IN THE COURT OF APPEAL OF NEW ZEALAND

CA256/2010
[2011] NZCA 154

	BETWEEN	PETER TUKITERANGI CLARKE Appellant
	AND	HARVEY KARAITIANA Respondent

Hearing: 2 March 2011

Court: Ellen France, Randerson and Harrison JJ

Counsel: H M Aikman QC and M A Taylor for Appellant
M S McKechnie for Respondent

Judgment: 14 April 2011 at 9:00 AM

JUDGMENT OF THE COURT

A The appeal is allowed.

B The Māori Land Court is directed to call a further meeting of the beneficial owners of the Tauhara Middle 15 Trust as directed in [57] of this judgment.

C Counsel are to file memoranda as directed in [60]–[61] of this judgment.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] This appeal from a decision of the Māori Appellate Court[1] raises issues about the considerations relevant to the appointment of trustees for Māori land trusts under Te Ture Whenua Māori Act 1993 (the Act). It also concerns the procedures for counting votes at meetings called to obtain the views of the beneficial owners of trusts of this kind.

[2] The trust in question is known as Tauhara Middle 15 Trust (the TM 15 Trust). It is an ahu whenua trust constituted by the Māori Land Court under s 215 of the Act and has at least 3,600 beneficial owners. The appellant, Mr Clarke, and the respondent, Mr Karaitiana, were two of six incumbent trustees of the trust. The TM 15 Trust owns farmland and, at relevant times, was in negotiation with Contact Energy over geothermal projects.

[3] This matter has a lengthy and convoluted history arising from a disputed land purchase which we will shortly relate. For the purpose of an initial understanding of the issues on appeal, it is only necessary to state that Judge Harvey of the Māori

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1 *Wall v Māori Land Court* (2010) Waiariki Appellate MB 55.

Land Court directed on 30 July 2008 a special general meeting of the beneficial owners of the TM 15 Trust to be held on 28 September 2008 to consider the election of trustees.[2] This was a step preliminary to the appointment by the Court of trustees for the TM 15 Trust under s 222 of the Act.

[4] Confusion arose about the counting of votes at the meeting. In particular, whether it was permissible to take into account the votes of persons who had given powers of attorney to others present at the meeting. If the votes of those who had given powers of attorney were counted, Mr Clarke would have been a frontrunner. On the other hand, if the votes of persons granting powers of attorney were excluded, Mr Clarke was the lowest polling candidate.

[5] In a decision issued on 18 December 2008,[3] Judge Harvey directed a fresh meeting of the owners of the TM 15 Trust. He also held, contrary to his earlier decision, that none of the incumbent trustees was eligible for re-appointment.

[6] Mr Clarke and four others appealed against Judge Harvey's decision of 18 December 2008. The Māori Appellate Court held in the judgment under appeal that the incumbent trustees could be re-appointed. However, the Māori Appellate Court also held that the votes of those granting powers of attorney were to be excluded. Mr Clarke submits that this was an error of law with adverse consequences for his election as a trustee. It was also submitted for Mr Clarke that the Māori Appellate Court erred in finding that the Māori Assembled Owners Regulations 1995 did not apply to the meeting. Finally, Mr Clarke submitted that the Māori Appellate Court had erred in not directing a further meeting of beneficial owners and in its approach to the exercise of discretion under s 222 of the Act.

[7] The issues to be determined are:

(a) Did the Māori Appellate Court err in any of the following respects:

(i) Finding that the Māori Assembled Owners Regulations 1995 did not apply to the 2008 meeting.

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2 *Wall v Karaitiana* (2008) 87 Taupo MB 107.
3 *Wall v Karaitiana* (2008) 88 Taupo MB 62.

(ii) Finding that the votes of those who gave powers of attorney for the purposes of the meeting were to be excluded.

(iii) Failing to direct a further meeting of the beneficial owners of the TM 15 Trust but instead deciding the outcome of the voting for itself.

(iv) In its approach to the exercise of discretion under s 222 of the Act.

(b) If there were errors in all or any of the respects identified, whether we should direct the Māori Land Court to convene a further meeting of the beneficial owners of the TM 15 Trust.

The background facts in more detail

[8] In 2006, Landcorp decided to sell large areas of its lands in the Taupo area within the rohe of the Ngāti Tūwharetoa tribe. A private trust, known as the Hikuwai Hapū Lands Trust, was established to facilitate the acquisition of these lands. Three of the trustees of the TM 15 Trust trustees (including Mr Clarke) were also trustees of the Hikuwai Hapū Lands Trust.

[9] It was eventually arranged that land known as the Tauhara North Block would be purchased for $5 million. It was to be a joint venture in which the TM 15 Trust would have a 20 per cent interest. The TM 15 Trust was to provide 20 per cent of the purchase price. Meetings of the owners of the TM 15 Trust endorsed the purchase. In order to fund its $1 million share of the purchase price, the TM 15 Trust was to provide cash from its reserves of $240,000 and it was proposed to raise a mortgage of $450,000. The remaining funds would come from another trust.

[10] Mr Karaitiana refused to sign the mortgage documents and the other five trustees applied to the Māori Land Court for an order authorising the majority of the trustees to execute the mortgage.[4] On 29 June 2007, Judge Harvey made orders authorising the remaining five trustees to execute the mortgage. [5] However, he

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4 As provided for in ss 227 and 237 of Te Ture Whenua Māori Act.

5 *Wall v Karaitiana* (2007) 85 Taupo MB 225.

raised concerns about potential conflicts of interest by the trustees and about the overall prudence of the transaction. He directed that a further hearing be held to address these issues.

[11] After several hearings in 2007, Judge Harvey delivered a decision on 30 July 2008 in which he found that the trustees had failed to properly discharge their duties. The Judge determined that all six trustees of the TM15 Trust were to stand down from their positions at a special general meeting of the beneficial owners for the election of trustees to be convened by the Registrar for that purpose within 30 days from the day of the judgment. Until that time, the trustees could remain in office and were entitled to offer themselves for re-election if they wished.[6]

[12] The judgment of 30 July 2008 was not challenged by the trustees, who took the opportunity to have their mandate refreshed and to offer themselves for re-election. The District Registrar of the Māori Land Court at Rotorua (acting under the direction of Judge Harvey) issued a notice calling a special general meeting of the TM 15 Trust for 28 September 2008 at Taupo. The agenda included a number of items including the judgment of 30 July 2008 and the election of trustees. The notice then continued:

> The meeting is open to beneficial owners of Tauhara Middle 15 Trust and their duly appointed attorneys. Registration will commence at 12.30pm and certificates of non-revocation along with any powers of attorney must be presented for noting prior to the commencement of the meeting. Only beneficial owners or those persons holding a valid power of attorney will have the right to speak or be able to vote at the meeting. Voting will be by show of hands as provided for in clause 7(a)(ii) of the trust order. The trust order makes no provision for proxies. An independent chairperson appointed by the Court will conduct the meeting. Nominations for the position of trustee should be lodged in writing with the Registrar of the Māori Land Court at Rotorua by 4.00pm on **Friday 26 September 2008** and must be signed by the nominee and two beneficial owners. Nominations may be accepted from the floor at the meeting. Up to 5 trustees may be appointed. All beneficial owners are encouraged to attend the meeting and participate in the discussions and business of the meeting.

[13] The reference in the notice of meeting to the "trust order" is to an order approved by the Māori Land Court on 23 September 2004 under s 244 of the Act. The trust order provides for general meetings of the beneficial owners to be called by

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6 *Wall v Karaitiana* (2008) 87 Taupo MB 107.

the trustees at least once every five years. It further provides that a vote at general meetings shall be determined by a show of hands. A quorum of at least 15 beneficial owners present in person is required. The trust order does not provide for voting by proxy or power of attorney.

[14] There were various departures from the process stipulated in the meeting notice which we discuss further below. As well, the meeting notice itself gave rise to obvious difficulties including, for example, how the votes of those who had provided powers of attorney would be counted if there were a show of hands.

[15] The matter came back before Judge Harvey on 1 December 2008. In a reserved judgment issued on 18 December 2008,[7] the Judge held that:

(a) None of the former trustees (including Mr Clarke) could be reappointed as trustees under s 222 of the Act having regard to his adverse finding in his earlier judgment of 30 July 2008 although they might, in the future, be considered as advisory trustees.

(b) The Māori Assembled Owners Regulations 1995 did not apply where there was an existing trust order, incorporation or other form of management structure in place.

(c) There were irregularities in the conduct of the meeting of 28 September 2008 in various respects: the registration details of the owners had not been taken; certificates of non-revocation of the powers of attorney were not made available at the time of the meeting; a secret ballot was held despite the trust order stating that voting at meetings was to be by show of hands; powers of attorney had been used at the meeting as if they were proxies where one person present claimed to have exercised the vote on behalf of a number of others who were not present; powers of attorney could only be used on an individual basis (by which we understand the Judge to mean that the person holding the power of attorney could only vote on behalf of one person).

(d) In view of the irregularities, a further general meeting of owners was directed. It was indicated that the Court may appoint up to five trustees and might also appoint advisory trustees.

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7 *Wall v Karaitiana* (2008) 88 Taupo MB 62.

The decision under appeal

[16] Five of the nominees (including Mr Clarke) then brought an appeal to the Māori Appellate Court under s 58 of the Act.

[17] The findings of the Māori Appellate Court may be summarised as follows:

(a) The Māori Land Court had been acting under the jurisdiction conferred on it in relation to trusts by ss 237 and 238 of the Act.

(b) The meeting of 28 September 2008 was held to enable Judge Harvey to satisfy himself that the proposed trustees were broadly acceptable to the beneficiaries in accordance with s 222 of the Act.

(c) The provisions of the Māori Assembled Owners Regulations 1995 did not apply to the meeting. Rather, the provisions of the trust order applied.

(d) Since Judge Harvey's decision of 30 July 2008 had not been appealed, it was a final decision ruling that the existing trustees could stand for re-election. It followed that the Judge had been wrong in determining, in the decision of 18 December 2008, that the existing trustees could not stand for re-election.

(e) Nevertheless, the discretion under s 222 of the Act in relation to the appointment of trustees was broad and largely unfettered. An incumbent trustee or any other successful candidate at an election could not be guaranteed appointment as a trustee.

(f) By reference to common law authorities, a vote by show of hands as required by the trust order entitles each person present who is entitled to vote either as an owner or as the holder of a power of attorney to exercise only one vote and the votes were to be counted accordingly.

(g) On a recount of the votes, some 60 persons could be positively identified as owners in the TM15 Trust.

(h) All but one of the votes cast in reliance on the powers of attorney were invalid in any event because certificates of non-revocation were not provided at the time.

(i) Only the 60 votes of owners attending were to be counted. This excluded the votes of another 60 owners who had granted powers of attorney.

(j) In the result, the five top polling candidates[8] did not include Mr Clarke. He would have been the sixth highest polling candidate in accordance with the recounting exercise conducted by the Māori Appellate Court.

(k) It was not necessary for a further meeting of owners to be called.

[18] The judgment of the Māori Appellate Court was that the decision of Judge Harvey of 18 December 2008 was annulled to the extent that he had held that the incumbent trustees of the TM 15 Trust could not be eligible for re-election or reappointment as trustees. It was also annulled to the extent that Judge Harvey had directed a further meeting of the owners of the TM 15 Trust. In all other respects, Judge Harvey's decision of 18 December 2008 was upheld. The Māori Land Court was directed to hold a rehearing to consider the appointment of trustees for the TM 15 Trust pursuant to s 222 of the Act.

[19] Mr Clarke then appealed to this Court and sought an application for a stay of the judgment of the Māori Appellate Court under s 58A of the Act. The application was declined on 28 October 2010 with reasons given two days later.[9]

[20] After a further hearing on 11 November 2010, Judge Harvey appointed as trustees the five top polling candidates as determined by the Māori Appellate Court. It is common ground that if the votes of those holding powers of attorney had been counted at the meeting of 28 September 2008, Mr Clarke would have been the top polling candidate with 71 votes. The Judge reserved his decision in relation to the appointment of Mr Clarke stating that he needed time to consider the matter. The record of the Māori Land Court hearing shows that Mr Clarke's counsel had submitted the Court could consider appointing a sixth trustee.

Did the Māori Appellate Court err in finding that the Māori Assembled Owners Regulations 1995 did not apply to the 2008 meeting?

[21] For Mr Clarke, Ms Aikman QC submitted that the Māori Assembled Owners Regulations 1995 (the Regulations) applied to the 2008 meeting of the TM 15 Trust.

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8 Topia Rameka, Hemi Biddle, Dr Charlotte Severne, Peter Eden and John Fenwick.

9 *Clarke v Karaitiana* [2010] NZCA 485.

The Regulations apply when there is a meeting of "assembled owners"[10] at a meeting called and held in accordance with Part 9 of the Act. If the Regulations apply, voting at meetings called under Part 9 permit voting in person, by proxy, by persons holding powers of attorney and by post.[11] A high degree of formality is required in relation to the validity of proxies and powers of attorney and, in general, a quorum for the passing of any resolution at any such meeting must comprise:[12]

> … at least 40% of the beneficial freehold interest in the land to which the resolution relates, not being in any case less in number than 10 or one-quarter of the total number of owners (whether dead or alive), whichever is the less.

[22] Voting is by show of hands, but postal votes are also to be taken into account.[13] The Regulations also provide:[14]

> (3) If any person entitled to vote on behalf of more than one person (including him or herself) casts a vote, that person shall, unless he or she informs the chairperson to the contrary, be deemed to have voted on behalf of all persons for whom he or she is entitled to exercise an unrestricted vote.

[23] Ms Aikman submitted that if the Regulations were applicable to the 2008 meeting, then the Māori Land Court was clearly wrong to exclude the votes of those who had provided powers of attorney. She relied particularly on a decision of McGechan J in *Proprietors of Mangakino Township v Māori Land Court.*[15] The High Court had before it an application for review of an ahu whenua trust under s 351 of the Act. This section required the periodic review of trusts constituted under s 438 of the Māori Affairs Act 1953. McGechan J found:[16]

> … on the facts of this case the full rigour of recognised statutory procedure should have been applied. There were divided opinions, strongly held. There would never be a consensus on this matter. There was a need for a clear basis, and unchallengeable outcome. There was no room for informal and debatable action under s 351 or even s 239. The correct procedure was under Part IX. I am conscious that would lead to voting on the basis not of heads (hands) but shares. That is the law. It reflects policy, which it is not for the judiciary to displace. If voting by shares is felt to reflect inadequate

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10 As defined by s 170(2) of the Act.
11 Regulations 8, 9, 18, 25, 26, 27 and 44 of the Māori Assembled Owners Regulations 1995.
12 Regulation 32(2) of the Māori Assembled Owners Regulations 1995.
13 Regulations 44 (1) and (2).
14 Regulation 44(3).
15 *Proprietors of Mangakino Township v Māori Land Court* HC Wellington CP252/97, 5 May 1998.
16 At 36.

> guidance, then the law must be changed. I have no doubt the Judge's "information gathering exercise" was well intentioned, but it was wrong in principle in the circumstances.

[24] McGechan J specifically left open whether Part 9 applied where the replacement of trustees was being considered under s 239 of the Act (a provision dealing with the replacement of trustees). He recorded the views expressed by the Māori Appellate Court in *Pokuru – Wipaea Manu Block 1A1B2*[17] in which the Court said:[18]

> Section 222 of Te Ture Whenua Māori Act 1993 provides that the Court in appointing trustees, must be satisfied inter alia that the trustee/trustees to be appointed "would be broadly acceptable to the beneficiaries". The meeting of beneficial owners was arranged by the Court under the chairmanship of an officer of the Court. This was a meeting of beneficial owners not a meeting of assembled owners, summoned in terms of Part IX of the Act. It was sought merely to enable the owners to decide who should be nominated to the trust for appointment for the purposes of satisfying the provisions of section 222 of the Act. Such meetings have no formal requirements as to quorum or voting and since a consensus only is sought, voting by a show of hands is appropriate. Trustees are appointed in accordance with statute or the trust document. In this present instance the trust document is silent as to the matter of appointment of trustees and neither the Trustee Act 1956 nor Te Ture Whenua Māori Act 1994 make any provision as to the manner of voting on these matters. A vote by poll is not essential nor warranted and a consensus is more appropriate and better meets the provisions of section 17(2)(c) of the Act, whereby a balance is achieved between major and minor owners.

[25] In the present case, the Māori Appellate Court held that the Regulations did not apply because:

(a) The *Mangakino Township* case was distinguishable. The Court was not acting under s 351 of the Act. Rather it was acting under s 238 and had found breaches of trust such as to warrant the removal of the existing trustees.

(b) Under s 237 of the Act, the Māori Land Court had all the inherent jurisdiction of the High Court in respect of trusts generally.

(c) The meeting was held to enable Judge Harvey to satisfy himself that the proposed trustees were broadly acceptable to the beneficiaries in accordance with s 222 of the Act.

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17 *Pokuru - Wipaea Manu Block 1A152* (1997) 19 Waikato Maniapoto Appellate MB 66 (19 APWM 66).

18 At MB 67.

(d) The quorum requirements of the Regulations were a major drawback in blocks with large numbers of owners. The quorum would be virtually unachievable in such a case. Based on 3,897 owners, this would require attendance representing owners holding 11,658.18200 out of 29,145.45684 shares.

(e) The trust order for the TM 15 Trust defined its objects and powers and contained provisions relating to the holding of general meetings. This was clearly a special general meeting of the beneficial owners and could not be construed as constituting a meeting of assembled owners under Part 9 of the Act.

Discussion

[26] We are unable to accept the argument on behalf of Mr Clarke that the Regulations applied to the 2008 meeting. We see material differences between the provisions of Parts 9 and 12 of the Act. In broad terms, Part 9 deals with the powers of assembled owners while Part 12 deals with the extensive powers conferred upon the Māori Land Court in relation to trusts established under the Act. Part 9 applies with respect to Māori freehold land and to General land owned by Māori.[19] Except as may be otherwise expressly provided, Part 9 applies to land vested in a trustee in the same way as it applies to land vested in the beneficial owners.[20]

[27] Section 170(1) of the Act relevantly defines the term "owners" for the purposes of Part 9 as meaning the persons who are beneficially entitled to the land. Section 170(2) provides:

> In this Part, the term **assembled owners**, in relation to any land, means the owners of the land assembled together in a meeting called and held in accordance with this Part.

[28] In terms of s 172, the assembled owners may consider, and, where appropriate, pass resolutions relating to a range of matters specifically defined by the section. In the main, the defined topics relate to the land itself or its management including, for example: a proposal that the owners of the land become incorporated under Part 8 or included in an existing order of incorporation; proposals for the application of money held in respect of the land; and the alienation or leasing of

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19 Section 169(1).
20 Section 169(2).

land. None of the defined topics relate to the appointment of trustees. However, the matters that may be dealt with by assembled owners at a meeting called under Part 9 are also described more generally to include:

> (h) any other matter of common interest to the owners or any of them, or on which the opinion of the owners is sought by the Court.

[29] Critically, the calling of meetings of assembled owners under Part 9 lies in the discretion of the Court. Section 173(1) provides:

> The Court may call, or direct the Registrar to call, a meeting of owners –
>
> (a) on formal application by any person interested, where it is intended to put 1 or more specific resolutions to the meeting; or
>
> (b) of its own motion or at the request of any owners, where it is proposed to discuss any matter referred to in section 172(h).

[30] While we accept that a meeting may be called under Part 9 for the more general purposes described in s 172(h) of the Act, it may be utilised more usually where there are specific proposals falling within the defined topics in s 172(a) to (g) including a proposal to proceed with some form of alienation of land.[21] Where the alienation of land is concerned, a resolution passed by the assembled owners at a meeting under Part 9 does not have any force or effect unless and until it is confirmed by the Court in accordance with Part 8 of the Act which prescribes the duties and powers of the Court in relation to alienations of Māori freehold land.[22] In such a case, we can readily appreciate the need for the greater degree of formality which the Regulations require.

[31] We view the provisions of Part 12 differently. Under that Part, the Māori Land Court has extensive jurisdiction in relation to trusts including an ahu whenua trust such as the TM 15 Trust in respect of any Māori land or General land owned by Māori. The Māori Land Court has exclusive jurisdiction to constitute trusts of this kind and the legislation provides for a number of different types of trust.[23] When such a trust is established, the Court prescribes the terms of any such trust which are

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21 The term "alienation" in relation to Māori land is widely defined by s 4 of Te Ture Whenua Māori Act 1993.

22 Section 175(1).

23 Section 211.

to be included in the relevant trust order.[24] On constituting any trust under Part 12, the Court may order the vesting of the land and any assets of the trust in the responsible trustees, subject to the trusts declared by the Court.[25]

[32] Sections 237 to 240 of the Act set out the general jurisdiction of the Māori Land Court in relation to trusts. It is necessary to set those provisions out in full:

> **237 Jurisdiction of the Court generally**
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> (1) Subject to the express provisions of this Part, in respect of any trust to which this Part applies, the Māori Land Court shall have and may exercise all the same powers and authorities as the High Court has (whether by statute or by any rule of law or by virtue of its inherent jurisdiction) in respect of trusts generally.
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> (2) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court.
>
> **238 Enforcement of obligations of trust**
>
> (1) The Court may at any time require any trustee of a trust to file in the Court a written report, and to appear before the Court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.
>
> (2) The Court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).
>
> **239 Addition, reduction, and replacement of trustees**
>
> (1) The Court may at any time, on application, in respect of any trust to which this Part applies, add to or reduce the number of trustees or replace 1 or more of the trustees.
>
> (2) The Court may amend the Court's records for a trust if a trustee dies and the Court receives a death certificate for the deceased trustee.
>
> (3) In exercising the powers in subsections (1) and (2), the Court may order the vesting of land or other assets of the trust in any person or persons (with the consent of that person or those persons) upon the terms of the trust, whether or not that person was previously a trustee.
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> **240 Removal of trustee**
>
> (1) The Court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied –

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[24] Section 219.
[25] Section 220.

(a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or

(b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[33] The Court also has the power to terminate the trust[26] and to vary the trust by amending or replacing the trust order or in such other manner as the Court considers appropriate.[27]

[34] It should be noted that the inherent jurisdiction under s 237 is conferred on the Māori Land Court alone but, otherwise, references to "the Court" may, as the case may require, include the Māori Appellate Court as well.[28] Under s 56, the Māori Appellate Court has the same discretionary powers as the Māori Land Court.

[35] The critical provision relating to the appointment of trustees is s 222(2):

222 Appointment of trustees

…

(2) The Court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part, –

(a) shall have regard to the ability, experience, and knowledge of the individual or body; and

(b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

[36] In the light of this statutory background, there is no doubt that, in relation to his decisions of 29 June 2007 and 30 July 2008, Judge Harvey was exercising the jurisdiction available to him under ss 237 and 238 of the Act. Indeed, the formal decisions issued by the Court cite those provisions in the intituling. Apart from the inherent jurisdiction enjoyed by the High Court and conferred on the Māori Land Court by s 237, the Māori Land Court has wide supervisory and enforcement powers under s 238. These include the power to require any trustee to provide a written report to the Court and to appear before the Court in any matter relating to the

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26 Section 241.
27 Section 244(2).
28 Section 4.

administration of the trust or the performance of his or her duties as a trustee. In addition, the Court may, at any time, in respect of any trustee, enforce the obligations of the trust whether by injunction or otherwise. As well, the Court has the power, at any time, to add, reduce, replace or remove trustees under ss 239 and 240.

[37] The appointment of trustees required the Court ultimately to act under s 222. Despite Ms Aikman's submission to the contrary, we are satisfied that the Māori Land Court (or indeed the Māori Appellate Court on appeal) has the power to direct a meeting of the beneficial owners of the trust. Such a power is reasonably necessary to assist the Court in meeting the mandatory obligation under s 222(2)(b) of satisfying itself that the appointment of the persons proposed as trustees would be broadly acceptable to the beneficiaries.

[38] The jurisdiction of the High Court in the field of trusts is both statutory and inherent. The inherent jurisdiction is derived from the Court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries.[29] The inherent jurisdiction of the Court includes the power to enable it to act effectively within its jurisdiction.[30] The Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute, so long as it can do so without contravening any statutory provision.[31]

[39] We agree with the Māori Appellate Court that the inherent jurisdiction conferred by s 237 of the Act in respect of trusts is sufficiently wide to empower the Māori Land Court to call the meeting for the purpose identified. We are not persuaded that the inherent jurisdiction conferred by s 237 is limited by the inclusion in Part 9 of the power conferred on the Court to call meetings under s 173 of the Act. Parts 9 and 12 are discrete parts of the Act. The Court is entitled to call a meeting in relation to the appointment of trustees under Part 12 and is not obliged to proceed under Part 9.

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29 *Kain v Hutton* CA23/01, 25 July 2002.
30 *R v Connelly* [1964] AC 1254 at 1301 (HL).
31 *Taylor v Attorney-General* [1975] 21 NZLR 675 at 680 (CA); *Donselaar v Mosen* [1976] 2 NZLR 191 at 192 (CA); *Schier v Removal Review Authority* [1999] 1 NZLR 703 (CA).

[40] Our conclusion that the Māori Land Court was free to call the meeting in reliance on its inherent jurisdiction under Part 12 is supported by other provisions in the Act. We note that, in contrast to Part 12, Part 10 of the Act (relating to the representation of owners of Māori land) provides specifically that where the Court directs a meeting of owners under s 182(2) or s 183(8), the provisions of Part 9 "shall apply" in respect of the meeting. This is a statutory indication that the Act does not require all meetings of owners to proceed under Part 9. Where there is a mandatory obligation in that respect, the Act says so expressly.

[41] We also observe that the purpose for which the meeting is called is important. Section 17(2) of the Act obliges the Court to seek to achieve certain objectives including ascertaining and giving effect to the wishes of the owners of any land to which the proceedings relate, and providing a means by which the owners might be kept informed of any proposals relating to any land.[32] As we later discuss, the views of the beneficial owners of the trust are relevant to, but do not necessarily control, the Court's discretion under s 222(2).

[42] As the Māori Appellate Court concluded, the purpose of the meeting was to assist the Māori Land Court in ascertaining the views of the beneficial owners. We are satisfied the Māori Land Court was entitled to call a meeting of the beneficial owners upon terms which it considered were most appropriate to achieve that purpose. It was permissible for the Māori Land Court to direct that the meeting should proceed in accordance with the trust order or some modification of that order. It could also have utilised the procedures described in the Regulations or some modified form of them. In short, the Māori Land Court was entitled to fashion its own process in such a way as to enable it to act effectively and to fulfil the purposes of the Act. But whatever form was adopted, it was important that the notice of meeting should specify the process in unambiguous terms.

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[32] Section 17(2)(a) and (b).

Did the Māori Appellate Court err in finding that the votes of those who gave powers of attorney for the purposes of the meeting were to be excluded?

[43] The Māori Appellate Court noted that both the trust order and the notice calling the meeting provided that voting was to be by way of show of hands. The Court also observed that the trust order did not contain any provision for proxies nor reference to ballots or poll voting.[33] Crucially, the Māori Appellate Court held:[34]

> The notice of meeting states that "*only beneficial owners or those persons holding a valid power of attorney will have the right to speak or be able to vote at the meeting"*. While holders of powers of attorney may have anticipated that they would be entitled to vote for each power of attorney they held, their voting rights were qualified by the provision that voting would be by show of hands. Those were the conditions of the notice of meeting and we have to accept and apply those conditions.

[44] As earlier noted, there was confusion at the meeting. It was recognised by those present that there were difficulties in counting the votes of those holding powers of attorney by show of hands. For that reason, the meeting decided to proceed by way of ballot, a course which the Māori Appellate Court described as sensible in the circumstances.[35] It is not surprising that confusion arose given the terms of the notice of meeting. It was reasonable for beneficial owners receiving the notice of meeting to anticipate that, if they gave a power of attorney for the purposes of voting, their vote would be counted. They would not have anticipated that a "one person one vote" regime would apply so as to limit those present to a single vote and effectively disenfranchise them. To exclude voting by the exercise of powers of attorney would also be contrary to the obligation on the Court under s 17(2)(a) of the Act to seek to achieve the objectives of ascertaining and giving effect to the wishes of the owners of any land to which the proceedings relate. The insistence on compliance with the "show of hands" stipulation and on the "one person one vote" approach was an error on the part of the Māori Appellate Court given the clear indication that voting by persons holding a power of attorney was permitted with the expectations that engendered.

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33 At [56]–[57].
34 At [65].
35 At [86].

[45] The Māori Appellate Court referred to common law authority to support the proposition that a member who holds a proxy for another member may exercise only one vote on a show of hands.[36] However, we accept Ms Aikman's submission that, given the confusing nature of the notice and the effect that had on the owners' expectations about the voting arrangements, it was not appropriate to enforce the one person/one vote regime inherent in the show of hands approach.

[46] Of course, as the Māori Appellate Court pointed out, the notice of meeting also stipulated that certificates of non-revocation along with powers of attorney were to be presented for noting prior to the commencement of the meeting. This requirement was not met except in one case. We agree with the Māori Appellate Court that, in those circumstances, it was not appropriate for votes by persons exercising powers of attorney to be counted. The potential for abuse by the use of powers of attorney is such that we view the absence of the certificates as more than a merely technical defect. But for this defect, we would have found that the votes by those exercising powers of attorney should have been counted. For example, a beneficial owner would have been entitled to have their own personal vote recorded as well as the votes of all of those who had provided to that person a valid power of attorney for voting purposes.

Did the Māori Appellate Court err in failing to direct a further meeting of the beneficial owners of the TM 15 Trust but, instead, deciding the outcome of the voting for itself?

[47] On this issue, we agree with Ms Aikman that the proper course in these circumstances was for the Māori Appellate Court to direct a further meeting (or to direct the Māori Land Court to do so). On a strictly legal approach, there was a procedural defect in relation to the certificates of non-revocation of the powers of attorney. But the ambiguity and confusion created by the notice of meeting and the identified flaws in the processes adopted at the meeting were such that the Māori Land Court did not receive a proper indication of the views of the beneficial owners for the purposes of s 222(2)(b). The radically different results depending on whether votes under power of attorney were to be counted graphically illustrates the

[36] *Ernest v Loma Goldmines* [1897] 1 Ch 1.

inadequacies in what occurred. Despite the delays, we consider that the Māori Appellate Court should have directed a further meeting of the beneficial owners to ensure that the views of all interested beneficial owners were obtained. To exclude half of those who clearly wished their votes to be counted did not achieve that objective.

Did the Māori Appellate Court err in its approach to the exercise of discretion under s 222 of the Act?

[48] On this issue the Māori Appellate Court held:[37]

(a) The outcome of any meeting of the owners was not binding on the Court.

(b) Voting in this context was simply a device for making the views and strength of those views known to the Court.

(c) It would be wrong for the Court to exclude the incumbent trustees from appointment simply because of their actions over the Tauhara North purchase.

(d) While the discretion of the Court was tempered to that extent, it should not otherwise be fettered.

(e) The Court was entitled to weigh up the respective merits of the candidates against the circumstances of the trust and, in a principled exercise of discretion, select the trustees it considered to be in the best interests of the trust.

[49] Ms Aikman submitted that the Māori Appellate Court had gone too far in emphasising the breadth of its discretion. She submitted that the approach adopted by the Māori Appellate Court was wrong because it could not ignore the owners wishes. The wishes of the owners should only be departed from in exceptional circumstances. Ms Aikman placed particular weight on the views expressed by the Māori Appellate Court in *Pukeroa Oruawhata Trust v Mitchell*.[38] She drew our attention to observations by the Court to the effect that the beneficial owners must

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[37] At [48]–[52].

[38] *Pukeroa Oruawhata Trustees v Mitchell* (2006) 11 Waiariki Appellate MB 66 (11 AP 66).

now be seen as having a right to participate directly and regularly in the choice of their trustees.[39] Ms Aikman also drew our attention to the following passage:[40]

> … But it is to be remembered that even if elections are held, ultimately appointments are made by Court order. While the Court will always be guided by the collective voice of the beneficial owners, it is not bound by their view. There may be rare cases where the Court considers it imprudent to accede to the expressed wishes of beneficial owners in their choice of trustees. In any event such risks can be adequately guarded against by imposing basic qualification requirements on those seeking office. By this means, the owners can exercise effective control in selecting their representatives without putting the land or the business of the trust at risk. The larger or more complex the business of the trust, the more onerous the qualification standard should be.

[50] This aspect of the Māori Appellate Court's decision was not disturbed on appeal to this Court.[41] Undoubtedly, the observations of the Māori Appellate Court in *Pukeroa* and in the present case differ to some extent in emphasis but they must be considered in the context in which they arose.

[51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by s 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.

[52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court

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39 At [34].
40 At [38].
41 *Trustees of the Pukeroa Oruawhata Trust v Mitchell* [2008] NZCA 518.

would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint the leading candidates as elected by the owners, it must still be satisfied the requirements of s 222(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

[53] It will be plain from these observations that the discretion of the Court is not broad and unfettered. Of course, the Court may take into account such other matters as it thinks fit but the exercise of its discretion will be primarily guided by s 222(2). The importance ordinarily attaching to the views of the owners highlights the need to design meeting procedures which are likely to secure the widest possible input from the owners. Given the inconvenience of travelling long distances to attend meetings, and the number of beneficiaries involved in a trust such as this, the use of voting under powers of attorney may well be desirable.

Should we direct the Māori Land Court to convene a further meeting of the beneficial owners of the TM 15 Trust?

[54] Given our findings about the flaws and inadequacies in the election conducted at the 2008 meeting, we conclude that the appointment of trustees was invalid in consequence. Ms Aikman urged us to direct the Māori Land Court to convene a further meeting of the beneficial owners. Mr McKechnie for the respondent submitted that if we were to reach the view that the process of the appointment of trustees was invalid for any reason, there were two options. Either a further meeting of the beneficial owners should be called or the matter should be referred back to the Māori Land Court for a decision as to whether Mr Clarke should be appointed.

[55] We have given consideration to this question but have decided that the better course is to direct the Māori Land Court to convene a further meeting of the beneficial owners of the TM 15 Trust. We are very conscious of the extensive delays which have occurred throughout this process, but the difficulties which have arisen so far have been such that the views of the beneficial owners have not been

adequately or properly conveyed to the Māori Land Court. We also take into account that, in view of the delays to date, the circumstances of the TM 15 Trust may now be different from those it was facing at the time of the meeting in September 2008.

Result

[56] For the reasons given, we allow the appeal.

[57] We direct the Māori Land Court to convene a further meeting of the beneficial owners of the Tauhara Middle 15 Trust to assist the Court in appointing trustees under s 222 of the Te Ture Whenua Māori Act 2003.

[58] The Māori Land Court shall determine the manner in which the meeting is to be conducted. The Court might find it helpful to consider the following suggested guidelines:

(a) The meeting to be conducted under the supervision of a Court official appointed by the Court.

(b) The Court to fix in advance the number of trustees to be appointed.

(c) Nominations for the position of trustee to be lodged in writing with the Registrar of the Māori Land Court at Rotorua by a time and date to be fixed by the Court. Nominations to be accompanied by the written consent of the nominee.

(d) Further nominations could be accepted from the floor at the meeting where accompanied by the written consent of the nominee.

(e) Voting by beneficial owners of the Tauhara Middle 15 Trust could be in person or by power of attorney granted to a beneficial owner or other person who is present at the meeting.

(f) An attendance register to be kept with all attendees registering their attendance before the business of the meeting commences. The names of those attending and those who have given powers of attorney to be cross-checked against the list of owners to ensure that those claiming to be owners and those giving powers of attorney are, in fact, owners.

(g) Persons attending who have been granted powers of attorney by beneficial owners of the Tauhara Middle 15 Trust to register a duly completed copy of the power of attorney and a duly completed certificate of non-revocation of the power of attorney before the business of the meeting commences.

(h) Only beneficial owners and those persons holding powers of attorney to have the right to speak and vote at the meeting.

(i) Those beneficial owners who attend in person to be entitled to one vote on their own behalf. If they hold one or more powers of attorney from other beneficial owners they are entitled, in addition, to one vote on behalf of each person from whom they have received a power of attorney provided that the formalities provided by clause (g) above in relation to the power of attorney have been duly met.

(j) Persons attending the meeting who are not beneficial owners but who have been granted one or more powers of attorney by beneficial owners to be entitled to one vote on behalf of each of those persons from whom they have received a power of attorney provided that the formalities prescribed by clause (g) above in relation to the power of attorney have been duly met.

(k) The meeting to be chaired by an independent person appointed by the Māori Land Court.

(l) Any person (including the trustees appointed by the Māori Land Court on 11 November 2010 and any previous trustee) to be eligible for appointment.

[59] The guidelines we have suggested in this case would not necessarily be suitable for all meetings of beneficial owners. The Court must be free to tailor its requirements to the circumstances of the trust concerned and the issues for consideration.

[60] We seek submissions from counsel as to the standing of the trustees appointed on 11 November 2010. Our present view is that their appointments should be declared to be invalid and that the Māori Land Court should appoint interim trustees pending fresh appointments. There is no reason of which we are aware why the trustees appointed on 11 November 2010 should not be appointed on an interim basis.

[61] Counsel are to confer and file a joint memorandum if there is an agreed position within 14 days of the date of this judgment. Otherwise, the appellant's submissions are to be filed and served within 14 days and the respondent's within 7 days thereafter.

[62] We record that counsel raised an issue about whether Judge Harvey should deal with the appointment of trustees in future. We express no view on that issue. It is a matter for the Māori Land Court to decide.

[63] We intend to order the respondent to pay costs to the appellant for a standard appeal to be calculated on a band A basis together with usual disbursements. We certify for two counsel. We will refrain from making an order at this juncture in case there are legal aid or other matters which might affect such an order. Counsel may raise any such views in their memoranda.

Solicitors:
Woodward Law Offices, Lower Hutt for Appellant