

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

**CIV 2015-485-463  
[2015] NZHC 1398**

IN THE MATTER of section 66 of the Trustee Act 1956  
IN THE MATTER of an application for a direction under  
section 66 of the Trustee Act 1956  
BETWEEN TE KENEHI ROBERT MAIR,  
NANCY TE URUMANAO TUAINÉ,  
JOHN NIKO MAIHI,  
GERRARD PAUL ALBERT AND  
BRENDON TE TIWHA PUKETAPU  
Applicants  
AND TIRA PEHI  
Person directed to be served

Hearing: 19 June 2015

Counsel: J P Ferguson and H Irwin-Easthope for Trustees  
No Appearance for T Pehi

Judgment: 19 June 2015

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**JUDGMENT OF BROWN J**

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[1] Ngā Tāngata Tiaki o Whanganui (the Trust) is a common law trust established by a Deed of Trust dated 4 August 2014 (the Trust Deed) as the post-settlement governance entity for Whanganui Iwi in the context of the settlement of the historical Treaty of Waitangi grievances of Whanganui Iwi relating to the Whanganui River.

[2] The applicants are the Initial Trustees of the Trust. They hold office from the date of the Trust Deed until the date on which they are succeeded by the election of Trustees in accordance with the procedure set out in the Second Schedule of the Trust Deed. One of the functions of the Initial Trustees is to organise and manage

the first election of Trustees which must be held prior to the date upon which the settlement legislation is enacted giving effect to the Whanganui River Deed of Settlement.

[3] An issue of interpretation has arisen under the Trust Deed that affects the nomination process that is required to be conducted by the applicants. Consequently the applicants apply to the Court for a direction pursuant to s 66 of the Trustee Act 1956 determining in relation to the exercise of a power of decision vested in the applicants as trustees the following issue:

Whether the written resolution of Te Rūnanga o Te Awa Tupua received by Ngā Tangata Tiaki o Whanganui (and signed by all but one of the persons that Te Rūnanga o Te Awa Tupua agreed would sign the resolution at a meeting on 17 May 2015) satisfies the requirements of paragraphs 4.5 and 4.6 of the Second Schedule to the Trust Deed of Ngā Tāngata Tiaki o Whanganui.

[4] The application was filed on a without notice basis together with an application seeking leave to bring the proceeding by way of originating application. In my Minute of 16 June 2015 I granted leave to commence the proceeding by originating application. Having considered the affidavit of Ms H F T Smith in support of the application I directed that notice of the application should be given to Ms Tira Pehi whose failure or refusal to sign the written record of the resolution of Te Rūnanga o Te Awa Tupua from the hui of 17 May 2015 resulted in the need for the making of the application to the Court.

[5] Ms Pehi has filed a notice of appearance indicating that she does not oppose the applicants' application for directions pursuant to s 66 and she does not propose to participate in the hearing of the matter.

### **The context to the application**

[6] The background to the application is conveniently summarised in the originating application as follows:

- (c) Under the Trust Deed, the first election of trustees to the Trust is required to be completed before the annual general meeting of the Trust on 26 September 2015.

- (d) The nomination and election process prescribed in the Second Schedule to the Trust Deed is a staged process over six months.
- (e) The nomination and election process for the first election of trustees commenced in March 2015.
- (f) The first stage of the nomination process under the Trust Deed requires nominations for three (of seven) trustee positions to be sought from Te Rūnanga o Te Awa Tupua, a collective hapū forum within Whanganui Iwi.
- (g) An issue has arisen regarding the first stage of the nomination process under the Trust Deed.
- (h) The issue is a question of interpretation regarding the validity of the written resolution received from Te Rūnanga o Te Awa Tupua in terms of paragraphs 4.5 and 4.6 of the Second Schedule to the Trust Deed.
- (i) The question of interpretation affects the number of trustee positions for which nominations are publicly called in the second stage of the nomination process under the Trust Deed.
- (j) The timeframes in the Trust Deed require nominations in the second stage of the nomination process to be called for by public notice by Friday 26 June 2015.
- (k) Paragraph 5.3 of the Third Schedule to the Trust Deed provides that the quorum of the Trust is 50% or more of the trustees, which is three (of the current five) trustees.
- (l) Three of the five trustees (being Brendon Te Tiwaha Puketapu, John Niko Maihi and Gerrard Paul Albert) are interested trustees pursuant to clause 22.1 of the Trust Deed as they were candidates for nomination by Te Rūnanga o Te Awa Tupua under the first stage of the nomination process.
- (m) Pursuant to clause 22.4(b) of the Trust Deed interested trustees cannot be counted for the purposes of forming a quorum.
- (n) The Applicants cannot form a quorum to determine the issue of interpretation.
- (o) The Applicants are consequently unable to publicly call for nominations as required under the second stage of the nomination process in the Trust Deed without the Court's direction on the question of interpretation.
- ...
- (r) There is particular urgency with this Originating Application because a decision of the High Court is required by Tuesday 23 June 2015 to avoid a breach of the requirements of the Trust Deed (which require nominations in the second stage of the nomination process to be called for by public notice by Friday 26 June 2015).

## Aspects of the Trust Deed relevant to the election of Trustees

[7] The Trust Deed provides that there shall be no more than seven trustees. Te Rūnanga o Te Awa Tupua is a hapu forum within Whanganui Iwi responsible for the nomination of candidates for election to three trustee positions in accordance with the Second Schedule of the Trust Deed. Paragraph 4 of the Second Schedule relevantly provides:

### 4. NOMINATIONS

4.1 In respect of the seven (7) Trustee positions, the Trust will seek nominations of eligible candidates for election:

- (a) in respect of three (3) Trustee positions, from Te Rūnanga o Te Awa Tupua; and
- (b) in respect of four (4) Trustee positions, from all Adult Registered Members of Whanganui Iwi.

4.2 At least 6 months before the annual general meeting of the Trust for the relevant Income Year, and in any event in sufficient time for the election to be concluded in accordance with *rule 3.7* of this Schedule, the Trust will give written notice to Te Rūnanga o Te Awa Tupua of:

- (a) the pending expiration of the term of office of Trustees;
- (b) the date at which the election of Trustees will be held;
- (c) the entitlement of Te Rūnanga o Te Awa Tupua to nominate candidates for election for three (3) of the seven (7) Trustee positions that are open for election; and
- (d) the date by which nominations for the three (3) Trustee positions are to be provided by Te Rūnanga o Te Awa Tupua to the Trust, such date to be no later than two (2) months after the date of the written notice to Te Rūnanga o Te Awa Tupua.

4.3 Any member of Whanganui Iwi wishing to be considered for nomination by Te Rūnanga o Te Awa Tupua may provide the Whanganui hapū to which he or she affiliates with the information specified in *rule 4.12(a) to (c)* of this Schedule and, if endorsed by that hapū, the hapū shall provide that information to Te Rūnanga o Te Awa Tupua.

...

4.5 The nominations from Te Rūnanga o Te Awa Tupua must be provided in writing in the form required under *rule 4.12* of this Schedule and received by the Trust by the date specified in the notice under *rule 4.2(d)* of this Schedule.

4.6 In the event that the number of nomination forms received by the Trust from Te Rūnanga o Te Awa Tupua within the timeframe specified in *rule 4.2(d)* of this Schedule is less than or equal to the three (3) Trustee positions for which nominations from Te Rūnanga o Te Awa Tupua have been sought:

- (a) the nominees in those nomination forms will be deemed to be duly elected as Trustees and a declaration for the purposes of *rule 9.1* of this Schedule will be deemed to have been made as at the date of the annual general meeting for the relevant Income Year; and
- (b) in respect of those Trustee positions for which there are insufficient or no nomination forms received by the Trust from Te Rūnanga o Te Awa Tupua, the Trust will seek nominations from Adult Registered Members of Whanganui Iwi in accordance with *rule 4.7* of this Schedule in respect of those remaining Trustee positions.

...

4.12 The nomination form prescribed by the Trust which must:

...

- (d) in the case of nominations by Te Rūnanga o Te Awa Tupua under *rule 4.5* of this Schedule, be accompanied with a written resolution of Te Rūnanga o Te Awa Tupua endorsing the nomination; or
- (e) in the case of nominations by Adult Registered Members of Whanganui Iwi under *rule 4.9* of this Schedule, be countersigned by not less than three (3) Adult Registered Members.

### **The nomination process by Te Rūnanga o Te Awa Tupua**

[8] Ms Smith, who is the Interim Manager Settlement Implementation at Ngā Tāngata Tiaki o Whanganui, explained in detail the steps which were taken in the nomination process by Te Rūnanga o Te Awa Tupua. In particular she:

- (a) annexed the written notice from Ngā Tāngata Tiaki to Te Rūnanga o Te Awa Tupua dated 26 March 2015 in accordance with para 4.2;
- (b) related the events at the hui of 19 April 2015 which she attended together with the Initial Trustees;

- (c) annexed the nomination form which she provided under cover of an email of 20 April 2015;
- (d) noted the events at the second hui on Sunday, 3 May 2015;
- (e) listed the 18 persons in respect of whom nomination forms were received by Ngā Tāngata Tiaki by 11 May 2015;
- (f) explained the events at the final hui on 17 May 2015.

[9] With reference to the hui on 17 May 2015 she stated:

- 40. The hui on 17 May was a lengthy one commencing at 11.00 am and concluding at approximately 8.00 pm. In addition to the presentations by each of the nominees who attended the hui (and the majority did attend in person), there was extensive discussion and debate regarding the process by which Te Rūnanga o Te Awa Tupua would determine the nominations that it wished to endorse and submit to Ngā Tāngata Tiaki and the number of nominations that it wished to endorse and submit. In the course of the hui, the attendees broke into smaller tupuna rohe/hapū groups to discuss certain issues and then reconvened for collective discussions.
- 41. At an early stage of the hui, and before any decision regarding the process that Te Rūnanga o Te Awa Tupua would use to endorse the nominations was made, the requirement for a written resolution to be provided to Ngā Tāngata Tiaki was discussed. It was agreed that the final resolution of Te Rūnanga o Te Awa Tupua from the hui would be signed by the following 11 persons comprising the facilitators of the hui, representatives of certain tupuna rohe/hapū groups and pāhake (senior iwi members):

Hui facilitators:

- (a) Rumatiki Henry Turoa (Hinengakau); and
- (b) Joey Allan (Hinengakau).

Representatives of tupuna rohe/hapū groups:

- (c) Thomas Treanor (Tamahaki);
- (d) Tira Pehi (Uenuku);
- (e) Hone Tamehana (Tupoho);
- (f) Monica Mataamua (Hekeawai); and
- (g) Jenny Tamekehu (Tamaupoko).

Pāhake:

- (h) Raana Mareikura;
  - (i) Jo Takarangi-Firmin;
  - (j) Turama Hawira; and
  - (k) Hokio Ngataierua-Tinirau.
42. Following the presentations made by each of the prospective nominees to the hui, the nominees were excluded from the hui while discussion proceeded regarding how Te Rūnanga o Te Awa Tupua would determine the nominations that it wished to endorse and submit to Ngā Tāngata Tiaki and the number of nominations that it wished to endorse and submit.
43. It was ultimately agreed by Te Rūnanga o Te Awa Tupua that:
- (a) it only wished to endorse and submit three nominations to Ngā Tāngata Tiaki; and
  - (b) the three nominations to be endorsed by Te Rūnanga o Te Awa Tupua would be determined by a ballot/vote of those persons present at the hui.
44. As a result of that voting process, the three nominees with the most votes at the 17 May hui were:
- (a) Gerrard Albert;
  - (b) Mavis Mullins; and
  - (c) Susan June Osborne.
45. The hui then concluded with the following resolution being put to those present:
- “That at the hui of Te Rūnanga o Te Awa Tupua at Ngapuwaiwaha Marae, Taumarunui, Sunday 17 May 2015, Te Rūnanga o Te Awa Tupua collectively endorse Gerrard Albert, Susan June Osborne and Mavis Mullins as the three (3) candidates to the elected trustee positions to Ngā Tāngata Tiaki o Whanganui.*
46. Those present at the conclusion of the Te Rūnanga o Te Awa Tupua hui on 17 May 2015 approved this resolution.

## Applicable law

[10] Section 66(1) of the Trustee Act provides:

### **66 Right of trustee to apply to court for directions**

- (1) Any trustee may apply to the court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power of discretion vested in the trustee.

[11] My approach to the jurisdiction conferred by s 66(1) is the same as that of Kós J in *New Zealand Māori Council v Foulkes*:<sup>1</sup>

[44] That disarmingly simple provision has become engrafted with a body of qualifying case law. The fundamental purpose of s 66 may be in danger of becoming lost. It is, after all, simply an enactment of a broad Equitable jurisdiction that has long resided in the Chancery Courts.

[45] The approach I take to s 66 is as follows.

[46] First, s 66 may be used to resolve any live question of interpretation of the Trust Deed, as well as any uncertainty as to the exercise of a power. The former power necessarily must fall within s 66, as well as the other matters provided for expressly. It is, therefore, wider than the oft cited passage in *Re Allen-Meyrick's Will Trusts*:

Wherever Trustees have some discretionary power of this kind, where it is properly described as a power or a pure discretion, and they are in doubt how, in the relevant circumstances, they ought to exercise their discretion, they are able to come to the Court and obtain directions what is the proper thing for them to do.

That might seem (although I do not believe it was intended) to confine the Court's role to an advisory one on how powers may be exercised. But that is not in fact the position at all. Section 66 is a robust, parallel source of jurisdiction to resolve any substantial question of law concerning the meaning or administration of a trust. It is not, in my view, confined to points of "minor importance arising from the management of a trust".

## The issue

[12] Following the hui on 17 May 2015 the office of Ngā Tāngata Tiaki prepared the written version of the resolution that was passed at the hui for signing by the 11 persons that Te Rūnanga o Te Awa Tupua had agreed would sign the resolution.

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<sup>1</sup> *New Zealand Maori Council v Foulkes* [2014] NZHC 1777 (citations omitted).

[13] By 26 May 2015 the signatures of 10 of the 11 persons referred to in para 41 of Ms Smith's affidavit<sup>2</sup> had signed the resolution. The one person who had not signed was Ms Pehi. Ms Smith relates in her affidavit the efforts which she made to arrange for Ms Pehi to sign the resolution. In particular I note that in an email dated 24 May 2015 Ms Pehi stated that she would be in Wellington the following day and that she would try to get to Ms Smith's office by 5.00 pm to sign the resolution. In response Ms Smith advised that she would be happy to meet Ms Pehi at an alternative venue if she was unable to come into the office to sign the document. In fact Ms Pehi never signed the document.

[14] The issue which confronts Ngā Tāngata Tiaki is whether Ngā Tāngata Tiaki should treat the written resolution without the signature of Ms Pehi as a valid written resolution of Te Rūnanga o Te Awa Tupua for the purposes of the Trust Deed, in particular paras 4.5 and 4.6 of the Second Schedule.

[15] The issue regarding the validity of the written resolution of Te Rūnanga o Te Awa Tupua is of pivotal importance to the balance of the nomination and election process under the Trust Deed. As Ms Smith explained:

73. Accordingly, if the written resolution of Te Rūnanga o Te Awa Tupua is valid, then:

- (a) the three nominees endorsed by Te Rūnanga o Te Awa Tupua will be deemed to be elected as trustees of effect from the AGM on 26 September 2015;
- (b) nominations will be sought from adult members of Whanganui Iwi (by public notice no later than 26 June 2015) for the remaining four elected trustee positions on Ngā Tāngata Tiaki.
- (c) if more than four nominations are received, elections for those four positions will be held in July/August 2015.

74. Alternatively, if the written resolution of Te Rūnanga o Te Awa Tupua is not valid, then:

- (a) no nominations will have been validly endorsed by Te Rūnanga o Te Awa Tupua;

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<sup>2</sup> At [9] above.

- (b) nominations will be sought from adult members of Whanganui Iwi (by public notice no later than 26 June 2015) for all seven elected trustee positions on Ngā Tāngata Tiaki; and
- (c) if more than seven nominations are received, elections for those seven positions will be held in July/August 2015.

[16] To put the issue slightly differently: is it the consequence of Ms Pehi's refusal to sign the written resolution that there will be no nominees endorsed by Te Rūnanga o Te Awa Tupua and that nominations for all seven elected trustee positions on Ngā Tāngata Tiaki will need to be sought from adult members of Whanganui Iwi?

[17] As noted above there is particular urgency in the determination of the issue because the Trust Deed provides that Ngā Tāngata Tiaki must give public notice to members of the Whanganui Iwi calling for nominations for the remaining elected trustee positions by Friday, 26 June 2015 (being no less than three months before the scheduled annual general meeting of the Trust on 26 September 2015).

### **Decision**

[18] In my view the answer to the question turns on the function which the written version of the resolution of Te Rūnanga o Te Awa Tupua referred to in para 4.12(d) serves.

[19] Both the nominations from Te Rūnanga o Te Awa Tupua referred to in para 4.5 and the nominations from Adult Registered Members of Whanganui Iwi referred to in para 4.9 are required to be in writing in the form prescribed by r 4.12. Clause 4.12(a) to (c) specifies the contents of the nomination forms from both sources.

[20] In the case of the Adult Registered Members the nominations are to be countersigned by not less than three such members. There is no equivalent requirement in relation to the nominations of Te Rūnanga o Te Awa Tupua. Instead the written nominations are to be "accompanied" by a written resolution of Te Rūnanga o Te Awa Tupua "endorsing the nomination".

[21] In my view the relevant resolution is the resolution which was put and passed at the hui on 17 May 2015. The terms of that resolution are as recorded at para 45 of Ms Smith's affidavit.<sup>3</sup> Consistent with that analysis, the document signed by the nominated persons (except Ms Pehi) refers to a resolution in those exact same words.

[22] I consider that the function of the "written resolution" referred to in para 4.12(d), which is to accompany the nominations of Te Rūnanga o Te Awa Tupua, is to provide written verification of a resolution which has already been proposed and passed orally in the context of a hui. Unlike para 4.12(e), para 4.12(d) does not specify the mode of verification or require that such verification be provided by a specified number of people present at the hui.

[23] From a Te Rūnanga o Te Awa Tupua perspective it would have been desirable and preferable that all those persons who were nominated to add their signatures to the written record of the oral resolution passed on 17 May 2015 should have proceeded to do so. However it does not follow that the written resolution is invalid by reason of the absence of the signatures of one or more of those persons if the document nevertheless provides sufficient verification of the resolution for the purposes of para 4.12(d).

[24] In my view the document annexed as exhibit J to the affidavit of Ms Smith, which records the terms of the resolution passed on 17 May 2015 and which contains the signatures of all those referred to in para 41 of her affidavit (save for Ms Pehi), constitutes ample compliance with the requirement in para 4.12(d).

[25] Consequently under s 66(1) I provide a direction that the written resolution of Te Rūnanga o Te Awa Tupua received by Ngā Tāngata Tiaki o Whanganui (and signed by all the persons, except Ms Pehi, that Te Rūnanga o Te Awa Tupua agreed would sign the resolution at the hui on 17 May 2015) satisfies the requirements for paras 4.5 and 4.6 of the Second Schedule to the Trust Deed of Ngā Tāngata Tiaki o Whanganui.

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<sup>3</sup> At [9] above.

[26] No order for costs is sought by the applicants.

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Brown J