

I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Appellate Court of New Zealand
Waiariki District

A20220001496
APPEAL 2022/1

WĀHANGA <i>Under</i>	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Torere Section 58
I WAENGA IA <i>Between</i>	NOLA RIPEKA HINEHAURANGI MELROSE AND MELANIE MIRIAMA THOMAS Ngā kaitono pīra <i>Appellants</i>
ME <i>And</i>	JODIE LORRAINE PORTER Kaiurupare pīra <i>Respondent</i>

Nohoanga:
Hearing 12 May 2022, 2022 Māori Appellate Court MB 154-175
(Heard at Rotorua via Zoom)

Kooti:
Court Deputy Chief Judge C L Fox (Presiding)
Judge S Te A Milroy
Judge A H C Warren

Kanohi kitea:
Appearances C Bidois for Appellants
J McDougall for Respondent

Whakataunga:
Judgment date 7 July 2022

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

Hei timatanga kōrero

Introduction

[1] This appeal addresses the Māori Land Court’s power to restrain trustees who have resigned, from re-standing in the subsequent election process, and how the power of restraint is to be exercised.

[2] Nola Melrose and Melanie Thomas (the appellants) were, for many years, trustees of the Torere Section 58 Trust, an ahu whenua Trust (the Trust). Against their opposition the Māori Land Court determined they had resigned in 2018 and should be replaced by those elected at a Meeting of Owners held on 13 July 2021.

[3] The lower Court made the orders under s 239 of Te Ture Whenua Māori Act 1993 (the Act) replacing the trustees on 24 November 2021. They now appeal those orders, on the basis that the directions given by the lower Court for the 13 July 2021 election were ambiguous, and they seek to have a further meeting of owners called for the purposes of holding another trustee election.¹

Kōrero whānui

Background facts and context

[4] The facts in this appeal are not in dispute. We therefore adopt the recitation of the facts contained in the legal submissions of counsel for the appellants, Mr Bidois, as well as the helpful chronology prepared jointly by counsel. We also include some other matters of context that are relevant to the issues before us.

[5] Given the number of different hearings, decisions and meetings relevant to this appeal, we begin with a list of defined terms, for the avoidance of confusion:

Resignation Hearing
Is the special hearing held on 24 May 2021, to determine whether the alleged resignations had been given

¹ The lower Court refused to grant Special Aid to the appellants to pursue this appeal until a Notice of Appeal was filed, and that initial refusal was included in the Notice of Appeal as a second ground of appeal. However, at the appeal hearing the appellants withdrew the second ground of appeal as, in the interim, Special Aid had been granted.

Resignation Decision
Is the decision made by Judge Coxhead at the Resignation Hearing confirming that the appellants had in fact resigned
Resignation Directions
Are the election of trustee directions given by Judge Coxhead as part of the Resignation Decision which are the subject of this appeal
Meeting of Owners
Is the meeting directed by Judge Coxhead as part of his Resignation Directions and includes the election that took place at that meeting on 13 July 2021
Appointment Hearing
Is the hearing held before Judge Coxhead on 24 November 2021 replacing the appellants per s 239 of the Act and appointing replacement trustees as a result of the elections held at the Meetings of Owners
Appointment Decision
Is the decision made by Judge Coxhead per s 239 of the Act replacing the appellants with new trustees, following the Appointment Hearing

[6] Mr Bidois' submission sets out the facts as follows:

“Hearing regarding resignations

3. The appellants were trustees for Torere Section 58 Ahu Whenua Trust. An application was brought by the respondent seeking a finding that the appellants had resigned from their positions and orders giving effect to those resignations, or alternatively, an order under s 240 of the Act for removal of trustees.²
4. On 24 May 2021, a special hearing (“**Resignation Hearing**”) was set down to determine whether the alleged resignations had been given, with the s 240 removal application to be addressed at a later date.³
5. In the Resignation Hearing, the Court found that the appellants had resigned at a meeting on 20 October 2018, saying:⁴
 - [25] It is clear to me that, based on the facts, applying the *Witana* principles, that resignations have taken place.
 - [26] Therefore these three trustees then will need to be replaced and that brings us to what directions this Court needs to make in order to allow that to happen.
6. The Court then issued the following directions (“**Resignation Directions**”):⁵

Directions

- [28] The Court will convene a meeting for the specific purposes of:

² *Porter v Melrose – Torere Section 58* (2021) 255 Waiariki MB 119 (255 WAI 119) at 121 of transcript.

³ At 124 of transcript.

⁴ At [25]-[26].

⁵ At [28]-[32].

- a. Determining amongst the owners as to how many trustees there are to be [...]; and
- b. The election of trustees.

[29] As I say, these three trustees do need to be replaced, given that their resignations have been accepted by this Court. In the meantime, until then, there will be a direction that the trustees are not to undertake any new ventures or anything of that matter.

[30] Judge Harvey has a standard direction, which I could find, where he essentially prohibits the trustees in the interim until they are replaced from undertaking any activities, other than maintaining the day to day running of the trust. I'm not sure that there are any day to day matters that are required but if there are any payments, I think Judge Harvey's standard direction requires they come to the Court first for approval before these trustees can sign anything off.

[31] That meeting is to happen as soon as possible. The Court will give notice and notice will be paid for out of the Special Aid fund.

[32] The Court will appoint an independent facilitator to run that meeting and as I say, there's two issues for discussion. One is how many trustees and then the second matter is for the election of trustees so that it can be brought back to the Court for final consideration and determination.

7. The Court further clarified the directions in a postscript:⁶

POSTSCRIPT:

I referred to standard directions that Judge Harvey has in replacement situations where trustees, who are to be removed or have resigned, continue until they are replaced. This is because to remove the trustees immediately prior to any replacement trustees being appointed would leave the Trust in a hiatus.

The approach I have taken is to direct a meeting so people can be elected and then put before the Court for consideration to be appointed as soon as possible.

So everyone is clear, until the trustees are replaced as I have directed:

- a. the trustees are not to undertake any new ventures or anything of that matter other than maintaining the day to day running of the trust.
- b. Any matters requiring payment, will require Court approval.

Meeting of owners

8. A meeting of owners was held on 3 July 2021 at Opotiki District Court. It was facilitated by a Court-appointed facilitator, Shane Gibbons, and had a Māori Land Court Deputy Registrar present.

9. At the meeting of owners, the facilitator ruled that the appellants were not eligible to stand for election:⁷

These trustees will need to be replaced and it needs to be clear, that the old trustees are being replaced, **they are not eligible to be elected** as a trustee at this meeting, they have resigned and are being replaced. [emphasis added]

10. The facilitator reiterated this:⁸

⁶ At 136 of transcript.

⁷ Minutes of Torere Section 58 Meeting of Owners dated 3 July 2021 at page 3, paragraph 3.

⁸ At page 5, paragraph 9.

So what the court is saying there- “therefore these three trustees will need to be replaced.” That’s the basis, that **in being replaced, you can’t retract and re-stand**. [emphasis added]

11. As a consequence, the appellants were denied opportunity to offer themselves for re-election and other candidates were elected.

Hearing for appointment of trustees

12. A hearing was held on 24 November 2021 before Judge Coxhead to consider an application for the appointment of trustees under s 239 of the Act, to give effect to the election held at the meeting of owners.⁹
13. The appellants opposed the appointments on the basis that they had been wrongly prevented from standing for election. The appellants submitted that the Court could not be satisfied that the proposed appointees were broadly acceptable to the beneficiaries in terms of s 222(2)(b) of the Act.¹⁰
14. The Court made the following finding (“**Appointment Decision**”):¹¹

When [the matter] was, I think, called the first time, there was the issue raised by Ms Thomas and Ms Melrose that they hadn’t resigned. Then there was a further hearing and at that hearing, I gave a decision recorded at 255 Waiariki Minute Book. **In that decision, I decided that yes, all three persons who had indicated that they were resigning had resigned and as I have said earlier, that they would be replaced.**

Now when I indicated that they would be replaced and now I’m reading from paragraph 26 which is at 255 Waiariki Minute Book 134 where I’ve said: “Therefore, these three trustees will need to be replaced” and that brings us to what directions the Court needs to make in order to allow that to happen and then later on I say the same thing again: “That these three trustees do need to be replaced.”

Then when I finished the decision, I also included in the minute a postscript because I had referred to a direction of Judge Harvey’s. In the standard direction that Judge Harvey has in replacement situations where trustees who are to be removed or have resigned, they continue until they are replaced and this is because to remove the trustees immediately prior to any replacement trustees being appointed would leave the trust in a hiatus.

Now all of those things, all of those indications that these trustees would be replaced, were taken by Mr Gibbons at the meeting to mean that the three trustees who I said had resigned and did need to be replaced, would not be eligible to stand for election. **I think he has read my decision correctly and that is certainly the intention that the three trustees having resigned were to be replaced and that’s not to be replaced by themselves. They were to be replaced by new trustees and the meeting proceeded on that basis.** [emphasis added]”

[7] The recitation of facts from Mr Bidois’ submission above is now followed by the agreed chronology set out in the table below.

Date	Event	Record of Appeal
25 February 1981	Vesting Order granted, vesting Torere Section 58 (65 Opotiki MB186), in: Melanie Thomas (current appellant); Bob Ihe; Olive Chapman; Nola Melrose (current appellant); Nimerate (Neville) Patu; Rover Waiapu.	
6 June 1991	New Trust Order issued: 65 Opotiki MB 186.	p. 98

⁹ *Porter v Melrose – Torere Section 58* (2021) 265 Waiariki MB 193 (265 WAI 193).

¹⁰ At 201 of transcript.

¹¹ At 205-206 of transcript.

1996	Trust review due: cl. 4.c. Trust Order.	p. 101
22 March 2015	Neville Patu (trustee) passes away.	p. 111
20 October 2018	Annual meeting of owners, at which current appellants resigned.	p. 91, 189, 213-220
5 September 2019	Rover Waiapu (trustee) passes away.	p. 110
22 November 2020	Meeting of owners called by Jodie Porter (respondent in this appeal); trustee elections were held at that meeting.	p.147
24 November 2020	Application to reduce, replace or remove trustees filed by Jodie Porter, A20200012870.	p.105
28 January 2021	Hearing of application A20200012870 in Rotorua. Issue raised as to whether the current appellants had resigned from their trusteeships. Current appellants acknowledge their resignations but claim given under duress. Application adjourned for filing further evidence.	p.85
19 February 2021	Current appellants execute Forestry Access License.	p.197
24 May 2021	Second hearing of A20200012870 held in Rotorua. The Lower Court found that the current appellants had resigned as trustees and needed to be replaced; application for removal not determined: 255 Waiariki MB 134 paras [25]-[26].	p.66
13 July 2021	Meeting of owners facilitated by Mr Shane Gibbons held at Torere. Election held for replacement trustees. Facilitator ruled that current appellants not eligible to stand for election.	p.275
22 November 2021	Minute of Lower Court issued in A20200012870, declining request by Ms Melrose for adjournment of 24 November 2021 hearing to replace trustees	p.61
24 November 2021	Third hearing of A20200012870 held in Rotorua. Having heard submissions from all parties, the Lower Court made orders: (a) Under section 239(1) replacing Neville Patu and Rover Waiapu as they are deceased, and Melanie Miriama Thomas, Nola Ripeka Hineaurangi Melrose and Olive Chapman as they have resigned, with Albert Waiapu, Alaina Chapman, Jodie Porter, Peggy Fell and Veronica Phipps as responsible trustees of Torere Section 58 Ahu Whenua Trust; and (b) Under section 239(3) vesting the land and assets in Albert Waiapu, Alaina Chapman, Jodie Porter, Peggy Fell and Veronica Phipps as responsible trustees of Torere Section 58 Ahu Whenua Trust.	p.60

22 December 2021	A20200012870 recalled in Rotorua. Orders made appointing and vesting Torere Section 58 Ahu Whenua Trust in three of the five abovementioned trustees, being those who had completed trustee training, with the condition that Albert Waiapu and Veronica Phipps have three months to complete trustee training: (a) Section 239(1) replacing Neville Patu and Rover Waiapu as they are deceased and Melanie Miriama Thomas, Nola Ripeka Hinehaurangi Melrose and Olive Chapman as they have resigned, with Jodie Porter, Peggy Fell and Alaina Chapman; and (b) Section 239(3) vesting the land and assets in Jodi Porter, Peggy Fell and Alaina Chapman as responsible trustees of Torere Section 58 Ahu Whenua Trust. The appointment of Albert Waiapu and Veronica Phipps is conditional upon them completing trustee training within the next three months.	p.29-31
1 December 2021	Appellants' application for special aid to appeal the appointment order made on 24 November 2021 ("the appointment order") filed in Rotorua.	p.16
3 December 2021	Appellants' application for special aid to appeal the appointment order declined.	p.32
14 January 2022	Appellants' notice of appeal filed against: (a) Order appointing trustees on 24 November 2021; and (b) The decision to decline the appellants' application for special aid to appeal on 3 December 2021.	p.4

[8] Further, the Resignation Decision was not made by a formal order of the Māori Land Court. Judge Coxhead did not stipulate in the Resignation Decision the legal basis relied upon for making the subsequent Resignation Directions.

[9] The trust order for the Trust does not specify whether a retiring trustee can restand in a subsequent election after retirement, but pursuant to clause 4(d) it does deal with the replacement process upon resignation:¹²

Clause 4(d) of the Torere 58 Trust Order

Replacement of Trustee

Upon the death, resignation or removal by the Court of a Trustee the surviving Trustees shall:

- i where the number of Trustees is less than 5 ensure that the next general meeting of beneficial owners considers a possible replacement, AND then make application to the Court for an order replacing such Trustee;

¹² Clause 4(d), Torere 58 Trust Order, 65 Ōpōtiki MB 186 (65 OP 186).

- ii where the number of Trustees is not less than 6 and the Court has not otherwise directed, forthwith make application to the Court for an order reducing the number of Trustees.

[10] The notice for the Meeting of Owners sent to owners by email (including Nola Melrose) and publicly advertised, did not state that the appellants could not stand as trustee candidates.¹³ The notice simply stated the agenda item as:¹⁴

2. Election of trustees

[11] The parties were sent a copy of the Court minute from the Resignation Hearing by email on 8 June 2021. A copy was sent to Mr Bidois.¹⁵

[12] By email dated 1 July 2021, the Māori Land Court responded to a number of queries about the Meeting of Owners, before it was held. None of the queries related to whether the appellants could re-stand as trustee candidates. Appellant Nola Melrose was copied into this email communication.¹⁶

[13] The removal application per s 240 of the Act was not dismissed by Judge Coxhead when he made the Appointment Decision and therefore it remains extant.

[14] There is no dispute that the appellants remained as trustees until such time as Judge Coxhead replaced them by the orders made in the Appointment Decision.

Ngā Take
The Issues

[15] The Notice of Appeal advances two grounds of appeal - that the Māori Land Court:

- (a) Erroneously held that as a matter of law, a trustee who has resigned cannot stand as a trustee candidate in the subsequent election of trustees; and

¹³ Email correspondence from P Savage, case manager, dated 14 June 2021.

¹⁴ Advertisement in Ōpōtiki News, 16 and 17 June 2021, page 18.

¹⁵ Email correspondence from P Savage, case manager, dated 8 June 2021.

¹⁶ Email correspondence from P Savage, case manager, dated 1 July 2021.

- (b) Misdirected itself as to the nature of the retirement finding, by finding it was an order for the appellants to be “replaced” as opposed to a finding that they had resigned.

[16] At the hearing of the appeal, Mr Bidois considered that the Māori Land Court had the power to restrain the appellants from standing for re-election.¹⁷ The appellants’ sole remaining argument on appeal is that the Resignation Directions needed to be given in unambiguous terms and were not. Mr Bidois argued that such directions “need to be explicit and clear and unambiguous.”¹⁸

[17] The appellants say that as a result of this ambiguity in the Resignation Directions, they were wrongfully deprived of the right to stand for election and that their notion of collective decision making was compromised or in Māori terms, the hē impacted their tino rangatiratanga.¹⁹

[18] Mr McDougall for the respondents conceded that as a matter of fact, Judge Coxhead was not explicit in his Resignation Directions or anywhere else on the record, that the appellants could not re-stand, and argued that the appeal falls to be determined on the question of what “replacement” means.²⁰

[19] Although the ambiguity argument was not specifically pleaded in the Notice of Appeal, in the way described above, we find that this issue is implicit in the grounds of appeal, on the basis that, because the power to restrain exists, the focus naturally shifts to a question of whether it was exercised appropriately. In any case, counsel for the respondents took no issue with this in his submissions and in fact focussed predominantly on the argument that the Resignation Directions were clear.

[20] The issues that arise in this appeal are:

- (a) What is the source of the power to restrain someone from standing to be elected as a trustee, at an election, for an ahu whenua trust?

¹⁷ 2022 Māori Appellate Court 158 (2022 APPEAL 158).

¹⁸ 2022 Māori Appellate Court MB 173 (2022 APPEAL 173).

¹⁹ 2022 Māori Appellate Court 174 (2022 APPEAL 174).

²⁰ 2022 Māori Appellate Court 171 (2022 APPEAL 171).

- (b) Did Judge Coxhead properly exercise this power, by issuing the Resignation Directions in unambiguous terms and if he did not, is this an error of law that justifies annulling the Appointment Decision, and if so, are there other remedies? and
- (c) If no such power exists, was the election process at the Meeting of Owners so flawed that the Court was unable to ascertain correctly the views of the owners for the purposes of making the s 239 orders?

Te Ture
The Law

[21] The orders appealed were made per s 239 of the Act:

239 Addition, reduction, and replacement of trustees

- (1) The court may at any time, on application, in respect of any trust to which this Part applies, add to or reduce the number of trustees or replace 1 or more of the trustees.
- (2) The court may amend the court's records for a trust if a trustee dies and the court receives a death certificate for the deceased trustee.
- (3) In exercising the powers in subsections (1) and (2), the court may order the vesting of land or other assets of the trust in any person or persons (with the consent of that person or those persons) upon the terms of the trust, whether or not that person was previously a trustee.

[22] Whilst that section deals with the replacement of trustees the appeal is not about whether Judge Coxhead misapplied s 239 of the Act, but rather focusses on whether his directions, that led to the s 239 orders, were unambiguous. If they were ambiguous then the question is whether there was an error of law sufficient to justify an appropriate remedy.

[23] 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.

[24] For completeness we note ss 238, the Preamble and ss 2 and 17 of the Act, which, respectively, provide for the Court to enforce the obligations of a trust and set out the values and objectives of the Court in exercising its powers, which are to support tangata Māori to retain and utilise their whenua as a taonga tuku iho.

Te wewete

Analysis

Source of the Power to Restrain

[25] In *Maruera v Te Rūnanga o Ngāti Maru (Taranaki) Trust* the Court of Appeal confirmed that the Māori Land Court has extensive supervisory powers.²¹ As that Court found, these powers are sufficiently wide to enable the Māori Land Court to call a meeting of owners for the purposes of an election of trustees and to ‘fashion its own process in such a way as to enable it to act effectively and to fulfil the purposes of the Act’.²² Further the Māori Land Court has wide supervisory and enforcement powers under s 238 of the Act, as well as the power, at any time, to add, reduce, replace or remove trustees under ss 239 and 240 of the Act.

[26] We consider that there is ample authority to show that, in exercise of its powers under ss 237 and 238, the Māori Land Court has the power to restrain a person from seeking re-election or standing to be elected for a Part 12 trust. The Court is able to direct that someone may not stand for re-election where that person is an incumbent trustee who has resigned from the trust but has not yet been replaced or removed by the Māori Land Court under the provisions of ss 239 or 240 of the Act. The Māori Land Court has on various occasions exercised this power to restrain beneficial owners of Part 12 trusts from standing for re-election. For example:

²¹ *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.

²² *Clarke v Karaitiana* [2011] NZCA 154 at [39]; at [42].

- (a) In *Brooking v Henderson – Wharekahika A47*, a trustee was removed and disqualified from standing for re-election at the next election of the trust.²³
- (b) In *Taueki v Proctor – Horowhenua 11 (Lake) Block*, two trustees were restrained from standing for re-election for two three-year terms, and a further six trustees were restrained for one three-year term.²⁴
- (c) In *Rātima v Sullivan - Tatarakina C* regarding trustees who had been removed for cause, Judge Harvey (as he was then) went on to consider whether the trustees he removed should be made permanently ineligible from standing for election.²⁵

Requirements for Exercise of the Power to Restrain

[27] We find that Judge Coxhead did not need to be explicit in his decision as to the source of his power to restrain the appellants from re-standing, although no doubt it is best practice to provide such reference. But failing to do so is not an error of law; it is sufficient that a judge *has* the powers per s 237 of the Act to render the Court's exercise of them legally effective.

[28] However, there is no rule of general application that a trustee who has resigned from an ahu whenua trustee cannot stand again for re-election. However, the ability of a trustee to do so can be curtailed by the terms of the trust order, which in any case is set in place by the Māori Land Court, or in appropriate circumstances as set out in the cases referred to in paragraph 27 above.

[29] That said, we also accept that the Māori Land Court should specify in its directions, in clear and unambiguous terms, the processes to be adopted in holding a meeting of owners and carrying out a trustee election process. That proposition is not controversial and is vital in the Māori Land Court context where most parties do not have legal representation and

²³ *Brooking v Henderson – Wharekahika A47* (2022) 110 Tairāwhiti MB 238 (110 TRW 238). Note that this decision is currently under appeal.

²⁴ *Taueki v Proctor – Horowhenua 11 (Lake) Block* (2021) 437 Aotea MB 86.

²⁵ *Rātima v Sullivan - Tatarakina C* (2017) 64 Takitimu 121 at [142].

where significant costs are incurred (both human and financial) if hui are conducted on an incorrect footing and have to be repeated.²⁶

[30] There are a number of examples where the Court has given clear and explicit directions preventing a particular person from standing for re-election as trustee, sometimes with a ‘restraint period’ specified, including those outlined in Mr Bidois’ submissions.²⁷

[31] In *Taueki v Proctor*, the decision about ineligibility was given as follows:²⁸

[87] Matthew Sword and Robert Warrington are ineligible for nomination as trustees of Horowhenua 11 (Lake) Block Trust for two consecutive trustee terms of six years in total commencing on 2 February 2019 and expiring in February 2025.

[88] Marokopa Matakatea, Kerry Hori Te Pa, Nere (Ned) Nahona, Johnathon Procter, Kelly Tahiwī and Mungu Kerehi Wī Warena are ineligible for reappointment as trustees of Horowhenua 11 (Lake) Block Trust for a single three-year term expiring on 2 February 2022.

[32] Likewise, in *Rātima v Sullivan*, a period of exclusion was given:²⁹

[157] Mrs Kahukiwa-Smith, Messrs Wano, McInnes and Young and Mrs Te Pohe Heke are to serve out a period of ineligibility for appointment as a trustee for three consecutive terms of three years commencing from the date of their resignations.

[158] Mrs Huata Kupa and Mr Edwards are to serve a period of ineligibility for appointment to the role of trustees for two terms of three years commencing from the date of their resignations.

...

[160] Any former trustee found liable to repay monies to the trust will be ineligible for reappointment until any such liability has been repaid.

[33] A more abbreviated version of an exclusion from standing in an election was given by Deputy Chief Judge Fox in the recent decision *Brooking v Henderson*:³⁰

(c) The Registrar is to facilitate a new election to replace trustees, and those who are on the trust now should consider retiring and standing for re-election, with the exception of Mr A Henderson [*who was removed in this decision*]

²⁶ We note that the appellants were represented by an experienced Māori Land Court practitioner.

²⁷ *Wall v Karaitiana – Tauhara Middle 15 Trust* (2008) 87 Taupo MB 107 (87 TPO 107); *Wall v Karaitiana – Tauhara Middle 15 Trust* [2010] Māori Appellate Court MB 55 (2010 APPEAL 55); *Seymour v Spelman – Kawhia 02 Section 4 Block* (Waipapa Marae) (2020) 201 Waikato Maniapoto MB 45 (201 WMN 45).

²⁸ *Taueki v Proctor*, above n 23.

²⁹ *Rātima v Sullivan*, above n 24.

³⁰ *Brooking v Henderson*, above n 22 at [18].

[34] The Māori Land Court is called upon frequently to give directions to resolve impasses and/or to provide clarity for the trustees and beneficiaries. Ideally the Court's directions should leave no doubt as to the processes that trustees and/or beneficiaries must follow in order to avoid exacerbating the problems that the parties wanted resolved in the first place.

[35] We turn now to the issue of whether the Resignation Directions were sufficiently clear and unambiguous for the purposes of the election process conducted at the Meeting of Owners.

Were the resignation directions ambiguous?

[36] The Court of Appeal in *Clarke v Karaitiana*, relied on by the appellants, was dealing with a specific notice issued in the context of a court-directed meeting of owners.³¹ The issue related to the status of powers of attorney and whether they could be used at an election of trustees. The Court of Appeal found that the notice of the meeting was ambiguous and created confusion:³²

[42] ...In short, the Māori Land Court was entitled to fashion its own process in such a way as to enable it to act effectively and to fulfil the purposes of the Act. But whatever form was adopted, it was important that the notice of meeting should specify the process in unambiguous terms.

[37] Due to the flaws identified in the processes adopted at the meeting, the Court of Appeal held that the Māori Land Court did not get the proper views of the owners for the purposes of appointing trustees.³³ This is exactly what the appellants argue here.

[38] Whether directions given by a Judge are unambiguous is a question of fact, to be determined on the basis of the words used, by giving them their ordinary meaning, in the context in which they were given; their purpose, nature and importance.³⁴

[39] There was no argument by the appellants here that the notice of the Meeting of Owners was ambiguous, but rather that the Resignation Directions were. Whilst there is a factual distinction between the "notice" context in *Clarke v Karaitiana* and the "directions"

³¹ *Clarke v Karaitiana*, above n 26.

³² At [42].

³³ At [47].

³⁴ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912-913.

context here, the distinction does not, in our view, displace the principle that the Resignation Directions should be unambiguous.

[40] The Māori Land Court cases relied on by Mr Bidois are examples where the Māori Land Court made directions for the holding of elections of trustees, including directions concerning who could stand as candidates.³⁵ We accept that those decisions are examples where the relevant judges have been clear and explicit in their directions.

[41] Mr Bidois argued that Judge Coxhead should have followed this approach by expressly stating in the Resignation Directions that the Appellants were not eligible to stand for re-election, if that was his intention. As noted above, Mr McDougall conceded that Judge Coxhead was not explicit in this respect.³⁶

[42] However, the question is whether the Resignation Directions were unambiguous and if they were, does that failure amount to an error of law such that this Court should revoke the order made under s 239 of the Act. We frame it in this way, because we take the view that an explicit direction is best practice, but failing to state expressly that someone may not stand for election as a trustee does not, in and of itself, amount to an error of law, if what was directed was unambiguous in the circumstances.

The Words Used

[43] We set out the actual words used by Judge Coxhead in the Resignation Directions.³⁷ We have highlighted what we believe are the relevant parts for current purposes.

- (a) Therefore these **three trustees then will need to be replaced** and that brings us to what directions this Court needs to make in order to allow that to happen.
- (b) As I say, **these three trustees do need to be replaced, given that their resignations have been accepted by this Court.** In the meantime, until then, there will be a direction that the trustees are not to undertake any new ventures or anything of that matter.
- (c) **POSTSCRIPT:**

³⁵ *Wall v Karaitiana – Tauhara Middle 15 Trust* (2008) 87 Taupo MB 107 (87 TPO 107); *Wall v Karaitiana – Tauhara Middle 15 Trust* [2010] Māori Appellate Court MB 55 (2010 APPEAL 55); *Seymour v Spelman – Kawhia 02 Section 4 Block* (Waipapa Marae) (2020) 201 Waikato Maniapoto MB 45 (201 WMN 45).

³⁶ 2022 Māori Appellate Court MB 170-171 (2022 APPEAL 170-171).

³⁷ 255 Waiariki MB 134, 136 (255 WAR 134, 136) at [26], [29].

I referred to standard directions that Judge Harvey has **in replacement situations where trustees, who are to be removed or have resigned, continue until they are replaced.** This is because to remove the trustees immediately prior to any replacement trustees being appointed would leave the Trust in a hiatus.

The approach I have taken is to direct a meeting so people can be elected and then put before the Court for consideration to be appointed as soon as possible.

So everyone is clear, until the trustees are replaced as I have directed:

- c. the trustees are not to undertake any new ventures or anything of that matter other than maintaining the day to day running of the trust.
- d. Any matters requiring payment, will require Court approval.

Post Hearing Comments

Now all of those things, all of those indications that these trustees would be replaced, were taken by Mr Gibbons at the meeting to mean that the three trustees who I said had resigned and did need to be replaced, would not be eligible to stand for election. **I think he has read my decision correctly and that is certainly the intention that the three trustees having resigned were to be replaced and that's not to be replaced by themselves. They were to be replaced by new trustees and the meeting proceeded on that basis.** (emphasis added)

[44] In our view the words used by Judge Coxhead in the Resignation Direction, when read together, make it clear what he was proposing, which was that the appellants were to be replaced by other persons. The words used make it clear the purpose of the direction, which was to replace trustees, because Judge Coxhead had found that the appellants had resigned. This was not a situation where there had been a challenge to a previous election process and the Judge was looking to push the re-set button. It was a clear replacement context, based on resignations. Judge Coxhead used the word “replaced” numerous times in Resignation Directions, including this statement:³⁸

...So everyone is clear, until the trustees are replaced as I have directed...

[45] In the context of s 239 of the Act, there does not appear to be any judicial consideration of what ‘replace’ or ‘replacement’ mean, however the definition of ‘replacement’ in the Oxford English Dictionary is “a person who or thing which replaces another, esp. as a substitute”.³⁹

³⁸ 255 Waiariki MB 137 (255 WAR 137).

³⁹ Oxford University Press “Replacement” (2022) Oxford English Dictionary <https://www.oed.com/view/Entry/162822?redirectedFrom=replacement#eid>

[46] ‘Replace’ is defined as “(a) To provide a substitute for; to put an equivalent in place of (something lost, broken, etc.)” and “(b) To fill the place of (a person or thing) *with* (also *by*) a substitute”. ‘Substitute’ (verb) is defined as “To appoint to a role or position in place of another.”⁴⁰

[47] *Black’s Law Dictionary* does not define replace or replacement but defines a substitute as “one who stands in another’s place”.⁴¹

[48] The natural and ordinary meaning of the words ‘replace’ and ‘substitute’ have one person or thing exchanged for another. It needs to be a different person or thing to fulfil the meaning of replace or substitute. In simple terms, and by way of example, if the chairperson of a trust resigned as chairperson, there would be no doubt that the outgoing chairperson would not be considered for re-appointment. S/he would be replaced and replaced with another trustee to become the new chairperson. In the absence of evidence or a provision in the trust order of the Trust, to the contrary, that same logic would apply here.

Importance of the Directions

[49] We find that the Resignation Directions were important directions, because of the context in which they were made (discussed below) and because the election of trustees is a significant kaupapa for beneficiaries and Māori landowners. The importance was underscored by Judge Coxhead appointing an experienced independent facilitator, who was previously the Chief Registrar of the Māori Land Court, to run the Meeting of Owners.

The Context

[50] In the law context is everything.⁴² The Resignation Directions were not made in a vacuum, but rather in a context that fortifies our view that they clearly expressed the Judge’s intention that the appellants were not to stand for re-election at the Meeting of Owners.

⁴⁰ Oxford University Press “Replace” (2022) Oxford English Dictionary <https://www.oed.com/view/Entry/162819?rskey=utszyl&result=2&isAdvanced=false#eid> and “Substitute” <https://www.oed.com/view/Entry/193079?rskey=rZruuj&result=3#eid>

⁴¹ Bryan A. Garner (ed) “Substitute” in *Black’s Law Dictionary* (9th ed, West, St Paul, Minnesota, 2009) at 1567.

⁴² *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [9] citing *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, p 447.

[51] An application per s 240 of the Act to remove the appellants was before the Court at the time the Judge made the Resignation Directions. The respondents in the lower Court adopted a common strategy of running the resignation argument first and if that was not successful, they would then progress their s 240 removal application in the alternative.⁴³ It is not for this Court to speculate about the merits of any removal application, but it does seem, based on the evidence before us, that there were significant internal issues with the trustees, including with the appellants.

[52] In this context the appellants resigned in 2018 and then sought to rescind their resignations, which created an impasse in the trust that required court intervention. The appellants lost the resignation argument and it was the determination that they had resigned, coupled with the fact that two other trustees had passed away and one other had resigned, that made it necessary for Judge Coxhead to issue the Resignation Directions.

[53] The Resignation Decision was delivered at the end of oral arguments by counsel, and was immediately followed by the oral delivery of the Resignation Directions. That is, the Resignation Directions were determined in the context of the finding that the appellants had resigned and that, as Judge Coxhead concluded, “they need to be replaced”.⁴⁴ The structure of the oral decision (which was subsequently transcribed into a court minute), is such, that there is a very clear nexus between the determination that the appellants had resigned as trustees and the need to have them replaced, that is, substituted by others.

[54] It is also material that the Meeting of Owners was held just a little over a month after the Resignation Directions were issued, supporting our view that there was a clear nexus between the Resignation Decision and the replacement/substitution of those trustees.

[55] As noted, the election process was facilitated by an experienced person with a legal and Māori Land Court background. His view at the Meeting of Owners, when questioned by one of the appellants about their ability to stand for re-election, was clear, that they were to be replaced and could not re-stand. Further, the evidence in the transcript of the Meeting of Owners is that only Nola Melrose questioned the appellants’ ability to re-stand.⁴⁵

⁴³ Synopsis of Submissions for Applicant [Jodi Porter], 24 May 2021.

⁴⁴ 255 Waiariki MB 134 (255 WAR 134).

⁴⁵ Torere Section 58 Trust Meeting of Owners 3 July 2021 Minutes, page 4.

[56] The appellants did not question the Resignation Directions nor seek further clarification as to whether they could re-stand either at the Resignation Hearing on 24 May 2021 when the Resignation Directions were issued, or prior to the Meeting of Owners.

[57] The appellants had legal counsel present when the Resignation Directions were issued in open court and the court minute confirming the Resignation Directions was emailed to counsel on 8 June 2021.⁴⁶ This is not a criticism of counsel, but there was sufficient opportunity for the appellants to seek clarity before the Meetings of Owners, if, as they now argue, the Resignation Directions were ambiguous. This was not done.

[58] Further, the appellants did not take the opportunity to seek clarification prior to the Meeting of Owners when Ms Savage of the Māori Land Court emailed a range of people (including Nola Melrose) responding to numerous issues that were raised about how the Meeting of Owners should be conducted. The issues which Ms Savage responded to did not include reference to the central issue now before us.

[59] There is no evidence that anyone else, other than the appellants drew a different interpretation as to the meaning of the Resignation Directions at the Meeting of Owners. This in itself is not determinative of the matter, but it does add weight to our view that the Resignation Directions were unambiguous.

[60] The wording of clause 4d of the trust order also provides that a trustee's resignation triggers an application to the Court for that trustee's replacement:⁴⁷

Replacement of Trustee

Upon the death, **resignation** or removal by the Court of a Trustee the surviving Trustees shall:

- i where the number of Trustees is less than 5 ensure that the next general meeting of beneficial owners considers a possible **replacement**, AND then make application to the Court for an order **replacing such Trustee**

(Emphasis added)

⁴⁶ Email correspondence from P Savage, case manager, dated 14 June 2021.

⁴⁷ Clause 4(d), Torere 58 Trust Order, 65 Ōpōtiki MB 186 (65 OP 186).

[61] In our view, taking into account the importance of the Resignation Directions, the words used by Judge Coxhead in making those directions and in the context described make it clear that “replaced” meant that the appellants could not stand for re-election at the Meeting of Owners, as they were to be replaced by new people. There is, in our view, no other logical conclusion to be made. Put simply, the Resignation Directions were unambiguous.

[62] For completeness we find that the Appointment Decision replacing the appellants and appointing new trustees did not infringe on the principles of the Act nor the objectives in ss 2 and 17 of the Act. We also find that the Appointment Decision made was in the best interests of the beneficiaries and there is no basis to change the orders made.

[63] Furthermore, it is clear that the Resignation Directions only related to the 13 July 2021 Meeting of Owners and the election held at that hui, and is not a complete bar to the appellants from being considered for any vacant trustee positions on the trust in the future. The words used and the context described does not support any future restraint on the appellants beyond the Meeting of Owners.

[64] There is no need to discuss remedies or the final issue of the position where the power to restrain does not exist, given the conclusions we have reached.

Kupu whakatau

Decision

[65] Nō reira, kua whakakorea te tono pīra. For the reasons given, the appeal is dismissed.

[66] Mā te wāhanga 56(f) o Te Ture Whenua Māori, ka whakakore te tono i raro i te wāhanga 240, nā te mea ka huakore mai tēnā tono i te whakautanga nei. Per s 56(f) of the Act, we also dismiss the s 240 removal application filed against the appellants, given that it is now nugatory in light of our decision.

Te utu

Costs

[67] The appellants are recipients of Special Aid pursuant to s 98 of the Act and it would be unusual for the Court to consider making an order for costs against the appellants in such

circumstances. However, if counsel for the respondents wishes to make submissions on costs, they are to be filed within two weeks of the date of this judgment, with counsel for the appellants to file two weeks thereafter.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

C L Fox
DEPUTY CHIEF JUDGE
(Presiding)

S Te A Milroy
JUDGE

A H C Warren
JUDGE