IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT

A20090014063
A20160006805

UNDER	Sections 19, 67, 231, 238 and 240, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Whakapoungakau 24 Block
BETWEEN	JILLIAN NAERA, ERIC HODGE, WARWICK MOREHU, ANAHA MOREHU, BUNNY ORMSBY, KURANGAITUKU FARRELL AND KEREAMA PENE Applicants
AND	PIRIHIRA FENWICK, WIREMU KINGI (deceased), WINNIE EMERY (deceased) AND HIWINUI HEKE (deceased) First Respondent
AND	TAI ERU (deceased) Second Respondent
AND	JEWEL MATTHEWS, GEORGINA WHATA, DALE ERU AND KEN KENNEDY Third Respondents

Hearings: 26 March 2019, 211 Waiariki MB 1-46
(Heard at Rotorua)

Appearances: F Geiringer for Applicants
M Kyriak for Third Respondents
M McKechnie for Mrs Fenwick
J Koning and D Chesterman for the Paehinahina Mourea Trust

Judgment: 6 August 2019

JUDGMENT OF JUDGE L R HARVEY

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Introduction

[1] By a decision dated 10 September 2010, an application seeking determinations over a geothermal joint venture and, inter alia, removal of trustees of the Whakapoungakau 24 Trust, was dismissed.[1] A subsequent appeal to the Māori Appellate Court was also dismissed on 5 August 2011.[2] A further appeal to the Court of Appeal was disposed of in a judgment dated 8 August 2013. That Court dismissed four of the five issues on appeal except for claims of conflict of interest, which were referred back to this Court.[3]

[2] Leave for a final appeal to the Supreme Court was refused, however a cross appeal by the first respondents was granted.[4] The Supreme Court subsequently heard the cross

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1 *Naera v Fenwick – Whakapoungakau 24 Block* (2010) 15 Waiariki MB 279 (15 WAR 279)
2 *Naera v Fenwick – Whakapoungakau 24 (Tikitere Trust)* [2011] Māori Appellate Court MB 316 (2011 APPEAL 316)
3 *Naera v Fenwick* [2013] NZCA353
4 *Naera v Fenwick* [2014] NZSC 58

appeal and issued its decision on 20 May 2015.[5] The appeal was allowed in part and the proceedings remitted back to this Court:[6]

> [139] We allow the appeal in part. The Court of Appeal's order to remit the matter to the Maori Land Court (to deal with the issue of innocent third parties) stands. However, should there be no relevant third party interests, the Maori Land Court should consider what the consequences of the breach of s 227A should be, taking into account the matters discussed in this judgment. The Maori Land Court is also to decide on the existence (or otherwise) of the conflicts in light of this judgment.

[3] This decision considers several preliminary issues regarding the scope of and appropriate procedures for the disposal of the referral from the Supreme Court.

Procedural history

[4] Following the return of the proceedings to this Court, counsel for the applicants and the third respondents sought directions on a range of issues. On 30 November 2016, the Registrar was directed to arrange a teleconference with counsel.[7] That was held on 20 December 2016 followed by the issue of an interim judgment.[8] By that decision, I issued directions regarding the provision of relevant documents along with a trustees' report, and set the matter down for hearing.[9] One of the orders issued was for Wiremu Kīngi, then a Whakapoungakau 24 trustee, to provide the relevant project documents to Dr Kyriak.[10] The trust had complied with similar orders issued in 2009.

[5] In the 20 December 2016 judgment, the trustees of Paehinahina Mourea Trust and Manupirua Trust had also been directed to file a report and to attend Court and answer questions on those reports, on the following terms:[11]

> [18] I therefore direct the trustees of Paehinahina Mourea and Manupirua Trusts to provide me with a written report on their activities as they concern the geothermal power project, the company and the project agreement. In particular, I would like the trustees to report on what steps if any they have taken to continue advancing the project, whether they have received a copy of the judgment of the Supreme Court dated 20 May 2015, whether they have taken independent advice as to the impact and implications of that judgment to the project, and whether they have consulted with their beneficial owners on these issues. The report should be filed with the Registrar on or before 27 January 2017, unless there are compelling reasons why an extension should be provided.

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5 *Fenwick v Naera* [2015] NZSC 68
6 Ibid
7 152 Waiariki MB 287-291 (152 WAR 287-291)
8 *Naera v Fenwick – Whakapoungakau 24 Block* (2016) 154 Waiariki MB 254 (154 WAR 254)
9 An amendment per s 86 of the Act was later made to replace Rabin Rabindran in the order with Tikitere Geothermal Power Ltd: 156 Waiariki MB 265-283 (156 WAR 265-283)
10 Regrettably, Mr Kīngi passed away on 27 December 2017. I understand that at the time of his passing he had not complied in full with this order.
11 *Naera v Fenwick – Whakapoungakau 24 Block* (2016) 154 Waiariki MB 254 (154 WAR 254)

> [19] The Registrar will then arrange a hearing on or before 3 February 2017 so that the trustees may answer questions on their report. It may also be appropriate for any parties affected by the orders in this decision to address the Court further if they seek to have any of those orders amended, stayed, annulled or revoked. Should it prove necessary for any reason, I confirm that I will be available at short notice to convene further judicial conferences and hearings.

[6] Further teleconferences were then held, and interim judgments issued on 31 August 2017, addressing matters of costs and the provision of documents.[12] Additional directions were issued on 27 August 2018.[13] A teleconference was held with counsel on 8 November 2018 where it was agreed that further argument was required on several preliminary issues.[14]

[7] On 30 January 2019, another interim judgment was issued outlining a proposed approach to determining the following matters:[15]

(a) Is this Court required to consider the claims of conflict of interest afresh?

(b) What is the appropriate procedure for dealing with the referral back?

(c) Is the Paehinahina Mourea Trust required to provide the agreement to the Court? and

(d) If the Paehinahina Mourea Trust fails to provide the agreement is that a contempt?

[8] In that judgment, I gave preliminary views on the issues, confirming that they were without the benefit of further submissions from counsel, and then issued directions:

> [35] Counsel are invited to file submissions on the procedure and scope for the referral back within two weeks.
>
> [36] Counsel are directed to file submissions on the issue of whether the trustees are required to provide the amended project agreement and related documents to the Court as soon as possible.
>
> [37] The trustees are directed to file a report on the amended project agreement including attaching a copy of the said agreement within three weeks. The trustees are also directed to attend Court in person to answer any questions on the report.
>
> [38] Counsel are invited to file submissions within two weeks on whether the trustees' conduct amounts to a contempt and, if so, set out what appropriate remedies might be in the circumstances of these proceedings.
>
> [39] Leave is reserved for any party to seek further directions at any time.
>
> [40] Costs are reserved.

[9] Counsel filed submission in response and a hearing was held on 26 March 2019.[16]

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12 165 Waiariki MB 114-120 (165 WAR 114-120); *Naera v Fenwick – Whakapoungakau 24 Block* (2017) 168 Waiariki MB 257 (168 WAR 257); *Naera v Fenwick – Whakapoungakau 24 Block* (2017) 169 Waiariki MB 3 (169 WAR 3)

13 195 Waiariki MB 31-32 (195 WAR 31-32)

14 204 Waiariki MB 76-94 (204 WAR 76-94)

15 *Naera v Fenwick – Whakapoungakau 24* (2019) 205 Waiariki MB 96 (205 WAR 96)

Is this Court required to consider the claims of conflict of interest afresh?

Applicants' submissions

[10] Mr Geiringer submitted that the Supreme Court made an unequivocal finding that Pirihira Fenwick had a material conflict of interest when she entered into the project agreement for the Tikitere Trust.[17] Counsel contended that this Court can rely on and adopt the findings of fact made by the Supreme Court, as they were made within the same set of proceedings. He argued this is not a case where the parties would be relying of findings made in separate proceedings. Mr Geiringer submitted that the proceedings began in this Court and have been to the Supreme Court where the latter corrected a finding of fact made at first instance and then referred the matter back to this Court to conclude. He argued that in such circumstances it is not open to this Court to re-decide those issues of fact.

[11] Mr Geiringer contended that the Supreme Court did, however, leave other issues of conflict to be decided by this Court, should there be a need. Counsel submitted that the Supreme Court's direction that this Court resolve issues of conflict can only be read as a reference to the issues left open, and not an invitation for this Court to revisit, and possibly reverse, that Court's unequivocal decision. Mr Geiringer submitted, however, that it is not necessary for those issues to be resolved, as findings on them would not change the scope and appropriateness of any relief. Nor would it affect the potential liability of any party.

Third respondents' submissions

[12] Dr Kyriak submitted that it is not necessary for the Court to undertake any further factual enquiry into the conflict issue. He contended that the Supreme Court recognised that this Court, the Māori Appellate Court, the Court of Appeal and the Supreme Court itself have all already considered and made judgments on the conflict question. Dr Kyriak argued that the Court's preliminary view - that the question of the existence of a conflict has been determined - must be correct given the extensive prior judicial consideration, unless there are aspects of the Supreme Court's findings on that issue that require a further decision.

[13] Counsel submitted that, in relation to Mrs Fenwick, the Supreme Court's findings are conclusive. Mrs Fenwick had a real and appreciable possibility of conflict and should

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16 211 Waiariki MB 1-46 (211 WAR 1-46)
17 Ibid, at 4

not have taken part in the decision-making process. However, there were issues remaining from the Supreme Court's decision in relation to both Mrs Fenwick and Mr Eru. They included whether Mrs Fenwick's family's beneficial interest in Paehinahina Mourea Trust would also constitute a conflict of interest and whether Mr Eru's conflict was *de minimus* considering the nature and extent of the joint venture. Dr Kyriak contended that it is these matters that the Supreme Court referred to this Court for determination, if necessary.

Mrs Fenwick's submissions

[14] Mr McKechnie confirmed that Mrs Fenwick accepted she had a disqualifying conflict and did not want to be involved in relitigating that issue.[18] Counsel submitted that, in any case, the judgment of the Supreme Court was clear and does not require re-examination. Mr McKechnie also confirmed from the bar that, while Mrs Fenwick accepted that she was in a conflict, she had instructed that she received no benefit from that conflict. The project remained in limbo (and subject to an existing injunction) and so there was no suggestion of an income or dividends. Mrs Fenwick had also already resigned as a trustee.

[15] Regarding Mr Eru, Mr McKechnie argued that, given his death since the Supreme Court judgment, it may not be necessary to examine his position further. The fact that one of the trustees was conflicted to the point where she was disqualified, is sufficient to call the transaction into question.

Paehinahina Mourea Trust's submissions

[16] Mr Chesterman submitted that two issues were referred to this Court for determination.[19] First, it is for the Court to make findings in relation to the conflicts of Mrs Fenwick, Mr Eru and Mrs Emery. This should be done after hearing any further evidence necessary, including the specific evidence identified by the Supreme Court. Mr Chesterman argued that, contrary to my preliminary view, that Court did not make findings on the issues of conflict. Instead, he contended that the Supreme Court merely provided comment regarding the conflicts and confirmed there were two separate issues for this Court to decide. Mr Chesterman submitted that the conflicts and findings on the conflicts must be considered afresh, given the existing evidence, any new evidence and the Supreme Court's comments.

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[18] 211 Waiariki MB 1-46 (211 WAR 1-46) at 37
[19] 211 Waiariki MB 1-46 (211 WAR 1-46) at 23

He argued that this Court must undertake its own evaluative process and reach its own decision on each of the conflicts. It cannot adopt the comments of the Supreme Court.

[17] Second, counsel submitted that it is for this Court to make findings on the consequences of the conflicts, especially rescission. Mr Chesterman contended that such findings are to be made after hearing all relevant evidence, including the inexhaustive list of factors contained at paragraph [125] of the Supreme Court's judgment. He argued that this required a fresh application and included the following sub-issues:

(a) If rescission is appropriate, the terms on which it should be ordered;

(b) If one or more of the trustees received any personal gain from the joint venture arrangements, whether there should also be an account of profits; and

(c) If rescission is not appropriate, whether there should be any other remedy for the breach of s 227A of the Act, including whether there should be an account of profits.

Discussion

[18] Having carefully considered the submissions of counsel, my preliminary view, that the question of the existence of a conflict on the part of Mrs Fenwick had been determined by both the Court of Appeal and the Supreme Court, remains unchanged. I interpreted their judgments to mean that both Mrs Fenwick and Mr Eru were in breach of trust because they had a conflict, although in Mr Eru's case his interest was likely to be *de minimus*. This is found at paragraphs [57], [60] and [137] of the Supreme Court's decision. Before then, the Court of Appeal in paragraphs [93] to [95] had determined a conflict existed and then referred the proceedings back to this Court on the issue of remedies. My conclusion is that a fresh inquiry into the conflict issue was not required, apart from ascertaining if Mrs Fenwick or any member of her family, by their shareholdings, received any benefit from the arrangements. This issue can be resolved by the individuals affected filing appropriate evidence, which can then be tested if necessary.[20]

[19] Moreover, while the Supreme Court at paragraph [139] of its decision states that this Court should "decide on the existence (or otherwise) of the conflicts in light of this judgment", as Mr McKechnie submitted at the last hearing, contrary to her earlier position, his client now *accepted* that she was in a position of conflict. Consequently, there seems

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[20] This was referred to by the Supreme Court at paragraph [126]

little point in embarking on a further costly and time-consuming review of events that occurred over a decade ago, where most of the key witnesses and participants are deceased, seeking to prove what has been accepted by the surviving former trustee as being correct. The consequences of the conflict that Mrs Fenwick accepts existed is, however, a key question remaining for resolution.

Is the Paehinahina Mourea Trust required to provide the agreement to the Court?

Applicants' submissions

[20] Mr Geiringer submitted that the terms of the project agreement have been altered substantially since they were discovered to the applicants in the earlier proceedings before this Court.[21] However, there has been no continuing discovery, nor any further consultation with the trust beneficiaries. The applicants are thus ignorant of the changes to the project. Mr Geiringer argued there should be full disclosure to the new trustees of all the documents related to the project, including those that set out the present state of the project and those which show how and why variations were made from the original project. In addition, counsel submitted that disclosure of the documents to the beneficiaries will be necessary, given the Supreme Court's determination that a relevant factor is the "level of fully informed support among the beneficiaries of the Tikitere Trust for the project".

[21] Mr Geiringer also submitted that much has been made of the distinction between the Paehinahina Mourea Trust and Tikitere Geothermal Project Limited and the claims that this trust did not hold the relevant project documents.[22] However, counsel argued that there had been no good reason articulated as to why one joint venture party should keep secret from its partner, the documents that directly related to that joint venture and which had been varied from the original version.

[22] In addition, while the Paehinahina Mourea Trust and the company are two separate legal entities, the latter is controlled by the former. Counsel argued that, therefore, it is simply wrong for a party falling under jurisdiction of this Court to seek to escape that jurisdiction by creating a company, putting the documents critical to those proceedings in the possession of that company and then refusing to exercise control over it to comply with this Court's orders. Mr Geiringer argued that the Paehinahina Mourea Trust has failed to provide

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21 211 Waiariki MB 1-46 (211 WAR 1-46) at 8
22 211 Waiariki MB 1-46 (211 WAR 1-46) at 10

the documents and trustees' report requested by the Court and, while the trust continues to allude to them having their reasons, they are still yet to articulate those reasons.

Third respondents' submissions

[23] Dr Kyriak submitted that a complete set of current documents of the joint venture and project agreement are required to be disclosed immediately.[23] Counsel argued that any consideration of whether to rescind the relevant agreements can only properly occur with the knowledge of their contents. The same applies to the required assessment of the potential rights of third parties. Without a complete set, many of the considerations identified by the Supreme Court as being relevant cannot be properly considered. Dr Kyriak argued that there is no reasonable basis for the company or its parent to withhold the documentation.

Mrs Fenwick's submissions

[24] Mr McKechnie submitted that an assessment of the worth of a proposed venture cannot be made when the Court and the affected parties do not know what it is about or what it might involve.[24] He argued that the Supreme Court proposes the Court take into account the non-exhaustive list of matters in para [125] of its judgment and then ensure that trustees are properly informed, as the Supreme Court emphasised that the trustees should be the primary decision makers. They cannot exercise that responsibility without the necessary documents.

[25] Counsel contended that for the trustees to be the primary decision makers, they will want to ensure they have the support of the beneficiaries and that can only happen if the parties are fully informed as to what is proposed and what the financial benefits or potential shortcomings may be, so that a meaningful evaluation of the proposal can be made. Full disclosure between the parties to the joint venture is therefore critical.

[26] Mr McKechnie also argued that, from a practical perspective, the relevant documents should be disclosed to the Court, who can then assess if there are valid confidentiality or commercial sensitivity issues which may restrict the release of certain information to the parties. This procedure had already been adopted in this case and had proved satisfactory.

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[23] Ibid, at
[24] 211 Waiariki MB 1-46 (211 WAR 1-46) at 38

Paehinahina Mourea Trust's submissions

[27] Mr Chesterman submitted that the Paehinahina Mourea Trust is not required to provide the modified agreement because it has not been ordered to disclose the modified project agreement in either the Court's interim judgment dated 20 December 2016 or in its directions dated 31 August 2017. While the Court directed the trustees to prepare a report, no additional discovery orders were made against the trust and the 2017 directions were made without notice and without an opportunity to be heard.[25]

[28] Counsel confirmed that the trust filed a notice of intention to appear dated 25 January 2017, which objected to the 2016 judgment and which has not been heard. A related application by the company objecting to the discovery orders made against it in the 2016 judgment has also not been heard. Since then however, the company has provided disclosure to the applicant on the condition of confidentiality, to which the applicant objected.

[29] Counsel also submitted that the trust is a separate legal entity from the company and not subject to the discovery orders against the latter. The 2016 judgment distinguished between the trust and the company and made different orders against each of them. There is no basis for treating the company and the trust as one, or for the trust to be responsible for orders against the company.

[30] Mr Chesterman contended that the Court can only invoke its jurisdiction to make orders against non-parties if it first gives them notice and an opportunity to be heard. There is no procedure for non-party discovery applications in the Act. Guidance may be taken from either the High Court Rules, the principles of natural justice, or s 37(3) of the Act. The process adopted so far has not been in accordance with any of those sources of procedural protection and the orders were therefore made without jurisdiction.

[31] Counsel submitted that the delay in these proceedings is not a ground for denial of its natural justice rights. The trust was not a party to the application and was not involved in the initial hearings in 2009 or the appeals. The parties did not apprise the trust of the progress of proceedings, the evidence heard, the submissions made, nor the fact that rescission became an issue in the Court of Appeal. It was not until the 2016 judgment that the trust became aware it was the subject of orders made. Further, counsel contended that

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[25] Ibid, at 30-32

the Supreme Court's anticipation of a hearing that addresses information potentially within the trust's control is not a basis for denial of its natural justice rights.

The Law

[32] This Court has a wide discretion regarding evidence. Section 69 of the Act provides:

> **69 Evidence in proceedings**
>
> (1) The court may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter that, in the opinion of the court, may assist it to deal effectively with the matters before it, whether the same would, apart from this section, be legally admissible in evidence or not.
>
> (2) The court may itself cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence, as it considers may assist it to deal effectively with the matters before it, but shall ensure that the parties are kept fully informed of all such matters and, where appropriate, given an opportunity to reply.
>
> (3) Subject to the foregoing provisions of this section, the Evidence Act 2006 shall apply to the court, and to the Judges of the court, and to all proceedings in the court, in the same manner as if the court were a court within the meaning of that Act.

[33] The Court may therefore cause inquiries to be made, call witnesses, and seek and receive such evidence it considers may assist it to deal effectively with the matters before it. Subject to the above provisions, the Evidence Act 2006 also applies to proceedings.

[34] Section 69 of the Evidence Act 2006 is relevant to confidential information:

> **69 Overriding discretion as to confidential information**
>
> (1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
>
> (a) a confidential communication:
>
> (b) any confidential information:
>
> (c) any information that would or might reveal a confidential source of information.
>
> (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
>
> (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
>
> (b) preventing harm to—
>
> (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or

(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—

(a) the likely extent of harm that may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely importance in the proceeding; and

(c) the nature of the proceeding; and

(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and

(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and

(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[35] The Court has previously referred to these provisions when considering the suppression of evidence based on confidentiality.[26] Indeed, in an earlier decision in these proceedings, I considered an almost identical claim for disclosure of the original project agreement, which was opposed by the then trustees of Whakapoungākau 24 because of claims of confidentiality.[27] An important difference in this instance, however, is that the then trustees of Whakapoungākau 24 held copies of the relevant documents and could therefore file them with the Court as directed, given that they were parties to the proceedings.

[36] The general duties of trustees are set out in s 223 of the Act:

223 General functions of responsible trustees

Every person who is appointed as a responsible trustee of a trust constituted under this Part shall be responsible for—

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[26] See *Hutcheson v Clarkson – Mangamaire B2 Block* (2018) 73 Tākitimu 88 (73 TKT 88)

[27] *Naera v Fenwick – Whakapoungakau 24 Block* (2009) 348 Rotorua MB 297 (348 ROT 297)

> (a) carrying out the terms of the trust:
>
> (b) the proper administration and management of the business of the trust:
>
> (c) the preservation of the assets of the trust:
>
> (d) the collection and distribution of the income of the trust.

[37] These general duties are not exhaustive and general trust law principles are also relevant, as are the terms of trust.[28] The relevant obligations include the duty to adhere to the terms of trust and invest trust funds in accordance with that instrument and the law, and a duty of diligence and prudence as an ordinary prudent person of business would exercise.[29] Fulfilling lawful directions of the Court would also be expected to be among a trustee's most elementary duties.

[38] It is trite law that the Court has extensive supervisory powers in relation to trusts:[30]

> **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.
>
> **238 Enforcement of obligations of trust**
>
> (1) The court may at any time require any trustee of a trust to file in the court a written report, and to appear before the court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.
>
> (2) The court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

[39] In *Māori Trustee v Smith*, Judge Doogan made an order transferring shares held by a limited liability company to the trustees of the estate of Francis Guthrie Smith.[31] The Court made such orders under ss 236, 237 and 239 of the Act and s 59 of the Trustee Act 1956. The Court noted that the company and its shareholding could be considered an asset of the estate, given that the estate assets were transferred to the company. The basis for the order transferring the company shares to the trustees was on the premise that the estate required

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28 *Rameka v Hall* [2013] NZCA 203 at [19]

29 Ibid, at [29]

30 *The Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999; *Clarke v Karaitiana* [2011] NZCA 154

31 *Māori Trustee v Smith – Estate of Francis Smith* (2017) 72 Tairāwhiti MB 57 (72 TRW 57)

ownership of the shares so that the trustees were able to exercise effective control of those assets. Judge Doogan agreed with counsel that the Court had jurisdiction under ss 236 and 237 as the estate was plainly included in terms of "every other trust" constituted in respect of any Māori or General land owned by Māori. Although not strictly on point, it does raise the possibility that the Court could exercise its powers under ss 237-245 in respect of Tikitere Geothermal Power Ltd, being a trust constituted in respect of Māori land and therefore within s 236.

[40] Then in *Tata v Kara – Waiwhakaata 3E4C Lot 2A (Hiiona Marae)* this Court considered the issue of non-party discovery.[32] In that decision, Judge Armstrong confirmed that an order for non-party discovery is discretionary and set out the three criteria which must be satisfied. The process Judge Armstrong refers to is based on the procedure under the High Court Rules, given the absence of a directly relevant alternative in the Māori Land Court Rules 2011. The commentary from *Laws of New Zealand* notes that such an application must be made on notice to the person from whom discovery is sought, while recognising the Court's ability to protect confidential information.[33]

Discussion

[41] The necessity of access to the project agreement and other relevant documents is critical for the Court and trustees to ensure compliance with the direction of the Supreme Court and to make an informed decision regarding the consequences of the breach of s 227A of the Act. This point has been underscored on previous occasions. I have yet to hear any sustainable argument that the documents required for completion of the referral should be denied not only to the parties but to the Court itself. The Supreme Court's decision contains numerous references to the need for this Court, the trustees and the owners of the land to make an informed decision as to the fate of the project. It is difficult to see how that can be achieved in an information vacuum.

[42] I also note that if the trustees of Paehinahina Mourea or the company were dissatisfied with any earlier rulings on the point they had the options of appeal or review. It is also pertinent to acknowledge the efforts of Mrs Aratema, a trustee of Paehinahina Mourea Trust and chairperson of the company, who appears to have attempted to provide some level

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32 *Tata v Kara – Waiwhakaata 3E4C Lot 2A (Hiiona Marae)* (2016) 121 Waikato Maniapoto MB 2 (121 WMN 2)

33 *Tata v Kara – Waiwhakaata 3E4C Lot 2A (Hiiona Marae)* (2016) 121 Waikato Maniapoto MB 2 (121 WMN 2)

of disclosure to the parties. That said, there is also the criticism of Mr Geiringer and Dr Kyriak that, while there may have been some disclosure, it was very late in the piece, in 2017, and even then, was either incomplete or came with a confidentiality requirement that would have rendered the disclosure meaningless. But as Mr Chesterman argued, given these events, it would be wrong to assert that there had been *no* compliance at all. Moreover, I read Mrs Aratema's correspondence to confirm that disclosure was possible where there was an accompanying order of the Court to do so. As the Supreme Court confirmed, at paragraph [125] (l) of its decision, a matter to consider is the level of fully informed support amongst the trust beneficiaries. To be fully informed, understandably, they will need to know about all and any material changes to the original project agreement.

[43] Even so, if the trustees and directors still wish to have their objections heard and considered then they should be given that opportunity. I direct the case manager to liaise with all counsel as to a suitable date for that purpose within the next four to six weeks.

[44] One last point in this context. While the Paehinahina Mourea Trust may not have been formally joined as a party, it would be unrealistic to suggest that its trustees have no or only limited knowledge of these proceedings and the decisions of the various courts that have been made since 2009. Four points bear this out. First, the trustees' own reports to their owners confirm knowledge of the proceedings and their impacts on the geothermal power project.[34] Second, the case has received considerable media attention through the proceedings since 2009. Some of the attention had been managed by the secretary of Whakapoungakau 24, the late Mr Gray, when giving interviews with local newspapers.[35] Third, the trustees of Paehinahina Mourea Trust would have become aware of Mrs Fenwick's involvement with Whakapoungakau 24 and the controversy surrounding her conduct and the allegations of conflict given, that at the relevant times, she was a trustee of that trust. She remains in her role to this day. It would be surprising therefore if the trustees of Paehinahina Mourea Trust had not taken advice on the impacts of the various court decisions and their implications for the progress (or otherwise) of the project. Fourth, in the Supreme Court's decision, the trust, along with the company are referred to from the very first paragraph and then again at [14] and [18] under the heading "The other trust parties".

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[34] Paehinahina Mourea Trust *The First Forty Years* (2011) Rotorua, Paehinahina Mourea Trust at 25-26

[35] Matthew Martin "New Rotorua jobs at Tikitere geothermal plant" *New Zealand Herald* (New Zealand, 6 July 2011)

If the Paehinahina Mourea Trust fails to provide the agreement is that a contempt?

Applicants' submissions

[45] Mr Geiringer submitted that the past decisions of this Court were unequivocal on the provision of the relevant documents.[36] The Paehinahina Mourea Trust was promptly served with the Court's decisions and the Court expressly gave any party leave to seek further orders. The Paehinahina Mourea Trust therefore had an opportunity to raise any issues it might have had. However, it chose not to challenge the decisions but simply to ignore them. Mr Geiringer contends that the trustees and their agents used their power with respect to the company to, in effect, obstruct the provision of documents. As such, according to counsel, they are in contempt.

[46] Counsel submitted that the most crucial point is for the Court to compel compliance, rather than punish the trustees. That said, Mr Geiringer argued that, given that the trustees have so blatantly acted in contempt, a declaration to that effect should be made. Anything less invites disrespect of this Court Counsel argued that the Court should make it clear that the trustees will be removed from office if they have not complied in full with the Court's direction to provide disclosure by a certain date. Further, the Court should reserve its position on the imposition of financial penalties, subject to the trustees' response.

Third respondents' submissions

[47] Dr Kyriak submitted that in the present circumstances, where the trustees of the Paehinahina Mourea Trust are in control of the company that, either directly or through its advisers, hold the relevant documents, failure to cause those documents to be delivered to the Court as directed, arguably amounts to contempt.[37]

[48] In addition, Dr Kyriak contended that it is now proposed for the Paehinahina Mourea Trust to be expressly ordered to provide the documents, with the consequences for their failure to do so being their removal. If such orders are made, this will ensure that either the orders are finally complied with or an appropriate sanction is applied to the trustees. Dr Kyriak argued that in such scenario, there is no practical need to make a declaration as to whether those trustees are presently in contempt. However, if the orders are not made, then

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[36] 211 Waiariki MB 1-46 (211 WAR 1-46) at 9-12
[37] 211 Waiariki 1-46 (211 WAR 1-46) at 22

Dr Kyriak submitted it would be appropriate for the Court to make a declaration that the Paehinahina Mourea Trust trustees are in contempt and for fines to be imposed at the discretion of the Court.

Paehinahina Mourea Trust's submissions

[49] Mr Chesterman submitted that there has been no contempt of Court by the trust. The 2016 judgment directed the trust to file a report with the Court and to attend to answer questions.[38] However, the trust objected to those orders in a timely fashion and its objection is yet to be heard. He argued that that the trust's attempts to engage with the Court process in respect of discovery were ignored. Mr Chesterman further submitted that the 2017 direction did not make additional orders to those in the 2016 judgment.

[50] Mr Chesterman argued that there has been no order to the trust to disclose the modified project agreement, that the trust and the company are separate entities, that the company has objected to discovery and that separate non-party discovery is required with notice. Counsel contended that s 89 of the Act provides that contempt of Court requires that a summons be issued to the relevant parties. While the requirements for a summons are not expressly defined in the Act, he referred to the High Court Rules which he says apply by analogy. He argued that such process was not complied with and no summons was issued to the trust by the Court. Therefore, the trust cannot be found liable for contempt.

Discussion

[51] Sections 89 and 90 of the Act deal with contempt. Section 89 provides:

> **89 Failure to comply with summons, etc**
>
> (1) Every person commits an offence who, after being summoned to attend to give evidence before the court or to produce to the court any papers, documents, records, or things, without sufficient cause—
>
> (a) fails to attend in accordance with the summons; or
>
> (b) refuses to be sworn or to give evidence, or, having been sworn, refuses to answer any question that the person is lawfully required by the court to answer; or
>
> (c) fails to produce any such paper, document, record, or thing.
>
> (2) Every person who commits an offence against this section is liable on conviction to a fine not exceeding $300.

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[38] Ibid, at 32-33

> (3) No person summoned to attend the court shall be convicted of an offence against subsection (1) unless at the time of the service of the summons, or at some other reasonable time before the date on which that person was required to attend, there was made to that person a payment or tender of the amount fixed by the rules of court.

[52] While this provision is slightly ambiguous as to whether a summons is required to produce documents before contempt can be found, the decisions which have addressed contempt have generally involved failure to comply with a summons in accordance with the above provisions.[39] However, in *Chapman v Aotearoa Resorts Ltd – Tokaanu Māori Township 2nd Residue Trust,*[40] contempt of Court outside of those provisions was considered, and a comparison was made with the District Court's ability to find contempt for wilful disobedience of a court order.[41] In that case costs had been already ordered, however it was noted that if the issues arose again then consequences could be serious.

[53] The issue of whether there is the jurisdiction to compel trustees to provide, in their reports to the Court, specific documents has not been fully argued, other than the contention by all other parties that the Court *does* have that jurisdiction and should order compliance by the trustees of Paehinahina Mourea Trust and the company's directors with its earlier orders. As foreshadowed, Mr Koning submitted previously that his client did not accept that the jurisdiction per s 238 of the Act enabled the Court to order trustees to file documents they considered confidential, or at least without having their objections heard first. This matter can be dealt with at the next hearing where the trust and the company will have the opportunity to be heard on the issue of discovery. Until that has been resolved, the question of contempt must be deferred.

[54] Even so, as foreshadowed, while I acknowledge that steps have been taken to seek to provide some of the documents requested, Mr Geiringer makes a fair point when he says that there has been delay in the provision of even those documents.[42]

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39 *Pue v Tapatu – Okawa A1B* (2011) 268 Aotea MB 93 (268 AOT 93); *Witehira – Awarua A25* (2008) 128 Whangarei MB 828 (128 WH 282)

40 *Chapman v Aotearoa Resorts Ltd – Tokaanu Māori Township 2nd Residue Trust* (2010) 257 Aotea MB 62 (257 AOT 62).

41 See also *White v Eriwata* HC New Plymouth CIV 2006-443-302, 8 August 2006

42 211 Waiariki MB 1-46 (211 WAI 1-46) at 39-40

What is the appropriate procedure for dealing with the referral back?

Applicants' submissions

[55] Mr Geiringer submitted that, given the project agreements were entered into in breach of trust, the issue now remaining is what relief should be granted. He says that issue turns on the factors identified by the Supreme Court and needs to be resolved either by the Court directly or by reference to a decision of the new trustees.

[56] Counsel argued that the question of rescission should be referred to the new trustees for determination. He relied on his earlier memorandum dated 27 November 2015, which recommended that the trustees be provided with all necessary information to make an informed decision on the issues, that the trustees obtain independent expert advice, and that the trustees have genuine consultation with the beneficiaries.

[57] Mr Geiringer reiterated that the terms of the project have been altered substantially since the matter was last before this Court and therefore full disclosure of all relevant documents to both the new trustees and beneficiaries is necessary.

Third respondents' submissions

[58] Dr Kyriak submitted that the matters cannot be adequately progressed without provision of a full set of finally agreed and executed project agreements, including any amendments. He suggested that an order issue for the Paehinahina Mourea Trust to deliver to him as counsel for the new trustees, a complete set of all documents, both physical and electronic. A further order should then be made for him to provide those documents to the Court, the applicant beneficiaries, and the present trustees of the trust. Counsel also argued that a conditional order should be made removing all trustees of the Paehinahina Mourea Trust if they fail to comply with the orders to deliver documents on time.

[59] Dr Kyriak submitted that once the relevant documents have been received, the trustees of the trust should be directed to take appropriate advice on the nature and effects of the project as documented and then consult with their beneficiaries on the same basis. Following consultation, the trustees should then make application to the Court for directions, at which stage the Court can determine any residual issues relating to the conflicts, if necessary, and determine the consequences of the breach of s 227A of the Act.

Mrs Fenwick's submissions

[60] Mr McKechnie submitted that the present situation is not one which requires fresh pleadings and if the Supreme Court thought it should proceed that way, it would have explicitly said so.[43] Counsel argued that it seems nonsensical to require pleadings that might involve rescission in relation to an agreement, the terms of which have not been fully disclosed. He says you would only seek to rescind an agreement if you have reached the conclusion that it is not in your best interests or is in some way unlawful.

[61] Mr McKechnie suggested that the parties be required to make full disclosure to the Court and for the Court to then determine if any of that information should not be made available to the parties.[44] In other words, the Court will be able to assess whether the claims for confidentiality or commercial sensitivity have any validity, and to then release to the parties such information as it considers appropriate in order that informed decisions can be made by the trustees, necessarily after consultation with the beneficiaries.

Paehinahina Mourea Trust's submissions

[62] Mr Chesterman submitted that the referral should be approached in four stages:[45]

(a) New pleadings alleging rescission and alternative remedies;

(b) Discovery process against the Paehinahina Mourea Trust and/or other non-parties per r 8.21 and 8.22 of the High Court Rules

(c) The Court to decide on a referral back after hearing from the parties and from interested parties; and

(d) A hearing to be held adopting procedures under Part 18 of the High Court Rules, to determine conflicts, rescission, or other relief.

[63] Counsel argued that there is no application before the Court pleading rescission or any other relief. He submitted that before any hearing on the other matters can proceed, the applicant must file a fresh application which pleads and particularises rescission, other relief, and how the alleged conflicts give rise to that relief. Such a procedure is necessary to

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43 211 Waiariki MB 1-46 (211 WAR 1-46) at 37
44 Ibid, at 38
45 211 Waiariki MB 1-46 (211 WAR 1-46) at 23

provide the Paehinahina Mourea Trust with notice of the case and assist in determining relevance in relation to the scope of discovery.

[64] Regarding discovery, Mr Chesterman submitted that the procedure for non-party discovery against the Paehinahina Mourea Trust has not complied with natural justice principles or the High Court Rules. He argued that the process should be recommenced by adopting the procedures under the High Court Rules.

[65] Counsel further submitted that the participation of interested parties must be mandatory in relation to the Court's decision as to whether to remit the issue of rescission to the new trustees and, as part of that remittance, whether further consultation with the beneficiaries is necessary. He confirmed that the joint venture is a major commercial contract involving several parties who have invested considerable time and money. The consequences of rescission will be significant for them.

[66] Regarding a substantive hearing, Mr Chesterman argued that the hearing should proceed by adopting similar procedures to those under Part 18 of the High Court Rules dealing with equitable applications. This includes evidence by affidavit or agreed facts and cross-examination. Counsel submitted that all interested parties should be served with the pleadings and given an opportunity to participate and present their own evidence.

[67] Finally, Mr Chesterman submitted that the option suggested by the Court, for it to seek the opinion of senior counsel, would be inappropriate. He argued this would be a derogation of the Court's duty and discretion to determine its processes and would potentially amount to acting under dictation or failing to genuinely exercise its powers.

Discussion

[68] There is, to some extent, something of an inherent circularity on the proposals to progress the referral back. One party, understandably, says they must have access to key documents before they can make decisions and submissions on their position. The other, not unreasonably, says that a fresh pleading will focus the scope of any discovery, which they oppose to some extent in any case, while noting that there has been at least some discovery to date. In rejoinder, it was submitted that until there is full and complete access, where a party does not know the material changes to the core project documents, then a comprehensive pleading cannot be provided. It was also contended that what documents have been provided were incomplete, with more being subject to unreasonable conditions of

confidentiality, while the timing of their provision was far from satisfactory and amounted to, effectively, such wilful defiance of earlier directions and orders that such conduct must amount to contempt.

[69] Having carefully reviewed the submissions of counsel, I consider that progress can properly be made once the applicants and third respondents file an amended or a fresh application setting out the details of their claims and the relief they seek. While I acknowledge that proceedings have been in train for some time, an amended or new application will provide clarity for the Court and the parties regarding the remaining issues and the relief sought. I also note counsel's acknowledgment that the applicants would not oppose such a procedure, along with the points made by Messrs Geiringer and McKechnie, that the current process remains part of the original proceeding, being a referral back and that an amended application is all that is required.[46]

[70] Moreover, I do take counsels' point, as expressed at the last and earlier hearings, including the submission of Mr McKechnie, that the applicants and third respondents cannot make an informed assessment as to the remedy of rescission without access to the relevant project documents.[47] That said, counsel are able to plead alternative relief conditional on such an assessment once access has been provided to the relevant documents.

[71] It would also assist the proceedings if Mrs Fenwick and a representative of the members of her immediate family who own interests in Paehinahina Mourea and Whakapoungakau 24, file evidence as to the extent of those interests as well as confirming whether they have received any benefits in connection with the project, notwithstanding its embryonic status in terms of any actual steps being taken to construct a geothermal power station.

[72] The next step is for the Paehinahina Mourea Trust and the company to be provided with the opportunity be heard on the issue of discovery. In this context, I note the submissions of Mr Chesterman that his client "is not saying that this Court does not have jurisdiction to make orders against non-parties" and that as the trust was not a party to the original proceedings, its opposition to providing documents should be heard.[48] Once there has been a resolution of the access issue, one way or the other, the amended project

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46 211 Waiariki MB 1-46 (211 WAR 1-46) at 12
47 Ibid, at 37-38
48 211 Waiariki MB 1-46 (211 WAR 1-46) at 28

agreement and related documents will need to be provided to the affected parties so that the Supreme Court referral can be concluded.

[73] Following that, and consistent with the directions of the Supreme Court, this Court will, after hearing from the parties, determine whether there should be further consultation by the trustees with their beneficiaries to consider whether rescission or some other remedy is appropriate. Once that has occurred, a final hearing can then be set down for consideration of the following matters:

(a) Are there innocent third-party interests to consider; and

(b) If there are no innocent parties, what is the appropriate remedy

[74] In the meantime, if the report of the trusts that had been directed to be filed per s238 have not been circulated to the parties, the case manager should attend to that forthwith. A hearing for the trustees to answer questions on the reports can also be arranged once the objections to the discovery process have been heard.

Other matters

[75] Dr Kyriak submitted that the present trustees of the Tikitere Trust have chosen to join the proceedings to assist the Court with its determination of the matters remitted back from the Court of Appeal and the Supreme Court. As volunteers, the trustees consider their role more as an *amicus* or friend of the Court and are not opposing the application. Accordingly, the present trustees seek confirmation from the Court that they have a right to be indemnified from the trust for their legal expenses, and that their involvement as an *amicus* or friend will not expose them, and consequently the Tikitere Trust assets, to future adverse costs orders.

[76] I see no reason why the indemnity sought should not be confirmed provided the trustees continue to act prudently and in accordance with their duties.

[77] One last point. In one of his last reports to the owners of Whakapoungakau 24, filed with the registrar in August 2014, the late Mr Kīngi made the claim that the applicants in this proceeding were opposed to the geothermal power project in its entirety. He then stated that if the owners opposed to the project were successful in their efforts to effectively halt the project indefinitely, from the perspective of the trust, then he opined that it would likely continue but without any significant input or involvement by Whakapoungakau 24. Mr

Kīngi also confirmed that "the project was continuing" and that the next important milestone was the preparation and progression of a resource consent application.

[78] In an earlier judicial conference, I noted that those opposed to the project would doubtless wish to be heard on any such resource consent application in due course with the probable consequence that further delays would be inevitable. In any event, while the present procedural engagement is in train, including the central issue of access to the amended project documents, with the issuing of an interim injunction on 20 December 2016, any progress with the project must have been suspended.

Decision

[79] The applicants, represented by Messrs Kyriak and Geiringer, are directed to file an amended or new application outlining the details of their claim, including the relief they seek, within one month from the date of this judgment.

[80] The Paehinahina Mourea Trust and Tikitere Geothermal Power Ltd will then be provided with a further month within which to file any response or defence to any such claims, following which a judicial conference will be arranged to discuss further procedural issues.

[81] The Deputy Registrar is directed to liaise with counsel for the convening a hearing as soon as possible to hear the objections to orders for discovery of the amended geothermal project agreement and all other relevant project documents by the Paehinahina Mourea Trust and Tikitere Geothermal Power Ltd.

[82] Pirihira Fenwick and any members of her immediate family are directed to file evidence as to the extent of their ownership in Paehinahina Mourea Trust and Whakapoungakau 24 Trust within 1 month including whether they have received any benefit, directly or indirectly, by that ownership because of the geothermal power project.

[83] To avoid doubt, the injunction issued on 20 December 2016 remains in force.

Pronounced at 5.15pm in Whanganui on Tuesday this 6th day of August 2019.

L R Harvey
JUDGE