IN THE COURT OF APPEAL OF NEW ZEALAND

CA247/2014
[2015] NZCA 552

BETWEEN	THE NEW ZEALAND MĀORI COUNCIL First Appellant
AND	SIR EDWARD TAIHAKUREI DURIE Second Appellant
AND	CLETUS MAANU PAUL Third Appellant
AND	ANGELA JANE FOULKES First Respondent
AND	ALAN PAREKURA TOROHINA HARONGA Second Respondent
AND	ALEXANDER JOHN WILSON Third Respondent
AND	THE FEDERATION OF MĀORI AUTHORITIES Fourth Respondent

Hearing:	6 October 2015
Court:	Harrison, Stevens and Winkelmann JJ
Counsel:	F E Geiringer for Appellants S Barker for First, Second and Third Respondents N Burley and L Mckeown for Fourth Respondent
Judgment:	18 November 2015 at 10 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is dismissed.

B The appeal is dismissed.

C Each of the three parties participating in this appeal is indemnified from the Trust for their costs in the sum of $2,500 plus usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] This appeal from a judgment of Williams J in the High Court[1] raises two related questions of documentary construction. One is whether a trust deed allowed two parties vested with a joint power of appointment of trustees to delegate that power to a third party. The other is whether an agreement later entered into between the same parties for the purpose of exercising that power was lawful and effective.

[2] Sadly, what lies beneath these questions is a divisive and expensive dispute between representatives of the New Zealand Māori Council (the NZMC) and the Federation of Māori Authorities (FOMA), the two bodies jointly responsible for appointing Māori trustees under the Crown Forestry Rental Trust (the CRFT or the Trust).

Crown Forestry Rental Trust

[3] The Trust's genesis was authoritatively summarised by Williams J in the judgment under appeal as follows:

> [6] The CFRT was established by deed in 1990 as part of the machinery resulting from the settlement of litigation between Māori interests represented generally by Sir Graeme Latimer and the Council (of which he was then chair) and the Crown over the Crown's proposed sale of cutting rights in Crown-owned exotic forests. Cutting rights could be sold but ground rent would be paid to the new Trust and the land would be subject to resumption by Māori claimants under the Crown Forest Assets Act 1989. Under the settlement, the Trust would hold all rental payments in respect of the forests pending resolution of Treaty claims to the land beneath them. The expectation was that the accumulated rentals relating to the claimed land

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[1] *The New Zealand Māori Council v Foulkes* [2014] NZHC 747.

> would eventually pass along with the land to the claimants if their claims for resumption of such land succeeded before the Waitangi Tribunal, or revert to the Crown if they were not.
>
> [7] It was then predicted that all forestry claims would be resolved by the Waitangi Tribunal one way or the other within three years, and that in the meantime, interest on the accumulated rentals would be expended on funding claimant participation in the claim process.
>
> [8] In hindsight, the three year assessment was hopelessly unrealistic. Twenty-four years later, although real progress has been made, forestry claims remain on the Waitangi Tribunal's books. And perhaps unexpectedly, the Trust has evolved into the primary funder of claimant participation in the processes by which they prosecute *all* of their historical claims. Without the Trust's interest based distributions, the historical settlements process would eventually grind to a halt. For that reason, it is of the utmost legal, political and social importance that CFRT functions effectively, efficiently and lawfully in discharging its obligations under its trust deed.
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> (Footnote omitted.)

[4] The Crown settled the deed on 30 April 1990. The deed opened by reciting the Crown's wish to dispose of certain assets including crops, chattels and fixtures, and the existence of claims by Māori to areas of land upon which the assets are located, before noting that:

> The Crown and Maori representatives have by an agreement dated 20 July 1989 agreed that the Crown proceed with its disposal programme, subject, inter alia, to the establishment of a trust to:
>
> (a) receive the Rental Proceeds from the Crown Forestry Assets upon which Crown Forestry Assets are located; and
>
> (b) make the interest, earned from investment of those Rental Proceeds, available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, certain Crown Forest Land.

[5] The trustees are directed to hold all the trust assets including income on trust for certain beneficiaries including the Crown, entities claiming distributions of income under the trust and those who have registered claims under the Treaty of Waitangi Act 1975.

[6] There are to be six trustees except when a casual vacancy arises and when an alternate is appointed. Three of the trustees are to be appointed by the Crown; three

trustees are to be appointed by Māori. The Minister of Finance has the power of appointment of the three Crown trustees, and:[2]

> The power of appointment of Trustees to be appointed under Clause 5.3 ["appointed by Maori"] shall be exercised by the New Zealand Maori Council and the Federation of Maori Authorities Incorporated (the "Maori Appointor") subject however to clause 6.6.[3] The trustees appointed under this clause 6.2 shall be Maori Trustees.

[7] The Māori Appointor has the power to remove or replace any Māori trustee or appoint a new Māori trustee. Every new trustee is obliged to execute upon appointment a deed whereby he or she undertakes to be bound by the covenants imposed on the trustees. Where a trustee has a conflict of interest relating to claims for payments, he or she shall declare that conflict as soon as it arises and the Māori Appointor shall appoint an alternate trustee. Because of the nature of the decisions the trustees must make, such conflicts of interest regularly arise.

[8] The deed also:

(a) prescribes in detail the powers and duties of trustees including the powers to make investments, open bank accounts, employ agents, act on advice, determine questions and hold trust funds on deposit or uninvested;[4]

(b) directs the trustees to accumulate interest earned from investments and apply it at their sole discretion to pay trust expenses and, more importantly, to assist any claimant in preparing, presenting and negotiating claims before the Waitangi Tribunal which involve licensed land;[5]

(c) directs the trustees to decide the criteria for persons applying for distributions of income to qualify as claimants, the basis for allocating funds and the machinery for ensuring confidentiality of information

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2 Clause 6.2.
3 Related to the Māori Appointor cl 6.6 makes provision (in cl 6.6.2) if the Māori Appointor ceases to exist by office or expresses a desire to be released.
4 Clause 7.11.
5 Clause 9.

supplied by claimants, with payments only to be made in accordance with the decisions of trustees upon delivery of satisfactory evidence and detail about expenditure for reimbursement and of costs incurred for the benefit of claimants.[6]

Events since 2013

[9] The NZMC and FOMA were able to exercise their joint power of appointment as Māori Appointor without apparent difficulty in the first 23 years of the Trust's operation. In 2013, however, difficulties about the appointments process emerged against the background of conflict within the Trust itself.

[10] In March 2013 the NZMC, Sir Edward Durie and Maanu Paul – two of the trustees – issued a proceeding in the High Court, seeking directions on a range of issues relating to the Trust. Kós J determined the application in a comprehensive judgment delivered in July 2014[7] and has since made orders appointing trustees which are unrelated to this appeal, in circumstances where the NZMC and FOMA have been unable to agree on the exercise of the appointment power. Examples are the appointments of Sir Edward;[8] Ms Raumati-Tu'ua and Mr Majurey;[9] and four alternate trustees.[10] Various appointments were also made in this way prior to July 2014.[11]

[11] In an attempt to resolve their differences about exercising their joint power of appointment of Māori trustees, FOMA and the NZMC participated in mediation hui in November and December 2013. The result was an agreement signed by the parties on 23 January 2014, creating a "Māori Appointor" to exercise the joint power of appointment vested by cl 6.2 of the trust deed.

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6 Clause 10.

7 *The New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441.

8 *The New Zealand Māori Council v Federation of Māori Authorities Inc* [2015] NZHC 1376 at [8]; *The New Zealand Māori Council v Federation of Māori Authorities Inc* [2015] NZHC 2019 at [12].

9 *New Zealand Māori Council v Foulkes* [2014] NZHC 2757 at [18].

10 *New Zealand Māori Council*, above n 9, at [20].

11 See *The New Zealand Māori Council v Foulkes* HC Wellington CIV-2013-485-455, 4 September 2013 (Minute of Williams J) at [18]–[19]; *The New Zealand Māori Council v Foulkes* HC Wellington CIV-2013-485-455, 9 September 2013 (Minute of Williams J) at [2]; and *The New Zealand Māori Council v Foulkes* HC Wellington CIV-2013-485-455, 4 November 2013 (Minute of Dobson J) at [5].

[12] The new body was to comprise ten members, being five members each from NZMC and FOMA. Clause 2, the operative clause, provided:

> **2. Constitution of the Māori Appointor**
>
> 2.1 The Māori Appointor shall comprise 10 members being 5 from the Council and 5 from the Federation.
>
> 2.2 The Executive committees of the Council and the Federation respectively may replace members in accordance with their own rules and procedures.
>
> 2.3 The Council and Federation may at any time agree upon a lesser number of members than 10.
>
> 2.4 At their discretion the members may elect a chair or in the alternative, the Council and Federation members may each appoint one of their number as chair, and the Co-Chairs shall share the chairing of each meeting as they shall agree.

[13] Clause 3 provided for the vision and purpose of the Māori Appointor:

> 3.1 *"Kia rewa te mana Māori ki runga."*
> Elevate the Māori mana to the fore. Keep uppermost in mind the enhancement of the capacity of the people.
>
> *"Kete riki, Kete Tangariki"*
> Working together to achieve our collective goal assisted by iwi to rise above challenges we face. Underpinned by the principles of mahi tahi, awhina, kia tutuki te kaupapa, Mana Māori and Mana Tangata.
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> 3.2 Members will act in accordance with tikanga Māori to uphold Mana Māori by ensuring Māori interests are represented on the Trust by experienced and competent trustees.
>
> 3.3 Members will work to ensure that full and adequate consideration is given to the objectives, needs and circumstances of Māori claimants and the customary and other groups they represent, to the extent that the Deed allows.

[14] Clause 4 recited the duties of members of the Māori Appointor as:

> 4.1 The members' primary commitment shall be to achieving the vision and purpose of the Māori Appointor, as given in clause 3 above or as amended from time to time.
>
> 4.2 Members shall work together in accordance with tikanga (customary protocols), seeking consensus, *and setting aside any distinctive preferences of their appointing body.*

> 4.3 *Members shall not disclose how any individual voted or spoke on any matter or the content of any discussions on candidates or nominees.*
>
> 4.4 Members shall be mindful of the confidential nature of the Māori Appointor role at all times.
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> (Emphasis added.)

[15] Clause 5 provided that the appointment panel was to make decisions in this way:

> 5.1 A quorum shall consist of no less than half of the members appointed by the Council and no less than half of the members appointed by the Federation.
>
> 5.2 Decisions shall be by consensus or if consensus is not achieved, by the majority view of members voting individually. In the event of a tie, the Ayes and Noes shall each select one person to present the argument to the chair of either Te Taura Whiri or Te Putahi Paho or the Chief Judge of the Maori Land Court to make a determination which the members will then accept.

[16] On 8 February 2014 representatives of FOMA and the NZMC attended a hui in Lower Hutt. In accordance with the agreement, five delegates were present from each side for the purpose of exercising the trust power of appointment of Māori trustees. Extensive affidavit evidence was adduced in the High Court about events which occurred that day. Ultimately all of this evidence is of little relevance. What matters is that eight delegates – four from each side – unanimously resolved that one of the three Māori trustees, Alan Haronga, should be removed immediately and replaced by Neville Baker; and that Sir Edward and Mr Paul should be appointed for extended terms.

High Court

[17] Shortly afterwards, FOMA's executive resolved to revoke its support for the resolutions passed on 8 February 2014. Within a fortnight, the NZMC applied to the High Court for directions (effectively declarations), validating the new body's decisions to remove Mr Haronga and appoint Mr Baker in his place. FOMA opposed on the ground that it was not lawfully able to fetter or delegate its power of appointment under the trust deed through the agreement. At real issue was whether the appointment power created by the agreement was lawful.

[18] Williams J agreed with FOMA. He was satisfied that the decisions purportedly made on 8 February 2014 were invalid. He concluded that the parties' creation of a "third party as a mechanism for working around their impasse"[12] was unlawful because that power was vested solely, for FOMA at least, in its executive, its authorised voice for acting in the ordinary course of business.[13] FOMA did not have the authority to delegate to five of its members, acting conjointly with five NZMC representatives, the power to dismiss or appoint Māori trustees.

Fresh evidence

[19] The NZMC sought leave to adduce fresh evidence from its secretary, Karen Wattereus, said be of an updating nature. Her affidavit traversed attempts by the parties since Williams J's judgment to reach agreement on exercising their power of appointment. The evidence referred to in Ms Waterreus' affidavit is of no relevance to the issues on appeal and the application for leave to adduce it is dismissed.

Decision

(a) Power to delegate

[20] In support of NZMC's appeal against the High Court decision, Mr Geiringer submitted that the Judge's construction of the trust deed was wrong for two reasons. First, he said, the Judge erred in concluding that the power vested in the Māori Appointor under the deed was personal to both parties and could not be delegated. In Mr Geiringer's submission:

> (a) Instead of requiring each party to reach an independent judgment on the appointment of a Māori trustee, the trust deed requires both parties to work together collaboratively, as envisaged by the agreement and consistently with the principles of tikanga Māori, where the possibility that the choice made by one party exercising its independent judgment must be subordinated to a collective view.

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12 At [94]
13 At [87] and [88].

(b) The deed must be given a construction that allows the appointment mechanism to work. At present, what is required of the MZNC and FOMA, both with large and geographically spread executive bodies, is not workable. If the mechanism provided by the deed is to work, it must be construed as allowing for the delegation of this joint power of appointment to another body, such as the one lawfully constituted by the agreement, by adopting a process which is reasonable and lawful under the trust deed, and which proved to be immediately effective.

[21] In developing this argument Mr Geiringer submitted that the question here is what a reasonable person would consider the Crown must have intended to occur in circumstances which are not expressly addressed by the trust deed, such as where the parties are unable to agree on an appointment of a Māori trustee.[14] In his submission, this point is proved by the fact that historically at least until 2013 the parties acted in the collaborative way envisaged by the agreement and, after an unsettled period, the agreement itself resulted in a functioning Māori Appointor. By contrast, he submitted, the Māori Appointor has been unable to make any decisions since the High Court's judgment.

[22] We must first identify the legal principles applying to this issue. As confirmed by two recent decisions of Gilbert J and Brewer J in the High Court,[15] the power to appoint new trustees is of a fiduciary nature because the subject matter of the power is the office of the trustee. That office lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole to the exclusion of the trustee's own interest. And, as it reposes the settlor's personal trust and confidence in the donee to exercise its own judgment and discretion, the power cannot be delegated to a third party. In this respect it does not matter that the party exercising the power is not itself a trustee; it is the object and purpose of the power, taken from the deed, that is decisive.[16] Finally, because the power is fiduciary in nature, it must not be exercised for a collateral purpose.

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14 *Dysart Timbers Ltd v Nielson* [2009] NZSC 43, [2009] 3 NZLR 160 at [25].
15 *Carmine v Ritchie* [2012] NZHC 1514 at [66]; *Harre v Clark* [2014] NZHC 2533 at [24].
16 *In Re Skeats Settlement* (1889) 42 Ch D 522 at 527.

[23] Mr Geiringer submitted, nevertheless, that the authorities settling these principles do not apply. He pointed out that the term "power of appointment" is a term of art in trust law, referring to the power of a trustee, of a discretionary trust to distribute the trust assets – to appoint a beneficiary for that purpose.[17] In this sense, the power is of a proprietary nature such as for the purposes of relationship property law.

[24] However, it does not matter whether that power is properly conceived as property in any given case. What matters is that in every case the power is to be exercised according to the best interests of the beneficiaries and cannot be delegated. We accept, of course, as Mr Geiringer submitted, that this non-delegation rule is subject always to the orthodox rules of construction; in particular it is subject to a fact specific inquiry into whether the particular trust deed vests a contrary and express authority enabling the donee to delegate its power.[18]

[25] Applying those principles here, we are satisfied that:

(a) the trust deed does not authorise either FOMA or the NZMC to delegate their powers of appointment to a third party constituted by an agreement subsequently entered into between them. As a matter of construction the terms of cl 6.2 are unequivocal:[19] the Crown has directed that the power be exercised jointly by the NZMC and FOMA acting in accordance with their respective constitutions. We accept Mr Burley's submission that a power of delegation by the appointers to a third party cannot be read into the trust deed or that one must necessarily be implied to accord with the Crown's intention when settling the Trust;

(b) the primary inference available from their separate identification and nomination as appointors is the Crown's expectation as settlor that each party would represent a different and significant body of Māori,

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17 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293.

18 *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2011] 4 All ER 704 at [53]–[54].

19 Above at [6].

each having different interests which may be relevant to that party's exercise of its own independent judgment. Williams J's assessment, on which we place weight, is that FOMA was likely to have been chosen along with the NZMC because it represented entities which administered Māori land, especially forestry blocks. We also agree with the Judge that the terms of the deed confirm the Crown's expectation as settlor that each of the two parties would exercise its own judgment and discretion when exercising the power of appointment in the best interests of the beneficiaries;

(c) this expectation is consistent with a related expectation that, guided by their fiduciary obligation, both parties would work together within the trust framework to reach agreement on decisions about appointing or removing trustees. The absence of a prescriptive appointment mechanism implies the Crown's confidence that the two bodies would put aside particular or partisan differences to the extent necessary to find consensus. As Mr Burley emphasised, that is how the appointors apparently operated for the first 23 years of the trust's existence.

[26] In this context we must reinforce the fiduciary nature of the Māori Appointor's power requiring each party to act in the best interests of the beneficiaries. That is because, as Mr Geiringer properly acknowledged, sectional vested interests as well as personal and tribal differences have dominated recent discourse over the appointment process. Examples are found in a narrative transcript of statements made by participants at the hui on 8 February 2014 and by documents, such as a paper submitted to the hui, characterised by elements of emotion and personal invective. Also, to give a more specific example relating to Mr Baker, it is irrelevant whether a particular Māori trustee has sided with Crown trustees on decisions made by the Trust. The question must always be whether a decision made by the Trust is in the best interests of the beneficiaries.

[27] Any decision about appointing or removing trustees must always be made on a measured evaluation by reference to the deed, consistent with the fiduciary nature of the power, and not for any collateral purpose. In this respect we endorse Kós J's

constructive summary of the qualities required of a trustee in a judgment delivered on 6 November 2014:[20]

> [14] … the Māori trustees and alternates should, collectively, have the following skills and experience: understanding of kaupapa Māori, Māori customary values and institutions; hapu and iwi leadership and interrelationships; experience in governance; experience in financial management; knowledge of and practical experience on behalf of hapu and iwi in the Treaty claims process; and knowledge of the experience of trustee law and trust interpretation. [As for] understanding of the claims process, Māoritanga, and the Treaty of Waitangi … They must have some of [these qualities]. They must also have an interest in the others and a willingness to develop them. And they must add materially to the collective talents of the trustees.

(b) No delegation

[28] Second or alternatively, Mr Geiringer submitted that, even if the deed does not authorise the appointors to delegate their powers in the manner provided by the agreement, the Judge was wrong to find that the process adopted in the agreement amounted to a delegation by either of the parties as that term is properly understood in the context of trust law. In FOMA's case it was lawfully empowered to appoint a sub-committee under its control to exercise its powers.

[29] In Mr Geiringer's submission the Judge erred in concluding that the settlor must have intended that decisions be made by the FOMA executive. Rather, the correct approach is to view the constitutional documents as a whole. Thus any decision made in accordance with them is a decision made by the respective organisations. A decision made by a properly appointed sub-committee, such as that constituted by the agreement, was still FOMA's decision. While it may be a delegation by the FOMA executive in accordance with its rules, it was not a delegation by FOMA of its powers to some other legal entity.

[30] We can answer this submission shortly. In terms of cl 6.2 of the deed, each of the NZMC and FOMA must act through their executive bodies. In FOMA's case it operates through an 11 member executive, requiring a quorum of six members. Mr Geiringer's argument that FOMA retained the necessary control because the executive appointed the sub-committee does not withstand scrutiny. We accept that

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[20] *New Zealand Māori Council*, above n 9,

the executive may appoint any person, sub-committee or body under its proper control to carry out any specified tasks or duties. However, the executive would not be in control of a decision made by its delegates where they are prohibited by the agreement from disclosing to the executive how they voted or exercised their power of appointment in any respect. As Mr Burley submitted, in terms of its rules the FOMA executive must retain the power to make substantive appointment decisions of the type required by cl 6.2.

[31] There is also a simple answer to Mr Geiringer's submission that the High Court's judgment effectively precludes the parties agreeing on any process. While he is correct that the parties can agree between themselves on an informal process for exercising the power of appointment, they cannot delegate the power to an entity separately constituted by them, not by the settlor, for this purpose. The non-delegation rule does not preclude FOMA and the NZMC from adopting practical procedures, such as creating ad hoc bodies to make recommendations to the respective executive bodies for approval, provided the practices comply with the rules of both bodies and require executive approval for the appointment before exercising the power. And, within this process, there is scope to incorporate the principles of tikanga Māori as envisaged by cl 3 of the agreement.

Costs

[32] Messrs Geiringer and Burley agreed that we should order that the costs of the parties on and relating to this appeal be paid by the Trust.[21] Orders to this effect have been variously made in the High Court. Mr Barker opposed, referring to Kós J's refusal on 28 August 2015 to make an order on the application to re-appoint Sir Edward as a trustee.[22]

[33] We agree with Kós J's approach. We are not prepared to accept counsels' proposal. They provided us with a breakdown of legal costs exceeding $2 million which the parties' have incurred on a range of defended applications in the High Court. The Trust has reimbursed these costs. We need not emphasise that the use of trust funds to pay legal costs of this magnitude is unacceptable. The result is that

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21 Trustee Act 1956, s 71.

22 *The New Zealand Maori Council v Durie* [2015] NZHC 2063.

income has thus been diverted from the Trust's primary purpose of funding treaty settlement claims to finance largely unproductive litigation. It is wrong that deserving beneficiaries must bear the cost of resolving a state of chronic dysfunction between parties whom the Crown would have expected to act in a responsible, cooperative and cost efficient fashion in the best interests of others.

[34] In the event we make an order that each of the three parties participating in this appeal be indemnified from the Trust for their costs in the sum of $2,500 plus usual disbursements.

Solicitors:
Woodward Law Offices, Lower Hutt for Appellants
Johnston Lawrence, Wellington for Fourth Respondent