

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND  
TAIRAWHITI DISTRICT**

**A20170006805  
APPEAL 2017/19**

UNDER Section 58, Te Ture Whenua Māori Act 1993  
IN THE MATTER OF OHINEPOUTEA B  
BETWEEN THOMAS DONNELLY, PERRY HAKARAIA  
and RICHMOND JOHNSON  
Appellants  
AND DEPUTY REGISTRAR  
Respondent

Hearing: 29 March 2018  
(Heard at Gisborne)  
Coram: Judge S Te A Milroy (Presiding)  
Judge C T Coxhead  
Judge M P Armstrong  
Appearances: T Donnelly and R Johnson in person  
Judgment: 2 May 2018

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**JUDGMENT OF THE COURT**

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## Introduction

[1] This is an appeal from an oral decision of the Māori Land Court given on 19 September 2017, appointing trustees to Ohinepoutea B Trust pursuant to s 239 of Te Ture Whenua Māori Act 1993.<sup>1</sup> In the lower court Mr Donnelly raised issues about the election process, particularly around the use of proxies, which constituted approximately two thirds of the vote. Judge Reeves considered these issues but determined to appoint the trustees in accordance with the final vote and appointed five trustees being Richmond Toki Johnson, Tui Aroha Warmenhoven, Perry Hakaraia, Ellen Rose Stone and Thomas Lionel Keith (Luke) Donnelly.

[2] Mr Donnelly, Mr Hakaraia and Mr Johnson appeal the decision appointing trustees to Ohinepoutea B Trust.

[3] The issues on appeal are:

- (a) Whether any failure to carry out Chief Judge Isaac's directions from the hearing of 3 May 2017,<sup>2</sup> or any flaws in the validation of proxy and voting forms, or the counting of votes were significant enough to require a further election to take place;
- (b) Whether the Māori Land Court was entitled to rely on the election results to appoint the nominated trustees.

## Factual background

[4] On 1 September 2016, the Court directed that an annual general meeting (AGM) take place to consider the appointment of replacement trustees for the block, and required all current trustees to stand down and, if they chose to do so, to offer themselves for re-election. The owners at the meeting were to consider the appointment of trustees who were able to work together. In accordance with those directions the trustees for the block held an AGM on 25 November 2016.

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<sup>1</sup> 71 Tairāwhiti MB 67-77 (71 TRW 67-77).

<sup>2</sup> 68 Tairāwhiti MB 121-130 (68 TRW 121-130) at MB 130.

[5] The Māori Land Court held a hearing on 3 May 2017 to consider the outcome of the AGM election.<sup>3</sup> At that hearing there were objections to the way in which the trustees managed the election process. The objections concerned issues around the advertisement of the meeting and whether proxies were permitted or not. The outcome of the hearing was that Chief Judge Isaac gave directions for another meeting to take place to consider the appointment of trustees. Because of the issues affecting the previous election the Chief Judge directed that the meeting was to be held under the auspices of the Court and to be chaired by a member of Court staff. Directions were given to the District Manager to notify the meeting. Proxy voting would be allowed and clear provisions relating to proxy voting were to be set out in the notice. The Chief Judge specifically stated that proxy forms would need to be signed and dated to avoid problems that had arisen previously.

[6] On 19 August 2017, the Deputy Registrar of the Court advertised, in the Gisborne Herald, that a meeting of owners was to be held on 8 September 2017 to elect trustees. The advertisement stated that anyone wishing to be nominated as a trustee could not be a proxy holder. It also stated that the proxy forms were to be filed in the Māori Land Court at Gisborne by 6 September 2017. No other details were given about proxy voting in the advertisement but the contact details for the Deputy Registrar were given for those seeking further details.

[7] Notice and proxy forms were sent out in the mail by the Court. The Court's instructions regarding the use of the proxy forms stated:

Proxy Voting will be accepted and needs to show the name of the owner as in the List of Owners, be signed by the owner and show the owner's address, e-mail and phone number so that a copy of the minutes of this meeting can be sent to all owners.

[8] The form of proxy sent to the owners by the Māori Land Court was:

Proxy Voter Form

**OHINEPOUTEA "B" Block**

I, \_\_\_\_\_ (Name shown on List of Owners)

Of \_\_\_\_\_ Town/City \_\_\_\_\_

Phone \_\_\_\_\_ email \_\_\_\_\_

**Being a Beneficial owner in the Land, appoint;**

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<sup>3</sup> 68 Tairawhiti MB 121-130 (68 TRW 121-130).

\_\_\_\_\_ - "Proxy Holder"

to be my Proxy Voter at the Meeting of Owners to take place on:

Date 8<sup>th</sup> September 2017 at Maori Land Court Gisborne

I direct my Proxy Holder to:

1. Vote as the Proxy holder decides
2. Vote For/against the resolutions specified below proposed for determination at the meeting

Signature of

Owner  
\_\_\_\_\_

[9] The proxy voting form in the schedule to the Māori Assembled Owners Regulations 1995 is:

Form 2 r 4(a)  
Proxy form to be used at meeting of assembled owners  
*Part 9, Te Ture Whenua Maori Act 1993*

(Front)

**Land:** *[insert description of block of land]*

**In the matter** of a meeting of assembled owners of the above-mentioned block of land to be held at *[place]* on *[date]*, and any adjournment thereof.

I, *[full name]*, being an owner (*or* the trustee of *[full name]*), an owner *or* the duly appointed attorney of *[full name]*, an owner *or* of *[specify]*, the trustee of *[full name]*, an owner) in the above-mentioned block of land **do hereby appoint** as my proxy (at least 1 name to be filled in):

*[name]*, *or* if he or she does not attend\*, *[name]*,\* *or* if he or she does not attend\*, *[name]*\*

\*I direct my proxy to vote for/against\* the proposed resolution to *[insert details of resolution]*.

\*I direct my proxy to vote for/against\* the proposed resolution to *[insert details of resolution]*.

Subject to any directions contained in this form in relation to any proposed resolution, my proxy may vote on my behalf in such manner as he or she thinks fit.

\*Delete if inapplicable.

Date:

Signature of owner *or* trustee *or* duly appointed attorney of owner *or* trustee:

Signed in the presence of: *[signature of witness]*

\_\_\_\_\_  
Full name of witness (block letters):

Occupation:

Address:

**Please see the notes on the back of this form**

(Back)

Notes

**Appointment of proxy**

- An owner or trustee or a duly appointed attorney of an owner or trustee may appoint as his or her proxy any person of full age and capacity other than any of the following persons:
  - (a) any applicant:
  - (b) any applicant's solicitor or agent:
  - (c) any person who holds property in trust for any applicant:
  - (d) any prospective alienee:
  - (e) any prospective alienee's solicitor or agent:
  - (f) any person who belongs to 1 or more of the preferred classes of alienee and who has, in accordance with rule 117(4) of the Maori Land Court Rules 1994, filed written notice of intention to appear at the meeting of assembled owners and make an offer for the land, or any person who holds property in trust for such a person:
  - (g) the recording officer.

**Directions to proxy**

- An owner or trustee or duly appointed attorney of an owner or trustee may direct his or her proxy to vote in favour of *or* against the proposed resolution(s) and the proxy may not vote contrary to the directions.

**Quorum requirements**

- Shares voted by proxy count toward the quorum requirements.

**Time by which proxy form must be lodged**

- **This proxy form, when completed, must either—**
  - **be lodged with the Registrar of the Maori Land Court at the address shown below at least 48 hours before the time fixed for the meeting; or**
  - **be lodged with the recording officer before the time fixed for the meeting.**

Address of the Registrar:

The Registrar

Maori Land Court

[*specify*]

[10] Deputy Registrar, Keith Bacon, chaired the meeting of 8 September 2017, and explained the proxy voting system and that whānau trust proxies were accepted on the basis that a majority of the trustees had to have signed the proxy form on behalf of the trust in order to be valid.

[11] At the meeting, the owners voted on the number of trustees they wanted, and by majority voted to have five trustees for the block.

[12] The election was then held. Ten people were nominated as trustees and the chair stated that the nominees were to have two minutes each to speak to the meeting. Mohi Aupouri was nominated but withdrew during the proceedings, so that in the end there were only nine nominees. Voting papers were distributed and owners were to select five nominees to be trustees. The staff then counted the vote and the results were announced to the meeting.

[13] For the hearing on 19 September 2017, the Deputy Registrar's submission set out the original count of votes, together with a revised vote count as follows:<sup>4</sup>

		<u>Original Count</u>	<u>Revised Vote Count</u>
1	Ellen Stone	185	161
2	Tui Warmenhoven	182	166
3	Richmond	174	147
4	Perry Hakaraia	166	142
5	Luke Donnelly	134	112
6	Makere Kaa	67	49
7	Richard Pohio	39	32
8	Ted Morrell	38	29
9	Tautohe Kupenga	24	16

### Hearing in the Māori Land Court

[14] At the hearing of 19 September 2017, Thomas (Luke) Donnelly, one of the appellants, objected to the result of the election on the basis that:

- (a) Mohi Aupouri, who held proxies for approximately 120 owners, did not cast the votes in accordance with oral instructions, and
- (b) two nominees, Tui Warmenhoven and Ellen Stone, were given more time to speak than the others so that the election process was unfair.

[15] Mr Donnelly put in evidence an affidavit from Mr Aupouri, which stated that Mr Aupouri held approximately 120 proxy votes and that he voted contrary to the proxy givers' wishes by voting for nominees other than those he was instructed to vote for. He also stated

<sup>4</sup> 71 Tairawhiti MB 67-77 (71 TRW 67-77).

that he was instructed to vote for the Appellants and two others – Makere Kaa and Tautohe Kupenga. Mr Aupouri was not present at the hearing, so his evidence was not able to be tested by cross-examination.

[16] Mr Donnelly acknowledged during the hearing that most of the proxy forms did not give Mr Aupouri any written instructions as to how to vote but left it to his discretion.<sup>5</sup> However, he considered that Mr Aupouri’s affidavit negated that discretion.

[17] Tautohe Kupenga also gave evidence at the hearing that he was one of the “proxy gatherers” who went around Gisborne and Napier collecting proxy forms from owners. He stated that the “understanding” on their side was that the proxies would be given to Mohi Aupouri who would vote for the five candidates set out in Mr Aupouri’s affidavit.<sup>6</sup>

[18] Others who spoke at the hearing were in favour of the appointment of Ellen Stone and Tui Warmenhoven as trustees.

[19] Judge Reeves, in coming to her decision to appoint the five trustees, noted that the proxy forms held by Mr Aupouri gave him discretion to vote as he saw fit. The Judge was not persuaded that the extra speaking time given to two of the nominees was a procedural irregularity of such significance that it went to the fairness or otherwise of the election process. The Judge held that she was satisfied that the elected trustees were broadly acceptable to the beneficiaries, and made a s 239 order appointing them as responsible trustees.

### **Grounds of appeal**

[20] The grounds of appeal set out in the notice of appeal filed by Mr Donnelly, Mr Hakaraia and Mr Johnson on 16 November 2017 are as follows:

- (a) That an ‘obsolete’ proxy form which was different from the proxy form in the Māori Assembled Owners Regulations 1995 was sent out to the owners. As a result, many of the owners were misled when filling out the form and did

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<sup>5</sup> At MB 70 and 73.

<sup>6</sup> At MB 72.

not date the form when they signed. Also, there was no provision for a witness to the owner's signature. In other words, owners were not given clear directions as to how the form was to be completed, in contravention of the Chief Judge's directions; and

- (b) Because owners were misled by the 'obsolete' proxy form, the proxy holder, Mohi Aupouri, was able to vote in a way that did not comply with the owners' instructions. Owners' intentions were therefore not given effect to.

[21] The notice of appeal stated that the remedy sought was to have the voting adjusted and calculated as if Mr Aupouri had carried out the proxy givers' instructions, and failing that, that the Court make an order that the election be set aside and a new election ordered. In the hearing before us, Mr Donnelly advised that the appellants only sought the cancellation of the s 239 order and that a new election be ordered, rather than any adjustment of the vote.

[22] Two specific issues were raised before the lower Court. These were – the extra time given to Ms Warmenhoven and Ms Stone to make a presentation to the owners as part of the election process, and the issue raised by the contents of Mr Aupouri's affidavit. Section 55 of Te Ture Whenua Māori Act 1993 provides that appeals are to be by way of rehearing. While we note that the technical issues raised about the proxy and voting forms were not squarely before the lower Court, there was evidence regarding these matters before the lower Court which meant that we were able to consider the issues on appeal. The notice of appeal was sufficient to inform the Court and interested parties of the issues. Therefore, we are able to come to our own decision on the issues before us, in line with the principles set out by the Supreme Court in the case *Austin, Nichols & Co Inc v Stichting Lodestar*.<sup>7</sup>

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<sup>7</sup> See *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [3] to [5].

### Submissions for the appellants

[23] The appellants submitted that:

- (a) The Māori Land Court staff did not carry out the directions given by Chief Judge Isaac in regard to proxy voting and as a result many of the proxy forms submitted did not comply with the requirements and should be invalidated;
- (b) Copies of the validated forms which were sent to Mr Donnelly by the Court after the 19 September 2017 hearing, show the following faults:
  - (i) Three voting forms where the owner's name was left blank;
  - (ii) Two voting forms have seven nominees instead of five;
  - (iii) Whānau trust votes where only one trustee for the whānau trust had signed rather than a majority;
  - (iv) A voting slip where the owner was not present and had given her apologies;
  - (v) A vote by a person who is not on the owners' list;
  - (vi) Validated proxy forms which were not signed by the shareholder;
  - (vii) Failing to validate proxy forms signed 'pp' by the agent of the owner.
- (c) A majority of the votes were not used correctly by the proxy holder as he voted according to his own discretion rather than following instructions.

[24] The appellants submitted that the Court's newspaper advertisement notifying the election meeting does not state clear provisions relating to proxy voting and that an obsolete proxy form was sent out rather than the form set out in the schedule to the Māori Assembled Owners Regulations 1995. The use of an obsolete form led to errors by the owners in filling out many of the forms. The appellants also noted that Chief Judge Isaac directed that an

officer of the Court would take the minutes, but in fact the Court authorised another person to do so and this was a failure of due process.

[25] Taking into account all the above flaws in the process, the appellants submitted that the process was not fair to the owners and that the election should be declared void and a new election called.

### **Submissions for the respondent**

[26] The Deputy Registrar, as the named respondent in the notice of appeal, did not make any submissions at the hearing. We did however hear from Ellen Stone and Tui Warmenhoven (hereafter referred to as “the respondents”) who made the following submissions:

- (a) Judge Reeves considered whether the proxy forms that Mr Aupouri used had directed him to vote as the proxy holder saw fit or in accordance with the owners’ instructions. The Judge had referred to a small number of proxy forms that specified how the proxy holder was to vote. Accordingly, the Judge was satisfied that the owners and the proxy holders understood the proxy form;
- (b) Regulation 9(3) of the Māori Assembled Owners Regulations 1995 provides that the proxy “must be appointed by notice in writing in Form 2 in the Schedule to these Regulations *or to the like effect.*” The proxy form sent out by the Deputy Registrar was not exactly the same as Form 2, but provided the necessary information and was therefore “of like effect”;
- (c) On the proxy form, two options were given to provide direction to the proxy holder:
  - (i) To vote as the proxy holder wishes;
  - (ii) To vote for or against the resolutions as specified in a space allowed for the owner to enter the way they wished the proxy holder to vote.

It was up to the owner issuing the proxy to fill it in appropriately and to give detailed instruction if necessary for the proxy holder to follow;

- (d) Most of the proxy forms submitted as evidence clearly allow a discretion to the proxy holder to vote as he saw fit. There is an example of a proxy vote in the Record of Appeal where the owner does specify who the proxy holder is to support in the election of trustees. There is no evidence that the owners, who signed the proxy forms, wished the proxy holder to vote for the five nominees of the appellants. Mr Aupouri was not bound as a proxy voter to vote as directed by Mr Donnelly and his group unless that intention was stated clearly on the proxy form;
- (e) There is no indication in Mr Aupouri's affidavit which was presented to the lower Court that Mr Aupouri personally collected the proxies. There is no evidence that the owners gave him oral instructions, and there is evidence before the lower Court that a number of proxies were collected by Tautohe Kupenga, which also shows that if there were any oral instructions they were not given directly to Mr Aupouri by the owners. It would therefore be wrong for Mr Aupouri not to vote in accordance with the written proxy form, whether that was to vote in a certain way or to vote as he decided;
- (f) In the lower Court hearing, Mr Donnelly stated that Mr Aupouri's affidavit stating that he voted contrary to the wishes of the owners should bear more weight than the fact that "he or the proxy gatherers failed to delete that particular clause on the proxy form" – meaning the clause on the proxy form allowing Mr Aupouri to vote as he decided.<sup>8</sup> Mr Donnelly is suggesting that Mr Aupouri should have tampered with the proxy forms, which he is not able to do;
- (g) Mr Aupouri voted at the meeting with the best interests of the land and shareholders in mind. Mr Aupouri was not present at the lower Court hearing and his affidavit is therefore untested;

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<sup>8</sup> 71 Tairawhiti MB 67-77 (71 TRW 67-77) at MB 70-71 and 73.

- (h) The motivation for the appeal is to prevent the respondents from being trustees and to put in trustees who are the nominees of the appellants. However, there is no evidence provided to show that the respondents are not suitable to be trustees;
- (i) No error was made by the lower Court in appointing the respondents as trustees and a substantial number of shareholders voted for them, including those who were present in person at the meeting.

[27] The respondents seek to have the appeal dismissed.

## Law

[28] Section 239 of Te Ture Whenua Māori Act 1993 gives the Court power to replace trustees. The matters the Court must consider in appointing a trustee are set out in s 222(2):

### 222 Appointment of trustees

...

- (2) The court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part,—
  - (a) shall have regard to the ability, experience, and knowledge of the individual or body; and
  - (b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

[29] Regulations 9 – 17 of the Māori Assembled Owners Regulations 1995 set out the requirements in relation to proxy voting. The relevant provisions of regulation 9 are:

### Appointment

...

- (2) The proxy must be a person of full age and capacity.
- (3) The proxy must be appointed by notice in writing in form 2 of the Schedule or to the like effect.

...

[30] Regulation 12(1) provides:

### 12 Limitations

- (1) Any owner or trustee or any duly appointed attorney of an owner or trustee who appoints a proxy may limit that proxy's authority by directing the proxy to vote in favour of or against any alienation or other proposed resolution affecting the land, and the proxy shall not be competent to vote on behalf of any such owner or trustee or duly appointed attorney of an owner or trustee contrary to directions of the owner or trustee or the duly appointed attorney of the owner or trustee. In all other cases a proxy may vote in such manner as the proxy thinks fit.

...

[31] In *Hipango v Peehi – Atihau Whanganui Incorporation*, one of the issues was the validity and use of proxies in an election where there were some defects in the proxy forms including proxies that were wrongly dated or undated by the owner. In that case it was held that the central question is whether the shareholders intention can be determined on the face of the proxy form. The failure to date the proxy form was not fatal to the validity of the proxy.<sup>9</sup>

[32] In *Whata – Proprietors of Ruahine Kuharua Incorporation*, the Court accepted that voting could include proxy voting but while the votes technically reflected the intention of the shareholders, the sheer number of incorrect votes tipped the balance from being a technical defect to a fundamental flaw in the election. In that case the proxy votes could not be counted and the election result was ruled invalid.<sup>10</sup>

[33] The leading case which sets out the principles with regard to proxies is the decision of the Māori Appellate Court in *Wall v The Maori Land Court – Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust*.<sup>11</sup> In that case the Māori Land Court made an order that all trustees of Tauhara 15 were to stand down and that a special meeting of the beneficial owners was to be convened by the Registrar. The Māori Appellate Court held that the meeting was a special general meeting of the trust, not a meeting of assembled owners under Part 9 of Te Ture Whenua Māori Act 1993 and the voting provisions of the Māori Assembled Owners Regulations 1995 did not apply. The Māori Appellate Court also held that the Judge in the lower Court could give his own directions as to how the meeting was to be held. The failure to follow some directions regarding the meeting did not prevent the Court from being able to reconstruct the vote.

<sup>9</sup> *Hipango v Peehi – Atihau Whanganui Incorporation* (2008) 221 Aotea MB 152 (221 AOT 152).

<sup>10</sup> *Whata – The Proprietors of Ruahine Kuharua Incorporation* (2015) 120 Waiariki MB 204 (120 WAR 204).

<sup>11</sup> *Wall v The Maori Land Court – Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust* [2010] Māori Appellate Court MB 55 (2010 APPEAL 55).

[34] At paragraph [47] of the decision the Māori Appellate Court said:

[47] Election is only the first part of the process. The Court then has to make an order of appointment and in doing so has a discretion under s 222(2) of TTWMA which reads:

**“222 Appointment of trustees**

...

(2) *The Court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part of this Act,—*

(a) *Shall have regard to the ability, experience, and knowledge of the individual or body; and*

(b) *Shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.”*

[48] The outcome of any meeting of owners is not binding on the Court: *Short & Ors v Mitchell — Pukeroa Oruawhata Trust* (2006) 11 Waiariki Appellate MB 66 (11 AP 66). Voting in this context is simply a device for making the views and strength of those views known to the Court: *Hemi v The Proprietors of Mangakino Township Inc — Pouakani No 2* (1999) 73 Taupō MB 30 (73 TPO 30).

[49] Taking into account s 222, the Court has a wide discretion as to whom to appoint: *Thomson & Ors v Newton & Ors — Pokuru IAIB2* (1997) 19 Waikato-Maniapoto Appellate MB 66 (19 APWM 66).

[50] Thus whilst we accept that the incumbent trustees are eligible for re-election, the outcome of any future election, should any of them be among the leading candidates, should not be taken as an automatic endorsement that the Lower Court has to reappoint those persons as trustees. The Lower Court retains a discretion under s 222 of TTWMA to decide whether or not to appoint those persons...

[35] The decision of the Māori Appellate Court in the *Tauhara Middle 15 Trust* case, noted above, was appealed to the Court of Appeal in *Clarke v Karaitiana*.<sup>12</sup> The Court of Appeal upheld the Māori Appellate Court’s decision that the election was not held under Part 9 of Te Ture Whenua Māori Act 1993 – the Assembled Owners provisions – but under Part 12 of Te Ture Whenua Māori Act 1993 – the powers conferred on the Māori Land Court in relation to trusts. The Court of Appeal said:<sup>13</sup>

[30] While we accept that a meeting may be called under Part 9 for the more general purposes described in s 172(h) of the Act, it may be utilised more usually where there are specific proposals falling within the defined topics in s 172(a) to (g) including a proposal to proceed with some form of alienation of land. Where the alienation of land is concerned, a resolution passed by the assembled owners at a meeting under Part 9 does not have any force

<sup>12</sup> *Clarke v Karaitiana* [2011] NZCA 154

<sup>13</sup> At [30] to [31], [35], [37], [39], [41] to [42].

or effect unless and until it is confirmed by the Court in accordance with Part 8 of the Act which prescribes the duties and powers of the Court in relation to alienations of Māori freehold land. In such a case, we can readily appreciate the need for the greater degree of formality which the Regulations require.

[31] We view the provisions of Part 12 differently. Under that Part, the Māori Land Court has extensive jurisdiction in relation to trusts including an ahu whenua trust such as the TM 15 Trust [Tauhara Middle 15 Trust] in respect of any Māori land or General land owned by Māori. The Māori Land Court has exclusive jurisdiction to constitute trusts of this kind and the legislation provides for a number of different types of trust. When such a trust is established, the Court prescribes the terms of any such trust which are to be included in the relevant trust order. On constituting any trust under Part 12, the Court may order the vesting of the land and any assets of the trust in the responsible trustees, subject to the trusts declared by the Court.

...

[35] The critical provision relating to the appointment of trustees is s 222(2):

**“222 Appointment of trustees**

...

- (2) The Court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part, —
- (a) shall have regard to the ability, experience, and knowledge of the individual or body; and
  - (b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.”

...

[37] The appointment of trustees required the Court ultimately to act under s 222. Despite Ms Aikman's submission to the contrary, we are satisfied that the Māori Land Court (or indeed the Māori Appellate Court on appeal) has the power to direct a meeting of the beneficial owners of the trust. Such a power is reasonably necessary to assist the Court in meeting the mandatory obligation under s 222(2)(b) of satisfying itself that the appointment of the persons proposed as trustees would be broadly acceptable to the beneficiaries.

...

[39] We agree with the Māori Appellate Court that the inherent jurisdiction conferred by s 237 of the Act in respect of trusts is sufficiently wide to empower the Māori Land Court to call the meeting for the purpose identified. We are not persuaded that the inherent jurisdiction conferred by s 237 is limited by the inclusion in Part 9 of the power conferred on the Court to call meetings under s 173 of the Act. Parts 9 and 12 are discrete parts of the Act. The Court is entitled to call a meeting in relation to the appointment of trustees under Part 12 and is not obliged to proceed under Part 9.

...

[41] We also observe that the purpose for which the meeting is called is important. Section 17(2) of the Act obliges the Court to seek to achieve certain objectives including ascertaining and giving effect to the wishes of the owners of any land to which the proceedings relate, and providing a means by which the owners might be kept informed of any proposals relating to any land. As we later discuss, the views of the beneficial owners of the trust are relevant to, but do not necessarily control, the Court's discretion under s 222(2).

[42] As the Māori Appellate Court concluded, the purpose of the meeting was to assist the Māori Land Court in ascertaining the views of the beneficial owners. We are satisfied the Māori Land Court was entitled to call a meeting of the beneficial owners upon terms which it considered were most appropriate to achieve that purpose. It was permissible for the Māori Land Court to direct that the meeting should proceed in accordance with the trust order or some modification of that order. It could also have utilised the procedures described in the Regulations or some modified form of them. 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.

[36] The Court of Appeal continued:<sup>14</sup>

[44] As earlier noted, there was confusion at the meeting. It was recognised by those present that there were difficulties in counting the votes of those holding powers of attorney by show of hands. For that reason, the meeting decided to proceed by way of ballot, a course which the Māori Appellate Court described as sensible in the circumstances. It is not surprising that confusion arose given the terms of the notice of meeting. It was reasonable for beneficial owners receiving the notice of meeting to anticipate that, if they gave a power of attorney for the purposes of voting, their vote would be counted. They would not have anticipated that a "one person one vote" regime would apply so as to limit those present to a single vote and effectively disenfranchise them. To exclude voting by the exercise of powers of attorney would also be contrary to the obligation on the Court under s 17(2)(a) of the Act to seek to achieve the objectives of ascertaining and giving effect to the wishes of the owners of any land to which the proceedings relate. The insistence on compliance with the "show of hands" stipulation and on the "one person one vote" approach was an error on the part of the Māori Appellate Court given the clear indication that voting by persons holding a power of attorney was permitted with the expectations that engendered.

[37] The Court of Appeal went on to state that the notice of meeting also stipulated that certificates of non-revocation along with the powers of attorney were to be presented for noting prior to the meeting. This requirement was not met except in one case. The Court of Appeal therefore agreed that it was not appropriate for votes by persons exercising powers of attorney to be counted. The Court stated:<sup>15</sup>

[46] ... But for this defect, we would have found that the votes by those exercising powers of attorney should have been counted. For example, a beneficial owner would have been entitled to have their own personal vote recorded as well as the votes of all of those who had provided to that person a valid power of attorney for voting purposes.

[38] It is clear from the Court of Appeal's judgment that the same considerations would apply to proxy votes.

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<sup>14</sup> At [44].

<sup>15</sup> At [46].

[39] Summarising the case law relevant to the fact situation before us, we can draw the following principles:

- (a) Where the Court is exercising its supervisory jurisdiction pursuant to Part 12 of Te Ture Whenua Māori Act 1993, the Court is able to design a process for the holding of a meeting of owners which includes an election of trustees, and may modify or change the procedures set out in the trust order or under the Māori Assembled Owners Regulations 1995;
- (b) Where the Court's directions set out specific requirements in relation to proxy voting, any merely technical defects in the proxies will not be sufficient to invalidate the vote;
- (c) If the intention of the owner is clear on the proxy form, the vote will be valid despite any technical defects;
- (d) Where the directions or notice of meeting are not sufficiently detailed to cover the circumstances then the Court must give effect to the wishes of the owners so far as they are ascertainable: s 17(2)(a) of Te Ture Whenua Māori Act 1993.

[40] We note that despite its findings in relation to how the powers of attorney ought to have been dealt with in the *Clarke v Karaitiana* case, the Court of Appeal nevertheless held that the Māori Appellate Court should have directed a further meeting of beneficial owners because the ambiguity and confusion created by the notice of meeting meant that the Māori Land Court did not receive a proper indication of the views of the beneficial owners for the purposes of s 222(2)(b) of Te Ture Whenua Māori Act 1993. The Court of Appeal referred to the radically different results obtained depending on whether votes under the power of attorney were to be counted or not.

## **Discussion**

[41] The appellants' argument is that the directions given by the Chief Judge should have been carried out as set out in the minutes of that hearing, and that any deviation undermined the validity of the election process. The context in which the Chief Judge gave his directions

was one in which the trustees had been directed by the Court to hold an AGM for the Ohinepoutea B Trust to appoint trustees. The election process at the AGM resulted in misunderstanding and confusion between Court staff and Mr Donnelly as to the proxy voting process. This in turn confused the owners. The complaints about the AGM election process were that owners were not told that proxy voting would be allowed (it had not been allowed previously) until only two days prior to the meeting. Evidence before the Court was that a lot of the proxies for the AGM were invalid for various reasons, including that they were not signed by the owners.

[42] Thus, the Chief Judge's directions to advertise that proxy voting would be allowed, clear proxy voting provisions were to be set out in the advertisement, and that each proxy needed to be signed and dated, were a response to the evidence before him as to what went wrong at the AGM. However, the intention of his directions was to provide a clear and fair proxy voting process.

[43] The advertisement in the Gisborne Herald notifying the meeting provided for proxy voting by stating that nominees for appointment as trustees could not be proxy holders, and that proxy forms were to be filed by 4.00pm on 6 September 2017 at the Māori Land Court.

[44] Notice of the meeting was also mailed out to owners. The proxy form sent was included with the notice and was, in our view, clear on its face as to what was required of the owners who wished to give a proxy. The proxy form states the name of the trust at the top and provides places for the owners to insert their names, contact details and the name of the person to whom the proxy is being given. It also sets out the date of the meeting for which the proxy is valid, and since the proxies had to be filed with the Court prior to the meeting, it is clear that the proxies were current and specifically related to the relevant meeting. In other words, the proxy forms were dated for the purposes of the Chief Judge's directions.

[45] The proxy form also clearly provides a place for the owner to direct the proxy holder to vote either as the proxy holder decided or to 'Vote for/against the resolutions specified below...' The form is not complicated and we agree with Ms Stone that the proxy form is of like effect to Form 2 in the Schedule to the Māori Assembled Owners Regulations 1995. *Clarke v Karaitiana* is authority that the Court was not required to utilise Form 2, and another

form could be used so long as it was clear and contained the necessary information. We consider that the owners would have known on reading the form that it related to the notice of meeting of owners which was being called to elect trustees for the block and that they could either leave the vote to the proxy holder's discretion or specify how the proxy holder was to vote.

[46] We find the proxy form used by the Court was adequate for the purpose for which it was to be used, and that the Chief Judge's directions were carried out in the main. The process of proxy voting was fair to all owners. Any failure by the owners to fill out the form so as to give a clear direction to the proxy holder as to how they were to vote was the responsibility of the owners, not the Court staff.

[47] The appellants alleged that the validation of voting and proxy forms was flawed and that some voting forms which were validated should not have been, while others that were valid were not counted. A similar complaint was made about the validation of proxy forms. In terms of the actual forms referred to by the appellants, we found that there were approximately 14 forms involved. If the lower Court had relied on the Court staff's original count to ascertain whether there was broad support for the proposed trustees then we would have some concerns regarding the voting and proxy forms referred to by the appellants. However, in the minutes of the hearing before the lower Court there is a table showing the original count and the revised vote count.<sup>16</sup> The revised vote count is substantially less than the original count and is evidence that whatever errors might have been made in the original count were corrected in the revised count. Mr Donnelly's complaints about the particular proxy and voting forms placed before us were confusing as it was unclear whether these particular forms were accepted or not in terms of the revised vote count. On the balance of probabilities, we find that the revised vote count is a correct count and resolves questions as to the validity or invalidity of the forms used.

[48] The evidence regarding the original count and revised vote count was before the lower Court so that the Judge would have been aware that a process of checking the original count had taken place. While the votes cast in favour of the various candidates were reduced

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<sup>16</sup> 71 Tairawhiti MB 67-77 (71 TRW 67-77) at MB 69.

that did not alter the overall outcome of the election. We consider that Judge Reeves was entitled to rely on the revised vote count in coming to her decision.

[49] While the notice of appeal included the grounds that Mohi Aupouri, the proxy holder, did not vote in accordance with instructions given to him by the proxy givers, the Appellants did not rely on that point on appeal. Instead, they submitted that the problem lay with the proxy voting form, which caused owners to be confused as to how they should fill in the form. There was no evidence before the Court that the owners were confused. In any case, as pointed out by Ms Stone and Ms Warmenhoven, Mr Aupouri's affidavit does not state that he received his instructions from the owners. The proxy forms themselves for the most part gave Mr Aupouri the right to vote as he decided. The evidence given in the hearing of 19 September 2017 was that others had collected the proxies from the owners and delivered them to Mr Aupouri. Mr Aupouri was not present at the lower Court hearing and could not be cross-examined as to who gave him voting instructions. Thus, the only clear evidence before the Court of the owners' directions to Mr Aupouri were those on the proxy forms themselves. We consider that the Judge was correct to rely on the proxy forms, rather than on Mr Aupouri's affidavit.

[50] The purpose of trustee elections is to provide evidence to the Court as to whether proposed trustees have the broad support of the beneficiaries.<sup>17</sup> We are satisfied that the manner in which the court staff managed the election process (including validation of proxies and voting) did not render the process unfair and the lower Court was entitled to rely on the result of the election in determining who to appoint as trustees.

## **Decision**

[51] For the above reasons, the appeal is dismissed.

[52] Given what has occurred in these proceedings we consider it necessary to make some comment regarding the manner in which judges' directions around calling meetings of owners and elections of trustees should be carried out. The election of trustees for the Ohinepoutea B Trust had been the subject of various Court hearings, and abortive election processes. While we have found that the issues raised by the appellants were not sufficient

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<sup>17</sup> *Clarke v Karaitiana* [2011] NZCA 154.

to overturn the election result, it would have been preferable if no opportunities to query the result had been given by the conduct of the election process. In future, where there are any doubts or concerns as to exactly how directions are to be carried out, the best action to be taken by a Deputy Registrar is to seek further directions from the Judge.

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

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S Te A Milroy (Presiding)  
**JUDGE**

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C T Coxhead  
**JUDGE**

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M P Armstrong  
**JUDGE**