IN THE MĀORI LAND COURT OF NEW ZEALAND
TAIRĀWHITI DISTRICT

A20150003384

UNDER	Sections 19(1)(a) and 20 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waipaoa 5A2 – Injunction and Recovery of Māori Freehold Land
BETWEEN	THE MĀORI TRUSTEE Applicant
AND	BRUCE WINSTON ANDERSON SMITH Respondent

A20140012500
A20150003329
A20150003333

UNDER	Sections 240 and 43 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waipaoa 5A2 – Injunction, Removal of the Māori Trustee as Trustee and Rehearing of Injunction Application ordered on the 24th December 2014
BETWEEN	BRUCE WINSTON ANDERSON SMITH AND ROLAND MACDONALD SMITH AS TRUSTEES OF THE ESTATE OF THE LATE FRANCIS GUTHRIE SMITH First Applicants
AND	DIGGA BYGUM LIMITED Second Applicant
AND	BRUCE WINSTON ANDERSON SMITH Third Applicant
AND	THE MĀORI TRUSTEE Respondent

Hearings: 52 Tairawhiti MB 257 dated 13 October 2015

52 Tairawhiti MB 4-5 dated 2 September 2015
52 Tairawhiti MB 200-209 dated 30 September 2015
54 Tairawhiti MB 63-65 dated 17 November 2015
54 Tairawhiti MB 293-301 dated 30 November 2015
54 Tairawhiti MB 136 dated 8 December 2015
55 Tairawhiti MB 74-167 dated 27 January 2016
55 Tairawhiti MB 174-278 dated 28 January 2016
55 Tairawhiti MB 283-386 dated 29 January 2016
57 Tairawhiti MB 251-259 dated 16 February 2016
56 Tairawhiti MB 6-13 dated 17 February 2016
56 Tairawhiti MB 253-321 dated 26 February 2016
57 Tairawhiti MB 297-356 dated 30 March 2016
(Heard at Gisborne)

Appearances: Mr Greg Shaw, Counsel for the Māori Trustee
Mr GW (Bill) Calver, Counsel for Bruce Smith

Judgment: 18 October 2016

RESERVED JUDGMENT OF JUDGE M J DOOGAN

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Introduction

[1] Inland from Wairoa there is a 790 hectare block of Māori freehold land known as Waipaoa 5A2. It has been farmed under lease since 1951 by Francis Guthrie Smith and his family. They are the majority shareholder with just under 60 percent of the shares. In 2014 the lease was coming to an end and the Māori Trustee put the lease out to tender. The family put in a bid but were unsuccessful. They obtained an interim injunction in November 2014, which was lifted in December 2014 when the Māori Trustee agreed to run the tender a second time. The family were again unsuccessful and now ask the Court to intervene and set the Māori Trustee's decision aside.

[2] Whether the Court should intervene is the central issue but there are a number of complicating factors. I start with an outline of these and the key facts before returning to the central issue.

The context and the related proceedings

[3] Waipaoa 5A2 is part of a larger sheep and cattle station known as Ruatawhiri Station (1760 hectares). Francis Smith purchased the back part of the station, a 970 hectare block of General land known as Ngāpakira, from the Crown in 1977. Access to that land is through Waipaoa 5A2.

[4] Francis Smith died in 1997. His sons Bruce, Phillip, and Roland Smith, and his wife Sarah, are administrators of his estate. In 2003 they sold nearly all their livestock (capital stock), and with the approval of the Māori Trustee began sub-leasing Waipaoa 5A2 (together with the Ngāpakira block). Around the same time the estate's assets, including the Waipaoa 5A2 lease were transferred to a company called Digga-Bygum Ltd. The sole director and major shareholder of Digga-Bygum Ltd is Bruce Smith (55.56 percent). The other shareholder is his brother, the late Phillip Gordon Smith (44.44 percent).

[5] In 2014 when the Māori Trustee put the lease of Waipaoa 5A2 out to tender, Digga-Bygum Ltd put in a bid with a further sub-leasing proposal but was not

successful. It was Bruce Smith and the company who obtained the interim injunction in November 2014. It is they, together with Bruce and Roland Smith as surviving executors of Francis Smith's estate, who now ask the Court to set aside the Māori Trustee's decision in the second round. They apply for:

(a) A permanent injunction restraining the Māori Trustee from granting the lease of Waipaoa 5A2 to the Smith-Isaac Partnership (the successful party in round two).

(b) An order requiring the Māori Trustee to reconsider the lease of 5A2 and the status of the estate of Francis Guthrie Smith (as the major shareholder).

(c) An order varying the Trust determining that the woolshed, the shearers' quarters and the homestead belonged to the estate.

(d) An order under s 18 of Te Ture Whenua Māori Act 1993 (the Act) declaring a resulting or constructive trust with regard to the homestead, woolshed, and shearers quarters in favour of the estate.

(e) An order removing the Māori Trustee as responsible trustee.

(f) An order appointing Bruce Smith and two others as trustees in place of the Māori Trustee.

(g) In the alternative to removal of the Māori Trustee, an order partitioning Waipaoa 5A2 together with an adjournment to enable a formal application for partition and to award additional land as compensation for improvements.

[6] The Māori Trustee opposes the application and seeks a permanent injunction against Bruce Smith and Digga-Bygum Ltd, and an order for recovery of possession of the land.

[7] Normally a case such as this would be relatively straightforward, but four of Francis Smith's sons have commenced separate proceedings against their brothers Bruce and Roland Smith as surviving executors of the estate. Kevin (Tim) Smith, Ulric Smith, Daniel Smith and Francis Guthrie Smith (Junior) seek accountability for estate administration and disclosure of information. They complain that aside from one payment of $1,500 in 1997, they have received no benefit from the estate and despite frequent requests, have received no information from the executors as to financials of the estate, asset transfers or expenditure of funds. Those proceedings have, at the parties' request, been adjourned pending the outcome of this proceeding. The applicants in that proceeding have taken no formal part in these proceedings, though in seeking an adjournment of the estate proceedings they have expressed support for the challenge made in these proceedings to the lease decision.

[8] Kevin, Ulric, Daniel and Francis (Junior) Smith also submitted a separate and competing bid for the Waipaoa 5A2 lease in the second round. They were not successful.

[9] To complicate matters further, the successful bidders are a partnership consisting of George Smith Senior and Junior, and James Isaac. The Chief Judge of this Court (Wilson Isaac) was initially part of this bid but withdrew once litigation commenced. He remains interested as a guarantor of his son James' obligations under the lease. None of the successful tenderers are owners in Waipaoa 5A2, though they are descendents of former owners. The bid was not the highest and allegations of unfair or improper process because of deference or favour on the part of the Māori Trustee to the Chief Judge are among the issues raised on behalf of Bruce Smith and Digga-Bygum Ltd.

[10] Counsel for the estate and Bruce Smith (Mr Calver) quite properly raised the issue of whether the involvement of the Chief Judge gave rise to a question of bias, or perception of bias on the part of any judge of this Court dealing with the matter. That issue was argued pre-hearing before Judge Savage (by teleconference). Judge Savage did not accept that Wilson Isaac's participation in the bid in his personal capacity automatically disqualified all judges of this bench. He did however provide counsel with an opportunity to nominate any judge that he would prefer not deal

with the matter. That led to the matter being referred to me.[1] This issue has not been taken any further.

Outline and structure

[11] I begin with an outline of the relevant facts as I find them. To understand the decision under challenge, it is necessary to review the entire process, which includes both tender rounds.

[12] On issues relating to breach of the terms of the lease, boundary fencing and access between Waipaoa 5A2 and the Ngāpakira block, I was assisted by a site inspection which took place on 26 January 2016. I was shown over the Waipaoa 5A2 and Ngāpakira land by Ms Amy Sheriff, an expert appointed by the Māori Trustee, and Mr Ian Lyver, an expert appointed by Mr Bruce Smith. Also in attendance was a member of the Court staff.

[13] After reviewing the facts I then turn to the question of whether or not grounds have been established to intervene in the Māori Trustee's decision over the lease. That question overlaps with the application to remove the Māori Trustee for failure to perform its duties satisfactorily and I deal with that next.

[14] While an application for partition has been signalled, no application is before the Court so I can take that no further.

[15] The question as to what (if any) relief any of the parties are entitled to turns on the answer to these central issues.

The facts

The connection of Francis Smith and his whānau to the land

[16] Bruce Smith says that while his father initially inherited a small shareholding in Waipaoa 5A2, he adopted a strategy to purchase further shares so that his

[1] 52 Tairawhiti MB 200-209 (52 TRW 200-209); 52 Tairawhiti MB 257 (52 TRW 257).

whānau's position would be secure. The estate of Francis Guthrie Smith now holds 1,315.063 shares of a total of 2,199.521 shares (just under 60 percent). In 1977, Francis purchased the Ngapakira block from the Crown, strengthening the Smith's whānau's connection to Ruatawhiri Station as a whole.

[17] Bruce Smith detailed the following record of purchases by his father, obtained from the Court records:

i. On 8 February 1962, Francis Smith purchased 4.280 shares from George Smith (Snr) for the sum of £250.

ii. On 25 February 1964 Francis Smith purchased 54.282 shares from Huatahi or Timi Ihaka Ranapia for the sum of £400.

iii. On 3 February 1977, Francis Smith purchased 54.279 shares from Tiore or Pinati Ihaka Ranapia for the sum of $821.50.

iv. On 3 February 1977, Francis Smith purchased 983.166 shares from the Crown for the sum of $48,200.

v. On 29 March 1977, the Māori Trustee purchased 17.919 shares from "Mare James Hodges".

vi. On 17 January 1979, Francis Smith purchased 17.919 shares from the Māori Trustee for $1,080.42.

[18] Francis Smith built the family home on Waipaoa 5A2 in 1962. He built the house on the Waipaoa block because that was where the road access was. He and his wife Sarah raised their eight children there. He also constructed a woolshed and shearers quarters on Waipaoa 5A2. Under the lease he was not entitled to compensation for improvements.

[19] In 1993 Francis Smith applied to the Māori Land Court for a meeting of assembled owners to consider a proposal to surrender his current lease in return for a new lease of 20 years with a right of renewal for a further 20 years. The Court granted a lease of 10 years from 28 November 1994 with a right of renewal for 10 years. On 6 July 1993 an order was made vesting Waipaoa 5A2 in the Māori Trustee as responsible trustee under s 438 of The Māori Affairs Act 1953, with terms of trust set out.[2]

[2] In August 1996 the trust order was varied and advisory trustees were appointed. Bruce Smith was appointed advisory trustee at this time (together with four others).

[20] After Francis Smith died his sons Bruce and Phillip continued to farm the station. Sarah Smith continued to live in the homestead until it was destroyed by fire in May 1999. A new homestead was built in 2001. It was funded by insurance money and a contribution of approximately $30,000 from Sarah Smith.

Features of the land and the problems of access and infrastructure

[21] Access to Ruatawhiri Station is by way of a public road off Papuni Road and a bridge over the Ruakituri River. The public road continues a short distance from the bridge onto Waipaoa 5A2. Most of the station infrastructure is close to the road. The Wairoa District Council maintains the road to a distance of approximately 52 metres past the bridge across the Ruakituri River.

[22] The Ngapakira land is at a higher altitude than the Waipaoa 5A2 block and is less developed. The block borders Te Urewera and is essentially four large paddocks. The block has no yards or handling facilities and no power supply.

[23] The woolshed which Francis constructed in 1952 is now derelict and beyond economic repair. It is situated, at least in part, on the Council owned road reserve. Under the lease, the estate was required, by 28 November 2005, to complete the building of a woolshed or to improve the existing woolshed by expenditure of sufficient funds to increase its value by $20,000. That obligation was subsequently amended to require a building worth $15,000 to be on the land six months prior to expiry of the lease. This was not done and the Māori Trustee gave notice to Digga-Bygum Ltd that this was a breach that it must remedy. Notice of breach was also given regarding the failure to fence along the true boundary between Waipaoa 5A2 and the Ngapakira block.

[24] The southern boundary of Ruatawhiri Station is a bluff system which runs east to west the entire length of the station. Waipaoa 5A2 lies between the Ngapakira block and the Ruakituri River. The Ngapakira block is surrounded by forest and bluffs on one side and the Waipaoa River on the other. There is very little flat land on either block. A substantial area of native bush known as ‘the reserve’ runs along the northern boundary of Waipaoa 5A2. The eastern boundary of the Ngapakira block

runs along the edge of this reserve across the creek that borders the reserve and then up to the bluffs. The current boundary fence between the Waipaoa 5A2 and Ngapakira blocks is not located on the true boundary. If the true boundary were to be fenced, Ngapakira would gain approximately 14.7 hectares which at present is fenced within the Waipaoa 5A2 boundary.

[25] Access between the Waipaoa 5A2 block, administered by the Māori Trustee, and the Ngapakira block, owned by the estate is an important factor in this case.

[26] Legal access from Waipaoa 5A2 to the Ngapakira block is provided by way of a paper road which is partly formed. The formed access to Ngapakira is approximately 5.6 kilometres in length and for the most part is a bulldozed track suitable for a quad bike. Parts of the track are difficult in wet conditions and at times vehicle access is limited or not available at all.

[27] The difficulty in accessing the block is highlighted in a lease inspection report prepared by Ms Sherriff. She recorded that Waipaoa 5A2 is leased in conjunction with the Ngapakira block, which she says:

> works well and is probably the best scenario. If Waipaoa 5A2 was to be farmed separately, both properties would face issues regarding the use of the legal access… It is not practical to frequently move stock through Waipaoa 5A2, however an agreement could be created regarding all stock movements including:
>
> Frequency of movements
>
> Adequate notice regarding stock movement
>
> Best route to move stock
>
> Maintenance of the access

[28] Ms Sherriff also observed that as an isolated property, the Ngapakira block would be impractical to farm on its own without adequate access. Both Ms Sherriff and Mr Lyver agreed that farming the properties separately would present significant challenges particularly moving stock to and from the Ngapakira block. A high degree of cooperation would be required over access. Construction of a fenced laneway was one possible solution, but would be expensive.

[29] Based on the site inspection and the available evidence, I am satisfied that whilst it may theoretically be possible to farm the two blocks separately, the optimum practical solution is that they be farmed together (as has been the case for at least the last 50 years).

The subleasing arrangements

[30] With approval from the Māori Trustee the estate negotiated a sublease with Brown Riggs Agriculture in July 2003, initially for a one year term. The rental was $82,500 plus GST for the first six years. The rental was for both the Waipaoa 5A2 block and the Ngapakira freehold. The sublease was transferred to Digga-Bygum Ltd in 2004. One of the conditions of the sublease was a commitment to a development programme by which the estate would match dollar for dollar development expenditure by Brown Riggs. In affidavit evidence Bruce Smith claimed that proceeds from the sale of the capital stock were applied to meet the estate's contribution towards the development programme. He also said in response to questions that some of the proceeds from the sale of the stock had been used to repay debt.

[31] No records of actual development expenditure by Brown Riggs or Digga-Bygum Ltd, or the estate were produced. The sublease reserved to Digga-Bygum and the estate rights of access for hunting, fishing, logging of native timber and also the right to bid for the development work.

[32] The sublease with Brown Riggs came to an end in 2009. Bruce Smith said that he negotiated an end to that arrangement and negotiated with the neighbouring farmer (Mr McKinnon) to take over, initially on an informal basis. In 2010, again with the approval of the Māori Trustee, a sublease was entered into with Mr McKinnon for Ruatawhiri Station. The sublease was for a period of four years for a rental of $103,400. The term was to expire with the head lease of the Waipaoa 5A2 block on 27 November 2014.

[33] In his bid for the new lease Mr McKinnon ascribed 40 percent of the rental to the Ngapakira block and 60 percent to the Waipaoa 5A2 block (Ngapakira at $41,360

and Waipaoa 5A2 block at $62,040). During this period Digga-Bygum Ltd was paying the Māori Trustee $20,900 to lease Waipaoa 5A2.

[34] The McKinnon sublease also provided for a development programme. No details were provided of contributions by Digga-Bygum Ltd or the estate to the development programme but there was evidence of substantial expenditure by Mr McKinnon. For the financial years 1 October 2010 to 30 June 2014 Mr McKinnon calculates total expenditure on both the Ngapakira and Waipaoa 5A2 blocks to be $354,454, of which he estimates approximately 70 percent applied to Waipaoa 5A2.

[35] The sublease to Mr McKinnon reserved to the estate and Digga-Bygum access for fishing, hunting, logging of native timber and the right to bid for development work.

[36] For the period 1 October 2010 to 30 June 2014 Mr McKinnon also paid Digga-Bygum Ltd and Mamahi, a company controlled by Bruce Smith, $149,207.30 for development and maintenance work on the station.

The end of the lease and the tender process – Round 1

[37] Mr Brae Watkins is a business manager at the Māori Trustee responsible for high value leases (rental over $50,000). He is based in Wellington. Mr Watkins has extensive experience in the property industry and had been employed by the Māori Trustee for approximately three years prior to the expiry of the Waipaoa 5A2 lease. During that time Mr Watkins stressed that the policy of the Māori Trustee (which he administered) was against subleasing. He described a shift of emphasis away from subleasing to third parties towards enabling Māori owners to farm and utilise their lands directly. Mr Watkins said that it was standard policy to put high value leases out to tender.

[38] In her final end of lease inspection and report, Ms Sherriff recommended to the Māori Trustee a market rental for the lease of Waipaoa 5A2 of $60,000 per annum plus GST.

[39] The Māori Trustee advertised for expressions of interest in May 2014. Four bids for the lease of Waipaoa 5A2 were received, including one from Bruce Smith on behalf of Digga-Bygum Ltd.

The Digga-Bygum Ltd bid

[40] Bruce Smith submitted a proposal on behalf of Digga-Bygum Ltd by letter dated 9 June 2014.

[41] After setting out the background to his family's association with the Waipaoa 5A2 and Ngapakira blocks, Bruce Smith states that the bulk of the rental including the capital development fund had historically gone into redevelopment of Waipaoa 5A2 including new fences and roading.

[42] He then sets out his long term vision for the property which is to continue to improve it to make it an asset for generations to come. Realising this vision, he says, requires certainty into the future and the chance to maintain the integrity of the property by farming it as one. He states that it would be a disaster if the front block was leased to someone who did not share this vision and there would also be practical problems. A boundary fence along the legal boundary of the two properties would cost approximately $36,000.

[43] Under the Digga-Bygum Ltd proposal, rental for the first five years would be $35,000 to increase to $45,000 for the second five year term. Bruce Smith notes the position of his father and himself as kaitiaki for the land and also as a beneficiary and advisory trustee. He states he represents the interest of his immediate family who have a 60 percent interest in the Waipaoa 5A2 block and 100 percent interest in the adjoining land. He says that he is conscious that the interests of the 40 percent owners in the Waipaoa 5A2 block must be protected and enhanced and he believes that the development work which has and will be done is in the interest of all. There is then a somewhat ambiguous description of the strategy for subleasing which is said to be:

> … intently a proactive response to financial institutes (mortgage funding) defining equity funding to European title of up to 80%. In comparison to

> Māori freehold title 50% - 60% equity rending. With the obvious future proofing required, gaining full equity support, in depth development in the shortest possible timeframe is evident. This adding value "going forward" for sustainable business practice. Plus the decision to sublease which was approved by the Māori Trustee. Motivation/a dollar for dollar capital development strategy was adopted. In its purest form intended to nurture positive outcomes for all stakeholders.

[44] Bruce Smith concludes by saying allowing that a sublease of Waipaoa 5A2 has created various commitments for all parties, many of them long term. Income from subleasing is still being applied to the development of the Waipaoa 5A2 block. A one page development programme was attached to the bid, itemising various works totalling $231,138.

The McKinnon bid (Puhoro Station)

[45] Mr McKinnon, on behalf of Puhoro Station, submitted a bid dated 29 May 2014.

[46] Mr McKinnon proposed a new lease for a term of ten years and seven months with a rent of $74,418 plus GST plus Māori Trustee commission of $5,582 (a total of $80,000 plus GST). Rent reviews were proposed for 2019, 2022 and 2025. In addition he pledged to spend 75 percent minimum of the total lease amount, including Māori Trustee commission, on maintenance of Waipaoa 5A2 (estimated annual spend of $60,000 p/a).

[47] Mr McKinnon notes that the woolshed and cattle loading facilities are unusable and uneconomic to repair and confirms his intention to use his own facilities located nearby.

[48] Mr McKinnon wished to negotiate with the owners of the Ngapakira block so that he could lease that block in conjunction with Waipaoa 5A2. He notes that the block is effectively landlocked and if necessary he would be prepared to discuss with all parties a contribution towards the cost of establishing a fenced laneway access.

The Creswell bid

[49] Svarn and Sharelle Creswell submitted a bid proposing an annual rental of $54,600 plus GST (calculated at $14 plus GST per stock unit over 3,900 stock units) or to build a four stand woolshed over a three year period capped at $163,800. The lease term was to be three plus three years with a right of renewal. The bid included expenditure of $50,000 annually on fertiliser and repairs and maintenance of tracks.

The Smith-Isaac bid

[50] Wilson Isaac submitted a bid dated 22 May 2014 on behalf of himself, his son James and George Smith senior and junior. After setting out their respective farming experience the association of the Smith and Isaac families with Waipaoa 5A2 is set out:

> The original title to this land reveals that the land was largely owned by the Ihaka (Isaac) Ranapia (Isaac) and Kunaiti (Goodnight) families. In fact the true papakainga of the Isaac family was situated on this land. The George Smith family also have close connections in that one of the original owners, Aira McRoberts who was a first cousin to the Isaacs' was a mother of the Smith family with shares in the land. It goes without saying that as descendants of the original owners we want to protect this land for the generations of owners to come.

[51] The bid proposed a ten year lease term with a right of renewal for five years. Rental for the first five years was to be $35,000 (or such other amount as may be negotiated). Further proposals included five yearly rent reviews with rent to be fixed by valuation, no compensation for improvements and no rental paid on improvements effected by the lessee. There was a commitment to make the woolshed workable during the lease term, to maintain boundary and internal fences, to apply fertiliser annually, and to carry out weed, scrub and erosion control.

Appraisal of the Round 1 bids

[52] Māori Trustee staff based in Gisborne anticipated problems in the event that Bruce Smith and Digga-Bygum were not successful in obtaining a new lease of Waipaoa 5A2. On 30 June 2014 the Gisborne portfolio manager (Beverley Murray),

reported to the Deputy Māori Trustee and in-house legal counsel. Relevant parts include:

> Kia ora Tiaki
>
> I have previously briefed you on the issues with the Waipaoa 5A2 Block. For Gregs benefit, I will summarise:
>
> …
>
> - The property has been advertised for lease and we received 4 expressions of interest with the net annual rentals offered as follows:
>
> - Puhoro Limited - $74K
> - Digga-Bygum Ltd - $35K
> - S & S Creswell - $54K
> - G & G Smith & W & J Isaac - $35K
>
> - It is noted that Digga-Bygum and Smith & Isaac are landowners (i.e. Judge Wilson Isaac)
>
> - Property has recommended that we offer the lease to Puhoro Ltd. Obviously the rental is far superior but they have also offered significant development. The property is run in conjunction with their adjacent freehold.
>
> - **Bruce Smith (Digga Bygum)** Bruce Smith will be very difficult to deal with. He has asked his solicitor to be in attendance. The offer from Digga Bygum included the right to continue to sub-lease. We have already advised his solicitor that the MT will not consent to a sub-lease. The house on the block belongs to all of the owners even though the Smith whanau have occupied it since it was built in the early 2000's. (The original house was built by Bruce's father the late Francis Smith. In early 2000 the house burnt down and was rebuilt with insurance proceeds). If Bruce loses the lease it is doubtful whether we will be able to move him out of the house.
>
> - **Smith and Isaac** are also owners and are expecting to be contenders for the lease. However, their rental and development programme offers do not *stack up* to the other offers.

[53] On 15 September 2014 Ms Murray met with the advisory trustees (Ra Cotter and Hune Kapene). Bruce Smith was considered ineligible to attend due to a conflict of interest because of his bid for the new lease.

[54] The advisory trustees recommended offering the lease to the Creswells. The advisory trustees acknowledged that Mr McKinnon was offering a premium rental.

However because Mr McKinnon owned the adjoining land and had access to his own woolshed at the end of the term the owners would not have a new woolshed. The advisory trustees also acknowledged that the estate of Francis Smith, as major shareholder, may consider the acceptance of a lesser rental inappropriate. They had considered that over the years the Smith family had received the proceeds from the sale of native timber which had not necessarily been put back into the property or shared with the other owners. The advisory trustees were concerned that if the lease was granted to Mr McKinnon, then Bruce Smith would remain in occupation of the homestead (as it was not required by Mr McKinnon).

[55] In this and subsequent communications the advisory trustees made it clear that they did not want Bruce Smith living on the block and/or controlling activity on the station.

What was the outcome of Round 1?

[56] The Gisborne property team recommended awarding the lease to Mr McKinnon. They saw his bid as far superior, the best in terms of financial and farming experience. The difference in rental from the next highest bid over the term was $262,370. In addition, Mr McKinnon proposed a development plan worth $212,000 more than the next highest bid. They thought there could be discussions with Mr McKinnon over reducing the rental in return for a woolshed or holding money back for construction of a woolshed. It was noted that in comparison with the Creswell offer to build a woolshed worth $163,800, Mr McKinnon's higher rental would still yield $98,570 more, even allowing for the cost of the woolshed. A lease to Mr McKinnon also opened up the possibility that he could sublease the house, as he did not need it. The house could possibly be offered to Bruce Smith. In an email dated 1 October 2014 Faith Northover (Gisborne office) said:

> We are looking at what is good for the block and not the people behind it. If you take away the people Puhoro Ltd (Mr McKinnon) is the best option.

[57] Beverley Murray had earlier recommended to Mr Watkins that the decision on the lease be referred to the Te Tumu Paeroa subcommittee as it would be difficult. Mr Watkins responded to both Ms Northover and Ms Murray on 1 October 2014:

> This is not going to any subcommittee here. Please process the paperwork for me and approve the new lease based on your recommendation to me.

[58] The recommendation approved by Mr Watkins on 1 October 2014 was for the lease to be awarded to Mr McKinnon.

The amended Smith-Isaac proposal

[59] On 6 October 2014 Wilson Isaac wrote by email to the Māori Trustee as follows:

> Tēnā koe Jamie
>
> **Lease Waipaoa 5A2 Block – G & G Smith and W & J Isaac**
>
> I understand the decision to determine who will lease Waipaoa 5A2 has been referred to your Senior Management Team.
>
> On 22 May 2014, along with my son James and cousins, George (Senior) and George (Junior) Smith, we filed an expression of interest to lease the above block with the Māori Trustee in Gisborne. We attach a copy of this proposal for your information.
>
> At the time no decision was made by the Māori Trustee and the Māori Trustee called a meeting of owners at Wairoa to discuss the issue. Following the meeting we understand no decision has yet been made and because of the length of time that has passed since time for filing expressions of interests closed we can only assume some complications have arisen in the decision making.
>
> The current lease expires at the end of November 2014 and as potential incoming lessees we wish to clarify our lease proposal which may assist in your decision making. In so doing we do not consider we are creating a dutch auction situation but as stated simply clarifying our proposal in the following manner:
>
> **1. <u>Rental</u>**
>
> In our proposal we submitted a rental of $35000 for the first 5 years "or such other amount as may be negotiated with the responsible trustee." We have received no communication from the Māori Trustee in terms of negotiation and we therefore wish to clarify our position.
>
> We will pay rental in the sum of $60,000 for the first 5 years and for any further term, the rental to be determined by a registered valuer.
>
> **2. <u>Woolshed</u>**
>
> We state in our proposal that we would make the woolshed workable during the lease term. We wish to clarify this statement.

We will ensure that Waipaoa 5A2 has a 4 stand woolshed whether by repairing the existing one or replacing it during the term of the lease.

3. <u>Connection to the land</u>

In our proposal we referred to our whakapapa connection to this land.

We consider this to be highly relevant and we understand that at the meeting of owners, those owners present largely supported our proposal because of this connection.

We note that in terms of Te Ture Whenua Māori Act 1993, Māori land should be retained and utilised by its owners, whanau and hapū if at all possible. In the present situation we have the necessary skills and expertise to farm this land and protect it for generations of owners to come. Therefore, if our proposal is on a par with proposals from prospective lessees with no whakapapa link to this land, then as descendants of owners and members of the hapū associated with this land, it would seem that in the interests of the owners and in terms of Te Ture Whenua Māori Act 1993 our proposal should be given favourable consideration.

4. <u>Other proposals</u>

All other proposals we made in our offer of 22 May 2014 remain unaltered.

In clarifying the above matters we understand you as responsible trustee have the final say in making the decision and we will respect your decision when it is made.

If we can be of further assistance do not hesitate to call the writer.

Ngā mihi, nā

W W Isaac

[60] Mr Watkins was extensively cross-examined about this letter. He was asked whether he thought it odd that an unsolicited letter such as this should arrive nominating a revised rental that happened to be the market rental nominated by his expert advisor. Furthermore, the bid was modified to more specifically address the need for a woolshed which happened to be another factor under active consideration. Mr Watkins acknowledged that he was troubled by the possibility that there had been some improper communication with the Smith-Isaac partnership. He therefore telephoned Faith Northover, Beverley Murray and the Deputy Māori Trustee (Tiaki Hunia). They assured him they had not given Wilson Isaac or his partners confidential information about the bid process. He accepted those assurances.

[61] On 7 October 2014 Mr Watkins notified solicitors for Digga-Bygum Ltd that their clients had not been successful in securing a further lease of the property. Mr Watkins said that the Wilson Isaac letter of 6 October 2014 played no part in his decision to notify Digga-Bygum that they had been unsuccessful the following day. This was because he did not receive the letter until several weeks later as it was sent by email to the Māori Trustee and not forwarded on to him until some time in late October. He has no contemporaneous record or recollection of precisely what date he received the letter.

[62] Mr Watkins was cross-examined on who the preferred bidder was at the time he notified Digga-Bygum that it was unsuccessful. Mr Watkins said that no decision had been made and that he was ultimately prevented from doing so by the injunction proceedings which were lodged in November 2014.

[63] Pressed further, he conceded that he was "leaning" towards the modified Smith-Isaac proposal at the time the injunction proceedings intervened. When asked why internal correspondence showed the property team still working on the assumption that Mr McKinnon was the preferred tenant in late October 2014, Mr Watkins said that was because they did not have what he had (the Wilson Isaac letter of 6 October 2014).

[64] On 14 October 2014 Ms Northover sought approval from Christine Reuhman (in-house counsel) to offer the lease to Mr McKinnon. Ms Northover had sought clarification as application for a review of trust and appointment of advisory trustees was pending. She goes on to say:

> The advisory trustees all do not want a lease to be given to McKinnon as they feel that Bruce Smith will interfere with the process. I am bringing this up if we make application to the Court these advisory trustees may hold up the process.

[65] Ms Reuhman advised Ms Northover that she could send out the offer. However a short time later Mr Watkins advised that after discussion with Ms Reuhman they had concluded that they should hold all leases over until after the review of trust hearing in December.

[66] On 17 October 2014 Ms Northover emailed Mr Watkins confirming she had sent the letter to Digga-Bygum's solicitors giving notice to vacate the block. She also said:

> I had a discussion with Christine, she pointed out that we could have looked at the option to treat the house separate and not lose sight that Bruce Smith's family are the major shareholder through the mother's estate. I advised that was in my original submission that we lease to McKinnon and allow him to sublease the house or deal with the house separately, but the advisory trustees were adamant that Bruce not go into the house or be on the block. McKinnon was trying to make things work out with Bruce as well. No offer to treat has gone out to McKinnon pending the Court hearing as earlier advised.

[67] The minutes of the meeting between Beverley Murray and the advisory trustees on 24 October 2014 record that the advisory trustees unanimously recommended that:

> Due to historical issues with McKinnon and Digga-Bygum that Te Tumu Paeroa approaches Creswells to see if they will increase their rental offer and to seek clarity around building of a woolshed and load out facilities and renegotiate the development programme.

[68] The advisory trustees wanted their views known and heard before any offers were made. They wanted to meet personally with the Māori Trustee or his deputy. Depending on the response they would reconsider the role of the Māori Trustee. Beverley Murray is recorded as advising that the Māori Trustee would be unable to accept a below market rental.

[69] Those minutes were sent to Mr Watkins (and others) and on 27 October 2014 Mr Watkins responded saying:

> We are holding off making decision on who to lease the property to until CT hearings in November. If the trustees choose to remove us and take this block back then it is their choice, surely and the NOV CT sitting could hear such an application which further confirms what property have done to date.

[70] The November court hearing referred to was an application then before the Court for review of trust and appointment of advisory trustees. That hearing did not in fact take place until March 2015.

[71] On 20 October 2014, Faith Northover in internal correspondence copied to Mr Watkins (and others), said:

> Property have held off confirming a lease to any parties until after the Court hearing. Property have settled on the preferred lessee going forward who is not Digga-Bygum (Mr Bruce Smith), the current lessee. I believe that the advisory trustees are the only parties (besides Bruce Smith who is an advisory trustee) who know who the preferred party is.

[72] On 21 November 2014 Ms Northover wrote to head office and copied to Mr Watkins suggesting that a six month lease be offered to Mr McKinnon with the Māori Trustee to then make application to the Court for directions. Ms Northover refers to a call she had received from Mr McKinnon saying that he still had stock on the block and wanted to know when a decision would be made. She records that Mr McKinnon had said that if need be the house could be kept separate or they could allow Bruce Smith to use the house. Ms Northover concludes saying that if a short term lease is to be put in place she suggests that in the interim "we are probably better off going with the occupier who is McKinnon." Mr Watkins responded a short time later:

> Faith, this should have come to me. I don't want you going straight to Jamie with this stuff. A course of action has been agreed between Greg Shaw, Jamie and I, and we are all comfortable with that. What you have proposed here is counter to that and not what Greg has advised Jamie and I is the better way to do things. I would appreciate it if you would not go over my head again on property matters, irrespective of how strongly you feel about this.

[73] Greg Shaw is an in house legal counsel at the head office of the Māori Trustee. He represented the Māori Trustee in these proceedings. The context suggests that the course of action recommended by Mr Shaw was to run the tender process a second time.

[74] At the conclusion of the cross-examination of Mr Watkins it was clear that the Māori Trustee had withheld relevant documents on the basis of their commercial sensitivity. I invited the Māori Trustee to reconsider its position and as a result a substantial amount of additional documentation was made available. This information shed a good deal more light on the process and Mr Watkins was recalled and questioned further.

The injunction and direction to re-run the tender process

[75] On 24 November 2014, on the application of Bruce Smith an interim injunction was granted ex parte restraining the Māori Trustee from taking further steps. The substantive hearing took place in Gisborne on 23 December 2014. The Māori Trustee advised the Court that they had offered to re-run the tender process a second time, with Digga-Bygum Ltd to remain under a holding over arrangement until May 2015. In an oral decision released on 24 December 2014 Her Honour Deputy Chief Judge Fox said:[3]

> I am satisfied that Te Tumu Paeroa (The Māori Trustee) is willing to undertake a further rigorous process for ascertaining the future utilisation of this block. While the applicant has raised a number of concerns regarding the administration of the Digga-Bygum Ltd lease, it has expired and a new process must commence to secure the future for this land and its owners. I am also not convinced that there has been any actual or potential breach of trustee duties and any risk to the trust.
>
> I do consider that in evaluating future applications Te Tumu Paeroa should consider the points made regarding the importance of the land to this family, their passion for the land and the shareholding. I expect them to be given more than passing weight.

[76] The Māori Trustee was directed to re-run the process for calling for applications to lease Waipaoa 5A2 which was to take place over the following six months. During that time Digga-Bygum Ltd could remain in occupation pursuant to a holding over of the lease on the same terms and conditions.

[77] On 11 December 2014 Wilson Isaac wrote to Beverley Murray saying that in light of the proceedings and given his position as a Judge of the Court he would be withdrawing as a potential lessee. The expression of interest in the lease would continue in the names of James Isaac, George Smith Senior and George Smith Junior.

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[3] *Smith v The Māori Trustee – Waipaoa 5A2* (2014) 44 Tairawhiti MB 104 (44 TRW 104)

What happened in Round 2 of the tender process?

[78] In January 2015 Ms Northover began to advertise for new expressions of interest to contact the round one bidders to check whether they wished to continue in the second round with existing or revised bids.

[79] The parties were advised that current or resubmitted bids had to be confirmed by 13 February 2015. Advertising was placed on that basis also.

[80] On 14 January 2015 Ms Northover wrote to Mr Watkins and others saying that she had just got off the phone with Wilson Isaac about the Māori Trustee re-running the process. She goes on to say:

> He asked if the Māori Trustee were aware that an application had been filed by Leo Watson on behalf of Bruce's brother Tim and other siblings, excluding Bruce and Roland to invoke the obligations of the estate of the will of F G Smith. If this goes through this would remove the power of Digga-Bygum Ltd – interesting, watch this space. I also asked Greg McKinnon if Bruce lived in the house on the block. Greg McKinnon advised that Bruce has not been living in the house.

The McKinnon revised proposal

[81] On 29 January 2015 Mr McKinnon's accountants confirmed that he was prepared to continue to lease from the Māori Trustee and that some minor modifications would be made to his round 1 bid.

The Smith-Isaac revised proposal

[82] On 29 January 2015 a revised proposal was submitted on behalf of the Smith-Isaac partnership. It was dated 26 January 2015 and was signed by George Smith Senior, George Smith Junior and James Isaac. It was sent to Ms Northover from Chief Judge Wilson Isaac's Chambers by his personal assistant. The ongoing involvement of Wilson Isaac, notwithstanding his apparent withdrawal, is relied upon by the applicants as evidence of improper process.

[83] The revised Smith-Isaac offer dated 26 January 2015 was on the same terms as that submitted to the Māori Trustee in the 6 October 2014 letter. The following sentence was added under the heading "Connection to the land":

> Also the Māori Land Court records will also show that both James or Huatahi Isaac and George Smith Senior gifted their shares in this land to Francis Smith, the father of the present head lessee, to help him establish himself on the block.

[84] Ms Northover forwarded it to Mr Watkins on 30 January 2015 stating:

> Proposal resubmitted by Judge Isaac's whānau, George Smith etc. upped the rental offer to $60,000 and will make the woolshed workable to replace during the term. They connect back to the whenua the same as Bruce Smith.

[85] On 8 February 2015 Wilson Isaac wrote to Ms Northover advising that he would be the guarantor for James Isaac in the lease of Waipaoa 5A2.

Bruce-Smith proposal – round 2

[86] Following a number of chasing emails and calls Bruce Smith confirmed that he wished to proceed with Digga-Bygum Ltd's lease proposal. No modified proposal was submitted. His farm consultant's report (the Fraser report) was relied upon by Mr Watkins in the second round although it was not submitted as part of the Digga-Bygum Ltd tender. Mr Watkins was uncertain as to when he received that document. He thought it may have been in conjunction with documents filed by Bruce Smith in the course of the injunction proceedings. He said that it confirmed to him that neither Digga-Bygum Ltd or the estate would be farming the land directly in the short term.

The Creswells proposal – round 2

[87] The remaining bidder from the first round (the Creswells) confirmed their wish to be considered in the second round. Their bid remained the same.

New bid round 2, Kevin, Ulric, Daniel and Francis Smith (Junior)

[88] A new bid emerged from Bruce Smith's brother, Tim Smith, dated 15 February 2015 (received in the Gisborne office on 23 February 2015). By email dated 23 February 2015 Ms Northover reported to Mr Watkins as follows:

> (10) Owners – Tim Smith (Bruce Smith's brothers). – ***Note: Financial Information does not stack up – Reliant on winning Court Case***
>
> $80,000 Includes MT Comm/Comm ? (Only verbal) for 10 X 10 year Lease. I had a word with him earlier about supplying clear Financial Support due to high rental. I had to be sure that they could afford to stock the block and pay the rent. Stressed no subleasing.
>
> Kevin (Tim) Smith called in today with his son Joseph Fivash. He confirmed that his brothers Francis Guthrie Smith Jnr, Daniel John Smith and Ulric Smith were co applicants (The other brother's names were shown in the document). They will be able to move a 2nd hand – 4 Stand Wool Shed on to the block. Court case is to be heard for the 24th March re Assets of Estate of their father FG Smith.
>
> They do not have the Financial ability to Farm the block. They were looking at using the Assets of the Estate. I told them up front, that it is not good enough, it may take some time before they get anything out of the Estate. They do not have any stock and income from Wages I sighted does not cover it. May see if they can go into a sharefarming Agreement. If they did not get the Lease, they would like a short lease arrangement put in place to allow them to be able to make application at a later dated. I advised that MT would make the decision. Only criteria from last Meeting was that the Owners wanted a Woolshed. We had to be practical in that a 5 year term would be two short to recover costs if replacing or building a new woolshed.

Appraisal of round 2 proposals

[89] On 3 March 2015 Mr Watkins wrote to Jamie Tuuta (the Māori Trustee) as follows:

> Hi Jamie,
>
> Just a heads up for you on the above.
>
> After review of all proposals I have confirmed to Faith this morning that we are going with the Isaacs family. Their rental was double what Smith's was and they whakapapa back to the land a little stronger than Smith. They also included some redevelopment of the woolshed in their proposal which Smith didn't.

> Given the judgement from Judge Fox, Christine will drop the Judge a note outlining what we have settled on in this case. She will be comfortable with our decision I'm sure.

[90] On a copy of this document submitted to the Court there is a manuscript alteration to the sentence which records that the Isaacs whakapapa back to the land a little stronger that the Smiths. The amendment reads "corrected share vs descendant." Under cross examination, Mr Watkins said that close to the time that he had sent this email he realised that there was an error and had written that correction himself. He said he understood that the Smith-Isaac parties were not owners in the block whereas the Smith estate were owners. He said that this was why he had given the Smith-Isaac partnership a score of five with respect to owner/affiliation and had given the Smith estate interests a maximum possible score of 10.

[91] In response to questions Mr Watkins said that when considering the Smith-Isaac bid in the second round he took at face value the claim that James Isaac and George Smith Senior had gifted shares to Francis Smith to help establish him on the land. Ms Northover said that she had researched the Māori Land Court records and found that this was not correct. She had sent her research to Mr Watkins. Mr Watkins accepted that Francis Smith had in fact purchased the shareholding of James Isaac and George Smith Senior and had not been gifted shares. It is not clear when Mr Watkins became aware of this.

[92] On 3 March 2015 Mr Watkins wrote to Ms Northover copying Christine Reuhman saying that he had looked at all the proposals and had settled to go with the Smith-Isaac proposal as: *"the rental is on our inspectors figure and the family whakapapa back to the land very strongly."*

[93] Ms Reuhman responded shortly after suggesting that they contact Bruce Smith to confirm whether his existing proposal stands, record their understanding of the proposal and ask Bruce to confirm that their understanding was correct. If they did not hear back from him by Friday they would assume they had correctly interpreted his proposal.

[94] Mr Watkins responded that day saying that he was satisfied that they understood the Smith proposal:

> He has had time to amend his proposal and hasn't. Faith has contacted him and sought to confirm his position and I am happy to defend what our approach is. We have done more with Smith in this process than is acceptable to me and given the nature of the issues here I am comfortable with that, but no more. We/owners need to move on. If trusts want to advise the AT's what the decision is that's fine with me. This won't stop or delay the decision I've made here on this.

[95] On 3 March 2015 Mr Watkins also responded to an enquiry from another staff member about a commitment to meet with owners before awarding the lease. Mr Watkins responded as follows:

> I think this is another delay owners may need to endure. God knows this has dragged on forever.
>
> I'm ok with owners being told what we intend to do, that meets all Court requirements/directions, **but not seeking approval.** As RT we need to show a bit of courage and leadership here.
>
> [Emphasis as in original]

[96] On 20 April 2015 Bruce Smith and Digga-Bygum Ltd were advised that they were unsuccessful and required to vacate the block by 27 May 2015. Shortly before this Bruce Smith had padlocked the gates over the bridge on the public road leading to Waipaoa 5A2. On or about 17 April 2015 the Māori Trustee contacted the local Council to have the padlocks and gates removed.

[97] Following the hearing of evidence in January and February 2016 police attended the Court's registry in Gisborne to serve a trespass notice on one of the Court staff. I was also advised that police had been requested to issue trespass notices to staff at the Gisborne office of the Māori Trustee including those who had been witnesses. The trespass notices were issued on behalf of Bruce Smith. I issued a minute dated 11 March 2016 expressing concern that Bruce Smith was attempting to interfere with the process of the Court. I sought and received an explanation from

Bruce Smith's counsel and provided an opportunity for counsel for the Māori Trustee to make submission. No further steps were necessary.

[98] Whilst these proceedings were in hearing the holding over arrangement continued. Mr McKinnon continued to run stock on Waipaoa 5A2 and the Ngapakira freehold block under the sublease arrangement with Digga-Bygum Ltd.

Should the Court intervene?

[99] The central issue is whether the Court should intervene in the Māori Trustee's decision to award the lease of Waipaoa 5A2 to the Smith-Isaac partnership.

[100] The threshold for intervention is high. The Court's role in reviewing a Trustee's decision is limited. It is not the Court's role to stand in the shoes of the Trustee and decide who should get the lease. In a case such as this the Court must look at how the Trustee reached its decision and will only set aside the Trustee's decision if satisfied that the Trustee has: [4]

1. acted in bad faith or for an improper motive;

2. failed to exercise the discretion by considering the wrong question or misinterpreting the Trust deed;

3. considered irrelevant considerations;

4. failed to consider relevant considerations; or

5. reached a decision that is perverse or capricious.

[4] *Wrightson Ltd v Fletcher Challenge Nominees Limited* (1998) HC Auckland, CP 129/96, 21 August 1998 at 41-42.

Has it been shown that the Māori Trustee acted in bad faith or from an improper motive?

[101] Mr Calver says his clients are suspicious about the Māori Trustee's motive in awarding the lease to the Smith/Isaac partnership. He says that while Wilson Isaac withdrew as a full partner in December 2014 he nonetheless continued to be actively involved in the tender process and was the spokesperson in all communications with the Māori Trustee. Given that the Māori Trustee is a frequent litigant before the Māori Land Court the perception arises that the Māori Trustee was at least to some degree influenced by the Chief Judge's involvement. This is especially so when the unsuccessful applicants include a higher bidder and the 60 percent shareholder with a seven decade involvement with the land.

[102] Mr Calver also pointed to the Māori Trustee's resistance to disclosure of information about how it awarded the tender, coupled with Mr Watkins' confirmation that he would not have offered a lease to Digga-Bygum Ltd even if it had offered a market rental. Mr Calver notes that the Smith-Isaac partnership offered substantially less in rent than Mr McKinnon, who had a long established and successful association with Waipaoa 5A2. Also suspicious was the increase in the Smith-Isaac partnership offer from $35,000 to $60,000, which happened to coincide with the market rental assessed by the Māori Trustee's advisor.

[103] Mr Watkins said that he was satisfied that nobody within the Māori Trustee office had improper communications with Wilson Isaac or members of the Smith-Isaac partnership. He therefore believed he could accept and consider the revised offer during round one because any bidder was entitled to make a revised offer prior to a decision being made.

[104] The rules of tender given to applicants stated that offers submitted would be irrevocable for a period of 28 days. That and other rules of tender suggest a conventional tender whereby parties submit their best offer in a competitive bid process. While the conditions of tender are silent on whether applicants may modify their offer following the 28 day period, it is concerning that Mr Watkins did not think

any issue of fairness to other parties in the tender process would arise if he accepted the modified bid.

[105] Evidence of improper conduct by the Māori Trustee by way of informal or back channel communication with Wilson Isaac or other members of the Smith-Isaac partnership is inconclusive. The timing and content of the letter of 6 October 2014 suggests the partnership had been informed that their bid was too low and lacked detail about the woolshed. It also seems more probable than not that the partnership had been informed that the market rental had been assessed at $60,000.

[106] The modified offer arrived after Mr Watkins had agreed with his staff's recommendation to award the lease to Mr McKinnon. The documentary evidence suggests that the only parties who knew the identity of the preferred bidder were Māori Trustee staff and the advisory trustees (other than Bruce Smith).

[107] It seems inherently unlikely that Digga-Bygum Ltd would be notified that they had been unsuccessful on 7 October 2014 if the Māori Trustee had not decided who the successful bidder was. All contemporaneous evidence points to Mr McKinnon being the successful bidder.

[108] It is difficult to see how Mr Watkins could believe that he could subsequently change his decision in favour of the modified Smith-Isaac bid without compromising the integrity of the process.

[109] In the circumstances, the decision to re-run the tender process was a prudent one. Allegations of bad faith or improper motive are simply not made out. There is little to suggest that the Smith-Isaac partnership was given particular preference because the Chief Judge was involved. The partnership's initial bid was quickly discounted as too low. The modified bid was seen as attractive by the Māori Trustee, but not because of the Chief Judge's involvement. It was attractive because there was a whakapapa connection to the land, the rental was at market rate and it resolved concerns expressed by the advisory trustees that a lease to Mr McKinnon would mean Bruce Smith might remain in the house. I consider these aspects in more detail below.

[110] In the absence of clear evidence of improper conduct on the part of the Māori Trustee there is no basis for a finding that the Māori Trustee acted in bad faith or from an improper motive.

Has the Māori Trustee considered the wrong question or misinterpreted the trust deed?

[111] Counsel for the Māori Trustee (Mr Shaw) correctly points to case law which emphasises the limited basis upon which a court will intervene in the exercise of discretion by a trustee. As Mr Shaw puts it:

> The Court does not sit as a Court of Appeal on trustees' decisions. It does not consider the issue for itself and substitute its own decision for that reached by the trustees. Rather the Court looks at how the trustees reach their decision.

[112] Mr Shaw argued that the spreadsheets used by Mr Watkins to evaluate tenders included an "owner category" with a range of scores between one and ten. The Digga-Bygum Ltd proposal had been given the maximum rating possible reflecting Mr Watkin's regard for the Smith whānau's strong connection and its historical farming of the land in conjunction with the Ngapakira block. Mr Watkins said he was conscious of Deputy Chief Judge Fox's expectation that those matters be given more than passing weight. Mr Watkins said that the ownership category also recognised applicants with a whakapapa connection. On his final spreadsheet the Smith-Isaac partnership received a rating of five out of a possible ten under the ownership category.

[113] Mr Watkins was cross examined upon how he came to reject a bid made on behalf of the 60 percent shareholder in favour of a non-owner bid. The following exchanges are noteworthy:[5]

> **Mr Calver:** Mr Watkins, may I respectfully suggest to you that in circumstances pertaining here where the family you were looking at evicting, had a history on the block going back almost seven decades, where they owned the adjacent block which had always been farmed as one unit with Waipaoa 5A2 and where one family owned 60 percent of the shares compared to the next biggest shareholder 2.4 percent of the shares, your decision was anything other than simple?

[5] 55 Tairawhiti MB 74-321 (55 TRW 74-321) at 244 & 246.

> **B Watkins:** No I don't agree. My decision was simple but it did take in account the very things you're talking about.
>
> **…**
>
> **Mr Calver:** Despite the history of the matter you didn't think that Mr Smith warranted a bit more than that consideration?
>
> **B Watkins:** In a process like this I need to be treating all the parties who make a proposal including the current lessee exactly the same way so I don't show any bias towards either a current tenant or a new tenant.
>
> **…**
>
> **Mr Calver:** So it's not being oppressive to the owner evicting him and his whānau from a home they've occupied for almost 70 years?
>
> **B Watkins:** I'm not evicting him Mr Calver – his lease is at an end. The improvements don't belong to him; it's time to move on.

[114] Mr Watkins was also cross examined on the distinction between his duty as responsible trustee to owners and non-owners. Mr Watkins accepted that he owed a duty to all owners, both the majority and minority owners. He was asked why he had not gone back to Bruce Smith and asked him to increase his rental to market value. Mr Watkins maintained that that was not the only consideration and in particular he pointed to the no sub-leasing policy combined with the objective of having an owner or a descendant of an owner actively farming the land. Mr Watkins acknowledged that Mr McKinnon had been a very good tenant and that significant development work had been carried out under his stewardship which had benefitted all owners. The following exchange then took place:[6]

> **B Watkins:** Yes, 60 percent, it was definitely to his benefit, yes, but not to the benefit of all, in my opinion. I wanted someone farming this land for themselves, for the benefit of all and what better opportunity could there be than having other people who whakapapa to this land farming it for owners?
>
> **Mr Calver:** Someone who might whakapapa but who certainly isn't an owner?
>
> **B Watkins:** I don't distinguish that. If you whakapapa to this land through descendants or other assets being shown to me. I'm comfortable with that Mr Calver and that's what the Act prescribes. I'm not doing anything outside the law here.

[6] Above n 5, at 248 & 249.

> **Mr Calver:** Is the answer to my earlier question the, is that a change of answer, you did hold a duty to someone who could whakapapa to the land rather than somebody who owned the land?
>
> **B Watkins:** Whakapapa to? – Sorry, I hold that interest for both interests, people who own the land, people who whakapapa to the land.
>
> **Mr Calver:** So are you saying as responsible trustee, you do have a duty to people who whakapapa to the land?
>
> **B Watkins:** And I took due account of it as I had been instructed by Judge Fox.
>
> **Mr Calver:** So is then your evidence, let's just get this plain, you felt that you had a duty to someone who could whakapapa to the land to be given an opportunity to farm the land?
>
> **B Watkins:** Correct.
>
> **Mr Calver:** Do you accept, as a responsible trustee, do you hold to your answer, given earlier, that as a responsible trustee the only duty you have is to the owners?
>
> **B Watkins:** All owners?
>
> **Mr Calver:** Yes, all owners?
>
> **B Watkins:** All owners, yes.
>
> **Mr Calver:** So do you accept that in giving consideration to someone who could whakapapa to the land but not as an owner that you took into account an irrelevant consideration?
>
> **B Watkins:** No, I did not.

[115] I have a concern about the relative weight Mr Watkins has placed upon what he sees as his duty to owners and a duty he also identifies to non-owners who are descendants of former owners. To the extent Mr Watkins considers he is under an equivalent duty to both, he has misinterpreted the Trust Deed. I explain this further in the context of the relevant/irrelevant considerations section which follows.

Has the Māori Trustee considered irrelevant considerations or failed to consider relevant considerations? Was the decision perverse or capricious?

[116] The case for the Māori Trustee is straightforward. It is argued that there has been no failure to consider relevant considerations and neither was the decision flawed by reason of irrelevant considerations.

[117] Mr Calver argues that in regarding himself as under a duty to someone who was not a beneficiary of the Trust, Mr Watkins took into account an irrelevant consideration. Mr Calver also argued that in adopting an inflexible policy against subleasing combined with a policy that prioritised owners or those who may be descendants of owners farming the land directly, the Māori Trustee had failed to have due regard to the relevant fact that he was thereby disregarding his obligation not only to the 60 percent owner, but to all owners, to achieve the best possible return.

[118] In his third affidavit Mr Watkins had stated that "Bruce Smith's lease application would not have been the preferred application even if he had offered a market rental." This was because his bid was to sublease and not to farm the land directly.

[119] The following exchanges are noteworthy:[7]

> **Mr Calver:** The determining factor for you isn't how many dollars the owners are going to receive by way of rent, but the most important factor in your decision is whether or not someone who can whakapapa to the land is farming the land?
>
> **B Watkins:** Correct. That is our desired outcome at the Māori Trustee at the moment sir.

[120] And also:

> **B Watkins:** It is the position in all the leases I take Mr Calver and that's prescribed in the Te Ture Whenua Act that I should pay as much attention as I can to getting Māori back onto Māori land, farming Māori land, so I can't go to the press and say "Māori only please," I can't do that.
>
> **Mr Calver:** But realistically no one else was in with a show?
>
> **B Watkins:** Unless you were an owner or a descendant of an owner, correct.

[121] Mr Watkins also said this about the Smith-Isaac partnership relationship to the land:[8]

> I am satisfied that they whakapapa to the land and the descendants of owners. As far as I am concerned that makes them owners.

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[7] Above n 5 at 252-253.
[8] Above n 5 at 316.

[122] It is clear from the documentary evidence and from Mr Watkins' demeanour giving evidence that he believed a prompt decision was required. While acknowledging some complex factors he maintained that the situation was relatively straightforward. The lease was coming to an end, the lessee was not entitled to compensation for improvements and in the absence of a competitive bid from the lessee (to farm the land directly) it was time to move on.

[123] Mr Watkins appeared to be under a mistaken belief that he owed a duty to the Smith-Isaac partnership as descendants of former owners. As trustee he owes no such duty. His duty is to the beneficial owners. While Mr Watkins is entitled to have regard to the fact that the Smith-Isaac partnership has a whakapapa link to the land in question, this cannot supplant his primary duty to the beneficial owners. The whakapapa connection is a relevant consideration, but no more.

[124] The Māori Trustee's statutory duty is set out in s 223 of the Act. A trustee is responsible for carrying out the terms of the trust, the proper administration and management of the business of the trust, the preservation of the assets of the trust and the collection and distribution of the income of the trust.

[125] The trust deed provides that the Māori Trustee holds the land subject to the following trusts:[9]

> 1. To use, occupy, and manage the land for the benefit of the equitable owners with power to do all or any of the things which the Māori Trustee would be entitled to do if he were the beneficial owner of the land. PROVIDED HOWEVER:
>
> > a. That the Māori Trustee shall have no power to sell the land or any part thereof.
> >
> > b. That the Māori Trustee shall not lease the land or any part or parts thereof other than in accordance with the provisions of clause 3 hereof.

[126] Clause 3 of the trust order sets limits on the term of any lease and also provides that any lease executed by the Māori Trustee must contain a provision that the lessee shall not be entitled to compensation for improvements.

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[9] Trust Order 140 Gisborne MB 67 (140 GIS 67) see also review and variation of Trust Order at 47 Tairawhiti MB 16-39 (47 TRW 16-39) relevant parts of the Trust Order have not changed.

[127] The Preamble and s 2 of the Act make it clear that retention of land in the hand of Māori owners, their whānau and hapū, and facilitation of the occupation, development and utilisation of that land for the benefit of owners, whānau and hapū are foundational principles. All those exercising powers, duties and discretions under the Act (including the Māori Trustee and this Court) must do so in a manner that facilitates and promotes the retention, use, development and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū and their descendants.

[128] Section 17 gives this Court further specific direction that in exercising its jurisdiction and powers under the Act, the Court's primary objective must be to promote and assist the retention of Māori land and General land owned by Māori in the hands of the owners, and the effective use, management and development of such land on behalf of the owners.

[129] It is the interests of the beneficial owners of Māori land (and General land owned by Māori) that are central. Former owners, and descendants of current owners are recognised as a preferred class and provided for in matters such as succession and alienation. There is however no general duty owed to descendants of former owners that would supplant or equate to the primary duty a trustee owes to the beneficial owners. To the extent Mr Watkins believed that he was under an equivalent duty to both the estate of Francis Smith and the Smith-Isaac partnership, he was mistaken. This error has led to undue weight being placed upon the fact that members of the Smith-Isaac partnership are descendants of former owners.

[130] The corollary is that the Māori Trustee gave insufficient weight to the interests of the estate as a 60 percent shareholder, and the interests of all owners in securing the best return on the land. Insufficient weight was given to the strength of the Smith whānau's association with the land. They are descendants of the hapū associated with the land and own 60 percent of the shares. The family has been farming the land from 1951 until 2003, and thereafter under sublease. What they regard as their family home is located on the block. They also own outright the back part of the station which is only accessible through Waipaoa 5A2. While the Māori Trustee is not responsible for the Ngapakira block, the fact that it had been farmed together with Waipaoa 5A2 since at least the 1950s and is dependent on access

through Waipaoa 5A2, is a highly relevant factor which has received only cursory consideration. Bidders were asked whether they would negotiate with the estate over a lease of Ngapakira because Mr Watkins considered it in the estate's best interest to agree to leasing Ngapakira to whichever party was awarded the lease of Waipaoa 5A2. If agreement could not be reached between the incoming tenant and the estate the Māori Trustee proposed to formalise existing access by way of an easement. Stock movement between the properties would need to be agreed, or failing that, creation of a laneway might be necessary. None of these complex matters were discussed with Bruce Smith or any other estate beneficiary.

[131] In the *Wrightson* case Justice Fisher observed:[10]

> The relevant/irrelevant considerations duty extends to an appreciation of the significant facts and their relevance to the problem in hand…

[132] The emphasis on the no subleasing policy and on descendants farming the land appears partly to be a response to perceived problems presented by Bruce Smith's administration of the lease.

[133] The bid submitted by Digga-Bygum Ltd was in some respects unclear and substantially below par with a number of competing bids. Mr Watkins was sceptical about claims of a dollar for dollar contribution by the estate to the development programme, in the absence of any accounting evidence that this was so. Given the disparity in the rental received by the Māori Trustee for Waipaoa 5A2, and the amount received by Digga-Bygum Ltd under the sublease, there was good reason to end that agreement and achieve a market return for all owners.

[134] Once the decision had been made to award the lease to Mr McKinnon, there was strong pushback from the advisory trustees. They were concerned that a lease to Mr McKinnon would enable Bruce Smith to remain in the homestead and interfere with what happened on the land.

[135] There is no evidence in the documentary record from the first round of tenders that shows that Mr Watkins or anyone else within the office of the Māori

[10] *Wrightson Ltd v Fletcher Challenge Nominees Ltd* (1998), above n 4, at 42.

Trustee placed particular emphasis upon the need to lease only to descendants of original owners who would farm the land themselves. When the first bids were received Ms Murray simply noted that while the Smith-Isaac partners were owners expecting to be contenders for the lease, their rental and development programme did not stack up.

Relevant matters not properly weighed

[136] The Māori Trustee did not fully engage with or appreciate the significance of two developments during the second round tender process.

[137] The first was the fact that an application had been lodged by four of Bruce Smith's brothers to invoke the obligations of the estate in relation to the will of Francis Smith. The second was the lodging of a competing bid for the lease by the same brothers. Both developments clearly signalled a challenge to Bruce Smith's administration of the lease and authority to represent the estate interests.

[138] When it became clear that Bruce Smith's role as trustee and representative of the estate was under challenge the Māori Trustee should have sought further information. At the very least some inquiry of the disaffected estate beneficiaries who had submitted a bid and commenced proceedings against the estate administrators would have been prudent. This is not a counsel of perfection. In the first round Māori Trustee staff had correctly noted the importance of keeping in mind that the estate was a 60 percent shareholder. They had also proposed at one stage a short term lease with Mr McKinnon combined with an application to the Court for directions. These remained reasonable options in the face of the complexity presented in round two of the tender.

[139] In light of the direction from Deputy Chief Judge Fox to give more than passing weight to the estate's association with the land, it would also have been prudent to seek direction from the Court before proposing to enter into a long term lease against the wishes of the major shareholder and at a rental that was substantially less than that offered by the highest bidder.

[140] I appreciate that Bruce Smith could be difficult. He came across as single minded and determined in his focus to preserve what he saw as his duty to manage the land and keep outsiders away. He was firm in his view that the sublease and associated development programme had brought about significant enhancement to the capital value of Waipaoa 5A2 to the benefit of all owners. He appeared hostile to any challenge to his control over access and farming arrangements on Ruatawhiri Station.

[141] Mr Calver fairly conceded;[11]

> Counsel is not oblivious to the fact that over the past two years his client, Mr Bruce Smith, has at times not made things easy for himself. His dealings with some of the Māori Trustee staff have at times been fraught.

[142] To that could be added the fact that he also failed to submit a competitive bid for the lease.

[143] Nonetheless, Mr Watkins' email to colleagues on 3 March 2015 observing that he had already done more in the process than was acceptable to him illustrates not just impatience for resolution, but also a failure to differentiate problems arising from Bruce Smith's actions and the wider interests of the estate.

[144] The decision to award the lease to the Smith-Isaac partnership is not so unreasonable or irrational as to be perverse or capricious. In some respects it was a rational response to a number of issues the Māori Trustee was trying to deal with.

[145] On balance however, I conclude that the decision must be set aside. Mr Watkins is a property manager of considerable experience and expertise. I do not question his integrity or professionalism. I conclude that the Court must intervene with some diffidence and after reminding myself that it is not the Court's function to substitute its decision for that of the responsible trustee.

[146] Had there not been a challenge to Bruce Smith's administration of the estate and lease during the second round by a majority of estate beneficiaries, I doubt the threshold for intervention would have been reached. The cases make it clear that

[11] Closing submissions, counsel for Bruce Smith 29 March 2016, at [150].

failure to have regard to a relevant fact or consideration does not provide a ground to intervene if the trustee's decision would have been the same in any event. In this case, four of the beneficiaries of the major shareholder were clearly expressing a wish to farm the land themselves. The McKinnon bid presented options which would have achieved a very good return whilst also allowing time to work out issues concerning ownership of the house. Had the Māori Trustee paused and entered into a dialogue with Kevin, Ulric, Daniel and Francis (Junior) Smith, it is by no means certain that he would have still decided to award the lease to the Smith-Isaac partnership.[12]

[147] Ultimately, too little weight was given to the interests of the beneficiaries of the estate as 60 percent shareholder, and too much weight was given to the objective of securing a tenant with whakapapa connection to farm the land directly.

Should the Māori Trustee be removed as responsible trustee?

[148] Application has been made to remove the Māori Trustee on the basis that the Māori Trustee has failed to carry out its duties as trustee satisfactorily.[13]

[149] There are two steps. The first is to consider whether it has been shown that the Māori Trustee has failed to carry out its duties satisfactorily. If so, the second question is whether the Court should exercise discretion to order removal.

[150] The allegations of unsatisfactory conduct arise from the facts already recited. It is alleged that the Māori Trustee breached its fiduciary duty to exercise its discretionary powers carefully, properly and reasonably and with fairness to all beneficiaries. It is said that the decision over the lease was demonstrably unfair to the majority shareholder, and that it failed to take into consideration the estate's history with the land, the disadvantages to the estate as owners of 60 percent of the shares, and the long term interests of all owners of Waipaoa 5A2. It is further said that the decision to award the lease to the Smith-Isaac partnership will lead to an

[12] *Wrightson Ltd v Fletcher Challenge Nominees Ltd* (1998), above n 4.
[13] Te Ture Whenua Māori Act 1993, s 240.

effective partitioning of Ruatawhiri Station with enormous disadvantage to the estate not only as majority owners of Waipaoa 5A2 but as sole owners of Ngapakira.

[151] The applicants argue that the Māori Trustee cannot remain as responsible trustee because all trust and confidence between the trustee and the majority shareholder has been lost. Therefore the requirement of s 222(2)(b) that a trustee must be "broadly acceptable to the beneficiaries" cannot be met. Should the Court conclude that grounds for removal had not been made out, a direction is sought calling a meeting of owners to vote on continuation of the Māori Trustee as responsible trustee.

[152] Counsel for the Māori Trustee opposes the application and submits that it was entitled to call for expressions of interest for the new lease. Going out to tender is standard practice for high value leases. The land had been subleased since 2003. Digga-Bygum Ltd had failed to comply with its lease obligation regarding the woolshed which had come to the end of its economic life. The Māori Trustee sought proposals that addressed the woolshed so that the land could, if necessary, be farmed independently of the neighbour's facilities. The Māori Trustee was also aware of interest amongst owners and others who whakapapa to the land to have the opportunity to tender for the new lease. In these circumstances, failure to enter into direct negotiation for the new lease with Digga-Bygum Ltd was not a failure to act prudently.

[153] It was also argued that the rental offered by the Smith-Isaac partnership was a market rental which represented a significant uplift on the current rental received from Digga-Bygum Ltd. The fact that it was not the highest rental was one of the many factors taken into account. Expert advice indicated that an operational woolshed would significantly enhance Waipaoa 5A2 from a capital and leasing perspective. Accordingly, the Māori Trustee considered that the benefits of that in the medium to long term outweighed the trust receiving less rental than it would have received from the McKinnon bid.

[154] The Māori Trustee also argues that excluding Bruce Smith from meetings between the Māori Trustee and other advisory trustees concerning the lease decision

was appropriate because Bruce Smith had a clear conflict of interest as sole director and major shareholder of Digga-Bygum Ltd, which was a bidder for the lease.

[155] I adopt the following passage from the closing submissions of Mr Shaw, which captures from the relevant case law, the key principles:[14]

> 2. The Court of Appeal in Rameka v Hall, endorsed the settled approach of the Maori Appellate Court: the first stage of the inquiry is to assess the trustee's conduct against the standard trustee duties together with what the Maori Appellate Court has described as:
>
> > … the broader approach having regard to the special nature of Maori land trusts and the provisions of [the Act]. Thus the prerequisite for removal of a trustee was not a simple failure or neglect of duties, but a failure to perform them satisfactorily. Accordingly an assessment of the trustee's performance was essential when applying s 240.
>
> 3. Later in its judgment the Court of Appeal noted at para [90]:
>
> > We agree that there is a need for caution before a trustee is removed. The issue of removal cannot be determined by viewing each relevant factor in isolation from others. The Maori Land Court must consider the bigger picture which may involve examining the history of the trust as well as each trustee's performance.
>
> 4. As to governance performance, the Court of Appeal at para [32] cited with approval a passage in the Maori Appellate Court's decision in Bramley v Hiruharama Ponui Incorporation:
>
> > Whether governance performance has been satisfactory or not must depend then on whether there is a clear and present apprehension of risk to the incorporation asset or to the wider interests of the incorporation shareholders as a result of action or inaction of the committee. It is not every unsatisfactory act or omission which should lead to removal, but those that go to the principles of the Act. To adopt any other approach, would lead to removal being the primary remedy available for any technical breach of the Act. We do not think that wholesale removal of Maori governance members is consistent with the principles of the Act or the intentions of the legislature.

Has there been a failure to perform trustee duties satisfactorily?

[156] I do not think that the Māori Trustee has failed to perform its duties satisfactorily. While I have concluded that the Māori Trustee erred in its decision to award the lease to the Smith-Isaac partnership I do not consider that, of itself, the

[14] Submissions for the Māori Trustee, 30 March 2016 at [2]-[4].

error, or the circumstances leading to it, constitute a failure to perform trustee duties satisfactorily.

[157] The expiry of the lease presented the Māori Trustee with a complex and difficult situation. The decision to end the subleasing arrangement was not unreasonable. Digga-Bygum Ltd were in effect receiving a premium of approximately $40,000 per annum on the market rental for Waipaoa 5A2 in the period before the expiry of the lease. The Māori Trustee was correct to take steps to ensure that a market rental could be achieved for the benefit of all owners.

[158] Digga-Bygum Ltd were in breach of lease conditions. Bruce Smith as sole director, major shareholder and apparent spokesperson for the estate's 60 percent interests was known to be difficult to deal with. Subsequent events bore this out. In these circumstances, failure to enter into direct negotiations with him was not unreasonable and certainly falls short of unsatisfactory conduct sufficient to warrant removal. Neither do I consider improper the decision to exclude Bruce Smith from meetings of the advisory trustees where the bids were discussed. Bruce Smith did have a conflict of interest. On the question of who should be awarded the new lease, Bruce Smith was entitled to submit a bid on behalf of Digga-Bygum Ltd. It was in that capacity that he was entitled to be considered, not separately and in addition as an advisory trustee.

[159] I therefore conclude that while there has been error, there has not been unsatisfactory conduct on the part of the Māori Trustee that would warrant removal. If I am wrong on that primary conclusion I go on to record that I would not exercise discretion in favour of removal. I consider that it is important that the Māori Trustee remain in place while a range of issues concerning the lease are worked through. I also note that the level of support for this application from the estate beneficiaries other than Bruce Smith is unclear.

Relief, remedies and next steps

[160] The decision to award the lease of Waipaoa 5A2 to the Smith-Isaac partnership must be set aside. This is not a situation where it would be appropriate to

simply direct the running of a further tender process. An important factor in the decision to intervene is the view that I have reached that the beneficiaries of the estate of Francis Smith were entitled to greater consideration than they in fact received. I have come to that view even allowing for the fact that the way that Bruce Smith represented the interests of the estate in the tender process was problematic.

[161] The accountability of Bruce and Roland Smith for estate administration and Bruce Smith's authority to represent the beneficiaries of the estate are live issues in the estate proceedings. Pending the outcome of those proceedings, it will be difficult to determine with certainty what the position of the estate is with respect to a number of important issues affecting the lease of Waipaoa 5A2. This includes whether or not the estate would be prepared to lease the Ngapakira block to the incoming lessee, and what access arrangements need to be made. There are also important issues to resolve about the house and other improvements on Waipaoa 5A2.

[162] While the arguments over ownership or an equitable interest in the homestead, woolshed and shearers quarters are clear, I believe that estate beneficiaries who are not party to these proceedings should have an opportunity to be heard. The advisory trustees and other owners in Waipaoa 5A2 may also wish to be heard. I will adjourn this issue to be heard in conjunction with the estate proceedings. I will provide an opportunity during those proceedings for other parties to be heard and will reserve leave to the Māori Trustee to file further evidence and/or submissions in response.

[163] So far as I am aware Mr McKinnon remains in occupation of Ruatawhiri Station on a "holding over" basis in accordance with the sublease terms. The orders I will now make bring that arrangement (and any ongoing holding over of the sublease) to an end. There will be an order in favour of the Māori Trustee for recovery of possession of the land, which means Digga-Bygum Ltd and Bruce Smith must relinquish possession of Waipaoa 5A2. Importantly, and to be clear, this means that Bruce Smith has no legal authority to issue trespass notices or in any way hinder access to Waipaoa 5A2 on the part of the Māori Trustee, its staff, agents, or invitees, including an existing or incoming lessee.

[164] Pending resolution of all issues that are now the subject of the estate proceedings I believe it would be in the best interests of all parties if Mr McKinnon was to remain in occupation if he is prepared to do so. I direct the Māori Trustee to enter into discussions with Mr McKinnon to establish whether he would be prepared to lease Waipaoa 5A2 on the terms and conditions set out in his bid in the second round of tenders, save that it would be for a lesser term sufficient to enable the Court to dispose of the estate proceedings.

[165] Those proceedings may take some time and it is only fair that Mr McKinnon be offered reasonable security of tenure. I reserve leave to the parties to apply for directions on an appropriate term, if necessary. If Mr McKinnon is no longer in occupation, or does not wish to remain in occupation, I direct the Māori Trustee to enter into discussions with the next highest bidder to try and reach agreement for a short to medium term lease on the basis of their second round bid. If that party does not wish to proceed, then the Māori Trustee should enter into discussions with the third highest bidder on the same basis. If no party is willing to take up a lease on that basis the Māori Trustee should apply for further directions.

[166] It will be for Mr McKinnon (or another party) to negotiate with Digga-Bygum Ltd and the estate interests for a corresponding short to medium term lease of the Ngapakira block, should they so desire. Should any issue arise concerning access to Ngapakira, leave is reserved to Bruce Smith, other estate beneficiaries, the Māori Trustee and any lessee of Waipaoa 5A2 to apply for directions.

[167] The objective is to preserve so far as possible the interests of all beneficial owners in Waipaoa 5A2 whilst issues concerning the estate of the largest shareholder are resolved. Once resolved, a new long term lease for Waipaoa 5A2 can be arranged.

[168] Pending resolution of the estate proceedings and the claim on behalf of the estate to an equitable interest in the home, it will be for the Māori Trustee to decide who (if anyone) may be granted access to and use of the house on Waipaoa 5A2. I understand that the house is not permanently occupied by Bruce Smith and his whānau but is used from time to time. The family have possessions in the house and

if the Māori Trustee requires the house to remain vacant they should be provided with a reasonable opportunity to remove their personal items and chattels. If Mr McKinnon is to continue farming Ruatawhiri Station, it may be possible for the Smith whānau to continue to have rights of access to the homestead under license from the Māori Trustee pending determination of their claim to the house. Should any issue concerning the house or access to it arise, the parties should apply for directions.

Orders

[169] The application on behalf of Bruce Smith for a rehearing of the injunction of 24 December 2014 and for a permanent injunction is dismissed.

[170] The application for removal of the Māori Trustee and to summon a meeting of owners is dismissed.

[171] The application on behalf of Bruce Smith and the estate for an order varying the trust to determine that the woolshed, shearers quarters and homestead belong to the estate or in the alternative, an order under s 18 declaring a resulting or constructive trust with respect to those assets is adjourned to be heard in conjunction with the estate proceedings.[15]

[172] The decision of the Māori Trustee to award the lease of Waipaoa 5A2 to the Smith-Isaac partnership is set aside.

[173] The application by the Māori Trustee for a permanent injunction is dismissed.

[174] The application by the Māori Trustee for recovery of possession of the land is granted.

[175] Bruce Smith's counsel has received funding from the Court's special aid fund and the Māori Trustee has been represented by in-house counsel. My preliminary

[15] A20150001011: Estate of Francis Gurthrie Smith, application by Kevin Smith, Ulric Smith, Daniel Smith and Francis Guthrie Smith Junior for relief.

view is that costs should lie where they fall. If counsel have a different view they may submit memoranda within 14 days.

Pronounced at 6.10pm in Wellington this 18th day of October 2016.

M J Doogan
JUDGE