuheu, prior to the 2022 Trustee Election; and
- (b) That the decision made by the trustees of the Lake Taupō Forest Trust on 7 November 2021, with respect to who was to retire as a trustee at the 2022 Trustee Election, was appropriate and in accordance with the 2019 Trust Order.

[85] There is no award of costs given the nature of the application and the fact that Mr Lawless raised issues that, in the circumstances, were arguable.

[86] If the trustees require formal orders of the Court reflecting the above determinations, then leave is granted to submit draft orders for sealing.

Mauri ora

I whakapuaki i te 9.00 am i Tāmaki Makaurau te 21st o ngā rā o Hōngongoi i te tau 2022.

Pronounced at 9.00am in Auckland on this 21st day of July 2022.

A H C Warren
JUDGE