

IMPORTANT LESSONS FOR TRUST GOVERNANCE FROM TRUSTS THAT BENEFIT NEW ZEALAND'S
INDIGENOUS MAORI-RECENT DEVELOPMENTS by

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INTRODUCTION

The landmark New Zealand Court of Appeal decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641[SOE Case] marked a watershed in New Zealand's jurisprudence concerning the relationship between the Government of New Zealand('the Crown') and the indigenous Maori peoples of New Zealand. Very recently, New Zealand's highest Court, the Supreme Court in its decision in *New Zealand Maori Council v Attorney-General*[2013] 3 NZLR 31 referred to the SOE case as follows:

'The SOE case by the Court of Appeal is a judgment of *great authority and importance to the law concerning the relationship between the Crown and Maori*' (emphasis added)[53].

The SOE case involved the granting of declaratory relief in respect of the proposed transfer from the Crown to State-Owned Enterprises, of assets which could form a significant component of reparation that would need to be made to Maori as redress for historical breaches of their property rights that had occurred through confiscation of their land and resources. As part of this redress, the SOE case held that the transfer could not occur until there were in place safeguards to ensure that Maori claims for historical wrongs committed against them would not be prejudiced through the Crown divesting itself of such property.

In achieving this milestone, the SOE case was seen as not only real cause for optimism for Maori but in doing so, would also be perceived as a development which would engender a sense of national reconciliation between the indigenous Maori and the majority of New Zealand's non-Maori population. While there has generally been a national consensus that Maori ought to have redress for historical wrongs committed against them by the Crown, New Zealand has been looked upon as an international success story for the progress that has been made over the years in compensating Maori. While the current New Zealand Government appears to have made and continues to make record progress in the sheer number of settlements it has reached with numerous Maori tribes and sub-tribes, there appears to be clearly a new challenge emerging for Maori.

A not insignificant number of these settlements have involved the transfer of significant resources to trusts. These trusts which are set up on behalf of particular Maori tribal groups, are charged with managing these large and valuable assets on behalf of the groups for whom the assets are held on trust. Since there continue to be a not insignificant number of Maori tribal groupings that have yet to obtain final redress from the Crown, there is also a Trust namely the Crown Forestry Rentals Trust('CFRT')that has been set up to provide financial assistance to some of these tribal groups, particularly those with claims involving forestry resources. The assistance includes the provision of funding which is required to enable these groups to prepare their claims for compensation and have

these registered as official claims with the Waitangi Tribunal (Tribunal). The tribunal is a body set up by law with which an official claim for compensation has to be registered and which also considers the merit of the claim in order to make recommendations on whether and the extent to which it should be the subject of compensation by the Crown. Once the claim has been prepared and officially registered, there is additional funding available through the Trust for the cost of conducting negotiations with the Crown, with the aim of reaching a practical settlement of the claim.

It would be fair to say that the current position regarding progress made by Maori in their goal to both seek and obtain redress is that they have managed to successfully set up entities including trusts. These trusts have played and continue to play a significant role in managing these significant and valuable assets on behalf of Maori tribal groups. There is also a significant Trust namely the CFRT that is a source of valuable funding. The funding that is available is being targeted towards the preparation and official lodging of a claim and then additional funding for negotiations of those claims with a view to settling them with the Crown.

This being the general path that has been laid out to achieve redress from the Crown, the development that has become of significant legal interest as of late has been significant instances of failure by trustees to uphold the terms of the trust and secondly the struggle and state of conflict among such trustees who are charged with operating these trusts for the beneficiaries who are indigenous Maori. That there is conflict among trustees is not unexpected. However, continued conflict which seriously impairs the operation of a trust resulting in applications to the New Zealand High Court for rulings and directions, will not escape the attention of the Court. In a 6 month old decision by the High Court in ***New Zealand Maori Council v Angela Foulkes*** [2014] NZHC 1777 in July 2014, the opening comments of the Court judgment were as follows:

“It is unlikely that any single trust has given rise to more disagreement and litigation in recent years than the Crown Forestry Rental Trust. What was supposed to be a compact for consensus, after Crown attempts to sell forest lands in the 1980s were thwarted by the Court of Appeal, has become a crucible for continued conflict”[1]

In a High Court decision, 13 years earlier involving 2 Maori sub-tribes, the conflict among trustees administering the affairs of the Ngati Karewa & Ngati Tahinga Trust, which was a charitable trust was the subject of attention by Randerson J in ***Attorney General v Ngati Karewa and Ngati Tahinga Trust*** HC Auckland M2073/99, 5 November 2001. The Judge observed that:

“This is a sad case involving a charitable trust known as the Ngati Karewa and Ngati Tahinga Trust. It was established in 1985 to hold ancestral lands in the Port Waikato area together with other assets for the benefit of Maori generally but with preference to the peoples of the Ngati Karewa and Ngati Tahinga subtribes or hapu.

[2] For much of the time since the trust was established, there have been on-going disputes and litigation over the way in which it is administered” [1]-[2]

Where conflict amongst trustees or between trustees and beneficiaries cannot be practically managed and it results in either a serious breach of trustees’ duties or a state of deadlock in the trust’s administration or ability to viably function, the Courts have shown a willingness to intervene

in the interests of the beneficiaries. Such intervention can involve the outright dismissal of trustees and the appointment of an interim trustee. The interim trustee could quite capably operate the trust but under the supervision of the High Court. In the very recent High Court decision in ***New Zealand Maori Council v Angela Foulkes*** the conflict among trustees of the CFRT resulted in numerous High Court hearings where the minority trustees were resoundingly unsuccessful in their applications alleging that the Trust was acting in breach of its Trust Deed. Justice Kos' ruling in July 2014 had the effect of putting the minority trustees on notice. This being that despite their interpretations of how the Trust Deed ought to be interpreted and applied, being at significant variance with the view of the majority and despite the acrimony that may have been caused as a consequence, the minority needed to continue working with the majority of the trustees to further the interests of the CFRT. The Trust was playing a critically important role in assisting Maori in their claims for settlement with the Crown and the trustees collectively could not lose sight of this.

An examination of a select few of these Maori trusts which clearly demonstrate significant conflict at a high level in their operations, serves as a reminder to other Maori and non Maori trusts that issues of governance can arise where trustees lose sight of their obligations under the particular trust deed. The experience with Maori trusts also serves as a reminder of the importance of trustees working together in the preeminent interests of beneficiaries. The High Court for instance in ***Karaka v Ngai Tai Ki Tamaki Tribal Trust*** HC Auckland CIV-2003-404-6161, 9 March 2004, which was the first of eight separate decisions over a period of 5 years or so, clearly illustrates how the High Court will not hesitate to assume a supervisory jurisdiction of trusts, where there is an apparent irretrievable breakdown in the working relationship amongst trustees. It seems appropriate to provide some comment on the specific issues that needed to be addressed in the operations of these trusts, to illustrate the nature of the conflict, the basis for Court intervention and finally the measures taken by the Court to deal with conflicts that arose.

FIRST Trust: Attorney General v Ngati Karewa and Ngati Tahinga Trust

The operations of this Trust were subject to scrutiny by the High Court as a result of complaints that had been made to the Attorney General of New Zealand. The Attorney General responded by issuing proceedings against the Trust and sought a High Court order for the appointment of a new trustee or trustees in substitution for the existing trustees. Proceedings were also taken in the High Court against the Trust in a bid to have the actions and decisions of the trustees reviewed. The specific actions and decisions of the trustees that were relied on as grounds for their removal were the following:

- (i) failure to deal conscientiously and fairly with applications for inclusion on the preferential membership roll of the sub-tribes
- (ii) failure to comply with the provisions of the Trust deed in relation to the appointment of new trustees
- (iii) failure to disclose the accounts and minutes of the trust to beneficiaries and failing to maintain proper audited annual accounts.

(iv) failing to act appropriately in regard to a \$NZD150,000 loan by the Trust to two of its current trustees

Each of these serious failings were examined by the Court and the following findings were made in respect of each respectively:

Failure To Deal With Applications For Inclusion On The Preferential Roll

What was clear from the outset was that there was a Trust Deed, which had specified in some detail how the trustees were expected to administer the Trust's affairs. Clause 10 of the Deed outlined in detail how the trustees were to act in regard to persons that had applied to be included on the roll of preferential beneficiaries of the sub-tribes of Ngati Karewa and Hgati Tahinga. The determination of whether a person may be included on the roll was to be exercised by the trustees acting collectively, fairly and objectively. Justice Randerson presiding as the High Court Judge found on a review of all the evidence that the failings of the trustees towards those beneficiaries who sought inclusion on the roll was so deep seated and had continued for so long. It was accordingly quite unrealistic to expect the remaining trustees to carry out the terms of the Trust relating to inclusion of preferential beneficiaries on the roll of the sub-tribes in question.

Secondly, there were serious failures to comply with the provisions of the Trust Deed regarding appointment of new trustees. The presiding Judge observed how despite the Deed clearly specifying that the power to appoint trustees lay with the preferential beneficiaries in general meeting as stipulated in Clauses 11 and 12 of the Trust Deed, the trustees had on several occasions sought to make these appointments themselves in clear breach of the Deed.

Thirdly, there was a clear breach of the Deed in not having the accounts audited. The Judge specifically commented that the failure to have the accounts audited was:

“..a breach of a fundamental safeguard for the protection of beneficiaries”[96].

Fourthly and finally the High Court Judge found that there had been no valid authorisation for the loan for \$NZD150,000 nor for the later attempts to write it off. In light of these major failings the Judge saw no alternative but to remove the trustees and in doing so observed that:

“Given the lengthy delays in progressing the roll to date and the other conclusions which I have reached about the administration of the Trust and the ability of the remaining trustees fairly to carry out their duties as trustees, I see no alternative but to remove them. I am satisfied in terms of s 51[of the *Trustee Act* 1956] that I should take that step and that it is expedient, difficult, or impracticable so to do without the assistance of the Court”[114].

The removal of the trustees from their role was quite a serious step to take. The trustees being removed with immediate effect also led to an independent trustee, the Public Trustee being appointed as the interim trustee of the trust. It is a salutary lesson for those who remain trustees of trusts but do not act circumspectly as well as for those trustees who choose to act in flagrant breach of the trust deed that they can be held to account, even in cases where due to serious breaches, their removal could well be the inevitable consequence.

SECOND Trust: Karaka v Ngai Tai Ki Tamaki Tribal Trust('Tamaki')

The Trust in *Tamaki's* case had gained recognition as the appointed body which would on behalf of the Ngai Tai tribe, negotiate the tribe's claims before the Waitangi Tribunal. It had also been granted the mandate to conduct negotiations with the Crown for settlement of the tribe's claims. Although the trust had been incorporated as early as 1992, between 1997 and 2004, there had emerged a state of disharmony amongst trustees of the trust. This state of disharmony had exacerbated in 2004 to the point where two distinct factions of trustees had emerged and compounding this state of affairs was the serious financial difficulty the trust found itself in. The High Court decision in *Tamaki* is worth noting in that the intervention by the Court was more invasive than in the case of the first Trust. In *Tamaki*, additional steps were taken besides the removal of the existing trustees by Court Order and appointment of an interim trustee. The added dimension to the Court's intervention was that the trust while operating under the stewardship of the interim trustee, remained subject to the supervisory jurisdiction of the High Court. This meant that the Court supervised the administration of the Trust's activities and this was exercised for a period of five and a half years. The extent of the oversight and supervision is quite apparent from the 29 minutes and 8 judgments that were issued by the High Court over this five and a half year period.

Justice Heath was clear about the aim of the Court's intervention through the Court Orders that had been made. The aim was to restore order to the management of the Trust and in doing so seek to restore confidence by the beneficiaries in those who would later assume the role of trustees and advance the interests of the beneficiaries. The need to restore order to the management of the Trust was not an end in itself. It was imperative that order be restored as a matter of priority in order to enable the Trust to make progress on the tribe's claims for redress against the Crown. Judge Heath was of the view that it was not in the interests of the tribe that two distinct factions running on parallel courses, should lead the Trust in important negotiations with the Crown and other bodies. The Court emphasised that the restoration of order to the Trust's affairs would include members of the tribe eventually assuming responsibility for the election of trustees who would administer the Trust. This would require the tribe members working together for their mutual benefit and if they failed to work together, "they risked losing the prized redress they seek for past wrongs they believe have occurred".

In accordance with the Trust Deed an election was held at an Annual General Meeting of the Trust pursuant to which twelve persons were elected as trustees. Court Orders were made confirming the appointment of the elected trustees and discharging the interim ones. This occurred in December 2009. However, less than 4 years later these elected trustees were again at an impasse and sought assistance from the High Court to find a way forward which would enable the Trust to operate effectively and advance its important negotiations with the Crown. In March of 2013 the matter came before the High Court. Justice Katz made the observation that it was clear from the evidence that the current group of trustees was dysfunctional and could not work together constructively. This was a state of affairs that was to the detriment of the beneficiaries and such a state of dysfunction could well compromise the ability of the Trust to conclude a deed of settlement with the Crown. In early 2013 Justice Katz noted the number of irregularities and breaches of the Trust Deed which had occurred including the absence of a trustee election in 2011. Her Honour ordered the removal of all the trustees with fresh elections to be held.

THIRD Trust: Crown Forestry Rental Trust('the Trust')

Although there were difficulties with the governance of this Trust also, due to disagreement amongst trustees, the disagreements were different in kind from the two previous trusts examined. The two previous trusts experienced the ultimate sanction, which was removal of the entire board of trustees principally for actions that were in flagrant breach of the Trust Deed. In this third case, the problem in respect of the governance of the trust arose principally because of disagreements on how particular provisions of the Trust Deed ought to be interpreted and applied. The Trust was created by trust deed on 30 April 1990. Its relevant purpose was to apply the interest earned on the Trust corpus, to provide financial support to claimants pursuing their claims before the Waitangi Tribunal and in direct negotiations for settlement of their claims with the Crown. Clause 5 of the Deed required that there be six trustees, three of whom were appointed by the Crown and the other three who were to be Maori, appointed by the 'Maori Appointor'. The Maori Appointor comprised the New Zealand Maori Council (NZMC) and the Federation of Maori Authorities (FOMA). It followed that any person that would serve as trustee on appointment by the Maori Appointor, had to be put up by agreement between both Maori organisations. Clause 7 of the Deed provided for the appointment of a chair of trustees. The deed also provided that where trustees were not unanimous on any matter relating to the Trust Fund, decisions could be made by a majority comprising at least two Crown trustees and two Maori trustees. Clause 10 empowered the trustees to decide on criteria for persons applying for funding as claimants and the basis for allocating funds.

The application made by the NZMC and two of the Maori trustees for directions from the High Court are worth reflecting on as the qualifications and experience of particular individuals who served as trustees was very high. Ms Foulkes who was chair of the trustees and a respondent in this Court case had a background in leadership roles at a national level having served as a very senior official in the trade union movement as well as in senior roles in private, public and not-for profit entities. Sir Edward Durie one of the Maori trustee applicants was a former Chief Judge of the Maori Land Court, chair of the Waitangi Tribunal and a former High Court Judge. The second Maori applicant had an extensive background in leadership and governance roles in Maori organisations both at national and local levels. The Maori applicants had taken this matter to Court as they were of the view that the Trust was acting in breach of the Deed. Amongst other matters, they argued that the chair of the trustees was unsuited to her role and lacked the ability to objectively manage the trustees' agenda and discussions. They applied to the Court for the temporary removal of Ms Foulkes as chair and the appointment of an interim independent non-voting chair. In support of their argument they pointed to the decisions of Justice Randerson in *Attorney General v Ngati Karewa and Ngati Tahinga Trust* (the FIRST TRUST discussed above) and the decision of Justice Heath in *Karaka v Hgai Tai Ki Tamaki Tribal Trust* (the SECOND TRUST discussed above). The presiding Judge refused to exercise the High Court's jurisdiction to intervene in the Trust's affairs so as to subject it to judicial management and responded by commenting that:

"The trustees in dispute here are, all of them, highly experienced professionals with expertise in governance, policy, business, finance, treaty claims, and law. They are respected leaders of national standing. And they administer a major national fund whose income is directed at supporting New Zealand's unique truth and reconciliation process. This situation is a world away from that facing the two hapu based trusts that came before Justices Randerson and Heath"

Worth noting however, was that the High Court Judge having heard the application commented as follows:

“What is abundantly clear however is that this application arises in the context of a serious breakdown in the comity one might be justified in expecting between trustees of such wide and long experience, engaged as they are in governing such an important organisation” [23] (*New Zealand Maori Council v Foulkes* [2014] NZHC 747).

The Judge further observed that this Trust had been intentionally structured so that progress would be by consensus among the trustees that represented the Crown and Maori. It followed in the Judge’s view that the attitudes of trustees on both sides had to change, particularly the attitude of the applicant minority trustees who were also the Maori trustees. A failure to act by consensus meant that the future of the trust looked quite bleak as it could seriously jeopardise provision of a significant funding stream required for those seeking to bring their claims for settlement. If such a risk did arise the Court clearly signalled that it would not stand idly by when it noted that:

“And hands-on judicial supervision may well become the last and only remaining option. This Court will certainly not stand on the sideline while trustee conflict at CFRT brings the Waitangi Tribunal process to a standstill. But I remain of the view that with trustees of the calibre of those involved in this Trust, compromise within the limits of the law ought to be not just possible but likely”

In a measure designed to assist trustees to iron out their differences, the Judge was prepared to direct trustees to meet as a group and that the meeting be facilitated by an independent third party or parties. If the trustees could not agree on an independent facilitator then they were to revert to the High Court which would appoint one. Similarly, if the trustees could not agree on an agenda, they should revert to the Court which would, “impose one”.

CONCLUSION

The proper and competent governance of trusts in general is critical. It is even more so when Maori trusts are involved particularly where their involvement is in relation to progressing tribal interests in having settlements registered with the Waitangi Tribunal and negotiations advanced for settlement of historical grievances with the Crown. The Courts through their judgments have clearly indicated that where there is a complete breakdown in the relationship between trustees so much so that the trustees need Court intervention to assist in the governance of these trusts, the Courts will not hesitate to intervene. The Courts have also clearly signalled that in the case of trusts such as the CFRT which provides critical funding that is vital in assisting New Zealand’s unique truth and reconciliation process, they will not stand idly by. Even if the trustees are as highly qualified as ones that serve on the CFRT, the message by the Court is clear, that trustees must act by consensus to advance the wider interest which is the duty owed to their beneficiaries or the duty to advance the purpose of the trust if it is a purpose trust. The Courts have expressed a clear reluctance to intervene in terms of judicial management of a trust’s affairs. Accordingly, there is a heavy onus on trustees to act in accordance with their fiduciary obligations in respect of the beneficiaries of such trusts. Where there is a purpose trust such as a charitable trust, as happens to be the case with numerous Maori trusts, trustees are still obliged to act consistently with the furtherance of such purpose or purposes.

