

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT**

A20180004715

UNDER Section 58, Te Ture Whenua Māori Act 1993

IN THE MATTER OF an appeal against an order of the Māori Land Court made on 24 May 2018 at 162 Waikato Maniapoto MB 90-115 in respect of Poike 8E Block

VALENTINE NICHOLAS
Appellant

SHANE GIBBONS
MICHAEL GRAY
Respondents

Hearing: 7 November 2018
(Heard at Hamilton)

Court: Judge L R Harvey (Presiding)
Judge M J Doogan
Judge M P Armstrong

Appearances: J P Koning for the Appellant
No appearance for the Respondents

Judgment: 15 February 2019

JUDGMENT OF THE COURT

Copies to:

J P Koning, Koning and Webster Lawyers, Level 1, 34 Gravatt Road, Papamoa 3151

Introduction

[1] Poike 8E is a 1.8711-hectare block of Māori freehold land located in Tauranga. There are at present 113 owners. In July 2015, an investigatory trust was established over the land for two years.¹ On 24 May 2018 Judge Clark decided that while the trust terminated by operation of law on 27 July 2017, there were grounds to establish a new ahu whenua trust over the land.

[2] Valentine Nicholas now appeals that decision. He argues that, having found that the trust terminated as at 27 July 2017, and in the absence of any direction from the beneficial owners to vest their legal interests in a new trust, the Court must vest the land in the owners.

Issues

[3] The issues on appeal are:

- (a) Did the investigatory trust terminate by operation of law on 27 July 2017?
- (b) Were the orders granted by the Māori Land Court properly made?
- (c) What orders should be granted, if any?

Māori Land Court orders

[4] The orders made in the Court below interrelate and were the subject of detailed argument. For convenience, we set them out in full:²

[97] I make the following orders pursuant to Te Ture Whenua Māori Act 1993:

- (a) Section 18(1)(a), declaring that the Poike 8E Investigatory Trust terminated on 27 July 2017;
- (b) Section 18(1)(i) determining that the trustees of the Poike 8E Investigatory Trust ceased to hold office on 27 July 2017;
- (c) Section 241(1) terminating the Poike 8E Investigatory Trust as at 27 July 2017. Subject to what happens at the next hearing, I intend at this stage to vest the legal interests in the trustees of the Poike 8E Trust;

¹ *The Māori Trustee – Poike 8E block* (2015) 101 Waikato Maniapoto MB 286-311 (101 WAI 286-311).

² *Nicholas – Poike 8E* (2018) 162 Waikato Maniapoto MB 90 (162 WAI 90) at [97]-[98].

(d) Section 237 dismissing application A20170006831, being an application to review, appoint additional trustees and vary the Poike 8E Investigatory Trust;

(e) Section 215 constituting the Poike 8E Trust;

(f) Sections 19(1)(b) and 37(3) issuing an injunction that no funds held by Webster Malcolm Solicitors on behalf of the Poike 8E block be disbursed until further order of the Court.

[98] I anticipate that further orders will issue once the trust order, vesting and appointment of trustee matters are finalised.

Background

[5] We adopt the factual background from Judge Clark's decision:³

[2] Mr Valentine Nicholas, an owner in the block, previously arranged for the Bay of Plenty Polytechnic to lease part of the block on an informal basis for the purposes of a car park. The Polytech agreed to pay \$50,000 per annum for that informal lease, payments were made into a bank account in the name of the Pakere Trust, a private trust set up by the Nicholas Whānau to hold the funds for land projects

[3] In March 2014, the Māori Trustee filed a number of applications with the Māori Land Court seeking inter alia, a determination as to the right and title of the proceeds of the lease, the appointment of themselves, as agent for the purposes of receiving the proceeds of the lease and to formalise the signing of a lease to the Polytechnic on behalf of the owners;

[4] Between 21 March and 1 December 2014, I made various directions and orders concerning those applications;

[5] One of the directions I made on 1 December 2014, was that the Registrar call a meeting of assembled owners seeking their opinion on the future governance of the block, that is, whether they wished to remain with the Māori Trustee appointed as agent or the possible adoption of a trust;

[6] A meeting of owners took place on 14 March 2015. A resolution was passed by the assembled owners to establish a two-year investigatory trust.

[7] The applications came back before Judge Milroy on 13 April 2015. During the hearing, Judge Milroy heard submissions from counsel acting for Mr Valentine Nicholas objecting to the establishment of an ahu whenua trust;

[8] At the conclusion of the hearing, Judge Milroy indicated that she intended to make orders constituting a trust. She stated her reasons orally but did not make any final orders pending receipt of a certified resolution by the chairperson of the meeting of assembled owners.

[9] In a reserved decision dated 27 July 2015, Judge Milroy made orders pursuant to ss 215 and 219 of Te Ture Whenua Māori Act 1993 ("the Act") constituting the Poike 8E Investigatory Trust ("PIT").

³ Above n 2 at [2]-[10].

[10] In her decision, Judge Milroy made it clear that the trust was to be established as “an investigatory trust” for a two-year period. The trustees were appointed to undertake certain objects, they being:

- (a) To obtain a feasibility study or report at a cost of \$15,000.00;
- (b) To make decisions regarding continuance of the lease with the Polytechnic;
- (c) To make decisions regarding the distribution of funds;
- (d) To report back within one year on the results of the study or report; and
- (e) To report back about the future options regarding ongoing governance.

The order establishing the trust and terms of trust

[6] The recitals and provisions of the order establishing the trust provide:⁴

WHEREAS application was filed by the Māori Trustee to be appointed as agent of the beneficial owners

AND WHEREAS the Court of its own motion pursuant to section 37(3) of Te Ture Whenua Māori Act 1993 has amended the application to section 215 of Te Ture Whenua Māori Act 1993 to enable constitution of an Investigatory Trust over the said block for a period of two (2) years

NOW THEREFORE the Court upon reading and hearing all evidence adduced in support thereof and being satisfied on all matters upon which it is required to be so satisfied

HEREBY CONSTITUTES THE POIKE 8E INVESTIGATORY TRUST, pursuant to section 215 of Te Ture Whenua Māori Act 1993

AND THE COURT FURTHER DECLARES, pursuant to section 219 of the said Act that the trusts upon which the said trustees shall now and henceforth hold the said block until further or other order of the Court are set out in the terms attached hereto

[7] Clause 9.1 of the trust order provides:⁵

Calling general meetings

9.1 The Trustees shall call a General Meeting of the Beneficial Owners at the end of their two-year Investigatory Trust tenure least once every year for the next two years.

[8] Clause 24 of the trust order provides:⁶

24. TRUST REVIEW AND REPORTS

Trust reviews

24.1 The Trustees shall by **April 2017** apply to the Court for a review of the Trust.

24.2 When the Court reviews the Trust the Court may by order:

⁴ Above n 1.

⁵ Above n 1.

⁶ Above n 1.

- (a) make directions to the Trustees as it thinks fit;
- (b) confirm the Trust Order without variation;
- (c) vary the terms of the Trust Order in such manner as it thinks fit; or
- (d) make an order terminating the Trust.

Appellant's submissions

[9] Mr Koning argued that as at 27 July 2017 the trust had terminated. As the beneficial owners had not made a direction under s 241(1) to vest their legal interests in any other persons they were entitled to an order pursuant to s 241(1) vesting the legal interests in them in their respective shares. The Court's discretion under s241(1) is very limited. The Court can only vest the legal interests in either the owners or in persons as directed by them.

[10] Counsel maintained that the Judge erred in placing reliance on information provided to owners in the October 2017 hui-a-tau information pack entitled "Future Governance". Mr Koning submitted that there is no clear and unequivocal direction from the beneficial owners to vest their legal interests in the trustees of a new ahu whenua trust because:

- (a) the Poike 8E Investigatory Trust had terminated by operation of law on 27 July 2017;
- (b) the meeting notice published on 23 to 30 September and 7 October 2017 does not expressly refer to the establishment of a new ahu whenua trust;
- (c) the section on "Future Governance" in the report dated 13 May 2017 proposes an amendment to the existing trust order for the Poike 8E Investigatory Trust;
- (d) the meeting on 14 October 2017 was inquorate;
- (e) the resolutions recorded in the minutes were to vary the existing trust order, reappoint the existing trustees and appoint two new trustees for the Poike 8E Investigatory Trust;
- (f) there was no resolution to constitute the Poike 8E Trust to replace the Poike 8E Investigatory Trust.

[11] Mr Koning went on to submit that the Judge further erred by holding that an order in favour of the owners under s 241(1) could be delayed pending further applications being filed pursuant to ss 219, 220 and 222 being the sections on trust orders, vesting orders and

appointment of trustees. Moreover, he contended, because the owners did not provide a clear and unequivocal direction that their interests be vested in a new ahu whenua trust, this Court must therefore grant an order vesting the land in the owners in their respective shares.

Respondents abide

[12] Two of the five interim trustees, Messrs Gray and Gibbons, filed a notice on 30 July 2018 on behalf of the respondents confirming that they did not intend to appear or make submissions on the appeal.

Discussion

Did the investigatory trust terminate by operation of law on 27 of July 2017?

[13] While we understand the force of the argument that persuaded the Court below that the trust terminated by operation of law on 27 July 2017, our consideration of the statutory provisions and the order establishing the trust leads us to a different view.

[14] The Judge placed weight upon the fact that the resolution of owners from March 2015 was to establish a two-year investigatory trust. Furthermore, in constituting the trust Judge Milroy clearly contemplated that it would last for a two-year period. The invocation of the Court's power under s 37(3) to vary the application and invoke the jurisdiction to constitute a trust without notice, gave weight to the argument that the orders establishing the investigatory trust should be construed strictly. Accordingly:⁷

The trust order was established for a two-year period and on the passing of that date, in accordance with the tenor of its order, it must terminate. I consider that it did so by operation of law, that being a situation and where a right or liability explicitly expressed to come to an end by automatic operation regardless of the parties' intent.

[15] That conclusion in turn lead Judge Clark to dismiss the application for review, variation and appointment of additional trustees on the basis the application had been filed after the trust had ceased to exist by operation of law.

[16] Mr Koning maintained that the trust did end by operation of law on 27 July 2017 and pending the making of a vesting order, the legal interests in the land were effectively in a kind of "limbo". The trust was no longer in existence and trustees had no power to act, but

⁷ Above n 2 at [33], references omitted.

at the same time and pending an order vesting the legal interests in the beneficial owners (or others), no party could act in relation to the interests.

[17] Counsel accepted that following termination of the trust by operation of law there would still need to be an order of the Court per s 241 terminating the trust. This was because until such an order is made, the block order file, list of owners and memorial schedule all record the trust as still in existence. Mr Koning argued an order under s 241 vesting the legal and beneficial interests back in the owners in their several interests was required. As we understand the submission, these steps were necessary for completion of termination by operation of law.⁸

[18] We accept that the intention of the parties and the Court at the time the investigatory trust was established was that it would be in operation for a finite period with certain specific objectives. What we cannot accept however is that there was an effective “drop dead” date upon the expiry of the two-year period. Formal termination requires a further order of the Court and the necessary changes to the title, as we have outlined.

[19] The order creating the trust records that the investigatory trust was established with the relevant terms upon which the trustees shall thereafter hold the land “until further or other order of the Court”. The review of trust contemplated under clause 24 specifically records that upon review the Court may by order confirm or vary the terms of trust or “make an order terminating the trust”.

[20] These provisions anticipate either an extension or a termination of the trust upon the expiry of the two-year investigatory period. They contemplate a managed transition from the investigatory period to whatever follows. To the extent there is ambiguity or doubt we prefer this interpretation over an arbitrary end date by operation of law. We consider the lower Court erred finding in favour of a ‘drop dead’ approach.

Were the orders granted by the Māori Land Court properly made?

[21] Mr Koning pressed upon us the need for an order vesting the legal interests back in the owners in accordance with their respective shares. He argued that this was required because there was no clear direction from owners to do otherwise, and absent such a

⁸ 159 Waikato Maniapoto MB 164 (159 WAI 164).

direction the requirements of s 241(1) compels the Court to return the interests to the owners.

[22] More fundamentally, s 241(1) of the Act provides the Court with power to terminate a trust “by making an order vesting that land...in the persons entitled to it in their respective shares...or in such other persons as the beneficial owners may direct.” Equally important in this context, termination can only be effected by a formal order bringing the trust to an end and then vesting the lands either in the hands of new trustees or an agent. Alternatively, in the absence of owner support for either option, the Court is required to vest the land back into the owners. Put simply, unless and until the Court makes an order terminating the trust and vesting the interests elsewhere, the trust remains in place. There is no need to conceive of a legal hiatus or limbo, into which the legal interests go pending a s 241 order. It is the s 241 order itself which is determinative.⁹

[23] While it was open to the Judge to make an order terminating the trust, the orders made were insufficient to constitute a formal termination. The order at paragraph 97(c) of the judgment may purport to terminate the trust as at 27 July 2017 but there is no contemporaneous vesting of the legal interests. Rather the order goes on to say that “subject to what happens at the next hearing I intend at this stage to vest the legal interests in the trustees of the Poike 8E Trust”, being the new trust established by orders of the Court that day.¹⁰ Our conclusion is that it was not open to the Court to purport to terminate the trust without immediately vesting the legal interests.

What orders should be granted, if any?

[24] While the Judge accepted several points raised by Mr Koning in terms of notice to owners of the proposal for a new trust, on balance, he was satisfied that the threshold requirements of s 215 had been met and that the new ahu whenua trust could be established. He made an order constituting the new Poike 8E Trust although he did not at that stage make orders vesting the land or appointing trustees. He anticipated that further orders would issue

⁹ To add further support to this point, this Court has previously confirmed that where trustees are removed, the Court cannot leave a trust without trustees: *Te Whata v Paku - Akura Lands Trust* [2011] Māori Appellate Court MB 55 (2011 APPEAL 55). To do so would render the trust effectively a fiction because a trust cannot exist without trustees.

¹⁰ Above n 2 at [97].

once the trust order, vesting and appointment of trustee matters were finalised subsequently.¹¹

[25] Section 215(4) of the Act provides that the Court shall not grant an application to establish an ahu whenua trust unless satisfied that the owners of the land have had sufficient notice of the application and sufficient opportunity to discuss and consider it, and that there is no meritorious objection. We cannot accept that the notice in this case was sufficient to constitute a new ahu whenua trust. The public notice issued in September and October 2017 recorded date and venue and an agenda which included registration and checking of proxy and postal voting. The matters to be considered at the meeting were a report to owners, financial statements, variations to the trust order and an election of trustees.

[26] There was nothing in the notice to suggest the possibility that a new ahu whenua trust would be considered. It is well settled that an order made without notice when required will be an order without jurisdiction.¹² It is also well settled that notice must be reasonably specific to ensure owners are aware of the intention and purpose of any meeting called for their benefit.¹³

[27] However, the Judge granted the order constituting the new trust based on his finding that the investigatory trust had terminated by operation of law on 27 July 2017. We have rejected that approach. This means the investigatory trust remained in existence after 27 July 2017, including when the meeting of owners was held on 14 October 2017, and when the subsequent application was filed seeking to review the trust, amend the trust order and appoint additional trustees. This is directly relevant to the issue of notice.

[28] While the notice for the meeting of owners was not sufficiently specific to constitute a new trust, it did expressly refer to varying the existing trust order and an election of trustees. Information packs were also sent to the owners. The various notices and information provided to the owners is as follows:

- (a) An information pack dated 22 July 2017 was sent to those owners for whom the trustees had address details, a total of 51 people. The information pack included:

¹¹ Above n 2 at [98].

¹² *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233); *Trustees of the Pukeroa Oruawhata Trust v Mitchell* [2008] NZCA 518.

¹³ *Naera v Fenwick - Whakapoungakau 24 Tikitere Trust* [2011] Māori Appellate Court MB 316 (2011 APPEAL 316) [32]-[41].

- (i) A detailed agenda which itemised the proposed variations to the trust order and the intended election of trustees;
- (ii) A summary of the proposed variations to the trust order; and
- (iii) A report to the owners from the trustees. Under the heading 'Future Governance' the report noted:

The Trustees have considered various options for future governance, and consider that at the current point in time, the most efficient way to continue the progress made to date with regard to the future use of Poike 8E is for the existing trust structure to be continued, with the objects of the Trust expanded to include the ongoing management of Poike 8E.

- (b) A public notice which appeared in the *Bay of Plenty Times* on three occasions on 30 June 2017, 1 and 8 July 2017. This notice expressly recorded variations to the trust order, and an election of trustees, as items on the agenda. The notice also advised that the information packs were available on request and provided the relevant email address to request one of the packs;
- (c) Following the inquorate meeting of 22 July 2017, a letter was sent to the 51 owners for whom contact details were held, on 8 August 2017. The letter advised of the new meeting date, enclosed an agenda, the information pack, and a copy of the existing trust order. This letter also invited owners to provide feedback on the proposed amendments to the trust order, or to propose any further variations;
- (d) The meeting for 14 October 2017 was publicly advertised in the *Bay of Plenty Times* on 23 and 30 September 2017 and 7 October 2017. Similar to the first public notice, it expressly referred to proposed variations to the trust order and an election of trustees, advised that the information packs were available on request, and provided the relevant email address to request one of the packs.
- (e) On 15 September 2017, the owners were sent a second notice informing them of the meeting for 14 October 2017.

[29] We consider the various notices and information provided to the owners sufficiently informed them that variations to the trust order were going to be considered at the AGM. They were also provided with the existing trust order, the proposed amendments to the trust order and were advised that the amendments would allow the existing trust to remain in

place and continue with the ongoing management of the land. Mr Koning responsibly conceded that if the trust did not ‘drop dead’ on 27 July 2017, the notice and information provided to the owners was sufficient to vary the trust order.

[30] At the meeting, the trustees and owners present discussed each of the proposed amendments to the trust order clause by clause. A unanimous resolution was passed approving those amendments. Unanimous resolutions were also passed re-appointing the existing trustees and appointing two additional trustees.

[31] It is also clear that amending the trust order was one of the options contemplated by the Court when the investigatory trust was first established. The trust order provided that, prior to the expiration of the two-year investigatory period, the trustees were to file an application for review with the Court. Per cl 24.2 of the trust order, the Court then had a discretion to:

- (a) make directions to the trustees as it thinks fit;
- (b) confirm the trust order without variation;
- (c) vary the terms of the trust order in such manner as it thinks fit; or
- (d) make an order terminating the trust.

[32] The application for review was filed by the trustees out of time. While that was in breach of that provision, we do not consider this is significant. Section 73(3) of the Act gives the Court power to extend time to enable performance of any conditions expressed in an order. The late filing of the application did not affect the Court’s jurisdiction to vary the trust order per cl 24.2 of the trust order, or per s 244 of the Act.

[33] We consider that the proper approach in this proceeding was to confirm the variations to the trust order and appoint the additional trustees. This is consistent with:

- (a) The options available under the trust order when the investigatory trust was established;
- (b) The notice and information provided to the owners leading to the meeting of owners on 14 October 2017;
- (c) The resolutions passed by the owners at that meeting; and

(d) The original application filed with the Court.

[34] On appeal, we can make any order that the lower Court could have made in the proceedings.¹⁴ We do not see any benefit in sending this back to the lower Court to confirm this approach. There is sufficient information before us to confirm these orders and we consider it is appropriate to do so.

Decision

[35] The appeal is allowed in part. Per s 56(1)(b) of the Act we revoke the orders made at paragraph 97(a)-(e) of the judgment under appeal, and substitute with the following orders, per:

- (a) s 244 varying the trust order adopting those amendments approved at the meeting of owners on 14 October 2017;
- (b) s 239(1) appointing Debbie Merrick and Poi Bidois as additional trustees of the Poike 8E Ahu Whenua Trust; and
- (c) ss 220 and 239(3) vesting the land and assets of the Poike 8E Ahu Whenua Trust in Shane Andrew Gibbons, Michael Clarke Gray, Patricia Pouaka Loffley Burton, Andrew Gordon Morrogh, Jack Bubba Paul, Debbie Merrick and Poi Bidois, as responsible trustees of the Poike 8E Ahu Whenua Trust, jointly no survivorship.

Pronounced in open Court at 10.15am on Friday this 15th day of February 2019

L R Harvey
JUDGE

M J Doogan
JUDGE

M P Armstrong
JUDGE

¹⁴ Te Ture Whenua Maori Act 1993, s 56(1)(f).