

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV 2024-404-488  
[2024] NZHC 3497**

UNDER Part 18 of the High Court Rules 2016

IN THE MATTER OF The Ngā Maunga Whakahii o Kaipara  
Development Trust

BETWEEN HOANI NERI PORTER, GLENDITH  
MERCIA SAMSON and EVE BRIAR  
STEENSON  
Plaintiffs

AND RANGIMARIE NAIDA GLAVISH,  
MARGARET TANIA TUKERANGI, TRISYA  
MARIA HEMANA, TRACY DAVIS,  
CHERIE DAWN POVEY, MARY JANE  
SHERARD, TAMAKI MERCER AND  
DEBRA STAR BREWER as trustees of the  
Ngā Maunga Whakahii o Kaipara  
Development Trust  
Defendants

Continued...

Hearing: 6 and 7 August 2024

Appearances: V T M Bruton KC, N L Walker and T T H Hullena for the  
beneficiary plaintiffs  
I T F Hikaka, H E McQueen and M S Bowie for the Majority  
Marae Trustees

Judgment: 21 November 2024

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**JUDGMENT OF CAMPBELL J**

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*This judgment was delivered by me on 21 November 2024 at 3.00 pm pursuant to Rule 11.5 of the High Court  
Rules*

*Registrar/Deputy Registrar*

AND

BETWEEN

MARGARET TANIA TUKERANGI, TRISYA  
MARIA HEMANA, TRACY DAVIS and  
DEBRA STAR BREWER  
Counterclaim Plaintiffs

AND

HOANI NERI PORTER, GLENDITH  
MERCIA SAMSON, EVE BRIAR  
STEENSON, RANGIMARIE NAIDA  
GLAVISH, CHERIE DAWN POVEY, MARY  
JANE SHERARD and TAMAKI MERCER  
Counterclaim Defendants

[1] The Ngā Maunga Whakahii o Kaipara Development Trust (**the Development Trust**) is a post-settlement governance entity created for Ngāti Whātua o Kaipara, following settlement with the Crown of breaches of Te Tiriti o Waitangi. There is disharmony in the Trust. One group of beneficiaries believes the Trust is so dysfunctional that the Court should replace the existing trustees with court-appointed independent trustees. Another group believes there should be an election for trustees. And the groups disagree, in the first place, about who the current trustees are.

[2] The plaintiffs are three beneficiaries of the Development Trust. They seek orders that all current trustees be replaced with two court-appointed independent trustees (**the Replacement Application**). They also seek declarations as to whether, on the proper interpretation of the Trust's trust deed, trustees whose terms have expired remain in office until the election of replacement trustees (**the Interpretation Issue**).

[3] Of the eight defendants, five are indisputably current trustees of the Development Trust. The three other defendants were elected as trustees, but their terms have expired. There is a dispute as to whether they remain in office pending the election of replacement trustees. Four of the five undisputed trustees have defended the claim: Ms Tokerangi, Ms Hemana, Ms Brewer and Mr Davis (**the Majority Marae Trustees**). The other four defendants support the plaintiffs' claim. The Majority Marae Trustees have also brought a counterclaim against the plaintiffs and the other defendants, seeking a declaration that there be an election for trustees and a declaration on the Interpretation Issue.

[4] This judgment deals with questions that the parties agreed to have decided separately from, and in advance of, a hearing of the Replacement Application, namely:

- (a) Should an election be held forthwith?
- (b) If so, on what terms is the election to be held and what steps are necessary to hold that election?

[5] The parties agreed that deciding these questions would necessarily require a determination of the Interpretation Issue.

## **Background**

### *The Development Trust*

[6] The hapū and whānau that whakapapa to the following marae in the south Kaipara are collectively known as Ngāti Whātua o Kaipara:

- (a) Whiti Te Rā o Reweti Marae.
- (b) Te Kia Ora Marae.
- (c) Te Aroha Pā Marae.
- (d) Ōtakanini Marae.
- (e) Puatahi Marae.

[7] The name Ngāti Whātua o Kaipara is not a traditional term. It comes from the settlement process with the Crown. The name was agreed by a majority of the hapū and whānau of the five marae. The name distinguishes those hapū and whānau from other Ngāti Whātua hapū and whānau.

[8] Claims were made in the Waitangi Tribunal on behalf of the hapū and whānau of the five marae in the 1990s. Negotiations towards a settlement were long and complex. They led to a formal Crown offer being made in 2009 which was approved at a hui in December 2009. There were then negotiations over the detailed terms of settlement.

[9] During the negotiations, the Crown required that any settlement funds and property be transferred to post-settlement governance entities, and it wished those entities to be trusts. Between June 2007 and July 2009, Ngāti Whātua o Kaipara held eleven whānau hui to discuss and decide the structure of the governance entities. These hui were held on all five marae. They were held in accordance with tikanga, and provided an opportunity for marae-based discussions, consideration of views, amendments and attempts to achieve consensus. A ratification process then took place from October to November 2010, including a series of six hui and a ballot.

[10] Two trusts were formed to hold property transferred by the Crown under the settlement. The Development Trust was formed to hold commercial assets. The separate Ngā Maunga Whakahii o Kaipara Tari Ppuritaonga Trust was formed to hold cultural assets. This dual-trust structure was used to protect assets of cultural significance from being jeopardised by commercial activities. The Ngā Maunga Whakahii o Kaipara Tari Ppuritaonga Trust is not in issue in this proceeding.

[11] The two trusts were settled by deeds of trust dated 4 April 2011. A deed of settlement between Ngāti Whātua o Kaipara and the Crown was entered into on 9 September 2011.

[12] There are two other relevant entities, which the parties described as “subsidiaries” of the Development Trust:

- (a) Whiti Ora o Kaipara Charitable Trust (**Whiti Ora**). This runs the social services arm of the organisation.
- (a) Ngā Maunga Whakahii o Kaipara Commercial Development Ltd (**KCDL**), which oversees and manages commercial activities and investments on behalf of the Development Trust.

*Broad structure of the Trust Deed*

[13] The Development Trust’s current trust deed is an amended deed dated 28 August 2013 (**the Trust Deed**).<sup>1</sup> I will begin by outlining the broad structure of the Trust Deed, as relevant to this proceeding. Later in this judgment I will examine relevant provisions of the Deed in more detail.

[14] The broad purpose of the Development Trust is to receive, manage and administer the Trust’s assets for the commercial and social development of Ngāti Whātua o Kaipara, on behalf of and for the benefit of the members of Ngāti Whātua o Kaipara, in accordance with the Trust Deed.

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<sup>1</sup> The original trust deed was not in evidence.

[15] The trustees of the Development Trust are appointed in accordance with rules in the First Schedule to the Trust Deed. Rule 1.2 provides that the total number of trustees elected at any one time “is nine persons”. There are three types of trustees:

- (a) Five Marae Trustees representing the hapū of each of the five marae. Each Marae Trustee is elected by registered adult members of the Trust whose primary affiliation is to that marae.
- (b) Three General Trustees elected at large by all registered adult members.
- (c) One Kaumātua Trustee nominated by the Nohoanga Kaumātua<sup>2</sup> and confirmed by a majority of registered adult members who are over the age of 60.

[16] The First Schedule thus draws a distinction between the appointment of, on the one hand, the Marae Trustees and the General Trustees (who are elected) and, on the other, the Kaumātua Trustee (who is confirmed). I will, however, generally refer only to elections, unless it is necessary to say something about the confirmation process.

[17] Rule 3.1 of the First Schedule provides for initial trustees who took office on the date of the Trust Deed. There were only eight initial trustees. They were:

- (a) The five marae lead negotiators with the Crown. The First Schedule described them as “Marae Trustees and Kaumātua Trustees”. (There was not, initially, a separate Kaumātua Trustee, apparently because several of the lead negotiators were kaumātua.) These trustees held office for a term from the date of the Trust Deed and ending on the date of the 2013 annual general meeting (**AGM**).
- (b) Three General Trustees elected in accordance with the First Schedule. These General Trustees held office for a term from the date of the Trust Deed and ending on the date of the 2015 AGM.

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<sup>2</sup> The Nohoanga Kaumātua is a self-selected group of those who are acknowledged by Ngāti Whātua o Kaipara as being people with expertise in te reo ake me ngā tikanga o Ngāti Whātua o Kaipara (the language and tikanga of Ngāti Whātua o Kaipara).

[18] The expiry of the terms of the initial Marae Trustees and General Trustees was staggered at two-yearly intervals (2013 and 2015) to ensure institutional knowledge and continuity of trustees was maintained. After expiry of those initial terms, r 3.2 provides that Marae Trustees and General Trustees are elected for four-year terms and Kaumātua trustees are appointed for two-year terms.

[19] The First Schedule contains detailed rules relating to trustee elections. Generally speaking, trustee elections must be concluded by the time of the AGM in the year in which an election is required for a trustee position.

[20] Rule 11.2 of the First Schedule says a trustee will cease to hold office in certain circumstances. These include where the trustee “completes his or her term of office and is not re-elected”.

[21] Clause 6.2 of the Trust Deed provides that the trustees “shall control and supervise the business and affairs of the Development Trust”. Rule 1 of the Second Schedule requires the trustees to meet not less than three times each year. Clause 7 obliges the trustees to appoint a Tumuaki Kaiārahi (chief executive officer) to manage the day-to-day administration of the Trust.

[22] Proceedings of the trustees are to be conducted in accordance with the rules in the Second Schedule of the Trust Deed. Rule 3 provides that six trustees shall constitute a quorum. Rule 4.3 provides that the trustees may act notwithstanding any vacancy, but if the number of trustees is reduced below the quorum, the continuing trustees “may act only for the purpose of advising of the vacancy or vacancies and taking the steps necessary to procure the election of new Trustees to fill the vacancy or vacancies, and for no other purpose”.

#### *Alleged dysfunction in the Development Trust*

[23] The plaintiffs allege there has been a history of dysfunction in the Development Trust and that this dysfunction remains. These allegations are central to the plaintiffs’ Replacement Application (the application to have all current trustees replaced with two court-appointed independent trustees).

[24] The Replacement Application has not yet had its first case management conference. The parties agreed that the conference should be scheduled after this judgment is delivered. So, although the allegations of dysfunction were addressed in the affidavit evidence filed by the parties for the separate question hearing, the time for filing evidence on these allegations (and on the Replacement Application generally) has not yet passed. Further, the evidence that has been filed on those allegations has yet to be tested by cross-examination. I therefore set out the events that are said to exhibit the dysfunction in as neutral terms as possible, noting where necessary the competing positions of the parties.

[25] Clause 27 of the Trust Deed required the trustees to initiate a review of the operations of the Trust Deed within four years of settlement with the Crown. The trustees engaged David Gray to carry out that review. He produced a report in November 2018 (**Gray Report**). Mr Gray reported widespread dissatisfaction among submitters about the performance of trustees. Submitters voiced concerns about the competence of trustees, an apparent failure by trustees to observe an appropriate separation between governance and management, a failure to ensure that basic corporate systems and processes were in place, the extent of individual trustees' involvement in the operations of the Trust, a perceived lack of accountability by trustees, a suspicion that certain trustees were making a full-time job out of their governance responsibilities, and concerns that Marae Trustees were inappropriately favouring their own marae in the decisions they made. Mr Gray said these concerns came from all levels of the organisation (those involved in both governance and management roles) and from beneficiaries.

[26] Mr Gray himself found that there was no properly functioning planning and reporting system within the Development Trust. This included the absence of adequate financial forecasting, little or no guidance to KCDL about the trustees' requirements and expectations, and a failure to implement the statement-of-intent process required by the Trust Deed. Mr Gray regarded this as a fairly serious failure by the trustees.

[27] Mr Gray made 35 recommendations in his report. At trustee meetings in early 2019, the trustees agreed to respond to the report. The plaintiffs say that, over the next five years, very little change occurred. By contrast, the Majority Marae Trustees say

that the trustees responded to the report and that some of the recommendations were implemented. They note that many of the recommendations were that the Trust Deed be amended, which is a matter that is in the hands of the beneficiaries rather than the trustees. Overall, they say that the trustees' response to the recommendations (to the extent the response lay in the trustees' hands) is indicative of resolution of issues rather than continued dysfunction.

[28] The plaintiffs say that further dysfunction occurred in 2020 and 2021, when the then Tumuaki Kaiārahi, Ms Woods, complained of bullying by Ms Tokerangi (one of the Majority Marae Trustees). The trustees investigated the complaint and resolved to stand Ms Tokerangi down as trustee in December 2020. Ms Tokerangi denies the bullying allegation. She issued a proceeding in the Māori Land Court challenging her being stood down, but discontinued that proceeding on 24 October 2023. By then the Development Trust had spent \$35,000 in defending the proceeding. The Majority Marae Trustees say this does not evidence dysfunction. They say that a complaint was made and then resolved.

[29] The plaintiffs also point to alleged overcharging of the Development Trust by Mr Davis (another of the Majority Marae Trustees). They said this was still the subject of a Police investigation at the time of the hearing. The Majority Marae Trustees, by contrast, say that Mr Davis himself raised an issue of overpayment with the Trust, that it was then investigated and then resolved, and that this again shows an ability to resolve issues rather than showing dysfunction.

[30] The plaintiffs say there was an attempted "reset" by the trustees at a meeting on 3 May 2022, where the trustees resolved to appoint an independent commissioner to provide guidance and assistance to the trustees to transform the Development Trust's operations and governance and to amend the Trust Deed. A post to the Trust's Facebook page on 1 July 2022 said this resolution was a step towards a transformation process to be known as "Tomorrow's Ngāti Whatua". Terms of reference for the independent commissioner were prepared, and a panel of kaumātua from each marae interviewed candidates for the position. However, a disagreement then arose between the Majority Marae Trustees and the other trustees as to whether the terms of reference

matched what was resolved at the 3 May 2022 meeting. This disagreement was never resolved and no independent commissioner was appointed.

[31] The plaintiffs say that this illustrates yet more dysfunction. The Majority Marae Trustees disagree. They say that the terms of reference provided for the independent commissioner to replace the trustees. They say this was not agreed on 3 May 2022 and that it would have been unlawful, as the trustees have no power to have themselves replaced by some other person. The Majority Marae Trustees therefore say they were simply resisting an unlawful proposal.

[32] In any event, this dispute led to factionalisation in 2022. In one faction were the Majority Marae Trustees, Mr Walker (the late Kaumātua Trustee) and Ms Mercer (who has since changed factions), who claimed that Mr Walker was the chair of the Trust. In the other faction were Dame Naida, Ms Sherard and Ms Povey, who claimed that Dame Naida was the chair. Each faction engaged solicitors. Disputes arose about who was instructed to act on behalf of the Development Trust, about the continued employment of the then Tumuaki Kaiārahi, and about to whom Trust employees should report. Several employees of the Trust brought personal grievance claims. Their solicitors were confronted by two sets of solicitors purporting to represent the Trust.

[33] On 9 November 2022, Dame Naida's faction brought a High Court proceeding seeking directions, including a direction that the trustees appoint an independent commissioner. Later that month the Trust's bank, after learning of the disputes between the two factions, froze the Trust's bank account. In February 2023, the parties attended a judicial settlement conference. Some progress was made (including having the bank account unfrozen) but a full resolution was not achieved. The plaintiffs say the proceeding cannot be fully resolved because the then lawyers for each faction have not been paid.

[34] The Majority Marae Trustees acknowledge the existence of these disputes. They say they arose from Dame Naida making unilateral decisions to appoint Tumuaki Kaiārahi and to appoint someone as "Director of Transformation". They say their opposition to this unilateral action was justified and is not dysfunctional.

[35] In April 2023, some of the trustees agreed to develop a “clean up” plan to get the Development Trust back on track. Any progress did not last long, with Dame Naida and Ms Sherard withdrawing from the plan in early May 2023. At a trustee meeting on 30 May 2023, Ms Tokerangi was purportedly appointed chair. Dame Naida and Ms Sherard dispute the validity of the meeting. Since that time, both Ms Tokerangi and Dame Naida have purported (to beneficiaries and to third parties) to be the chair of the Trust. The Majority Marae Trustees accept that this has happened, but say that this dispute, and the dispute over who the current trustees are (explained below), will be resolved by the declarations they are seeking on their counterclaim.

[36] The plaintiffs say that a result of these dysfunctions has been that the Development Trust’s commercial arm, KCDL, is acting without supervision from the Trust and is failing to make the distributions necessary to facilitate the Trust’s activities. Without distributions from KCDL, the Trust has relied on financial support from its charitable arm, Whiti Ora. Whiti Ora exhausted its funds paying staff wages at the Trust and has been non-operational since March 2023.

*An attempt to dissolve the Development Trust*

[37] Some beneficiaries, including the plaintiffs, were so concerned about the alleged dysfunctions that they formed the Ngā Rima Marae o Kaipara Whānau Action Group (**the WAG**). In August 2023, a special general meeting (**SGM**) of the Development Trust was called at the instigation of the WAG. The WAG proposed that the Development Trust be dissolved and have its assets transferred to a new trust established for the benefit of the present and future members of Ngāti Whātua o Kaipara. The new trust was to have an initial independent trustee chosen by the beneficiaries, followed by elections of five Marae Trustees and two Kaumātua Trustees.

[38] Clause 24 of the Trust Deed provides that the Development Trust can be dissolved by special resolution, which means a resolution passed by not less than 70 per cent of votes cast. The SGM was held on 30 September 2023. The special resolution attracted 53.37 per cent support and therefore did not pass.

[39] At the SGM it was agreed that the trustees would meet to approve the financial statements for the year ended 31 March 2022 and to commence calling an AGM and elections. The trustees have, however, remained in two factions and the 2022 financial statements have still not been approved. Part of the reason for this is that a dispute arose as to who are the current trustees.

*Dispute as to who are the current trustees*

[40] Until about the time of the 30 September 2023 SGM, there was no dispute as to who the trustees were. They were:

- (a) The five Marae Trustees who were elected on 26 March 2022. Their four-year terms end on 26 March 2026. The Marae Trustees are Dame Naida Glavish, Ms Tukerangi, Ms Hemana, Mr Davis and Ms Brewer.
- (b) The three General Trustees:
  - (i) Ms Mercer, whose four-year term commenced on 28 September 2019.
  - (ii) Ms Povey and Ms Sherard, whose four-year terms commenced on 30 November 2019.
- (c) The Kaumātua Trustee, Mr Walker, whose two-year term commenced on 26 March 2022.

[41] Ms Mercer's four-year term ended on 28 September 2023. Ms Povey's and Ms Sherard's terms ended on 30 November 2023. Mr Walker died on 8 November 2023. This meant elections were required for the three General Trustees and a nomination and confirmation was required for the Kaumātua Trustee.

[42] A dispute arose as to whether Ms Mercer, Ms Povey and Ms Sherard ceased to hold office as General Trustees when their terms ended. Their position is that they remain as General Trustees, notwithstanding expiry of their four-year terms, until their replacements are elected (which has not yet happened). Dame Naida and the plaintiffs

support that position. By contrast, the position of the other four Marae Trustees (who are therefore styled as the Majority Marae Trustees) is that Ms Mercer, Ms Povey and Ms Sherard ceased to hold office as General Trustees as soon as their terms ended.

[43] This dispute led to a further dispute, which is whether there is a quorum of trustees. The Majority Marae Trustees say the Development Trust currently has only five trustees, being the Marae Trustees, and is therefore inquorate. Dame Naida, Ms Mercer, Ms Povey and Ms Sherard (who I shall refer to collectively as the **Glavish Trustees**) and the plaintiffs say there are eight trustees (the Marae Trustees and the three General Trustees) and so there is a quorum.

[44] The quorum dispute led to yet another dispute, which is whether the steps that the Majority Marae Trustees took in late 2023 and early 2024 to hold an election were valid. In general, the Majority Marae Trustees involved Dame Naida in those steps but did not involve Ms Mercer, Ms Povey and Ms Sherard (taking the view that they had ceased being General Trustees). If Ms Mercer, Ms Povey and Ms Sherard remained General Trustees, the validity of the steps taken towards an election is called into question. I now turn to those steps.

#### *Steps taken towards an election*

[45] At a trustee meeting on 30 May 2023 (before a dispute arose as to who were the current trustees), the trustees discussed the need to commence an election process in June or July 2023, so as to align with an AGM on 30 September 2023. That election did not proceed, it appears because of the SGM that was called by the WAG.

[46] On 28 November 2023, Ms Tukerangi gave notice of a trustee meeting for 6 December 2023. She did not give notice to Ms Mercer (taking the view that she was no longer a trustee, her term having ended on 28 September 2023). Only the Majority Marae Trustees attended the meeting. They resolved to hold an election for the three General Trustee positions and a confirmation vote for the Kaumātua Trustee position, to engage Independent Election Services Ltd (**Election Services**) to assist with the election, and to direct KCDL to assist Election Services with the election.

[47] On 14 December 2023, Ms Tukerangi and Ms Hemana, purportedly on behalf of the Development Trust, engaged Election Services to assist with the election and act as chief returning officer. On 21 December 2023, the Glavish Trustees agreed to the appointment of Election Services to administer the election.

[48] On 19 January 2024, Election Services gave notice of an election of three General Trustees to conclude at an AGM on 20 April 2024. The notice said there would also be a confirmation vote for the Kaumātua Trustee on the same date. The notice called for nominations of candidates for General Trustees by 8 February 2024.

[49] In the meantime, the Majority Marae Trustees took steps to update the register of members of Ngāti Whātua o Kaipara (**the Register**). Only registered adult members may vote in elections for trustees. The Fourth Schedule of the Trust Deed has rules governing the Register. These include that the Trustees are to establish a Whakapapa Committee to make decisions on applications for registration. At a trustee meeting on 2 February 2024, the Majority Marae Trustees appointed a Whakapapa Committee. Dame Naida did not attend the meeting. The other Glavish Trustees were not given notice of the meeting (the Majority Marae Trustees taking the view that they were no longer General Trustees).

[50] Fourteen nominations were received for the three General Trustee positions. On 13 February 2024, Election Services gave notice of the nominations and of an election hui to be held on 9 March 2024. Under r 8.1 of the First Schedule, a candidate who does not attend the election hui is not eligible for election.

[51] The election hui took place on 9 March 2024. Voting papers became available on 18 February 2024. Postal and online voting was to close on 17 April 2024. Ballot box voting was to remain available at the AGM scheduled for 20 April 2024.

#### *Postponement of April 2024 election*

[52] The plaintiffs filed their Replacement Application on 11 March 2024 and sent copies to the Majority Marae Trustees on 18 March 2024. The Replacement Application pleaded that the decisions by the Majority Marae Trustees to call elections were invalid (because they had been made without notice to Ms Mercer, Ms Povey

and Ms Sherard). The plaintiffs did not, however, seek an injunction to prevent the election or AGM from proceeding.

[53] On 20 March 2024, the plaintiffs' solicitors asked the Majority Marae Trustees for urgent confirmation that they would cancel the election and AGM. The plaintiffs reserved their rights to seek an urgent injunction. On 28 March 2024, the Glavish Trustees wrote to Election Services saying that the AGM had to be postponed until such time as the financial statements for 2022, 2023 and 2024 were completed and audited. The Glavish Trustees withdrew their support for the election.

[54] The Majority Marae Trustees declined to cancel the election, but told the plaintiffs on 3 April 2024 that they would abide the decision of the Court if an injunction was sought. The plaintiffs did not seek an injunction.

[55] Postal and online voting completed on 17 April 2024. That day, without reference to the Majority Marae Trustees, Dame Naida took steps to cancel the AGM and election. She instructed the Development Trust's general counsel that the election and AGM would not proceed. She asked the general counsel to post a notice on the Trust's website saying that the AGM had been postponed "due to governance issues and a lack of consolidated audit financial statements for 2022 and 2023" and that the election process "is therefore unable to be concluded".

[56] Once Election Services learnt of Dame Naida's instructions and saw the notice on the website, it emailed both the Majority Marae Trustees and the Glavish Trustees advising that it was not able to complete the election process. The AGM and election did not occur on 20 April 2024.

### **Claim and counterclaim**

[57] In a statement of claim dated 11 March 2024, the plaintiffs allege that the Development Trust has been dysfunctional for several years in numerous respects and that there is significant dissatisfaction among beneficiaries regarding this dysfunction.

[58] The plaintiffs' first cause of action is what I have termed the Replacement Application. The plaintiffs say it is necessary or desirable to remove the current

trustees and that it is difficult or impracticable to do so without court assistance (in part because of alleged concerns that the election that was planned to conclude on 20 April 2024 was not validly called). They seek orders for removal of the current trustees and their replacement by two suitably qualified independent trustees. The plaintiffs propose that the independent trustees arrange for a full accounting of the Trust's position, undertake a full governance review and hold an election for new trustees "at a later date".

[59] In their second cause of action, the plaintiffs plead that, on a proper interpretation of the Trust Deed, Ms Mercer, Ms Povey and Ms Sherard remain as General Trustees until their replacements have been validly elected. They seek a declaration to that effect. They also seek a declaration that all decisions made by the Majority Marae Trustees without notice to Ms Mercer, Ms Povey and Ms Sherard are invalid.

[60] In their statement of defence, the Majority Marae Trustees say there is no basis for the court ordering removal of the trustees when the Trust Deed provides for regular elections of trustees. They say it is in the interests of all beneficiaries to have an election for the General Trustees and the Kaumātua Trustee as soon as possible. They deny the claim that Ms Mercer, Ms Povey and Ms Sherard remain as General Trustees until their replacements have been validly elected.

[61] The Majority Marae Trustees bring a counterclaim against the plaintiffs and the Glavish trustees. The Majority Marae Trustees say there is a need for an election to occur urgently and that there is a dispute as to whether Ms Mercer, Ms Povey and Ms Sherard remain in office pending an election for General Trustees. The Majority Marae Trustees seek declarations that an election should occur. Two alternative declarations are proposed: either (a) that the trustees should take steps to complete the election that was originally scheduled to conclude at an AGM on 20 April 2024 or (b) that the trustees should take steps to procure a new election.

[62] The Majority Marae Trustees also seek declarations that the terms of Marae and General Trustees end upon the expiry of four years from commencement of their terms, and do not continue until an election for their position is held, and that

consequently Ms Mercer, Ms Povey and Ms Sherard ceased to be General Trustees in September and November 2023.

### **Related applications and procedural matters**

[63] It is necessary to note three related procedural matters. The first is that the plaintiffs, when commencing this proceeding, made an interlocutory application for prospective costs orders (**the PCO application**). The second is that the Majority Marae Trustees filed, as a separate proceeding and before commencing their defence and counterclaim in this proceeding, an originating application for *Beddoe* orders.

[64] The third procedural matter is that the parties subsequently reached agreement as to an efficient way to deal with this proceeding (including the PCO application) and the *Beddoe* application. Counsel filed a joint memorandum dated 4 June 2024 seeking various orders and directions, which I made on 5 June 2024. These included:

- (a) An order that there be a separate question hearing to determine:
  - (i) whether an election should be held forthwith; and
  - (ii) if so, on what terms the election is to be held and what steps are necessary to hold that election;(together, **the Election Issues**).
- (b) An order that the affidavits that had already been filed in this proceeding (that is, those filed in relation to the PCO application) and in the *Beddoe* application be used at the separate question hearing.
- (c) Directions for the filing of any further affidavits for the hearing on the Election Issues.
- (d) The *Beddoe* orders sought by the Majority Marae Trustees.

- (e) Some of the orders sought by the plaintiffs in their PCO application. Directions for the disposal of the remainder of the PCO application were to be made following this judgment.
- (f) A direction that the first case management conference for the Replacement Application be set down as soon as possible after delivery of this judgment.

[65] As a result of these orders and directions, and as I noted earlier, the time for filing evidence on the Replacement Application has not yet passed. That is not to say I was short of evidence at the separate question hearing. Some 30 affidavits were before me, with exhibits that ran to over 2,000 pages.

### **Issues**

[66] The parties agreed there should be a separate question hearing to determine the Election Issues. They also agreed that these issues would necessarily include determination of the question whether the General Trustees remain in office after expiry of their four-year terms until replacement trustees have been validly elected (the Interpretation Issue).

[67] There are, therefore, three issues to determine:

- (a) Do trustees whose terms have expired remain in office until replacement trustees have been validly elected?
- (b) Should an election be held forthwith?
- (c) If so, how should the election be held and what steps are necessary to hold the election?

### **Do trustees whose terms have expired remain in office until replacement trustees have been validly elected?**

[68] The answer to this question depends on the meaning of the Trust Deed, properly interpreted.

### *Principles of interpretation*

[69] The usual principles of contract interpretation apply to the interpretation of trust deeds.<sup>3</sup> Trust deeds are therefore interpreted objectively and contextually. The aim is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the trust deed was entered into.<sup>4</sup> This approach reflects that all language “must be interpreted within its overall context, broadly viewed”.<sup>5</sup>

[70] A contextual interpretation is not dependent on the language being ambiguous.<sup>6</sup> However, in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* the Supreme Court said that, while context is a necessary part of interpretation and the focus is on interpreting the document rather than particular words, “the text remains centrally important”.<sup>7</sup> Accordingly, if the language, construed in the context of the document as a whole, has an ordinary and natural meaning, “that will be a powerful, albeit not conclusive, indicator of what the parties meant”.<sup>8</sup> This approach was confirmed by the Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*.<sup>9</sup>

### *The text of the Trust Deed*

[71] Rule 3.1 of the First Schedule provides for the initial trustees of the Trust. It does not say that their terms of office are for a specified time period. Rather, it says their terms end on the date of the 2013 AGM (in the case of the initial Marae Trustees) or the date of the 2015 AGM (in the case of the initial General Trustees).

[72] Rule 3.2 provides for appointment of trustees following the expiry of the initial terms. It says trustees shall thereafter be elected or appointed “for four (4) year terms”

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<sup>3</sup> *Powell v Powell* [2015] NZCA 133, [2015] NZAR 1886 at [54].

<sup>4</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]; and *Powell v Powell* [2015] NZCA 133, [2015] NZAR 1886 at [53]–[54].

<sup>5</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [61].

<sup>6</sup> At [61].

<sup>7</sup> At [63].

<sup>8</sup> At [63].

<sup>9</sup> *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [46]. At [43], the Court confirmed the objective and contextual approach to interpretation.

(in the case of Marae and General Trustees) or “two (2) year terms” (in the case of Kaumātua Trustees) and that trustees so appointed “shall remain Trustees during that term subject to the provisions for earlier removal or replacement provided in this Trust Deed”.

[73] There are provisions in the First Schedule under which a trustee can be removed or replaced earlier than the end of the terms specified in r 3.2:

- (a) Rule 4 sets the timing of elections. Generally, elections are to be concluded by the time of the AGM in the income year in which an election is required. Depending on the timing of that AGM, the election may occur before the incumbent trustees’ two- or four-year terms of office have expired. The new trustees “shall take office” immediately following the announcement of the election result. It is implicit in r 4 that, even if the incumbent trustees’ specified terms have yet to expire, they do not remain trustees once their replacements have taken office.
- (b) Rule 6.2 provides that if there is only one nominee for any of the Marae Trustee positions or the number of nominations for the General Trustee positions is equal to the number of vacancies, no election is necessary and the nominee or nominees “shall be deemed to have been duly appointed”. Depending on timing, such an appointment may occur before the incumbent trustees’ specified terms of office have expired. Again, it is implicit in r 6.2 that, even if the incumbent trustees’ specified terms have yet to expire, they do not remain trustees once their replacements have taken office.
- (c) Rule 11.1 provides that “[n]otwithstanding the foregoing rules of this schedule” a trustee shall “cease to hold office” in several circumstances (such as death or retirement), most of which can occur before the trustee’s specified term has expired.

[74] Rule 3.2 is a firm indicator that trustees who are appointed after expiry of the initial terms remain trustees only during the specified terms of two or four years and do not remain trustees for any longer period. This is because the rule contemplates earlier removal or replacement during those specified terms, but does not contemplate the trustees remaining as trustees beyond expiry of those specified terms.

[75] The plaintiffs submitted that r 3.2 “does not state that a trustee ceases to be a trustee precisely on the fourth anniversary of their election”. That, however, is the ordinary and natural meaning of words which provide for trustees to be elected for a specified time period, which provide that they remain trustees during that time period, which refer to the possibility of their earlier removal or replacement, and which do not make any reference to them remaining as trustees beyond that time period.

[76] Rule 3.2 is not the end of the inquiry. The Trust Deed has to be interpreted as a whole. But, given the language of r 3.2, had it been intended that trustees were to “hold over” beyond the expiry of the specified terms until their replacements were elected, I would have expected an explicit provision to that effect. It would not have been difficult to draft such a provision. Rule 3.1 provided a starting point, specifying that the terms of the initial trustees are to end on the date of AGMs (at which elections were to be concluded). The contrast between rr 3.1 and 3.2 is stark.

[77] The plaintiffs said r 11.1(b) is an explicit holding-over provision. Rule 11.1 provides:

11.1 Notwithstanding the foregoing rules of this schedule, a Trustee shall cease to hold office if he or she:

- (a) retires from office by giving written notice to the Trustees;
- (b) complete his or her term of office and is not re-elected;
- (c) refuses to act;
- (d) is absent without leave from three consecutive ordinary meetings of the Trustees without good reason;
- (e) becomes physically or mentally incapacitated to the extent that he or she is unable to perform the duties of a Trustee;
- (f) becomes bankrupt or makes any composition or arrangement with his or her creditors; or

- (g) is convicted of an indictable offence; or
- (h) dies.

[78] The plaintiffs submitted that r 11.1 “alone” governs when a trustee ceases to hold office. They submitted that a trustee therefore may cease to hold office only (i) prior to expiry of their specified term through one of the provisions in r 11.1 that allows for earlier termination or (ii) after expiry of their specified term if they have not been re-elected. It follows, they submitted, that r 11.1(b) provides for incumbent trustees to hold over until the next election.

[79] I do not accept that submission. First, r 11.1 is not exhaustive of the circumstances in which a trustee ceases to hold office. It is not expressed in exhaustive terms. It cannot be exhaustive, given that rr 4 and 6.2 provide that trustees may cease to hold office in circumstances that are not referred to in r 11.1 (namely, trustees being replaced prior to expiry of their specified terms).

[80] Secondly, read in the context of the Trust Deed as a whole, r 11.1 is concerned with termination of office prior to the appointment of trustees at a further election. This is supported by the structure and flow of the Trust Deed:

- (a) Rule 3.2 deals with the appointment of trustees. It provides for trustees to be elected for a specified time period.
- (b) Rules 4 and 6.2 deal with the appointment of trustees at a further election. Such trustees may be appointed before the incumbent trustees’ specified terms have ended, in which case the incumbent trustees cease to hold office.
- (c) Given that rr 4 and 6.2 already address what happens to incumbent trustees if new trustees have been appointed during the incumbent trustees’ terms, the natural reading of r 11.1 is that it addresses circumstances in which trustees may cease to hold office prior to the appointment of trustees at a further election.

- (d) This is confirmed by rr 12.1 and 12.2. They address what happens when there has been “termination of office of any Trustee”. By r 12.1, a replacement trustee shall be appointed (unless the terminating trustee ceased to hold office within six months of the end of their term). By r 12.2, the replacement trustee holds office only for the remainder of the term of the trustee he or she has replaced. Rules 12.1 and 12.2 are dealing only with termination of office under r 11.1, not with trustees who have ceased to hold office because their replacements have been appointed under r 4 or r 6.2. Therefore, rr 12.1 and 12.2 assume that r 11.1 is concerned only with the circumstances in which trustees may cease to hold office prior to the appointment of trustees at a further election.

[81] Given this context of r 11.1, it would be most odd to find within it a provision that, rather than providing for a trustee to cease office prior to a replacement trustee being appointed, provided for a trustee’s time in office to be *extended* until a replacement trustee is appointed. Very clear words would be needed to achieve such a result.

[82] Read in the context of r 11.1 as a whole, the preferable meaning of r 11.1(b) is that a trustee who completes his or her term of office and at that time is not re-elected ceases to hold office as trustee. This meaning of r 11.1(b) is consistent with the language of r 3.2.

[83] I acknowledge that this meaning may involve some redundancy, given that in the absence of r 11.1(b) the effect of r 3.2 in any event would be that trustees do not hold over. But it is not unusual to find redundancy even in documents that have been drafted with some care. The presumption against redundancy is an interpretative tool that must be used with caution, as it assumes a perfection in drafting that is seldom achieved.<sup>10</sup>

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<sup>10</sup> See the authorities discussed in Kim Lewison, *The Interpretation of Contracts* (7th ed, Sweet & Maxwell, London, 2021) at [7.28].

[84] The plaintiffs also relied on r 1.2, which provides that the “total number of trustees elected at any one time is nine persons”. I consider this provision to be neutral. It is not expressed in operative or mandatory terms. Nor could it have been intended to always reflect the position, given that the Trust Deed provides for instances where there are fewer than nine trustees.

[85] I conclude that the plain and ordinary meaning of the language of the Trust Deed, read as a whole, is that trustees whose terms have expired do not remain in office until the election of replacement trustees.

*Context: common sense and commercial practicality*

[86] The plaintiffs submitted it was consistent with common sense and commercial practicality for trustees to hold over until an election of their replacements. An election might occur somewhat later or somewhat earlier than the two- or four-year mark. When the election occurred somewhat later, holding over would ensure there were still enough trustees for the Trust to be functional. On the contrary interpretation, the Trust would be inquorate for a period whenever an election of Marae Trustees occurred after the four-year mark.

[87] This point provides only weak support for the plaintiffs’ interpretation, because the practical consequences of the Trust being inquorate are not significant. While cl 6.2 provides that the trustees “shall control and supervise the business and affairs of the Development Trust”, their role is one of governance rather than day-to-day management. Clause 7 obliges the trustees to appoint a Tumuaki Kaiārahi to manage the day-to-day administration of the Trust and provides that the Tumuaki Kaiārahi is responsible for the employment of all employees of the Trust. Rule 1 of the Second Schedule merely requires the trustees to meet not less than three times each year. Any period during which the Trust might be inquorate would usually be short, and during any such period the trustees would be obliged (by r 5.1 of the First Schedule) to take steps to arrange for elections.

[88] A contextual argument can be advanced against trustees holding over pending an election of their replacements. Under the Trust Deed, the trustees are responsible for arranging elections and therefore their successors. I accept Mr McQueen’s

submission that if trustees remained in office pending such elections, there would be a tension between their obligation to arrange elections and the prospect of holding over pending those elections. Avoiding that tension is a practical reason for not including a holding-over provision in the Trust Deed.

*Context: subsequent conduct*

[89] The plaintiffs pointed to some instances in the past where Marae and General Trustees had continued to act as trustees beyond the end of their specified four-year terms until the next election. They said this conduct supported their interpretation.

[90] Subsequent conduct is admissible as an aid to contract interpretation, provided it has a tendency to prove anything relevant to the objective approach to interpretation of the contract at the time it was made.<sup>11</sup> In a contract setting, such conduct will not be probative if it does not represent the views of the relevant contracting party at the time the contract was formed.<sup>12</sup>

[91] I consider the trustees' subsequent conduct is not probative. The Trust Deed (both in its original form and in its current amended form) reflects discussion and agreement reached by many beneficiaries of Ngāti Whātua o Kaipara. The subsequent conduct is of just a handful of trustees. There is no suggestion it reflects the collective understanding of beneficiaries (or even of a significant number of them). Further, there is no evidence that any of the trustees who continued to act after expiry of their four-year terms turned their minds to whether the Trust Deed entitled them to hold over (or even turned their minds to whether their terms had expired). The subsequent conduct does not assist me in determining the objective meaning of the Trust Deed at the time it was made.

*Context: tikanga*

[92] Relevant context to the interpretation of the Trust Deed includes that the Development Trust was formed to hold assets for the benefit of ngā tangata o Ngāti

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<sup>11</sup> *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [89]–[90].

<sup>12</sup> At [90].

Whātua o Kaipara following the Treaty settlement process with the Crown. Both sides advanced a general submission that the tikanga of Ngāti Whātua o Kaipara was therefore relevant context to the interpretation of the Trust Deed. However, neither side advanced any specific submission as to how tikanga bore on the interpretative issue as to whether trustees hold over. It is therefore not necessary for me to express any view on this matter.

### *Authorities*

[93] I was referred to two authorities. The Majority Marae Trustees relied on *Solomon-Rehe v Hokotehi Moriori Trust*.<sup>13</sup> I consider *Solomon-Rehe* provides only the faintest of support for the Majority Marae Trustees' interpretation. The trust provisions in that case were different from those in the Trust Deed, and the holding over issue was not squarely addressed by the court.

[94] Both sides sought support from a decision of Judge Harvey (as he then was) in the Māori Land Court in *Taueki*.<sup>14</sup> In that case the trust provisions bore some similarity to those in the Trust Deed. Clause 3.1 provided that “no Trustee shall hold office for longer than three years without facing re-election” and there appears to have been an equivalent provision to r 11.1(b). One of the issues addressed by the Judge was the trustees' term of office. His Honour held that “three years means three years”, rejecting an argument, based on the equivalent provision to r 11.1(b), that if an election was not held before the end of three years the trustee held over until there was an election.<sup>15</sup> That supports the interpretation of the Majority Marae Trustees.

[95] Judge Harvey then went on to find that the trustees were able to continue to act after the expiry of the three-year term.<sup>16</sup> At first glance this provides some support for the plaintiffs' interpretation. But the Judge found that the trustees could only act in a caretaker role pending an election,<sup>17</sup> which was not the position advanced for the plaintiffs in relation to the Development Trust. Further, the Judge's primary reason

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<sup>13</sup> *Solomon-Rehe v Hokotehi Moriori Trust* [2015] NZHC 46, [2015] NZAR 776.

<sup>14</sup> *Taueki v Horowhenua 11 Part Reservation Trust – Horowhenua 11 (Lake) Block* (2016) 347 Aotea MB 269 (347 AOT 269).

<sup>15</sup> At [37]. The argument is recorded at [28].

<sup>16</sup> At [59].

<sup>17</sup> At [61].

for finding that trustees could continue to act was that it was “generally accepted” that trustees of Māori land remain in office at the expiry of a specified term of appointment “until further order of the Court”.<sup>18</sup> This was because appointments of such trustees “are made by Court order”.<sup>19</sup> That is not the case for the Development Trust. The Judge did add, as a secondary reason, that “there is no express provision in the trust order that declares that the positions fall vacant on the expiry of three years”.<sup>20</sup> That provides some support for the plaintiffs on the Interpretation Issue.

[96] There is, therefore, something (but not a lot) for both sides in *Taueki*. It is of limited assistance in interpreting this Trust Deed.

### *Conclusion and declarations*

[97] The contextual matters to which I have referred do not persuade me that I should not adopt the plain and ordinary meaning of the language of the Trust Deed, read as a whole. I therefore conclude that trustees whose terms have expired do not remain in office until the election of replacement trustees.

[98] Accordingly, I make the following declaration sought by the Majority Marae Trustees at paragraph E of their prayer for relief in their counterclaim:

- (a) The terms of Marae and General Trustees elected to four-year terms under r 3.2(a) of the First Schedule of the Trust Deed end upon the expiry of four years from commencement of their terms, and do not continue until an election for their position is held.
- (b) Consequently:
  - (i) Tamaki Mercer ceased to be a trustee of the Development Trust upon expiry of her four-year term on 28 September 2023; and

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<sup>18</sup> At [56].

<sup>19</sup> At [59].

<sup>20</sup> At [59].

- (ii) Jane Sherard and Cherie Povey ceased to be trustees of the Development Trust upon expiry of their four-year terms on 30 November 2023.<sup>21</sup>

[99] My conclusion on the Interpretation Issue also means that I must refuse the declaration sought by the plaintiffs at paragraph (a) of the prayer for relief to their second cause of action. The other declarations sought in that cause of action refer to trustee decisions in general terms (that is, without reference to any time periods). While I expect that the plaintiffs will not pursue those declarations in light of my conclusion on the Interpretation Issue, I make no formal decision on them.

### **Should an election be held forthwith?**

[100] The Majority Marae Trustees say that an election should be held now. The plaintiffs say an election should take place only once independent interim trustees have been appointed (under their Replacement Application) and resolved the alleged dysfunction in the Trust.

[101] The parties agreed that the Court should determine “whether an election should be held forthwith”. As the submissions unfolded, it became apparent that there were two aspects to that question:

- (a) Are the trustees required to hold an election forthwith?
- (b) If so, should the Court make a declaration (or any other order) that the trustees are required to hold an election forthwith?

[102] The first aspect is about the trustees’ obligations. The second aspect is about what remedy, if any, should be granted if I find that the trustees are required to hold an election forthwith.

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<sup>21</sup> The prayer for relief said “30 September 2023”. I have corrected what appears to be a typographical error.

*Are the trustees required to hold an election forthwith?*

[103] The plaintiffs submitted that although trustees were likely obliged to call elections within a reasonable time of a trustee's term expiring, "the decision as to when to call an election is discretionary". They said that the Trust Deed contains no express requirement that elections be called within a certain timeframe of the expiry of a trustee's term.

[104] I do not accept that submission. The starting point is the Trust Deed. It provides that after expiry of the terms of the Initial Trustees, trustees are appointed by elections. One would therefore expect the Trust Deed to provide that when a vacancy in office occurs there should be an election to fill the vacancy.

[105] That is, subject to a limited exception, the approach taken by the Trust Deed. The timing and process for the election of trustees are, in general, governed by rr 4 and 5.1 of the First Schedule. Rule 4 provides that elections for trustees "in any given Income Year" must be concluded "by the time of the annual general meeting of the Development Trust in that Income Year".<sup>22</sup> Rule 5.1 says:

The Trustees shall give notice calling for nominations for those Trustee positions for which elections are required at least three months before the annual general meeting of the Development Trust for that Income Year, and in any event in sufficient time for the election to be concluded in accordance with rule 4 of this Schedule.

[106] Rule 5.1 is expressed in mandatory terms: the trustees "shall" call for nominations. The trustees have to do this whenever there are trustee positions "for which elections are required".

[107] Whenever a trustee's term has expired, or will expire during an Income Year, that trustee's position is one "for which elections are required". Under r 5.1, the trustees are obliged to start the election process for such positions. Rule 5.1 also places a timeframe on that process: it must be started at least three months before the AGM for that Income Year.

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<sup>22</sup> An Income Year is any year ending on 31 March. See the definitions of "Income Year" and "Balance Date" in the Trust Deed. The Trust has adopted 31 March as its Balance Date.

[108] There is one exception to this general position. When a trustee's term of office ceases early under r 11.1, and that cessation occurs within six months of the end of the trustee's term, r 12.1 provides that it is not necessary to hold an election until the time provided in r 4. This exception proves the general rule: elections are necessary (and thus required) when a trustee's position becomes, or is about to become, vacant.

[109] Rule 4.3 of the Second Schedule is also relevant. This provides that trustees may act notwithstanding any vacancy in their body. But it says that for so long as the number of trustees falls below the quorum (six), the trustees may act only for the purpose of procuring the election of new trustees to fill the vacancy "and for no other purpose". Rule 4.3 is consistent with the trustees being under an obligation to arrange an election of new trustees whenever there is a vacancy. It also shows that once the number of trustees falls below the quorum, there is urgency in arranging an election, as the trustees in the meantime cannot act for any other purpose.

[110] These provisions are all consistent with the trustees being obliged to start the election process when there is a vacancy or when a vacancy will arise during a particular Income Year. They are not consistent with the trustees having a discretion as to when to start that process.

[111] The plaintiffs' submission relied, in part, on their contention that trustees whose terms have expired remain in office until the election of replacement trustees. Even if I had accepted that contention, I would have found that trustees whose terms had expired (or were about to expire) held positions "for which elections are required", so that the obligation to call an election in r 5.1 was triggered.

[112] I was referred by both sides to case law that was said to support their respective positions. I found most of the cases to be of limited assistance. They dealt with different trust deeds, with different circumstances and contained little analysis. I mention only *Solomon-Rehe v Hokotehi Moriori Trust*.<sup>23</sup> There, the trust deed required elections to be held "every three years" and said that if the trust became inquorate the trustees could act for no purpose other than increasing the number of trustees to establish a quorum. The terms of all trustees had expired, but they

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<sup>23</sup> *Solomon-Rehe v Hokotehi Moriori Trust* [2015] NZHC 46, [2015] NZAR 776.

purported to remain in office pending an investigation into an earlier election. Brown J held that the putative trustees were not entitled to decline to hold a further election pending their investigations. Further, once the trust became inquorate, the trustees' powers were limited to the purpose of holding elections to increase their numbers.<sup>24</sup> *Solomon-Rehe* provides some support for the Majority Marae Trustees' position that the trustees are required to hold an election forthwith. I acknowledge that (as the plaintiffs emphasised) Brown J made an order removing the putative trustees and replacing them with interim trustees. But that was because he formed the view that the putative trustees were no longer trustees. Brown J did not remove any current trustees from office.

[113] Both sides said that tikanga supported their position on whether an election should be held forthwith. However, as I understood those submissions, they were directed not at the question whether trustees are required to hold an election forthwith, but rather at the question whether the Court should make an order to that effect. In any event, I consider that tikanga is not relevant to the former question. This is not because, as the plaintiffs put it, a trust is a "western construct" that was required by the Crown. Ngāti Whātua o Kaipara adopted and moulded the trust to their needs. They were careful in how they did so. The Trust Deed expressly refers to and gives effect to tikanga in some provisions, such as those dealing with the objects and purposes of the Trust (cl 2.4.10), the establishment of the Nohoanga Kaumātua to make recommendations to the trustees (cl 3.1), and the procedure of the Nohoanga Kaumātua (cl 3.7). The provisions relating to the timing of trustee elections are silent on tikanga.<sup>25</sup> Finally, none of the evidence on tikanga was directed at the specific question whether the trustees are required to hold an election forthwith (as opposed to the question whether the Court should make an order to that effect).

*Conclusion: the trustees are required to hold an election forthwith*

[114] There have been positions "for which elections are required" at least since Ms Mercer's term as trustee expired on 28 September 2023. There are now four

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<sup>24</sup> At [92].

<sup>25</sup> Dame Naida's evidence, in summary, was that the Development Trust and the Trust Deed "were not created to be consistent with tikanga" and tikanga "is not central to the Development Trust as conceived in the Trust Deed".

positions “for which elections are required”. The exception in r 12.1 does not apply to any of the vacancies. The Trust Deed therefore requires an election to be held for these positions. Further, the Trust has been inquorate since 30 November 2023 (when Ms Sherard and Ms Povey ceased to be trustees). There is an urgent need for an election.

*Should the Court make a declaration (or any other order) that the trustees are required to hold an election forthwith?*

[115] Having concluded that the trustees are required to hold an election forthwith, I have to decide whether to make a declaration (or make any other order) to that effect.

[116] The Majority Marae Trustees primarily seek remedies in the form of declarations, either under the Declaratory Judgments Act 1908 or the Court’s inherent jurisdiction. The plaintiffs say that the orders sought by the Majority Marae Trustees are, in substance, directions rather than declarations and are outside the jurisdiction of the Declaratory Judgments Act or the Court’s inherent jurisdiction.

[117] I agree that the “declarations” sought are, in substance, directions. For example, paragraph B of the Majority Marae Trustees’ prayer for relief seeks a “declaration”:

That the trustees of the Development Trust must immediately take all steps necessary to procure the election of three general trustees, and the confirmation of one kaumātua trustee ...

[118] However, this is nothing more than a mislabelling of the remedy sought by the Majority Marae Trustees. The plaintiffs accepted, unsurprisingly, that the Court has jurisdiction to direct trustees to act in a specific manner (albeit that the plaintiffs said this was only in “some limited circumstances”). Ms Bruton KC acknowledged that the plaintiffs’ point was a technical one and that the hearing would not have been very different if the Majority Marae Trustees had called the remedies that they sought “directions”. That was a proper acknowledgement. It is consistent with the approach the parties took when requesting the separate question hearing. They said:

The parties agree that the separate question hearing on the Election Issues should take place as soon as possible, to provide clarity on the election process (and the identity of the trustees) to the trustees and beneficiaries.

[119] The parties having agreed that the purpose of this hearing was to provide clarity on the election process, I consider that I should not be diverted by technical objections as to the form of the remedies sought.<sup>26</sup>

[120] I have concluded that the trustees are required to hold an election forthwith and that there is an urgent need for an election. That urgency has been present since at least 30 November 2023. In those circumstances, I would take some persuading not to make directions that the trustees are required to hold an election forthwith.

[121] The plaintiffs raised several objections to such directions. First, they submitted that courts will not make directions that trustees exercise a power where the trust instrument provides the trustees with a discretion whether to exercise the power. Even if there is such a principle,<sup>27</sup> I have rejected the premise that the trustees have a discretion whether to hold an election.

[122] Secondly, the plaintiffs submitted that the Court can only direct the trustees to comply with the Trust Deed, and the orders sought by the Majority Marae Trustees are not compliant with the Trust Deed in several respects (for example, because they are not compliant with financial reporting and AGM requirements that have to be satisfied for there to be a valid election). This point is relevant not to the question whether the Court should direct that the trustees are required to hold an election forthwith, but to the question (addressed below) as to what steps need to be taken to hold an election.

[123] Thirdly, the plaintiffs submitted that as a matter of discretion I should decline to make the directions. This was because:

- (a) The Court has jurisdiction to remove the current trustees and appoint interim independent trustees in their place.

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<sup>26</sup> I note also that paragraph C of the Majority Marae Trustees' prayer for relief asks that leave be reserved for any party to seek "further" directions at short notice.

<sup>27</sup> The plaintiffs relied on authorities which recognise such a principle where a party seeks to compel a trustee to exercise a power. I doubt any such principle applies where, as here, the trustees (or a majority of them) seek the direction.

- (b) Tikanga supports ordering an urgent substantive hearing on the plaintiffs' Replacement Application, rather than ordering an urgent election.
- (c) The plaintiffs have a strong case for their Replacement Application.
- (d) It is in the interests of the beneficiaries to determine the Replacement Application before an election.
- (e) Ordering an election now is inconsistent with the Trust Deed.
- (f) There are issues with the Register and the Whakapapa Committee that would undermine the validity of an election.

[124] I accept that the Court has a discretion whether to make the directions sought by the Majority Marae Trustees. I also accept that the Court has jurisdiction to remove the current trustees and appoint interim trustees in their place. The question is whether I should, in advance of hearing and determining the Replacement Application, exercise my discretion by declining to make the directions. I now turn to the matters that the plaintiffs said supported exercising my discretion in that way.

*Does tikanga support an urgent hearing of the plaintiffs' Replacement Application, rather than ordering an urgent election?*

[125] Both sides submitted that the tikanga of Ngāti Whātua o Kaipara, or of ngā marae e rima o Kaipara,<sup>28</sup> was relevant to the exercise of my discretion. They disagreed about how it was relevant. The Majority Marae Trustees said tikanga supported an election, whereas the plaintiffs said tikanga supported the removal and replacement of trustees before an election.

[126] The Majority Marae Trustees said that tikanga cannot be separated from the context in which it is to apply, that it is not possible to separate the process that tikanga requires from the principles of tikanga, and that a tikanga process would involve the

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<sup>28</sup> The Majority Marae Trustees' submissions tended to refer to the tikanga of Ngāti Whātua o Kaipara. The plaintiffs submitted that the tikanga was of each of the five marae, and that that tikanga was not all the same, albeit they shared some commonalities.

issues being discussed on the marae. They nonetheless said that holding elections would be consistent with four general principles of tikanga. They said an election would be consistent with rangatiratanga (which they said was the ability of whānau, hapū or iwi to exercise leadership over themselves), as an election would give the beneficiaries the vehicle to exercise leadership over themselves (rather than having interim trustees imposed upon them by the Court). They said an election of General Trustees and confirmation of the Kaumātua Trustee would be consistent with kotahitanga (which they translated as unity), as all beneficiaries participated (as compared to elections of Marae Trustees, in which the beneficiaries of each marae participated). They said the whakapapa basis of the election would enhance whakapapa and whanaungatanga (which they said was the maintenance of and respect for connections and links between people and their tupuna). Finally, they said that mana (which they translated as authority, prestige, reputation and power) would be enhanced by an election, as it would provide opportunity for service to the community.

[127] I do not accept that these tikanga principles support an election.<sup>29</sup> The principles were expressed at such a level of generality (before me) that they can be employed both for and against an election. This was apparent from the plaintiffs' submissions. The plaintiffs were able to make plausible arguments that each of the principles (and others to which the plaintiffs referred) supported replacement of the trustees rather than an election. For example, kotahitanga might be restored if the factionalised trustees were removed. Further, as the plaintiffs submitted, democratic elections are not typically associated with tikanga.

[128] My rejection of the Majority Marae Trustees' submission does not, however, mean that I accept the plaintiffs' submission that tikanga supports the removal and replacement of trustees before an election. There was no evidence that tikanga supported removal and replacement. Dame Naida explained that while there are references to tikanga in the Trust Deed, tikanga was not central to the creation of the Trust Deed or the Development Trust. They were both products of the settlement process and were not created to be consistent with tikanga. Tikanga was integral

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<sup>29</sup> I do not express a view on whether the Majority Marae Trustees accurately identified the tikanga of Ngāti Whātua o Kaipara (or of ngā marae e rima o Kaipara). It is unnecessary for me to do so, and is a matter better left for the hearing of the Replacement Application.

to how the people of ngā marae e rima o Kaipara lived, and would continue to apply in each marae regardless of the existence of the Trust. She said:

As a result, although tikanga does govern the people of the Development Trust, by virtue of their whakapapa and connections, it is not central to the Development Trust as conceived in the Trust Deed. Tikanga is in the people. The Development Trust is a product of the Crown and state law. It should therefore be subject to the appropriate channels of challenge, including in the Courts. Tikanga, in this instance, does not stop the Court from intervening with the Trust, removing all trustees and replacing them, for a time, with independent ones to give us a fresh start.

[129] This evidence, then, was merely that tikanga does not stop the Court from removing and replacing the current trustees.<sup>30</sup> It was not evidence that tikanga supported removal and replacement.

[130] The plaintiffs nonetheless submitted that the tikanga principles identified by Dame Naida supported the removal and replacement of trustees before an election. I am not persuaded by these submissions. For example, the plaintiffs said that the trustees were demonstrating a distinct lack of kotahitanga in their actions, shown by their factionalisation and adversarial behaviour. They submitted that replacing the trustees with independent trustees would allow for a unified approach “to refreshing the Development Trust”. This submission is speculative: it assumes that an election will not improve kotahitanga but that the appointment of independent trustees followed by an election will improve kotahitanga. The plaintiffs submitted that removing the trustees to enable a “refresh” would return the Trust to a state of order, restoring its tapu. However, they did not explain why a state of order would be returned by removal of the trustees (but would not be returned by an election). The plaintiffs submitted that the dysfunction in the Trust was a hara (wrong) for which utu (recompense) was required. They said the appropriate utu was removal of the trustees and that an election did not provide utu relative to the hara “because it does not appropriately acknowledge the extent of the dysfunction ... caused by the trustees”. But the plaintiffs did not explain why an election (in which the beneficiaries would choose whether to re-elect allegedly dysfunctional trustees) was not appropriate utu.

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<sup>30</sup> Again, it is unnecessary for me to express a view on whether this evidence should be accepted or rejected. That is a matter better left for the hearing of the Replacement Application.

[131] For these reasons, I consider that the tikanga to which I was referred is a neutral factor in determining whether I should exercise my discretion to make the directions sought by the Majority Marae Trustees.

*Does the strength of the plaintiffs' case on the Replacement Application support an urgent hearing of that application, rather than an urgent election?*

[132] Ms Bruton submitted that, on the evidence filed, the plaintiffs have a strong case that all trustees should be removed or replaced. She said there is clear dysfunction, referring to the matters that I traversed in the background section of this judgment. In summary, there are two factions of trustees, who cannot and will not work together. KCDL is acting without direction or oversight from the Development Trust. The Trust's social services arm has ceased to function. There has been a breakdown in the relationship between the trustees and those who work for the Trust. Ms Bruton said the current trustees are incapable of resolving these issues.

[133] The Majority Marae Trustees contest the extent of the dysfunction. That contest has yet to play out fully. As I noted earlier, although the allegations of dysfunction were addressed in the affidavit evidence that was before me, the time for filing evidence on these allegations has not yet passed, and the evidence that has been filed is yet to be tested by cross-examination. At this point, nonetheless, I accept that the plaintiffs have a good case for showing that the Trust has, on several important aspects,<sup>31</sup> been dysfunctional. Most recently, however, much of that dysfunction has been a result of the Glavish Trustees incorrectly believing that Ms Mercer, Ms Sherard and Ms Povey remained as trustees after expiry of their four-year terms.

[134] This is not to say that the plaintiffs' overall case on the Replacement Application is strong. The plaintiffs seek removal and replacement under ss 112 and 114 of the Trusts Act 2019. The Court may remove and replace trustees under these provisions only where "it is difficult or impracticable to do so without the assistance of the court". The difficulty for the plaintiffs is that the members of the Development Trust can, without the assistance of the Court, remove and replace trustees through

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<sup>31</sup> The Trust is not completely dysfunctional. In November 2023, the trustees approved the purchase by KCDL of a significant block of land.

regular elections. Three of the trustees whose removal the plaintiffs seek have already ceased to be trustees. The five Marae Trustees are up for election in March 2026.

[135] Moreover, the plaintiffs' case assumed that an urgent hearing on the Replacement Application and an urgent election are binary choices. They are not. The holding of an election will not prevent the plaintiffs from pursuing the Replacement Application. The plaintiffs did not explain why there could not be an election followed by the hearing of the Replacement Application (leaving aside arguments, which I address below, that ordering an election now is inconsistent with the Trust Deed).

*Is it in the interests of the beneficiaries to determine the Replacement Application before an election?*

[136] The plaintiffs say that all an election will do is create more dissension within the Development Trust, to the detriment of its members. I consider this is speculative. The plaintiffs assume there will be a continued strain in the relationship between the Marae Trustees. However, some of that strain will be resolved by determination of the Interpretation Issue. They assume there will be a poor relationship between the Marae Trustees and whichever of the 14 candidates for election as General Trustees succeed, and between the trustees as a whole and management. Neither is a given.

[137] The plaintiffs also say that an election will not resolve the governance issues that were identified by Mr Gray in 2018 and which they say remain unaddressed. They say these issues can only be resolved by the removal of all trustees and the appointment of independent trustees with significant commercial and governance experience. I accept there is not a lot of reason for optimism that an election of three General Trustees will, of itself, solve the Development Trust's governance issues. However, it may be a start (followed by the elections for new Marae Trustees in March 2026). In any event, the argument again presents the Court with binary choices. There is no reason why there should not be an election followed by the hearing of the Replacement Application.

*Is ordering an election inconsistent with the Trust Deed?*

[138] The Trust Deed requires the trustees to give notice of an AGM. That notice must contain details of where copies of any information to be laid before the AGM may be inspected. That information includes the annual plan, the annual report and the audited financial statements, as these are all documents that the trustees must present at an AGM. It is therefore clear that the trustees are obliged to prepare these documents (or arrange for their preparation) in advance of the AGM.

[139] At the time the trustees gave notice of the 20 April 2024 AGM, no annual plan, annual report or audited financial statements (for either of the years ended 31 March 2022 or 2023) had been prepared.<sup>32</sup> Those documents have still not been prepared. Financial statements for the years ended 31 March 2022 and 2023 have not even been signed by the trustees. Moreover, in the lead up to the April 2024 AGM, the Development Trust's auditors advised that even if the trustees signed off on financial statements for the year ended 31 March 2022, they would disclaim their audit opinion.

[140] The notice for the April 2024 AGM therefore did not comply with the Trust Deed. It is also clear that the current trustees will not be able to present audited financial statements at an AGM any time soon.

[141] The plaintiffs say these AGM requirements are not technical matters. Rather, they must be complied with before there can be a valid election at an AGM. The plaintiffs say that such documents have not been, and cannot be, prepared. They say that ordering an urgent election would therefore be inconsistent with the Trust Deed.

[142] I agree that these are not technical matters. The annual plan, annual report and audited financial statements provide members with important information by which they can assess the performance of trustees.<sup>33</sup>

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<sup>32</sup> The financial statements for the year ended 31 March 2024 were not yet due to be prepared, let alone audited, by 20 April 2024.

<sup>33</sup> *Taueki v Procter* (2020) 415 Aotea MB 1 (415 AOT 1) at [145] and [153]. In this case, the Court did not have to decide whether non-compliance with these AGM requirements invalidated any decisions (let alone an election) at the AGMs. The Court was merely deciding whether the trustees had breached the trust order by failing to hold compliant AGMs.

[143] I do not accept, however, that the validity of an election depends on compliance with these requirements. It is, of course, ideal if members have these documents available to them so they can make informed decisions at the AGM, including on voting in a trustee election. But, while the Trust Deed imposes these requirements on trustees, it does not condition the validity of an election on trustees complying with them. That is not surprising, for three reasons. First, were it otherwise, trustees in default of these requirements might be able to delay elections. Secondly, the absence of these documents is itself information (and not the only information) on which members can make their decisions (for example, whether to vote for a defaulting trustee). Thirdly, the Trust Deed provides for elections to conclude not only at AGMs but also at SGMs, at which these documents do not have to be prepared.

[144] As to that third point, Ms Bruton submitted that an election could occur at an SGM only where a replacement trustee had to be elected under r 12 of the First Schedule after the early termination of office of a trustee. I do not agree. The Trust Deed is not a model of clarity on this matter. However, the First Schedule contemplates (in rr 6.1(b) and 7.7(c)) that voting may sometimes occur at an SGM. An SGM can be called by a majority of trustees (cl 14.3). If the trust becomes inquorate, the remaining trustees may act only for the purpose of taking the steps necessary to procure the election of new trustees (r 4.3 of the Second Schedule). Where the trust becomes inquorate by reason of some trustees' terms expiring, and that happens outside the first six months of the financial year (the window for holding an AGM), the remaining trustees can take steps to procure an election (in compliance with r 4.3) only by calling an SGM for that purpose.

[145] The plaintiffs relied on a Māori Land Court decision, *Nikora*,<sup>34</sup> to support the proposition that the validity of an election depends on compliance with AGM requirements such as the provision of financial statements. In *Nikora*, two distinct complaints were made against the trustees. One complaint was that there had been non-compliance with the election process itself, the other that there had been failings in respect of AGMs.<sup>35</sup> Judge Coxhead found that there were significant failures

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<sup>34</sup> *Nikora v Trustees of Tūhoe – Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAI 157).

<sup>35</sup> At [2], [3], [53]–[54] (election process complaint) and [63]–[64] (AGM documents complaint).

to comply with the election process and consequently ordered fresh elections.<sup>36</sup> The Judge's order for fresh elections was not because of non-compliance in respect of AGMs. *Nikora* therefore does not support the plaintiffs' submission.

*Are there issues with the Register and the Whakapapa Committee that would undermine the validity of an election?*

[146] On 14 December 2023, Ms Tukerangi and Ms Hemana engaged Election Services to assist with the election and act as chief returning officer. A few days later, Ms Tukerangi emailed Election Services a copy of the Register of members.

[147] The plaintiffs say there are doubts as to the legitimacy of the Register that was emailed to Election Services. They say the only persons with access to the Register are employees of the Development Trust. However, I am satisfied that Ms Tukerangi obtained a copy of the Register indirectly from one of those employees.<sup>37</sup>

[148] It is common ground that the Register has not been updated for some time and that if it is not updated some beneficiaries will be unable to vote. This is not, as the plaintiffs might have it, a reason for not holding an election. It is simply a reason for taking steps to update the Register.

[149] The Majority Marae Trustees were taking steps to update the Register prior to the election that was to conclude on 20 April 2024. They were entitled (and probably obliged) to do so, by virtue of cl 4.3 of the Second Schedule.<sup>38</sup> They were thwarted in doing so by those who considered, incorrectly, that the General Trustees remained in office.<sup>39</sup> One of the steps they took was to appoint a Whakapapa Committee. It is common ground that, although the Trust Deed requires trustees to establish a Whakapapa Committee to make decisions on any application for registration as a member, there had never before been a formal Whakapapa Committee.

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<sup>36</sup> At [75], [79]–[80] and [85].

<sup>37</sup> This was explained in an affidavit made by Ms Hemana on 5 August 2024.

<sup>38</sup> *Mau Whenua Incorporated v Mulligan* (2020) 419 Aotea MB 112 (419 AOT 112) at [30].

<sup>39</sup> Also, Dame Naida said she was concerned that the Majority Marae Trustees would try to “improperly allow voters to register without the appropriate whakapapa connections to swell their support base, so they could get candidates elected who would toe their line”. There was no evidence to support any such concern.

[150] The plaintiffs say that the Majority Marae Trustees did not properly appoint the Whakapapa Committee, as they did not have open wānanga with kaumātua prior to the appointment. I do not accept that argument. The Trust Deed does not require such a process to be followed before appointing the Whakapapa Committee. I find that the Committee was validly appointed by the trustees on 2 February 2024.

*Conclusion: the Court should make directions that the trustees are required to hold an election forthwith*

[151] The trustees are required to hold an election. There has been an urgent need for an election since late 2023. As a matter of discretion, the Court should make directions accordingly.

**How should the election be held and what steps are necessary to hold the election?**

[152] The Majority Marae Trustees propose two alternatives for holding an election. One is to complete the existing election that had been scheduled to conclude on 20 April 2024. The other is to commence a new election process. The former is the preference of the Majority Marae Trustees.

[153] I consider the existing election should be concluded. Given my finding on the Interpretation Issue, that election was validly called. Some cost has already been incurred in the steps that have been taken. This cost would be wasted if a new election were commenced. Candidates have already put their names forward and appeared at an election hui.

[154] In their counterclaim, the Majority Marae Trustees sought a declaration for the holding of the election. The proposed declaration was detailed. In substance, directions were being sought, and that is how I will frame the Court's orders.

[155] At the start of the hearing, Mr Hikaka handed up an amended form of directions that were sought by the Majority Marae Trustees. Ms Bruton had the opportunity to make submissions on the amended directions.

[156] The proposed directions provide for the election to conclude either at an AGM or SGM. That is in accordance with the Trust Deed, which contemplates elections concluding at either form of general meeting.

[157] The directions do not provide for the Register to be updated prior to the AGM/SGM. Instead, it provides a process for those who are not registered to cast provisional votes at the AGM/SGM, at the same time submitting an application for registration. The registration applications will then be forwarded to the Whakapapa Committee for determination. I consider this is an appropriate response to the need to have the Register updated. There was evidence that provisional voting has been employed in prior elections for this purpose. Doing so for this election recognises that it is likely (given what happened earlier this year) that there will be further interference with any attempts by the Majority Marae Trustees to update the Register in advance of the AGM/SGM.

[158] The provisional voting mechanism means that results may not be announced at the AGM/SGM. Ms Bruton said this would not be in accordance with r 4 of the First Schedule. But any non-compliance is insignificant. Rule 4 is in two parts. The first says that elections “must” be concluded by the time of the AGM. There will be compliance with that part, and so the validity of the election will be unaffected. The second part says that new trustees “shall” take office at the AGM “immediately ... following the announcement of the election and confirmation vote results”. The only consequence of the non-compliance is that the new trustees may not take office until a few days later than r 4 contemplates. This will have no effect on the validity of the election.

[159] The proposed directions include some that are addressed to Election Services or the Whakapapa Committee. I agree with Ms Bruton that the Court cannot make directions against Election Services or the Whakapapa Committee, as they are not parties to this proceeding. The directions that I make will, instead, be that the trustees instruct Election Services or the Whakapapa Committee to do certain things.

[160] I have made other minor changes to the proposed directions. For instance, direction (a) has been changed so that it refers to a confirmation vote as well as to an election.

[161] The Majority Marae Trustees also sought a declaration that, following the election, the trustees of the Development Trust would be themselves, Dame Naida, and those elected at the AGM/SGM (each with specified terms of office). I see no need for such a declaration.

### **Costs**

[162] The Majority Marae Trustees have succeeded on the issues raised at the separate question hearing. If they seek costs at this stage, and that is opposed, the parties are to file and serve brief costs memoranda (no more than four pages each). The Majority Marae Trustees are to file first, the plaintiffs within ten working days thereafter.

### **Result**

[163] I make the following declaration:

- (a) The terms of Marae and General Trustees elected to four-year terms under r 3.2(a) of the First Schedule of the Trust Deed end upon the expiry of four years from commencement of their terms, and do not continue until an election for their position is held.
- (b) Consequently:
  - (i) Tamaki Mercer ceased to be a trustee of the Development Trust upon expiry of her four-year term on 28 September 2023; and
  - (ii) Jane Sherard and Cherie Povey ceased to be trustees of the Development Trust upon expiry of their four-year terms on 30 November 2023.

[164] I direct that:

- (a) The Trust is to place upon its website notice that in-person voting at the election and confirmation vote will occur at an Annual General Meeting or Special General Meeting (as applicable) on the next Saturday after 30 working days after the date of this declaration.
- (b) The trustees must instruct Election Services to attend that Annual General Meeting or Special General Meeting (as applicable) to enable voting forms to be returned until 12 noon on the day of the meeting.
- (c) Persons may vote in person so long as: (i) their name appears on the Register, or (ii) they provide to Election Services at the same time as voting a completed application for registration.
- (d) The trustees must instruct Election Services to:
  - (i) count all valid votes already cast in the election and confirmation vote and all further valid votes cast until 12 noon on the day of the Annual General Meeting or Special General Meeting (**Registered Votes**);
  - (ii) separately count, and keep separate, votes cast by individuals whose names are not on the Register but who provide an application for registration when voting under (c)(ii) above (**Provisional Votes**);
  - (iii) forward, that day, all applications received under (c)(ii) to the Whakapapa Committee to determine applications for entry on the Register.
- (e) The trustees must instruct the Whakapapa Committee (which for the purposes of this process is Gary Brown, Ngawai Beazley and Warratah Eruera) to:

- (i) determine applications for registration forwarded to it by Election Services within seven days of receiving the applications;
  - (ii) upon determining the applications, advise Election Services of the names of those whom they have determined should be registered as a Member of Ngāti Whātua o Kaipara.
- (f) The trustees must instruct Election Services to certify the result of the election and confirmation vote (based on the total of Registered Votes and Provisional Votes for each candidate) and communicate the result to the trustees of the Development Trust.
- (g) The trustees shall immediately thereafter advise the candidates of the result and give notice of same at the Annual General Meeting or Special General Meeting.
- (h) The trustees must instruct Election Services that, if the result is subject to the determination of Provisional Votes:
  - (i) Election Services shall advise the trustees that the result is provisional and the trustees shall advise the candidates of the same and give notice of the same at the Annual General Meeting or Special General Meeting;
  - (ii) Election Services shall, immediately following the determination of registration applications by the Whakapapa Committee and in the light of those determinations, confirm the results of the election and advise the trustees of the same, and the Trustees shall then confirm the results of the election by advising the candidates of the result and posting a notice on the Trust website.

[165] I reserve leave for any party to seek further directions at short notice. In particular, if the timing of the AGM/SGM in direction (a) is problematic in light of the upcoming summer holidays, a further direction can be sought.

[166] I refuse the declaration sought by the plaintiffs at paragraph (a) of the prayer for relief to their second cause of action.

[167] In accordance with the directions made on 5 June 2024, I direct that the first case management conference for the Replacement Application (including the remainder of the PCO application) is to be set down as soon as possible.

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Campbell J