

**IN THE MĀORI LAND COURT OF NEW ZEALAND
TĀKITIMU DISTRICT**

**A20160002171
A20160005059**

UNDER Section 67 and 239, Te Ture Whenua Māori
Act 1993

IN THE MATTER OF Owhaoko C1, C2, C4, C5 and C7
Blocks (Owhaoko C Trust)

BETWEEN KAHUKURANUI HAKIWAI, TANIA
HUATA-KUPA, PETER MACGREGOR,
NGAPUOTERANGI TE WHAITI AND
MATAORA TOATOAS AS TRUSTEES OF
OWHAKOKO C TRUST
Applicants

A20160003902

UNDER Sections 231, 238 and 240, Te Ture Whenua
Māori Act 1993

IN THE MATTER OF Owhaoko C1, C2, C4, C5 and C7
Blocks (Owhaoko C Trust)

BETWEEN WERO KARENA
Applicant

Hearings: 6 July 2016 at 51 Tākitimu MB 37-52
5 September 2016 at 52 Tākitimu MB 102-129

Appearances: C Bennett, for the trustees
Tania Huata-Kupa, in person
Wero Karena, in person

Judgment: 9 September 2016

INTERIM JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Three applications are currently before the Court concerning the Owhaoko C Trust.

[2] First, Ngapuoterangi Te Whaiti, chairman of the trust, seeks the appointment of Sheryle Allen and Mona Stewart as responsible trustees pursuant to s 239 of Te Ture Whenua Māori Act 1993. It is also said that a current trustee, Tania Huata-Kupa had tendered her resignation as a trustee. The application refers to a hui of owners held on 27 February 2016 at Omahu Marae, Hastings, where the nominees were elected in a contestable process. Mr Te Whaiti, through his counsel, confirms that the meeting was properly notified in accordance with the trust's usual custom and that 34 owners were recorded in the minutes as being in attendance. He therefore submits that the nominees are broadly acceptable to the beneficiaries.

[3] The appointment of trustees however is opposed, on the basis that the nominees are not sufficiently experienced to fulfil the onerous role of trustee, in relation to the process employed for trustee nomination, and as to whether the meeting was properly convened. For their part, the nominees Mona Stewart and Sheryle Allen confirm that they are both willing and able to contribute to the work of the trust. They point out that they have complimentary skills which will enhance the activities of the trust.

[4] The second application, filed by Wero Karena, seeks a review of the Owhaoko C Trust, along with an enforcement of the obligations of trust pursuant to ss 231, 238 and 240 of the Act. He says that the current trustees are failing in their duties and, in particular, have not understood or complied with the trust order. Mr Karena argues that the trustees have, inter alia, acted imprudently in purchasing a property contrary to the terms of the trust order. He also alleges that the trustees have failed to comply with earlier directions issued by the Māori Appellate Court in 2010, and have paid out Kaumātua grants, even though there is no power in the trust order permitting this.

[5] In addition, Mr Karena claims that the trustees have failed to follow due process and grant him a lease of trust lands, which he argues, in effect, is also an example of imprudence. For all of these reasons he argues that the trust should be reviewed, the obligations enforced against the trustees, or in the alternative, that the trustees should be removed.

[6] In response, the trustees deny the allegations. They say that they have acted prudently and have complied with the trust order. They also submit that they have complied with the Māori Appellate Court directions, which they note were issued over six years ago. In any event, counsel

for the trustees argued that the claims of Mr Karena lacked clarity and filed the third application in these proceedings seeking directions per s 67 of the Act that Mr Karena file further particulars in relation to his application.

Issues

[7] The issue for determination is whether or not the Court should now appoint Mona Stewart and Sheryle Allen as trustees.

[8] Regarding the application of Mr Karena, it was agreed that the hearing should be treated as a conference, in part, and accordingly, directions are issued at the end of this judgment.

Background

[9] Owhaoko C1, C2, C4, C5 and C7 blocks are the corpus of Owhaoko C Trust. This trust has been before the Māori Appellate Court previously (ironically on the appeal of Mr Karena) including in 2004 where a useful summary of the trust lands can be found:¹

The Land comprises five separate blocks the details of which are set out below. It is administered by an ahu whenua trust, the Owhaoko C7 Trust created on 29 April 1996, 50 Aotea MB 160 (“the Trust”). The background to the establishment of the Trust has been outlined in the Lower Court decision and so will not be repeated here. The current trustees are Aira Nelson, David Puna, Marai Apatu, Ngaputerangi Hohepa, Peter MacGregor, Thomas Gillies, Tyrone Karena, Waruonoema Allen and Wi Hakiwai (“the Trustees”).

Name	Area	Creation	Owners	Shares
Owhaoko C1	545.5162 ha	26 October 1894, 35 Napier MB 47	350	282
Owhaoko C2	2,935.8931 ha	26 October 1894	139	14
Owhaoko C4	696.4639 ha	26 October 1894	164	36
Owhaoko C5	1,917.9064 ha	26 October 1894	75	4,957
Owhaoko C7	2,962.0965 ha	26 October 1894	130	7,656

In summary, the Trust administers a large area of Māori freehold land, some 9,057.8961 hectares in area, located at the headwaters of the Ngauroro River south of Taupō and east of Taihape.

[10] On any assessment therefore, in land area alone, this is a substantial trust.

[11] As at the date of hearing, the current trustees are Ngaputerangi Te Whaiti, Tania Huata-Kupa, Kahukuranui Hakiwai, Mataora Toatoa and Peter MacGregor.²

¹ *Karena – Owhaoko C1, C2, C4, C5, and C7* (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4) at 5
² 45 Tākitimu MB 18-21 (45 TKT 18-21)

Applicant's submissions

[12] Ms Bennett submitted that there had been complete compliance with s 222 of the Act regarding the proposed trustee nominees. A hui of owners had been properly convened with appropriate notice. The hui was quorate and there had been proper discussion of the nominees at the meeting. For these reasons she argued that the appointments should be made forthwith.

[13] As foreshadowed, the two nominees confirmed that they were ready, willing and able to take on the role of trustee. They also outlined their involvement with the owners and the marae and how, in effect, they would seek to act for the benefit of the owners.

[14] Ms Bennett also rejected the allegations made by Mr Karena concerning trustee imprudence and misconduct. On the contrary, she argued that the trustees had been acting properly and prudently. Moreover, counsel contended that if the original trustees did not have a mandate as alleged – which was denied – then it would equally apply to Mr Karena, himself a trustee appointed many years ago.

Submissions in opposition

[15] Mrs Huata Kupa objected to what she claimed were flaws in the process of nomination and election. She claimed that the process was not robust or transparent. She acknowledged that her husband had stood unsuccessfully as a candidate but underscored that this was not the reason for her opposition.

[16] She also considered that the nominees may not yet have the necessary skills and experience for the role. That said, she later acknowledged that if the nominees were eventually appointed she should be able to work with them.

[17] Mr Karena expressed concerns with the process. In particular he objected to the practice of non-owners being permitted speaking rights at meetings of owners. He considered that this conduct was contrary to the relevant regulations and the terms of trust. Mr Karena intimated that he did not support the process or the appointments.

[18] He also expressed concerns over the mandate of the original trustees on first appointment since, he argued, the Judge on appointing the original trustees could not have satisfied himself that there had been compliance with both of the tests or requirements set out in s 222 of the Act.

[19] Finally, Ashley Apatu made submissions on the alleged lack of competence of trustees, both past and present. He also raised allegations of past cannabis growing on the land and submitted various newspaper reports. He contended that until the trust is populated by trustees who knew how to make money then the owners would continue to suffer from a lack of returns.

The Law

[20] Section 222 of the Act states:

222 Appointment of trustees

- (1) Subject to subsections (2) and (3) of this section, the Court may appoint as trustee of any trust constituted under this Part of this Act—
 - (a) An individual; or
 - (b) A Maori Trust Board constituted under the Maori Trust Boards Act 1955 or any other enactment, or any body corporate constituted by or under any enactment; or
 - (c) A Maori incorporation; or
 - (d) The Maori Trustee; or
 - (e) Public Trust; or
 - (f) A trustee company within the meaning of the Trustee Companies Act 1967.
- (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.
- (3) The Court shall not appoint any individual or body to be a trustee of any trust constituted under this Part of this Act unless it is satisfied that the proposed appointee consents to the appointment.
- (4) Subject to subsection (5) of this section, the Court may appoint any such individual or body as a responsible trustee, or an advisory trustee, or a custodian trustee.
- (5) For every trust constituted under this Part of this Act the Court shall appoint 1 or more responsible trustees, and may appoint 1 or more advisory trustees and 1 or more custodian trustees.

[21] The leading authority on the appointment of trustees is the Court of Appeal decision *Clarke v Karaitiana* where that Court considered the issue in this way:³

[51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature

³ [2011] NZCA 154

and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by s 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.

[52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint the leading candidates as elected by the owners, it must still be satisfied the requirements of s 222(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

[22] I adopt the reasoning set out in that decision.

Discussion

[23] This is, in part, a simple case. Either the nominees comply with s 222 of the Act or they do not. In my assessment, they do. I am satisfied that the meeting was properly advertised and, as the minutes record, there was robust discussion regarding the appointment of trustees, with the outcome of the election showing the proposed trustees are broadly acceptable to the beneficiaries.

[24] In terms of their abilities, Ms Allen is well known to the Court for submissions she has made from time to time concerning this and other lands over several years. Those submissions were invariably characterised by her knowledge of the land and its people. Her sincerity in advocating for the interests of owners and those associated with the land in accordance with tikanga is without doubt. I consider that Ms Allen will be able to make an important contribution to the business of the trust.

[25] Ms Stewart has an impressive resume of education and teaching. She also referred to her aspirations for the owners and their uri, and the need to hold wānanga and hui on the land to re-familiarise owners and their whānau with its historical and present day importance to them. Following her presentation to the Court, I am satisfied that she too can provide particular knowledge and expertise to the work of the trust with a complimentary set of skills.

[26] In addition, it would have obviously have been preferable for any objections to the nominees to have been made at the general meeting where they were elected. That is the correct forum for the raising of concerns in the first instance. I also acknowledge Mrs Huata Kupa's

submission that her opposition to the nominees did not have any connection with her husband's unsuccessful bid for election to the trust.

[27] Some of the submissions received in opposition were either irrelevant or concerned an earlier period of time. In any event, many of those submissions should properly be supported by evidence and presented at a substantive hearing, tentatively arranged for November 2016.

[28] Mr Karena will need to provide evidence to support his allegations including where he claims that there had been no hui of owners endorsing the appointment of the original trustees. He would also need to address whether or not subsequent general meetings of owners have cloaked the trustees with their authority by not objecting to their continuing in those roles since the time of their original appointment.

[29] For completeness, I note that Mrs Huata-Kupa withdrew her resignation at the last hearing. She therefore remains a responsible trustee. That said, she needs to ensure that she works effectively with her colleagues, including those now appointed.

Decision

[30] Sheryle Allen and Mona Stewart are appointed as additional responsible trustees of the Owhaoko C Trust. Application A20160002171 regarding the appointment of trustees is now concluded.

[31] In terms of Mr Karena's application A20160003902 for a review and enforcement of obligations of trust, the following directions are now issued:

- (a) The applicant Mr Karena is to file and serve his evidence on his application within one month from the date of this judgment. The trustees are to file any evidence in response one month later.
- (b) The proceedings are set down for further hearing at a date to be confirmed during the November sitting of the Court at Hastings.
- (c) The trustees are to provide a report to the Court within two weeks on the issues surrounding the purchase of the investment property.

[32] Application A20160005059 filed by the trust for directions per s 67 of the Act is now concluded.

[33] Costs are reserved.

These orders are to issue immediately, per r 7.5, Māori Land Court Rules 2011

Pronounced at 4.10 pm in Rotorua on Friday this 9th day of September 2016

L R Harvey
JUDGE