

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

**A20180004854
A20180004434
A20180006936**

UNDER Sections 19, 43, 67, 237 and 238 Te Ture
Whenua Māori Act 1993

IN THE MATTER OF Horowhenua 11 Part Reservation Trust and
Horowhenua 11 (Lake)

BETWEEN CHARLES RUDD and PHILIP TAUEKI
Applicants

AND THE FORMER HOROWHENUA 11 PART
RESERVATION TRUST TRUSTEES

Hearings: 388 Aotea MB 128-135 dated 19 July 2018
388 Aotea MB 136-144 dated 19 July 2018
391 Aotea MB 247-258 dated 26 September 2018 (By telephone)

Appearances: L Thornton and L Watson for the Applicants
M McKechnie and D Stone for the Respondents

Judgment: 25 October 2018

INTERIM JUDGMENT (No.3) OF JUDGE L R HARVEY

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Introduction

[1] The background to the present proceedings is set out in my earlier decisions dated 22 June and 6 September 2018 and need not encumber this judgment.¹ Since the issuing of those judgments, a telephone conference with counsel was held on 26 September 2018.² This further interim decision considers submissions made by counsel at that judicial conference and subsequently via written memoranda.

Issues

[2] The issues for determination include:

- (a) When would the trustees' term of office have expired if they had been validly appointed?
- (b) When should the calling for nominations commence?
- (c) When should the extant enforcement of obligations of trust proceedings be heard?
- (d) What further procedural steps are required before a hearing can be held?
- (e) Until replacement trustees are appointed, how will the trust be managed?

[3] Counsel also raised the issue of the effect of the recent decision of the Māori Appellate Court *Taueki - Horowhenua 11 Part Reservation Trust* in the context of decisions made by the then trustees from the time of their appointment until the quashing of that order.³ That point, in a preliminary way at least, is also considered in this decision.

Discussion

When would the trustees' term of office have expired if they had been validly appointed?

[4] I refer to my earlier judgment *Taueki v Horowhenua 11 Part Reservation Trust - Horowhenua 11 (Lake) Block* dated 2 February 2016 which also considers the procedural elements of the election process in some detail.⁴ The trust order provides that no trustee may

¹ 386 Aotea MB 142-150 & 390 Aotea MB 31-36 (386 AOT 142-150 & 390 AOT 31-36)

² 391 Aotea MB 247-258 (391 AOT 247-258)

³ [2018] Māori Appellate Court MB 512 (2018 APPEAL 512)

serve for more than three years. As foreshadowed in that 2016 decision, the limits of a three-year term were underscored:

[37] The short answer is that the trustees were appointed for a term of three years. That term expired on 26 November 2015 and the election of new trustees will not occur before March 2016, a delay of some four months. I consider that three years means three years and the trustees had an obligation to ensure that elections were held prior to the end of that three-year term to prevent any perception of an unreasonable delay.

[5] As to the commencement of the trustees' term, the following passages are apposite:

[43] According to the case manager, a timeline of communication with the Court confirms that Dr Procter did contact the Court in July 2015 regarding the election process and access to the Court's database of addresses.

[44] This was then followed by a request for information on the timing of the holding of elections by Mr Sword in late October 2015. Judge Doogan then issued directions via the case manager on 24 November 2015 confirming that the effective start date of the trustees' term of office was 26 November 2012. A trust meeting was held on 29 November 2015 resulting in elections being set for March 2016.

[6] The short point is that, in the absence of any detailed contrary arguments, I consider that the trustees appointment would have expired on 26 November 2018. Therefore, the holding of an election should have taken place before the end of 2018, regardless of the Appellate Court judgment. To do otherwise would be to extend the trustees' term of office contrary to the trust order. Therefore, an election is required and, given the provisions in the trust order for notice, the process of calling for nominations should have commenced in July or August 2018, notwithstanding the then pending Appellate Court decision.

[7] Put another way, while the quashing of the appointment decision was due to no fault on the part of the former trustees, their tenure would have expired in a month's time in any event. Consequently, an election needs to be held as soon as possible to ensure trustees are appointed at the earliest opportunity. This is supported by Appellate Court authority, *Te Whata v Paku - Akura Lands Trust*, that this Court should never leave a trust without trustees where incumbents are removed:⁵

[19] However, the effect of Judge Coxhead's decision was to remove the trustees immediately prior to any replacement trustees being appointed. That left the Trust in a hiatus. That aspect of the decision was plainly wrong. The Court should never consciously leave a trust without trustees.

[20] In our view, in the absence of suitable replacement trustees being available to be appointed immediately, whether interim or permanent, Judge Coxhead had to adjourn the

⁴ 347 Aotea MB 269-295 (347 AOT 269-295)

⁵ *Te Whata v Paku - Akura Lands Trust* [2011] Māori Appellate Court MB 55 (2011 APPEAL 55)

application to a further hearing to consider the appointment of replacement trustees. Any order removing the trustees should have been subject to the appointment of replacement trustees. If Judge Coxhead considered that the trustees to be removed should be restricted in what they could do in the meantime, then an injunction could have issued.

When should the calling of nominations commence?

[8] The detailed terms of trust approved in 2012 set out the process for the election for trustees. Clause 4.1 of the first schedule to the trust order makes provision for the notice for the calling of nominations:

Calling for nominations. The trust shall give notice calling for nominations at least three months before the date of the election. Such notice shall specify the method of making nominations, and the latest date by which nominations must be made and lodged with the Trust or such other person as the notice directs.

[9] The election should be held as soon as possible and, as has occurred in previous elections, the registrar should provide oversight of the process. This is because the effect of the Appellate Court decision is that until an election an appointment process has concluded, the trust cannot function, unless an interim trustee or trustees are considered and appointed. Given the background to these and earlier proceedings, it is essential therefore that care is taken to avoid any procedural defects.

[10] In summary, the Registrar is directed to call for nominations as prescribed in the trust order on an urgent basis as soon as possible. To avoid doubt, I expect that public notice will be issued no later than **Friday 26 October 2018**.

[11] It would also assist in the timely disposal of extant proceedings concerning Lake Horowhenua if the former trustees were able to confirm at their earliest convenience whether any of them intend to stand for election. This will then have consequences for the Rudd and Taueki proceedings, as foreshadowed during the last judicial conference.

Should the enforcement of obligations of trust proceedings be heard in November 2018?

[12] I understand from the case manager Mr O'Connell that counsel for Mr Rudd has now filed and served the evidence relevant to his application. It now remains for the trustees to file their responses to those claims. However, Mr O'Connell also confirms that no further response has been received from Mr Watson and this matter is considered below. The proceedings had been tentatively set down for hearing during 21-23 November next.

[13] Given the background to these proceedings, the allegations levelled against the trustees are not new and should come as no surprise. At a sitting of the Court at Levin in July 2018, many of the current allegations were traversed by counsel and the Court.⁶ The transcript of that hearing therefore set out many of the core allegations now contained in the evidence filed on behalf of the applicants. The former trustees are therefore directed to file any evidence in response to Mr Rudd's evidence on or before 20 November next.

[14] I acknowledge that this is several days short of the anticipated month. If counsel for the former trustees consider that they will be unable to comply with that direction in full then they should advise the case manager urgently. In any event, given the difficulties experienced in securing a two to three-day fixture at the Levin District Court, I am reluctant to abandon that proposed hearing without compelling reasons.

[15] The other difficulty is the filing of evidence by Mr Watson. If he has not done so by Monday, then it is difficult to see how the claims of Mr Taueki against the former trustees can proceed as planned at the November sitting. Mr Watson should therefore contact the case manager urgently and provide an update as to when his client's evidence will be filed. It would not be a sensible use of resources to start Mr Rudd's case on 21 November and then to have that adjourned because Mr Taueki's evidence has been received late, which will have the flow on effect of impeding the filing of responses from the former trustees.

[16] In such circumstances, the best-case scenario for the applicants would be the filing and serving of all their evidence without further delay, thus giving the former trustees' counsel the chance to prepare cross examination. The hearing of the applicants' cases could then be heard during 21-23 November following which the respondents' case could be heard sometime in the first quarter of 2019. While I acknowledge counsels' concerns over the prospect of their clients' allegations over potential nominees' past performance being untested before an election has concluded, I am unconvinced that an election *must* await the outcome of the present proceedings.

What further procedural steps are required before a hearing can be held?

[17] According to counsel, there remains outstanding the application for discovery. It will be remembered that the filing of the applicants' evidence was confirmed previously but with the proviso that should anything of relevance emerge following the completion of

⁶ 388 Aotea MB 128-144 dated 19 July 2018 (388 AOT 128-144)

discovery the applicants would be entitled to file further evidence. That would then of course require further response from the former trustees. As the direction to provide discovery had been issued prior to the release of the Appellate Court's judgment, I would have expected compliance with that direction by now.

[18] That said, I also acknowledge that the former trustees have in any event filed evidence in response to those directions. Counsel for the applicants appears to be suggesting that there is more information that is required for them to properly argue their clients' cases. The former trustees need to comply with the discovery direction as soon as possible.

Until replacement trustees are appointed, how will the trust be managed?

[19] The applicants argue that an interim trustee should be appointed because they say the former trustees are unsuitable for that role, given the serious allegations still pending. The former trustees say that they should be reappointed on an interim basis to ensure that the important work of the trust continues until the final disposal of the present proceedings.

[20] On reflection, considering the submissions of both parties, I appoint Clinton Hemana of Rotorua as sole responsible trustee until further order of the Court and an election has been held. Mr Hemana is an experienced professional trustee who has had the opportunity to oversee complex and challenging governance arrangements over Māori land in recent years.

[21] I have also carefully considered the submission that the former trustees are best placed to provide information and advice as to the day to day workings of the trust and to be able to respond meaningfully to the request for discovery. I therefore appoint, subject to their consent, the former trustees as advisory trustees on the same terms as the appointment of Mr Hemana. To avoid doubt, the advisory trustees have no authority to make representations to third parties except with the consent of the independent interim responsible trustee. Given Mr Hemana's appointment I direct that he convenes a telephone conference with the advisory trustees on an urgent basis to discuss priorities for the trust including compliance with the direction for discovery.

What is the effect of the quashing the former trustees' appointments on third parties?

[22] Without having heard any detailed argument on the point, my preliminary view is that third parties were entitled to rely on the representations of the former trustees in any

contractual context entered in good faith. Like the trustees, they would not have been aware of the defect in appointment because of issues of conflict of interest. Counsel may wish to provide submissions on this point in due course.

Decision

[23] The Registrar is to call for nominations for the election of trustees to Lake Horowhenua Trust commencing no later than 26 October 2018. The closing date for the receipt of nominations will be Wednesday 28 November 2018.

[24] The former trustees are directed to file any evidence in response to those of the applicants on or before 20 November 2018. If counsel consider that they may be in part unable to comply with this direction they should advise the case manager urgently and further directions may issue.

[25] The hearing of the applicants' case on the proceedings for the enforcement of obligations of trust will be heard at the Levin District Court on 21-23 November 2018 commencing at 2.15pm.

[26] Clinton Hemana, consultant of Rotorua, is appointed interim independent responsible trustee until further order of the Court.

[27] With their consent, the former trustees are appointed advisory trustees until further order of the Court.

[28] The independent interim responsible trustee is directed to convene a meeting, in person or by telephone, with the advisory trustees as soon as possible and is to take steps to comply with the discovery directions on an urgent basis.

[29] Leave is reserved for any party to apply for further directions at any time.

Pronounced at 4.55 pm in Rotorua on Thursday this 25th day of October 2018

L R Harvey
JUDGE