

IN THE SUPREME COURT OF NEW ZEALAND

SC 95/2013
[2014] NZSC 58

BETWEEN JILLIAN NAERA, KEREAMA PENE,
ANAHA MOREHU, WARWICK
MOREHU and ERIC HODGE
Applicants

AND PIRIHIRA FENWICK, WIREMU KINGI
and HIWINUI HEKE
First Respondents

TAI ERU
Second Respondent

Court: Elias CJ and William Young J
Counsel: F E Geiringer for Appellants
D G Hurd and J C Jeffries for Respondents
Judgment: 19 May 2014

JUDGMENT OF THE COURT

A The application by Jillian Naera, Kereama Pene, Anaha Morehu, Warwick Morehu and Eric Hodge for leave to appeal against the decision of the Court of Appeal of 8 August 2013 is declined.

B The application by Pirihira Fenwick, Wiremu Kingi and Hiwinui Heke for leave to appeal against the decision of the Court of Appeal of 8 August 2013 is granted. The questions for determination on the appeal are:

- 1. Was the Court of Appeal correct to hold that the Tikitere Project Agreement was voidable because three of the trustees were beneficially interested in other trusts which were parties to the Agreement?**
- 2. If so, was the Court of Appeal correct to hold that the remedy of rescission could be withheld only if third party interests were**

affected or should it have required general inquiry into whether rescission was in all the circumstances appropriate?

C No order for costs on the applications is made.

REASONS

[1] The Court has before it applications for leave to appeal by both parties to a decision of the Court of Appeal in CA542/2011 delivered on 8 August 2013.¹ The applicants are some of the beneficiaries of the Whakapoungakau 24 Ahu Whenua Trust. The respondents, who cross-apply for leave to appeal, are the trustees of the Trust. In these reasons we refer only to the application which we are dismissing.

[2] The case concerns a block of Maori freehold land, Whakapoungakau 24, administered by the Whakapoungakau 24 Ahu Whenua Trust (also known as the Tikitere Trust). The Trust was established by trust order in 1999 under Te Ture Whenua Maori Act 1993 and as of 2009 had some 1,222 beneficial owners. The trust order was varied by order of the Maori Land Court in 2004 and 2006 to allow the trustees to enter into joint ventures and to develop the area as a geothermal tourism park.

[3] In November 2008 the Trust, through Tikitere Geothermal Park Ltd, entered into the Tikitere Project Agreement, a joint venture agreement for the purpose of establishing a geothermal power station. The other parties to the agreement were two other trusts, the Manupirua Ahu Whenua Trust and the Paehinahina Mourea Trust, to which three of the trustees of the Whakapoungakau 24 Ahu Whenua Trust were connected, with two of them being beneficially interested in those trusts.

[4] The applicants objected to the actions of the trustees and took the position that the trustees had no power to enter into the Tikitere Project Agreement. They were unsuccessful in the Maori Land Court² and Maori Appellate Court³ in the

¹ *Naera v Fenwick* [2013] NZCA 353 [*Naera v Fenwick* (CA)].

² *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Waiariki MB 279 (15 WAR 279) [*Naera v Fenwick* (MLC)].

³ *Naera v Fenwick – Whakapoungakau 24* (2011) Maori Appellate Court MB 316 (2011 APPEAL 316) [*Naera v Fenwick* (MAC)].

argument that cl 3(a) of the Trust order, under which the trustees purported to act, did not empower the trustees to enter into the Tikitere Project Agreement.

[5] Clause 3 sets out the general and specific powers of the trustees. So far as is relevant, it provides:

3 Powers

The trustees are empowered:

(a) General

In furtherance of the objects of the Trust and except as hereinafter may be limited to do all or any of the things which they would be entitled to do if they were the absolute owners of the land PROVIDED HOWEVER that the Trustees shall not alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority or by partition as hereinafter provided.

(b) Specific

Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the powers of the Trustees it is declared that the Trustees are empowered:

i To buy

... [by purchase or exchange but only through the agency of the Maori Trustee or by other means to ensure vesting on appropriate trusts].

ii To subdivide

... [requiring application to the Court for partition orders].

...

xvi To operate as a Geothermal Tourism Park

...

xvii To represent owners

... [in planning matters or in negotiations with statutory authorities and local authorities].

xviii To enter into joint ventures

To join with others and to undertake and form companies and enter into joint ventures with other Maori Authorities sited over the same field to investigate the possibility of establishing a Geothermal Power Station and to take advantage of the findings. To process any other product resulting from the venture to be processed upon trust property. Those joint ventures and companies shall not provide that the Trustees can receive income other than in their capacity as Trustees pursuant to the existing Trust order and the accounts for the joint ventures and the companies are to be shown as part of the accounts of this Trust. The fees of any independent Director be set by the shareholders.

...

The remainder of clause 3(b) contains specific powers to improve the land, erect dwellings and to employ, borrow and set aside cash reserves. An amendment in 2006 removed a specific power to farm the land.

[6] The conclusion of the Maori Land Court and Maori Appellate Court on the interpretation of cl 3(a) entailed rejection of the argument by the beneficiaries that the inclusion of the specific powers in cl 3(b) of the Trust order limited the powers under cl 3(a).⁴ The Courts pointed out that cl 3(b) was expressed as not limiting cl 3(a). Reliance on cl 3(a) was necessary since the beneficiaries had indicated a challenge to the variation of the Trust order which authorised joint ventures under cl 3(b) which did not have to be resolved if the Agreement was within the powers of the trustees under cl 3(a). The Maori Land Court and the Maori Appellate Court applied earlier Maori Land Court authorities which had held that cl 3(a) (a common clause in such trust orders) gave trustees full powers in respect of the land, limited only by the restriction that they cannot sell the land. The effect of the Agreement was similar to that of a lease and was within the powers of the trustees.

[7] The decisions of both Courts also entailed rejection of the subsidiary argument that interpreting cl 3(a) to permit the trustees to enter into the agreement without reference to the beneficiaries was contrary to ss 229 and 244 of Te Ture Whenua Maori Act, which require beneficiaries to be consulted where the Maori

⁴ *Naera v Fenwick* (MLC), above n 2, at [98]–[101]; *Naera v Fenwick* (MAC), above n 3, at [20]–[29].

Land Court, respectively, varies the trust on application by the trustees and approves dealings with trust property which the Trust order does not authorise the trustees to undertake.

[8] The Court of Appeal fully considered the interpretation point and concluded that the Maori Land Court and Maori Appellate Court had been correct in the interpretation of cl 3(a).⁵ The Court pointed out that the subsidiary argument was misconceived since ss 229 and 244 operated in the very different circumstance where the trustees had no power under the Trust order to undertake the dealing in issue and the Maori Land Court was asked either to authorise the specific dealing or to vary the trust. The effect of and the requirements of consultation under ss 229 and 244 are not affected by the interpretation of cl 3(a) as empowering trustees to deal with trust property without reference to the beneficiaries.

[9] The applicant beneficiaries seek leave to appeal further to this Court on the interpretation of cl 3(a). They also flag further points in relation to the validity and scope of cl 3(b) which it is unnecessary to deal with if the trustees are held to have power to enter into the agreement under c 3(a).

[10] The applicant beneficiaries acknowledge that “[o]n its face and considered in isolation [cl 3(a)] undoubtedly grants the trustees extremely broad powers easily encompassing entering into the Tikitere Project Agreement”. They say, however, that, construed in conformity with the emphasis in the Act on consultation with beneficial owners in ss 229 and 244 and Maori tradition on consensus decision-making, the power should be more narrowly construed to preclude such significant change in use of land which had previously been used only for farming and tourism. They contend that the wide meaning given by the Courts below to cl 3(a) makes the specific power contained in cl 3(b) otiose and that the better interpretation is that, “notwithstanding the generality of cl 3(a) and the opening words of cl 3(b), cl 3(b) is a limit on cl 3(a)”. The applicants contend that cl 3(a) is properly to be construed as limited by the specific powers contained in cl 3(b) rather than cl 3(b) being, as the Court of Appeal considered, specific examples within the

⁵ *Naera v Fenwick* (CA), above n 1, at [33]–[38].

more ample power of cl 3(a), imposing specific “procedural” requirements only in relation to matters not in contention here.⁶

[11] The point of interpretation has been fully considered by the three Courts which have heard the case to date. They are in agreement on the essential point of interpretation that the scope of cl 3(a) empowered the trustees to enter into the joint venture. As the Court of Appeal noted, the breadth of cl 3(a) has been acknowledged in previous decisions of the Maori Appellate Court. No basis on which it would be proper for this Court to undertake further review is made out. There is no appearance of miscarriage of justice.

[12] As an alternative argument, the applicants seek to raise for the first time in this Court the argument that in 1999 (at a time when the trustees were specifically authorised to farm the land) the Maori Land Court lacked the power to approve cl 3(a). It is said to “emasculate the requirements of ss 229 and 244 to consult with owners and thereby defeat one of the objectives of the Act”. Section 226(1) authorises the Maori Land Court to “confer on the trustees such powers, whether absolute or conditional, as the Court thinks appropriate having regard to the nature and purposes of the trust”. The matter was not raised in the lower Courts and cannot properly be raised for the first time on appeal to this Court. Power exists under the Act to seek review of trust orders should that course be desired.⁷ In any event, the reliance in the argument on ss 229 and 244 seems misplaced for the reason given by the Court of Appeal in considering that they were of no assistance in relation to the applicants’ argument on the interpretation of cl 3(a): ss 229 and 244 are concerned with variation of trust and with Court authorisation for dealings by trustees which they do not have power to undertake without such authorisation.

Solicitors:
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Dowthwaite Law, Rotorua for Respondents

⁶ At [34].

⁷ Te Ture Whenua Maori Act 1993, s 231.