

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

A20160004036

UNDER Section 241, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Mangakahia 2B2 No 2A1A

BETWEEN KEVIN TITO
Applicant

AND JOHN ANDREWS and AROHA TITO
Respondents

Hearing: 28 June 2018, 176 Taitokerau MB 160-224
(Heard at Whangarei)

Judgment: 20 August 2018

RESERVED JUDGMENT OF JUDGE M J DOOGAN

Introduction

[1] Kevin Tito owns 65% of the shares in the Mangakahia 2B2 No 2A1A Block. The land is administered by an Ahu Whenua Trust (the Trust) and Mr Tito is a trustee. He has applied to terminate the trust.

[2] The application is opposed by Mr Tito's fellow trustees, Aroha Tito and John Andrews and by some owners, including his sister Ngaroma who is herself a significant shareholder.

[3] The issue to decide is whether to terminate the trust.

The context

[4] The Mangakahia 2B2 No 2A1A Block is 41.1843 hectares in size. There are currently 30 owners holding a total of 1020 shares. Since the mid 1980s the land has been leased to a neighbouring dairy farmer. The current rental is \$16,500 per annum and this is the only source of income. The rental is below a market rate because the trust has not been able to function due to litigation over the past decade.

Related Litigation

[5] Two decisions from the extensive litigation history are of particular relevance. The first was in response to an application by Mr Tito in October 2008 to terminate the trust. The second was an application by Mr Tito to the Chief Judge in 2015 seeking to overturn the 1998 orders constituting the trust.

[6] In 2009 Judge Ambler accepted that there had been material failures on the part of the trustees, but declined to terminate:¹

[22] Kevin Tito asks the Court to terminate the trust. He complains that he was not aware of the establishment of the trust in 1998 and says that the land can and should be managed as it was beforehand by his father and uncle as majority owners. I discussed with him the practical need for a trust to administer the land and the income from the lessee. Kevin maintained his view that the trust was not needed, though the alternatives he proposed inevitably took the form of a trust.

¹ *Tito – Mangakahia 2B2 No 2A1A* (2009) 130 Whangarei MB 134 (130 WH 134) at [22]-[23].

[23] The grounds are not made out to terminate the trust. While Kevin Tito may feel aggrieved that he was not involved at the time the trust was established, he never sought to challenge the decision at the time and it is doubtful that he would have grounds to do so as, at the time, he only held a future interest being one of the two remaindermen in respect of the life interest held by his mother. In my view a trust is necessary for this land given that it is leased and given that there is significant disparity in shareholding in that three shareholders out of 20 hold over 86% shares in the land.

[7] Judge Ambler went on to find that the real issue was not whether there should be a trust but who should be the trustees.

[8] In 2016, Deputy Chief Judge Fox heard Mr Tito's application to set aside the 1998 orders establishing the trust.² A background report by the Chief Registrar is set out in her decision and includes the following:

3. The applicant claims that he has been adversely affected by the orders complained of because Winifred Tito did not obtain his consent to establish a trust order over his interests in the family farm, and he has not been able to carry out kaitiakitanga bestowed upon him by his predecessor to uphold retain or manage the farm in the same manner as they did. Instead he has had to accept trusteeship, when he did not agree to the constitution of the trust. The trust ought to have been cancelled by the Court when it was dormant and dysfunctional.

[9] Judge Fox concluded that there was an error made by the Court at the time the trust was established.³

In this case the applicant says he did not know of the application or the hearing, so his right to natural justice was breached. However, even if his views were known it is not necessarily the case that his opinion would have prevailed. There is evidence that the trust was clearly supported by a majority of owners.

[10] Judge Fox noted that Mr Tito's primary complaints related to management of the trust and they had been dealt with by the superior courts. If there was further material not known to the Māori Land Court in 2009, then a fresh application for a review of trust or termination of trust could be filed. The learned Judge concluded that it was not in the interests of justice to remedy the error by cancelling the order establishing the trust.

² *Tito – Mangakahia 2B2 No 2A1A* [2016] Chief Judge's MB 398 (2016 CJ 398).

³ Above n 2 at [38].

Mr Tito's application

[11] The focus of Mr Tito's application is largely upon what he sees as dysfunction in the operation of the trust and failure to adhere to the terms of the trust. In his application, Mr Tito sets out the following reasons in support of termination:

- (a) Breach of Trustees Act 1956 by the former trustee, Winifred Pandora Tito (Life Tenant), as adjudged by DCJ C Fox's reserved decision on 23 May 2016;
- (b) Breaches of the Trust order [85 WHMB 205] by the "original trustees – Winifred Tito, Ngaroma Brown (Tito), Dorothy Tito, Te Anga Whanga and Edward Mulligan. Part IV Conducting Business: Section 23, 27 and 28 and General Meetings: Section 30(a) & (b), and section 33(a)(i);
- (c) Breaches of the Trust order by remaining "Original Trustees": Ngaroma Brown (Tito) and Dorothy Tito at August 2009 due to the breach of section 27 of the Trust order originally (above). The remaining trustees continued to breach section 25 and 28. And also, breached Part III Obligations: Section 19. Trust is dormant & dysfunctional & beyond the point of functioning. New information not known to the Court in 2009, is in (c) above: Breach of section 27: No treasurer of the trust (DCJ Fox directed waiver of fee);
- (d) Breaches of Trust order by "Interim Trustees": Aroha Tito and John Andrew Part IV Conduct of Business: Section 25 & 27;
- (e) Two "Meetings of Owners" held May and June 2015 voted to cancel trust as it was no longer needed.

[12] Mr Tito also filed an extensive submission in support dated 30 June 2016 together with a large bundle of documentation.

[13] In his detailed submission, Mr Tito itemises a number of discrepancies in payments and accounts that he says would not have been known to the Court when Judge Ambler refused his earlier application to terminate the trust.

[14] Following a teleconference on 16 April 2018, Mr Tito filed further supplementary submissions entitled "Submissions of new evidence by Kevin Tito". That submission was supported by a small bundle of additional documents which included aerial photographs of the land. The focus of the supplementary submission and evidence was upon the actions of his mother Winifred Tito and the Booths who Mr Tito says were conspiring to alienate the land to the Booth family at the end of a five year tenancy agreed to in 1995.

The arguments for Mr Tito

[15] Mr Tito framed his application as one founded upon matters that were not before the Court when his earlier application to terminate the trust was declined. Mr Tito correctly points to a number of matters that were not before Judge Ambler in 2008 and early 2009. That said, a review of the extensive supporting information shows that this material is largely further corroboration of arguments and evidence raised before Judge Ambler.

[16] Mr Tito did not appeal Judge Ambler's January 2009 decision. It is common ground that the trust has not been functioning as it should.

[17] In his detailed written submissions in support of the application Mr Tito particularises a number of alleged breaches of the trust order by the original trustees (Winifred Tito, Ngaroma Brown (Tito), Te Anga Whanga, Edward Mulligan and Dorothy Tito). These include failure to call any AGMs and failure to appoint a treasurer to approve distribution and payments.

[18] Mr Tito itemises what he says are unauthorised payments to his mother Winifred Tito's estate and a failure to pay tax obligations in 2009. A complaint is made about what are described as excessive payments to Aroha Tito of \$3,000 in September 2008 and \$4,000 in February 2009, and an overpayment of \$6,000 to Aroha Tito for Ngaroma in the 2009 financial accounts. It is said these overpayments were not referred to at the hearing before Judge Ambler. Mr Tito also points to an auditor's letter from September 2009 confirming various under and over payments in the 2007 and 2008 financial years.

[19] Mr Tito argues that information not known to Judge Ambler when he dealt with his earlier application to terminate the trust includes the fact that a treasurer was never appointed, no trustees had retired in 2001 by rotation as required, the lease was not legitimately renewed in 2000 and remaining trustees failed to pay tax obligations in 2009. As at August 2009 the trust was dormant and dysfunctional with only two trustees remaining active. This meant that the required quorum of three did not exist.

[20] In February 2010 Mr Tito appealed a November 2009 decision of the Court appointing the Māori Trustee as responsible trustee. Mr Tito's appeal was ultimately upheld

by the Māori Appellate Court. On the 23rd of February 2011, Kevin Tito, Aroha Tito and John Andrews were appointed as responsible trustees on an interim basis until the holding of the next general meeting of owners. The trustees were directed to call that meeting within 12 months to consider future administration of the trust and the appointment of permanent trustees.⁴

[21] Mr Tito appealed to the Court of Appeal seeking the removal of Aroha Tito and John Andrews as co-trustees. In October 2012, the Court of Appeal dismissed the appeal, upheld the decision of the Māori Appellate Court and extended the time for the holding of the general meeting of owners by three months. The Court of Appeal also directed the Māori Land Court to issues directions as to the manner in which the general meeting of owners was to be convened and conducted.⁵

[22] Mr Tito says that due to his appeals, the trust was inactive up until the 6th of April 2013 when the AGM ordered by the Māori Appellate Court and the Court of Appeal was finally convened. The Court had directed the Registrar (Mr Cameron) to convene and conduct that meeting.

[23] Unfortunately, after chairing the meeting Mr Cameron failed to follow up and issue minutes so that the outcomes of the AGM could be progressed (in particular the appointment of trustees). This inaction extended over several years and lead to Mr Tito himself filing his own version of the minutes of the 2013 AGM in March 2015. A draft minute was finally produced by Mr Cameron in 2017 by which time further competing and overlapping applications for appointment or removal of trustees, injunction and termination of the trust had been filed. In addition, Mr Tito had himself convened a further meeting of owners on the 16th of May 2015. At that meeting owners representing 72.6% of the shareholding were present. The meeting considered termination of the trust and a draft lease proposal by Mr Tito but no resolutions were passed as it was agreed to defer consideration to give whānau more time. The meeting reconvened on the 20th of June 2015 and the minutes provided by Mr Tito record that nine owners present or represented consisting of 76.04% of the shareholding were engaged. A resolution to cancel the ahu whenua trust was passed by those representing 74.4% of the shareholding, opposed by 1.5% of the shareholding (five owners

⁴ *Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86) at [67].

⁵ *Tito v Tito* [2012] NZCA 493 at [56].

voting for and five against). Those who had opposed the motion then left the meeting so no further resolutions were passed.

[24] Mr Tito says that he was not willing to attend to trust business pending resolution of his various appeals to the superior courts. He complains that notwithstanding this Aroha Tito and John Andrew had a first meeting of trustees, failed to appoint officers and then acted on decisions without first achieving a quorum of three trustees to validate decisions. Mr Tito complains about their decision to appoint the law firm Thompson Wilson, the opening of a bank account and then applying to the Court for an order that rent monies be paid to the nominated bank account in August 2011. When that application was heard Mr Tito was not in attendance at Court and did not therefore produce evidence to show that he had directed Mr Booth to pay the rental income to a chartered accountant.

[25] Mr Tito also complains that the law firm Thompson Wilson has a conflict of interest, having acted for a whānau trust that holds a beneficial interest in the land.

[26] One outcome of this division between the trustees was the imposition of an injunction by the Court preventing disbursement of rent money held by solicitors.⁶

[27] Mr Tito notes that Judge Ambler concluded the trust should remain because the land was leased and there was a disparity in the shareholding. He says “the lease expired in 2000, at which time I may lease the farm. This was our family’s agreement in 1995 before the trust was formed.”

[28] In his view matters had been diverted away from accountability for financial issues and breaches of trust into questions of replacing trustees and who those trustees should be.

[29] Mr Tito says that the general consensus of both meetings he convened in 2015 was in support of his long-term lease proposal and his direction to finalise financial issues and establish a putea trust for the minor shareholders, following cancellation of the ahu whenua trust.

⁶ 26 Taitokerau MB 267-269 (26 TTK 267-269).

[30] At the hearing Mr Tito, together with his spokesperson Tui Phillips argued that the wrongful establishment of the trust in 1998 had effectively frustrated the tikanga laid down by Mr Tito's grandmother Te Awhi Tito. She had developed the land as a farm and wanted it to be occupied and looked after by her direct descendants. In Kevin's view his mother and others who supported establishment of the trust did so for improper purposes. Their objective was to either sell the land or alienate under a long-term lease to the Booths. Since the trust was established there had been nothing but trouble.

[31] Just prior to establishment of the trust a 26 acre block of land that formed part of Te Awhi's farming operation was sold to the Booths (Mangakahia 2B2X Block). That land lost its status as Māori land in the 1960s or 1970s. Following the sale of that block, Mr Tito says that the Booths then removed his grandmother's house from the land and disconnected the power supply. This he says was done with the intention of preventing him being able to return to farm the land. Mr Tito also argues that this was wrong as the house was not on the 26 acre Mangakahia 2B2X Block but was located on the adjacent Māori land.

[32] In order to better understand this and a number of related issues, I undertook a site visit on the 29th of June 2018. In attendance were Mr Booth (the leasee), Mr Tito and Ms Phillips.

[33] Mr Tito maintains that whilst his father was alive the major decisions over the farm were made by his father and his Uncle Te Anga Whanga in consultation with Kevin. The understanding was that when Kevin was ready he would return and farm the land. Kevin had no objection to the five year lease being granted to the Booths in 1995 as he was not ready at that time to return to the land.

[34] Mr Tito is of the view that his Uncle Te Anga Whanga is unlikely to have understood what took place at the owners meeting in October 1997 agreeing to the establishment of the ahu whenua trust. Te Anga Whanga wrote a letter of support of Kevin's application for enforcement of obligations of the trust in 2008. At around the same time he altered his Will to leave his entire shareholding to Kevin solely. Prior to that it appears that his shareholding was to be split equally between Kevin and his sister Ngaroma.

[35] At the hearing, Mr Tito stressed that the land is first and foremost the tūrangawaewae of his whānau and his grandmother's former home. The main objective was to maintain and look after the whenua. Kevin said:

That whenua is freehold to our family. We don't have to even farm it if we want to. We have to maintain it and look after that whenua...and retain it and that is not a viable business for minor shareholders to make bulk money out of.

[36] In response to questions as to continuity of income for shareholders, Mr Tito said that money to pay the lease did not necessarily have to come from the land itself so long as shareholders were paid. Mr Tito confirmed that even if it was uneconomic in terms of income produced from the land he would be prepared to commit to sustaining an equivalent level of rental to that which the Booths were paying. If need be he would subsidise the rent from other sources.

[37] I asked Mr Tito about what information he would provide to shareholders about this. In response, Ms Phillips said that if the trust was not in place they would not be obligated to divulge details about their income or justify how they got the rent money.

Opposition to Mr Tito's application

[38] Those opposing Mr Tito's application argue that the trust should remain, and be allowed the chance to function properly. They also see the trust as necessary given the relationship between the majority and minority owners. The issue is essentially one of trust. The minority owners do not trust Mr Tito to protect or advance their interests.

[39] Mr Tito's fellow trustee, Aroha Tito (daughter of Mr Tito's sister Ngaroma) had this to say:

Over the years of these Court proceedings, it has become I guess more obvious to myself and some of the other shareholders that having Richard or the Booths on the land is more trustworthy. We know that things will be paid as in the rent, and I said, there has been no proper proposal from Uncle Kevin or anyone else so that they can or they can produce the same amount of money, if not more. Say that you can do it, doesn't mean that it can be done.

[40] Aroha Tito acknowledged that there had been problems with the running of the trust but argued that the trust needed to be given the chance to operate properly and this has not been possible while the trust had been mired in litigation for so long.

[41] Mr Andrews, also a trustee, was of the view that the trust should remain. He also expressed doubts about Kevin's proposal to farm the land noting that farming is expensive and that the size of the block meant that it was best suited as a dairy run off. He doubted that it would be viable to farm in its own right. Mr Andrews registered concerns about the future pointing out that decisions about the land shouldn't come under one person even though he may be the biggest shareholder. He went on to say:

I think that's unfair and I think that there should be still at trust there. My only concern is that regardless of who goes in if this trust is, and we have to do another trust, my only concern is while Kevin is on the board, it's not gonna work because he – you know they made it quite clear that he wants, they want full control of the farm because he is the biggest shareholder...if the trust is stopped and it goes back to Kevin then we all have to trust him in whatever happens with the block, and personally I don't think that farm is big enough to make money on...I just believe there should be a trust in place just to protect everybody.

[42] Aroha Tito also noted that when she, Mr Andrews and Mr Kevin Tito were initially appointed as interim trustees she and Mr Andrews tried to progress matters but Mr Tito refused to meet. Mr Tito's position has been that he would not participate in the trust administration while his various legal challenges were progressing through the Courts.

[43] Aroha Tito said that this is why the efforts of other trustees to appoint a valuer and solicitor to assist with determining a market rental and lease renewal have stalled.

[44] Kevin's sister Ngaroma Brown said:

Now for many years I have kept quiet about issues concerning us as a whānau. There is so much in me there is so much. I don't know whether it's anger, there probably is anger towards Kevin. His accusations over the years have been really my core basis of that anger towards him and his anger is towards me, my mother and my daughter. I was part of the original trustees when the ahu whenua trust was formed. Back then, I was totally ignorant of the rules and regulations concerning a trust and it's been like that right up to this time it has become dysfunctional, but that's me you know and I am owning up to that dysfunctionality over years. But there are things that Kevin has brought up as far as I am concerned his information is wrong...today I am here saying something for once...now I've come to terms to actually look forward and I am in support of keeping the trust but looking, progressing into the future whether it be keeping the trust or otherwise. By all accounts I think I am the next shareholder with the most shares which is pretty minor to what Kevin has got. There is still a lot of trouble things still with me that I am not going to go into just at this moment. Where I stand is for the trust and to progress forward...yes, because we have all got moko and its their future with this land as well. But yes I think that is about all I want to say.

[45] Mr Gordon Little one of the minority shareholders also spoke in opposition to the application. Mr Little said:

I tautoko a lot of the korero that has been spoken here today. But primarily the take is before us is whether the ahu whenua trust should stay or should be disestablished. I have heard the korero that has been going on. I have heard this korero for two or three years now. In my opinion, it is not the ahu whenua trust that I have a concern about, but some of the behaviours and some of the choices that have been made from within that trust. My understanding of that trust moving forward provides me and my whānau with maximum protection under the Te Ture Whenua Māori Act 1993 and so for that reason my vote is to maintain that ahu whenua trust. Let's establish a set of trustees that are competent and can manage that ahu whenua trust or manage that whenua on behalf of all of us shareholders whether we be major or minor. Because at the end of the day kaitiakitanga doesn't takahia on mana whenua and all of us as descendants of Kowhai Tito have that mana whenua.

[46] Tina Mahanga, also spoke in support of retaining the trust. However, Ms Mahanga does not appear on the current list of owners.

Termination of Trust – What are the legal tests?

[47] Section 241(1) Te Ture Whenua Māori Act 1993 provides:

241 Termination of trust

- (1) The Court may at any time, in respect of any trust to which this Part applies, terminate the trust in respect of –
 - (a) the whole of any part of the land; or
 - (b) the whole or any part of any interest in the land subject to the trust, - by making an order vesting that land or that part of that interest in land in the persons entitled to it in their respective shares, whether at law or in equity, or in such other persons as the beneficial owners may direct.

[48] The Māori Appellate Court decision in *Larkins* sets out the relevant principles:⁷

[This Court] must interpret the Act in a manner that best furthers the principles set out in the pre-ambule and must exercise its powers, duties and discretions 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 hapu and their descendants, and that protects waahi tapu. The Court also has obligations set out in section 17 which include ascertaining and giving effect to the wishes of the owners, to determine or facilitate the settlement of disputes amongst owners, to protect minority interests from an oppressive majority and to protect majority interests from an unreasonable minority, and to ensure fairness in dealings with the owners.

⁷ *Larkins v Kataia – Waihou Hutoia D2A Block* [2013] Māori Appellate Court MB 159 (2013 APPEAL 159) at [18].

[49] The Appellate Court in that case rejected the argument that unanimous support was required from owners for an application to terminate. The Court cited with approval the following extract from the decision in the *Rata* case:⁸

Jurisdiction to allow withdrawal of participation in a trust is discretionary, to be refused where in all the circumstances, withdrawal of a party from the trust would create unreasonable disadvantage to either the interests of the public, the other parties, or of other persons interested in the continuance of the trust, and, where any other unreasonable disadvantage exists after a broad overview consideration is had of all other relevant matters. The words “unreasonable disadvantage” denote “unsuitability”, a situation “non politic rather than unjust”, or “not having practical wisdom”. These definitions promote the idea of fairness. In terms of all classes of unreasonable disadvantage that may apply, the requirement is to look at the disadvantages and unsuitability of any request to sever an interest in the trust, and determine its practical wisdom and fairness in all respects relating to the interests of the classes of persons affected.

[50] From the cases the Māori Appellate Court distilled the following principles:⁹

[27] Three important considerations emerge from these decisions:

- (a) A change of mind is usually insufficient as a ground for termination unless there is an absence of opposition;
- (b) Termination should be refused where it is likely to result in detriment or create unreasonable disadvantage to affected parties;
- (c) Evidence of a trust failing to adhere to their terms of trust and core accountabilities may be sufficient grounds for termination.

Should the trust be terminated?

[51] In approaching the exercise of discretion in this case, I remind myself that issues raised by Mr Tito concerning the establishment of the trust have been decided by Her Honour Judge Fox in her decision on the section 45 application. Those issues are *res judicata* and I have no jurisdiction to re-visit them.

[52] Similarly, there are a number of issues raised concerning alleged dysfunction within the trust and a failure to comply with the terms of trust that were before Judge Ambler and are also *res judicata*.

⁸ Above n 8 at [24].

⁹ Above n 8 at [27].

[53] The approach I take is to put to one side those matters then assess in light of the new matters raised whether I ought now to exercise discretion to terminate.

[54] While there is evidence of the trust failing to adhere to its terms and evidence of dysfunction, I do not think it would be wise or practical to order termination.

[55] Dysfunction within the trust since 2009 is largely due to the ongoing litigation and delays in the Court process. These problems have been compounded by Mr Tito's refusal to meet with or co-operate with his fellow interim trustees. Mr Tito's refusal to act as a trustee is not just about deference to ongoing court process. In large part it appears to be driven by his view that the trust was wrongfully put in place, and therefore lacks legitimacy.

[56] Issues concerning payments to owners and reconciling any discrepancies in past payments can and are being addressed. A number of historic issues of this kind were addressed in directions and orders made by His Honour Judge Ambler. I have appointed Mr Steve Bennett to investigate and report on a range of matters in order to lift the injunction freezing the trust funds. The existence of the trust is not an impediment to resolving these matters.

[57] More fundamentally I also consider that termination should be refused because it would likely result in detriment to the minority shareholders. Of relevance are the following objectives from section 17(2) of the Act;

- d) To protect minority interests in any land against an oppressive majority.
- e) To ensure fairness in dealings with the owners of any land in multiple ownership.
- f) To promote practical solutions to problems arising in the use or management of any land.

[58] Mr Tito's sincerely held, but dogmatic view that the trust lacked legitimacy from the outset appears, over time to have lead Mr Tito towards an adversarial relationship with any owner or trustee who opposes his view. He appears to believe that, but for the establishment of the trust, he would have the sole right to decide what happens on the land.

[59] The following exchange is illustrative:

T Phillips: While this trust is in place he's not been given the opportunity that should've come to him naturally.

Court: All right. So, can I just ask this question? Just leaving aside the history of the cases that have been before the Court over the last seven or eight years about the trust and the fact that the trust has not really been able to function, but in principle if the trust was not divided and before the Courts in the way it has been, if so just assuming that, in terms of the fact that there is a trust there –

K Tito: Illegally.

Court: – that would not necessarily prevent a shareholder such as Kevin putting a proposal in and gaining agreement to occupy in the way that you have done. Just leaving aside the fact that we got a particular history here, the trust itself would not prevent an outcome that would see potentially an owner like Kevin putting a proposal and being given the right to occupy. That could happen under a trust structure.

T Phillips: But he doesn't have to. He –

K Tito: I don't have to ask their permission.

T Phillips: Or the permission of a trust.

K Tito: Our family –

Court: All right.

K Tito: Te Awhina's direct descendants do not have to ask their permission to do anything on the land -

Court: Well –

K Tito: – and to put a trust on there to force me to ask their permission.

[60] There is also little evidence to support his view that his mother engineered the establishment of the trust in order to alienate the land.

[61] There is no credible evidence that Te Anga Whanga lacked capacity or was not aware of what was proposed when owners considered establishment of the trust in 1997. His participation in that meeting and his execution a short time earlier of the sale and purchase agreement of the 26 acre block to the Booths indicate not only legal capacity but active participation in decisions concerning the land.

[62] The sale of the 26 acre block appears to have come about primarily as a way to raise money to re-pay a debt of approximately \$48,000. The record of the meeting of owners in 1997 includes the following:

The purpose of the meeting was then explained by Mr Dick. This was that Mrs Tito and Anga Whanga have offered to pay the debt on the land and were seeking a trust to be set up to administer the block.

The history of the block was then dismissed. In summary this was that the land had been brought under development in 1953 with the major owner, Mrs Whanga, being the occupier and being granted a lease for 42 years which expired in 1995. The lease was transferred to Anga Whanga in 1965 and he was paid compensation for improvements amounting to \$60,000 following expiry.

Since then the land had been leased to Richard and Sharron Booth with the net rental (\$11,500 per annum less Māori Trustee commission and Resident Withholding Tax) being used for debt reduction. By the end of September 1997 this debt had been reduced to \$48,000. Anga Whanga and Mrs Tito were prepared to repay this debt.

[63] The sale and purchase agreement specifically included the house and curtilage in the special conditions with a valuation of \$30,000. Mr Tito's argument that the house was not located on the 26 acre block sold to the Booths in 1997 is not supported by any credible evidence. While I was shown the former location of the house during the site visit there were no survey pegs of boundary markers pointed out to me that would support Mr Tito's claims that the house was on the adjoining land at the time of sale. The ordinary legal presumption is that fixtures such as a house run with the land. I see nothing in the evidence to displace that presumption.

[64] I agree with Judge Ambler's observation that the issue is not so much whether there ought to be a trust, but who should be the trustees. Judge Ambler endeavoured to address this by the appointment of Mr Tito as the majority owner together with representatives of minority interests. On Judge Ambler's initial proposal they were to be advisory trustees with the Māori Trustee appointed responsible trustee. This was overturned on appeal and all three were appointed responsible trustees on an interim basis. The issue of trusteeship will now need to be addressed as a priority going forward.

[65] The Court of Appeal concluded its decision with the following suggestion:¹⁰

As Judge Ambler is recorded as having noted at one of the hearings, the business of this Trust should be a straightforward matter. It is a relatively small trust with limited income from just the one source.

Because of the unfortunate dispute over management and appointment of trustees, we would urge the owners to give serious consideration to the appointment of an independent professional such as an accountant to act as sole responsible trustee.

¹⁰ Above n 6 at [59]-[60].

That would require consequential amendments to the Trust Order but in our view it may be the best solution in the interests of all concerned.

[66] While Mr Tito has a majority shareholding he does not have a unilateral right to decide what happens on and with the land. This is the case whether or not there is a trust. A trust does however provide a structure and process by which major decisions can be made. Remaining issues including trusteeship need to now be addressed as a priority so this trust can function properly for the benefit of all owners. Mr Tito's aspirations to occupy the land can and should then be taken to the trust for consideration.

[67] The application is dismissed.

Pronounced at 4.30pm in Wellington on this 20th day of August 2018.

M J Doogan
JUDGE