**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2013-485-455**
**[2013] NZHC 663**

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| UNDER | the Trustee Act 1956 and Judicature Amendment Act 1972 |
| IN THE MATTER OF | an application for interpretation of the Trust Deed of the Crown Forestry Rental Trust established by the Crown in April 1990 |
| BETWEEN | THE NEW ZEALAND MAORI COUNCIL<br>First applicant |
| | SIR EDWARD TAIHAKUREI DURIE<br>Second applicant |
| AND | THE CROWN FORESTRY RENTAL TRUST<br>Respondent |

Hearing: 25 March 2013

Counsel: M Palmer and S Arcus for applicants
S Barker and S Bisley for respondent
V Hardy for Attorney-General

Judgment: 28 March 2013

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**JUDGMENT OF WILLIAMS J**
**(Undertaking and Order by Consent on Other Matters)**

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Solicitors:
Donna Hall, Lower Hutt for applicants
Buddle Findlay, Wellington for respondent

[1] The Crown Forestry Rental Trust (the Trust) was created by trust deed in 1990. Its relevant purpose, in the context of this application, is to provide, from the interest payable on the Trust corpus, support to claimants in prosecuting their claims before the Waitangi Tribunal and in direct negotiations.

[2] The Crown appoints three trustees and, for the Mäori side, the Federation of Mäori Authorities (FOMA) and the New Zealand Mäori Council (together styled the Mäori appointor) appoint the other three. FOMA and the Mäori Council have a memorandum of understanding governing the appointment process for trustees from the Mäori side.

[3] Two trustees from each side must agree any resolution of the trustees for it to have effect under the deed.

[4] The applicants are the Mäori Council and one of the Mäori appointees, Sir Edward Taihakurei Durie. He is, not coincidentally, also co-chair of the Mäori Council. The other two Mäori trustees are Cletus Maanu Paul, the other co-chair of the Mäori Council, and Alan Haronga, a former chair of FOMA.

[5] Two alternate Mäori appointor trustees, Mr Peter Charlton and Ms Lorraine Toki, hold office until 30 June 2013. Their brief is to step in to the shoes of permanent trustees on funding or other deliberations in the event of unavailability or conflicts of interest. When Sir Edward was appointed on 30 June 2012, the alternate proposed alongside him was Mr Dion Tuuta. Mr Tuuta has since indicated that he cannot take up the appointment because of other work commitments.

[6] This proceeding is about a difference of opinion that has arisen between the Crown appointees and Alan Haronga on the one side, and Sir Edward (and perhaps Maanu Paul) on the other. It relates to the way in which trustee conflicts of interest are handled. The long-standing (and, until now, uncontroversial) policy of the Trust is that in the event Mäori appointor trustees find themselves in a conflict of interest on any funding decision, one of the alternate trustees provided by the Mäori appointor is selected by the chair to stand in for the conflicted trustee on that particular agenda item.

[7] The Crown trustees and Mr Haronga (that is four trustees) accept that this pooling approach is sound. Sir Edward and Mr Paul do not agree. They say that it is inconsistent with the deed. They say that the deed requires each permanent trustee to have a designated alternate appointed by the relevant appointor to be that trustee's second. To do otherwise, it is argued, risks skewing the delicate political balance at the trustees' table.

[8] There are practical implications, the applicants argue. The trustees are about to consider the allocation of funding two major Waitangi Tribunal inquiries. One is in Northland and the other is in the area between Porirua and Manawatu. In each district, Sir Edward is, for different reasons, conflicted and must step aside. The trustees have nominated Mr Peter Charlton as his alternate. Mr Charlton, the applicants say, is too closely aligned with Mr Haronga and has an extensive background in working with FOMA rather than the Council. Sir Edward does not want him.

[9] The Mäori Council would prefer that Mr John Tamihere act as Sir Edward's designated alternate. The problem is he has not been nominated by the "Mäori appointor" – that is, he has not been put up by agreement between both Mäori organisations in accordance with their memorandum of understanding and so has no status as an alternative.

[10] The parties are in deadlock. The applicants say this is a deed interpretation issue. The remaining trustees (excluding Mr Paul who has so far taken no formal steps) say the issue is between FOMA and the Mäori Council and has nothing to do with the trustees as a governance collective.

[11] The focus is on clauses 6.8 and 6.9 of the 1990 trust deed which provide as follows:

> 6.8 Where any Trustee has a conflict of interest in respect of claims for payments to Claimants, that Trustee shall declare its conflict of interest as soon as it arises, by notifying the relevant Crown Appointor or Mäori Appointor of that conflict of interest. A Trustee may not act on any matter which that Trustee has a conflict of interest.

> 6.9 If any Trustee has a conflict of interest in respect of claims for payments to Claimants, or if a Trustee is unable or unwilling to act in any matter or for a temporary period, the relevant Crown Appointor or Mäori Appointor shall appoint an alternate Trustee for that Trustee. The alternate Trustee shall have all the powers and duties of a Trustee, subject to any limitations specified in the appointment and notwithstanding that there may already be six Trustees. A Trustee and an alternate for that Trustee may not act simultaneously on the same matter but may act at the same time on different matters.

[12] The applicants initially sought interim relief on the basis that there was to be a meeting on 26 March 2013, at which the matters over which Sir Edward was conflicted would be considered by the trustees, and Mr Charlton would participate in Sir Edward's stead. The applicants do not wish those matters to be finalised in that way until this question of law is resolved.

[13] The parties have now reached a partial accommodation over the immediate path forward.

[14] That has been possible due to the availability of a one day fixture before Mallon J on 15 April 2013.

[15] The accommodation is as follows:

(a) there may be an order by consent preventing the trustees from further considering any agenda items on which the permanent Mäori appointor appointed trustees are conflicted until a substantive judgment is to hand on the issue of alternate trustees or, in the alternative, until FOMA and the Mäori Council agree on the appointment of a third alternate trustee and the mode generally of alternate trustee participation; and

(b) there may be confidentiality orders by consent in respect of the affidavits of Sir Edward and Ms Foulkes. Nor will there be access to the court file without leave of the Court.

[16] There was ongoing disagreement between the parties on two further important matters. The first is whether the applicants should be required to amend their pleadings to add any other causes of action in relation to the manner in which the trustees are required by law to exercise their powers. The second is whether Sir Edward (and Maanu Paul if he joins the proceeding on that side) should be required to give a personal undertaking.

[17] On the question of amended pleadings, it is important to understand that the dispute over alternate trustees is not the only issue in which the protagonists are in disagreement. Sir Edward has argued for some time, it appears, that the Trust's policy of funding individual claimants is inappropriate. He argues that the only appropriate recipients of Trust funding are iwi and hapu collectives. This has been the subject of intense discussion at the trustees' table and, Sir Edward at least, expects that discussion to continue. The respondent trustees want all issues in respect of the exercise of trustee powers of appointment (to the extent that they are legal issues) on the table and argued in this proceeding. Mr Barker says the respondent trustees want to avoid a scenario whereby the alternate trustee issue is resolved only to be replaced later by further proceedings in respect of the underlying dispute about appropriate funding recipients.

[18] A direction is sought accordingly requiring the applicants to re-plead with a view to directions in relation to other issues (than alternate trustees) being the subject of further directions at or after the 15 April 2013 fixture.

[19] Mr Palmer was very much opposed to this idea. He said that the trustees still have much talking to do on that issue and it would be pre-emptive to require them to go to court until all of the talking is done.

[20] The better alternative, it seems to me, is for the trustees together to seek directions on matters that have become the subject of controversy between them. Once there is certainty on the law, a robust discussion on policy within that framework may bear fruit. The respondent trustees have today decided that they will follow that course. That decision removes a potential sticking point in the litigation

and is sensible in the circumstances. I will set out consequential timetabling directions below.

[21] On the question of personal undertakings, the respondent trustees say that the Judicature Amendment Act 1972 does not apply because (in terms of s 3) the trustees are not a body corporate and there is no exercise of a statutory power of decision. That means that this is essentially a private action under the s 66 of the Trustee Act 1956 and an undertaking as to damages is therefore required by r 7.54 of the High Court Rules, such undertaking being required not just from the Mäori Council, but also from Sir Edward.

[22] Mr Palmer does not concede that Mr Barker is right in respect of the Judicature Amendment Act 1972, and he argues also that the prerogative writs may be available. In addition, he says, given Sir Edward's role as a trustee, it is quite inappropriate even under r 7.54 to hold him to a personal undertaking. He has no interest in this litigation other than his interest as a trustee in complying with the law.

[23] I consider, at this stage at least, that undertakings should not be required. I take that view because, whilst the public law element in this litigation remains extant, undertakings are not required in respect of that dimension of the proceeding. Secondly, and probably more importantly, I agree that the question in relation to alternate trustees is genuinely arguable and that it would not be appropriate to impose a requirement on trustees genuinely seeking clarification of their obligations and with no personal stake in the outcome. Such a requirement would clearly have an inappropriate chilling effect on trustees seeking clarification of the law.

[24] For his part, Mr Palmer also sought an order that his clients' costs be met by the Trust under s 71 of the Trustee Act. Since then, I am advised, the trustees on both sides are now agreed that their respective costs be met from Trust funds. In light of the issues arising, that seems to me an entirely sensible and responsible approach. I agree with Mr Barker that it is inappropriate for the Mäori Council's costs to be covered in the same way, although that distinction will probably now be somewhat academic.

[25] There will accordingly be orders as follows:

(a) the trustees are prevented from further considering the agenda items on which the permanent Mäori appointor appointed the trustees are conflicted until a substantive judgment on the issue of alternate trustees or, in the alternative, until FOMA and the Mäori Council agree on the appointment of a third alternate trustee and the mode generally of alternate trustee participation;

(b) the affidavits of Sir Edward Durie and Ms Foulkes are confidential and there will be no access to the Court file without leave of this Court;

(c) the reasonable costs of the applicants and respondent trustees may be met from the funds of the Trust pursuant to s 71 of the Trustee Act;

(d) the respondent trustees will file and serve their application for directions by ***5pm*** on ***Thursday 11 April 2013***;

(e) in the meantime (and although I am alive to the possibility that this pleading may be superseded by the directions application) the applicants will file and serve an amended statement of claim by ***Wednesday 3 April 2013*** and the respondent trustees will file their defence by ***Friday 5 April 2013***;

(f) there will, of course, be no order for costs.

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**Williams J**