The appointment of trustees to Māori land trusts

February 2012

Introduction

Trustees perform a vital role in the administration and management of Māori land. They have many important responsibilities to fulfil and must balance the expectations of the beneficiaries with their duties as prudent trustees.

Trustees are appointed by the Māori Land Court under the jurisdiction set out in s 222 of Te Ture Whenua Māori Act 1993. In making appointments two crucial criteria must be considered. Firstly, the Court must "have regard to" the nominee's "ability, experience and knowledge" for the role. Secondly, the Court must be satisfied that the nominee is "broadly acceptable" to the beneficiaries. Where both limbs of the test have been satisfied invariably the Court will make an appointment in accordance with the wishes of the beneficial owners, or in a case of a Māori reservation trust, the beneficiaries.

That seems simple enough. However, how does the Court assess compliance with the statutory criteria? Two issues regularly confront the Court in this context. The first is that where trustees are not appointed according to an election the Court is accused of ignoring the wishes of the owners or of usurping their role in electing individuals of the owners' choice. In addition, where the Court insists on compliance with trustees' duties adverse comment is sometimes made of the Court's perceived unjustified intervention. Secondly, when trustees find themselves in difficulty with the result that a trust suffers substantial losses, the Court is criticised for failing to properly supervise trusts and for appointing individuals lacking the necessary ability, experience and knowledge to administer trusts effectively. Some guidance on these issues was provided by the Court of Appeal's recent decision in *Clarke v Karaitiana*.

Clarke v Karaitiana [2011] NZCA 154

The Māori Land Court had ordered the Registrar to convene a meeting of owners of Tauhara Middle 15 to be held in September 2008 to elect trustees, having previously found that the then-trustees had committed breaches of trust sufficient to warrant removal. The trustees were permitted to stand for re-election. For a number of reasons, including a failure to undertake registrations of beneficial owners present at the meeting, the Māori Land Court decided that the election results were unsafe and ordered a further meeting. However, having heard further evidence and submissions arising from the September 2008 meeting, the Māori Land Court decided that the majority of former trustees were no longer eligible to stand for election. The trustees appealed to the Māori Appellate Court, which annulled the Māori Land Court's orders that a further meeting should be called and that the former trustees were ineligible for appointment. In addition, the Māori Appellate Court decided that a reconstruction of the voting at the meeting of owners could be undertaken on the evidence before

the Court. That Court then ordered the Māori Land Court to conduct a hearing to appoint replacement trustees. The trustees then appealed to the Court of Appeal. That Court agreed with the Māori Land Court and ordered a further meeting of owners but endorsed the Māori Appellate Court's decision that all of the trustees were eligible for reappointment. An election was then held in October 2011 and the owners voted to replace all of the existing trustees. New trustees were finally appointed in November 2011.

The Court of Appeal underscored the importance of s 222. On the discretion to appoint trustees, that Court stated that ordinarily the Māori Land Court would give substantial weight to the views of the owners. In summary, key points that emerge from this decision in the context of appointment of trustees are:

(a) the Court is not bound to appoint the highest polling candidates arising out of an election but ordinarily would give substantial weight to the views of the owners as demonstrated by an election;
(b) a nominee with strong support from the owners may be unsuitable through a lack of ability, experience and knowledge or for other reasons. For example, conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees;
(c) if the Court is not minded to appoint the leading candidates through an election it must still be satisfied that the requirements of s 222(2)(b) are met;
(d) the discretion to appoint is not broad and unfettered. The Court may take into account such other matters as it thinks fit but the exercise of its discretion will be guided by s 222(2); and
(e) the importance ordinarily attaching to the views of the owners highlights the need to design meeting procedures that are likely to secure the widest possible input from the owners.

The ability, experience and knowledge of nominees for appointment

How then is the Court to assess a candidate's ability, experience and knowledge? Should prospective trustees be required to show evidence of competency in basic accounting to ensure minimum levels of financial literacy? One means of exploring a candidate's ability to comply with s 222 is to require nominees to submit resumes with their application and for the Court to then pose questions to candidates for appointment that might include their knowledge of accounts and financial reporting, the trust order and general trust law principles, farming, forestry, tourism, geothermal power, property investment, equities and communications. Knowledge of the history and tikanga associated with the land will also be a relevant consideration. Much will depend on the nature of the trust's business and the ability, experience and knowledge of nominees in areas relevant to the trust's activities. As the Court of Appeal has indicated, a suitable spread of skills amongst trustees may be desirable and thus a relevant consideration for the Court. Another point that the Court may consider in the context of experience is a nominee's former or current role as a trustee and the extent to which that has been successful or otherwise. Where a trustee has been involved in difficult situations on other trusts, whether or not a

satisfactory explanation has been provided may also be a necessary point to review. If a trustee has been removed by the Court for cause under s 240 of the Act, should that be a relevant consideration when assessing a candidate's suitability for appointment?

The broad acceptability of nominees to the beneficiaries

The second limb of the test is equally important. How does the Court assess whether a candidate is "broadly acceptable" to the beneficiaries? Should the Court be guided by the results of an election conducted at a meeting of owners? Is one meeting enough or should there be several, in different locations, if the trust either has a large number of owners or significant assets (or both) and there are large population centres of owners in different localities? Should an election be held on the basis of the results of a meeting or a series of meetings or by postal ballot, and should any ballot also be available online as is the case with ratification of Treaty settlements? For larger, more sophisticated trusts with the necessary resources and infrastructure the conducting of a postal ballot or even online voting is not unprecedented nor without merit. Indeed, the Court of Appeal suggests that given the importance of the views of the owners on the question of whom to appoint, procedures should be devised that draw in the widest possible ownership participation. An obvious corollary to that proposition is, subject to the available resources and infrastructure of the trust to cater for such procedures. For example, one ahu whenua trust has over 8,000 beneficial owners for an area of land less than 200 hectares with income of less than $10,000.00 per annum. For that trust a postal ballot, let alone online voting, would be quite impractical. Conversely, another ahu whenua trust with assets in excess of $10 million and income exceeding $300,000.00 has less than 20 owners, and all of their addresses are known by the responsible trustee so an in person, telephone or postal ballot is a simple process.

Notice for meetings of owners

A common complaint from owners is that they were not aware of the meeting being held, so the question arises as to what constitutes sufficient notice. Is notification in national and local newspapers sufficient? What other modes of communication are available that trustees could reasonably expect to include as part of the notification process? How prescriptive do trust orders need to be to impose minimum standards of notice for the calling of a trust's meetings for the purpose of holding an election? Once again, some of the larger, more sophisticated trusts have included in their trust orders reference to the specific newspapers that are to be used for notice purposes and the frequency with which the notice must run as well as reference to iwi radio and tribal newspapers for example. The rise of social media networking and internet use has also created an expectation and an opportunity for notice to a wider audience to become more commonplace. As the number of owners of trusts expands and the asset bases increase, so too will the demands for more comprehensive and sophisticated means of notice to encourage the widest possible participation in the election of individuals to the important role of trustee.

Conclusion

The role of trustees is onerous and frequently thankless. Trustees may be held personally liable, jointly and severally, for any losses a trust may sustain and for other breaches of trust. They are held to high standards of conduct consistent with their duties. It is essential that the Court applies s 222 of the Act carefully to ensure the most appropriate nominees are appointed to the role of trustee having regard to their ability, experience and knowledge and their broad acceptability to the beneficiaries.

L R Harvey
JUDGE