IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA57/2022
[2023] NZCA 179

BETWEEN	TĀMATI KRUGER ON BEHALF OF TŪHOE TE URU TAUMATUA TRUST Appellant
AND	PAKI NIKORA ON BEHALF OF TE KAUNIHERA KAUMĀTUA O TŪHOE Respondent

Hearing:	5 April 2023
Court:	Miller, Gilbert and Goddard JJ
Counsel:	M G Colson KC and K O M Fitzgibbon for Appellant M S Smith and P T Harman for Respondent
Judgment:	18 May 2023 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made by the Māori Land Court in relation to elections of trustees of the Tūhoe Trust are set aside.

C The trustees of the Tūhoe Trust must pay the respondent his actual and reasonable legal costs and disbursements in connection with the appeal to this Court out of the assets of the Tūhoe Trust. If the parties are unable to agree on the amount of costs and disbursements payable, that will be determined by the Registrar of this Court.

D Any outstanding issues relating to costs in the courts below are to be determined by those courts, in light of this judgment.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction

[1] The Tūhoe Trust (the Trust) is a discretionary trust for the benefit of present and future Tūhoe iwi members. The Trust is also referred to as Tūhoe — Te Uru Taumatua. Mr Kruger is one of the current trustees of the Trust.

[2] The Trust is the post-settlement governance entity (PSGE) established by Ngāi Tūhoe to receive redress from the Crown for breaches of Te Tiriti o Waitangi/The Treaty of Waitangi (te Tiriti/the Treaty). The assets held by the Trust include a number of parcels of freehold land transferred to the trustees under the Tūhoe Claims Settlement Act 2014.

[3] Mr Nikora, on behalf Te Kaunihera Kaumātua o Tūhoe (Te Kaunihera), applied to the Māori Land Court for various orders in relation to the appointment of trustees of the Trust and the administration of the Trust. The trustees of the Trust did not accept that the Māori Land Court had jurisdiction to entertain the claim, and did not appear before the Māori Land Court.

[4] The Māori Land Court held that the Trust fell within its jurisdiction. It ordered the Trust to undertake fresh elections for two of its trustees.[1] Applying the decision of the Māori Appellate Court in *Moke v Trustees of Ngāti Tarāwhai Iwi Trust*, the Māori Land Court considered that it had jurisdiction over the administration of the Trust because it is a Trust that holds General land owned by Māori.[2]

[5] The trustees appealed to the Māori Appellate Court, arguing that the Māori Land Court did not have jurisdiction in relation to the administration of the Trust. The trustees submitted that *Moke* was wrongly decided. The Māori Appellate Court upheld *Moke*, and dismissed the trustees' appeal.[3] The trustees now appeal to this Court.

[6] The sole issue before us is whether the Māori Land Court has jurisdiction to hear claims in relation to the administration of the Trust. That turns on whether the Trust is a "trust constituted in respect of any General land owned by Māori" for the purposes of s 236 of Te Ture Whenua Māori Act 1993.

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1 *Nikora (on behalf of Te Kaunihera Kaumātua o Tūhoe) v Trustees of Tūhoe — Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAR 157) [Māori Land Court judgment].

2 *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* [2019] Māori Appellate Court MB 265 (2019 APPEAL 265), [2019] NZAR 1465.

3 *Kruger (on behalf of Tūhoe Te Uru Taumatua Trust) v Nikora (on behalf of Te Kaunihera Kaumātua o Tūhoe)* [2021] Māori Appellate Court MB 444 (2021 APPEAL 444) [Māori Appellate Court judgment].

[7] Before the Māori Appellate Court it was assumed that the assets held by the Trust included General land owned by Māori. However we asked the parties to address that issue before us. We have concluded that the General land held by the Trust is not General land owned by Māori for the purposes of Te Ture Whenua Māori Act, because the estate in fee simple in that land is not beneficially owned by the Trust's current discretionary beneficiaries.

[8] We have also concluded that the Trust was not "constituted in respect of" the General land that it owns. At the time the Trust was established, it was contemplated that it would acquire land as a result of a Treaty settlement. But the Trust was established for very broad purposes, including advancing the mana motuhake of Tūhoe and holding a wide range of assets for the long-term benefit of current and future Tūhoe iwi members. It was not established to hold one or more identified parcels of land on trust for the benefit of the beneficial owners of that land.

[9] Nor was the Trust constituted in respect of the small number of parcels of Māori freehold land that the trustees hold on separate trusts on a transitional basis, while new ownership arrangements are put in place. The Trust was not established to hold these parcels of land. More fundamentally, these lands are not held on the same trusts and do not form part of the assets of the Trust: so even if the Māori Land Court had jurisdiction in respect of the trusts of those lands, that would not mean it had jurisdiction over the Trust, or over the trustees in relation to the administration of the Trust.

[10] The appeal must therefore be allowed, and the orders made by the Māori Land Court set aside.

[11] Our reasons are set out in more detail below.

Background

[12] We begin by setting out in a little more detail the background against which the parties' dispute has arisen.

The Trust

[13] The Trust was established on 5 August 2011. The current version of its Trust Deed is dated 13 December 2013 (Trust Deed). The recitals in the Trust Deed emphasise the principles of Tūhoetanga and mana motuhake for Tūhoe. They record that:

> …
>
> G Tūhoe wishes to create the Tūhoe Trust to act as their Iwi authority and post-settlement governance entity (that is transparent, accountable and representative of the iwi) and for the Trustees to hold Property upon the trusts and with the duties, powers and discretions set out in this Deed.
>
> …

[14] Clause 2.1 records that the trustees hold the Trust Fund upon the trusts and with powers set out in the Trust Deed. Clause 2.3 provides that the trustees "shall distribute the remaining balance of the Trust Fund to the Tūhoe Iwi Members on the last day of the Perpetuity Period if the rule against perpetuities applies to the Trust at that time."

[15] The "Trust Fund" is defined to mean all property that is from time to time held by the trustees on the trusts of the Trust Deed.

[16] The "Tūhoe Iwi Members" are defined as "the individuals for the time being, who (a) by whakapapa (or by legal adoption) can claim descent from the eponymous ancestors Tūhoe or Potiki or who are Whāngai and (b) are affiliated to any of the Hapū".

[17] Clause 3.1 provides that the purposes of the Trust are to "receive, hold, manage and administer the Trust Fund in trust for the present and future Tūhoe Iwi Members" in accordance with the Trust Deed. Those purposes include:

> (a) Leading and serving the cultural permanency and prosperity of Tūhoetanga by way of re-enacting te mana motuhake of Tūhoe.
>
> (b) The promotion and advancement of the social and economic development of Tūhoe including, without limiting the generality of this purpose, by the promotion of business, commercial or vocational

training or the enhancement of community facilities in a manner appropriate to the particular needs of Tūhoe;

(c) The maintenance and establishment of places of cultural or spiritual significance to Tūhoe and marae of Tūhoe, including restoring the connection of Tūhoe with Te Urewera through the operation of the Te Urewera Board;

(d) The promotion of tribal forums to hear and determine matters affecting Tūhoe and to advocate on their behalf;

(e) Any other purpose that is considered by the Trustees from time to time to be beneficial to Tūhoe and Tūhoe Iwi Members;

(f) To achieve requital for raupatu and other claims from the Crown and to establish a new generation relationship between other iwi, the Crown and Tūhoe;

(g) To address the effect that Crown breaches have had on the economic, social, cultural, and political well-being of Tūhoe;

(h) To make distributions to Tūhoe Iwi Members.

[18] The powers of the trustees set out in schedule 1 to the Trust Deed include representing the collective interest of the iwi and being the legal representative of the iwi in relation to that collective interest; receiving, holding and managing Property transferred from the Crown to the Trust on behalf of the iwi in settlement of Treaty claims; and acquiring, holding and disposing of Property.

[19] Clause 3.5 provides that all land that is part of the Trust Fund and that is situated within the Tūhoe ahikāroa shall not be sold or otherwise disposed of by the trustees.

[20] The Trust is a discretionary trust. Clause 12 of the Trust Deed provides that the trustees may at any time, after meeting costs and expenses in connection with the Trust, pay or apply any or all of the income or capital of the Trust to or for the benefit of the Tūhoe Iwi Members or any group of Tūhoe Iwi Members in accordance with the purposes of the Trust.

[21] Section 19 of the Tūhoe Claims Settlement Act provides that limits on the duration of a trust in any rule of law, including s 16 of the Trusts Act 2019, do not restrict the period during which the Trust may exist in law, or during which the trustees may hold or deal with property or income derived from that property. So the Trust is

able to continue indefinitely, unlike most discretionary trusts. And, importantly for present purposes, the class of beneficiaries is open-ended: the Trust can, and on its terms will, continue forever for the benefit of Tūhoe Iwi Members.

[22] It follows that the trustees will never be required to distribute the balance of the Trust Fund to current beneficiaries under cl 2.3, as there is no relevant perpetuity period applicable to the Trust.

[23] Clause 19 of the Trust Deed makes detailed provision for resolving complaints and disputes about the operation of the Trust, which may be raised by any Tūhoe Iwi Member. If the dispute is not otherwise resolved – for example, by mediation – the complaint or dispute must be referred to a Disputes Committee. The findings and decision of the Disputes Committee are final and binding on the parties, including the Trust.

The assets held by the Trust

[24] At the time it was established in 2011 the Trust did not hold any land.

[25] Tūhoe and the Crown reached agreement on settlement of Tūhoe's claims for breaches of te Tiriti/the Treaty on 4 June 2013. That agreement was implemented by the Tūhoe Claims Settlement Act, which came into force on 28 July 2014. Certain parcels of General land were vested in the trustees as cultural redress pursuant to that Act: four central North Island forests and three other fee simple properties.[4]

[26] We were advised by counsel that the majority of the value of the Trust Fund is represented by assets other than land.

[27] We were also advised by counsel that the trustees have held a number of parcels of Māori freehold land on a transitional basis. These parcels of land were previously held by entities that were dissolved by the Tūhoe Claims Settlement Act. They have been held on trust by the trustees for the owners of each relevant parcel of land pending

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4 Tūhoe Claims Settlement Act 2014, ss 23–26 and Sch 2.

the establishment of permanent ownership arrangements. All but two of these parcels of land have now been transferred to other entities.

Mr Nikora's applications

[28] Mr Nikora is a kaumatua of Tūhoe, the chairman of Tauarau Marae Reservation Trust, and a board member of Te Kaunihera.

[29] In 2018, and again in 2019, Mr Nikora raised concerns with the Trust about the conduct of the process followed for election of trustees. He considered that there had been breaches of the Trust Deed in connection with the election process, and the appointment of Mr Kruger and Mr Patrick McGarvey as trustees. Mr Nikora attempted to invoke the internal dispute resolution process set out in cl 19 of the Trust Deed, but the notices of dispute he sent to the Trust were not replied to or acted on.

[30] In 2019 Mr Nikora, on behalf of Te Kaunihera, applied to the Māori Land Court seeking orders for the removal of Mr Kruger and Mr McGarvey as trustees, and for fresh elections to be held in accordance with the Trust Deed.

[31] The trustees considered that the Māori Land Court did not have jurisdiction to entertain these applications. They declined to participate in the proceedings before that Court, stating that the Trust was a private common law trust and was "surprised" to hear of the Māori Land Court's interest in it.

Relevant provisions of Te Ture Whenua Māori Act

[32] Because the decisions of the Māori Land Court and Māori Appellate Court turn on the interpretation of Te Ture Whenua Māori Act, it is helpful to set out the relevant provisions before summarising those decisions.

[33] The purpose of Te Ture Whenua Māori Act is set out in the Preamble:

> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū

> hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.
>
> Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles.

[34] Section 2(1) provides that it is the intention of Parliament that the provisions of the Act must be interpreted in a manner that best furthers the principles set out in the Preamble. Section 2(2) records that it is the intention of Parliament that powers, duties and discretions conferred by the Act will be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development and control of Māori Land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants, and that protects wahi tapu.

[35] For the purposes of Te Ture Whenua Māori Act, all land has one of six statuses: Māori customary land, Māori freehold land, General land owned by Māori, General land, Crown land, and Crown land reserved for Māori.[5]

[36] Land that is held by Māori in accordance with tikanga Māori has the status of Māori customary land.[6] Where the beneficial ownership of land has been determined by the Māori Land Court by freehold order, that land has the status of Māori freehold land.[7] The term "Māori land" is defined to mean Māori customary land and Māori freehold land.[8]

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5 Te Ture Whenua Māori Act 1993, s 129(1).
6 Section 129(2)(a).
7 Section 129(2)(b).
8 Section 4.

[37] Section 129(2)(c) provides that land (other than Māori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple, while that estate is beneficially owned by a Māori or by a group of persons of whom a majority are Māori, has the status of General land owned by Māori. The term "General land owned by Māori" is defined in s 4 as "General land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori".

[38] Land (other than Māori freehold land and General land owned by Māori) that has been alienated from the Crown for a subsisting estate in fee simple has the status of General land.[9]

[39] Part 1 of the Act provides for the continuation of the Māori Land Court. Section 17 sends out the general objectives of the Court:

> **17 General objectives**
>
> (1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—
>
> (a) the retention of Māori land and General land owned by Māori in the hands of the owners; and
>
> (b) the effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori.
>
> (2) In applying subsection (1), the court shall seek to achieve the following further objectives:
>
> (a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
>
> (b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
>
> (c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:
>
> (d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
>
> (e) to ensure fairness in dealings with the owners of any land in multiple ownership:

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9 Section 129(2)(d).

(f) to promote practical solutions to problems arising in the use or management of any land.

[40] The general jurisdiction of the Māori Land Court is, as one would expect, focussed on determining matters relating to Māori land and General land owned by Māori. Section 18 provides:

> **18 General jurisdiction of court**
>
> (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
>
> (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Māori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:
>
> (b) to determine the relative interests of the owners in common, whether at law or in equity, of any Māori freehold land:
>
> (ba) to determine whether a person is a member of a class of persons who are or will be beneficial owners of, or beneficiaries of a trust whose trustees are owners of, land that is or will become Māori freehold land:
>
> (c) to hear and determine any claim to recover damages for trespass or any other injury to Māori freehold land:
>
> (d) to hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Māori freehold land:
>
> (e) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified person is a Māori or the descendant of a Māori:
>
> (f) to determine for the purposes of this Act whether any person is a member of any of the preferred classes of alienees specified in section 4:
>
> (g) to determine whether any land or interest in land to which section 8A or section 8HB of the Treaty of Waitangi Act 1975 applies should, under section 338 of this Act, be set aside as a reservation:
>
> (h) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not Māori customary land or Māori freehold land or General land owned by Māori or General land or Crown land:

(i) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

(2) Any proceedings commenced in the Māori Land Court may, if the Judge thinks fit, be removed for hearing into any other court of competent jurisdiction.

[41] The Act goes on to provide for the jurisdiction of the Court in relation to specific matters such as actions for recovery of land, mortgages, relief against forfeiture and other land-related matters.[10] The Court has jurisdiction in respect of certain matters under the Māori Fisheries Act 2004[11] and under the Māori Commercial Aquaculture Claims Settlement Act 2004.[12] The Court also has jurisdiction to conduct certain inquiries.[13] And it has a broad jurisdiction to advise on or determine appropriate representation of Māori groups.[14]

[42] Part 2 is concerned with the Māori Appellate Court. Part 3 contains provisions relating to both the Māori Land Court and the Māori Appellate Court.

[43] Part 4 of the Act is concerned with administration of estates of deceased persons (whether or not Māori) comprising in whole or in part any beneficial interest in Māori freehold land.[15]

[44] Part 5 is concerned with the recording of ownership interests in Māori freehold land.[16]

[45] Part 6 provides for the status of land. As already mentioned, all land in New Zealand has one of six statuses for the purposes of Te Ture Whenua Māori Act.[17] The Māori Land Court has jurisdiction to determine the particular status of any parcel of land.[18]

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10 Sections 19–26.
11 Sections 26A–26N.
12 Sections 26O–26ZB.
13 Section 29.
14 Section 30. See also ss 30A–30I.
15 Section 100(1).
16 Section 122.
17 Section 129.
18 Section 131(1).

[46] Section 133(1) provides for the Māori Land Court to have jurisdiction to make a status order declaring that any land shall cease to be General land or General land owned by Māori, and shall become Māori freehold land. Section 133(2) provides that the Registrar-General of Land may apply to the Court for the exercise of its jurisdiction to declare that General land or General Land owned by Māori shall become Māori freehold land in respect of any land that "is beneficially owned by more than 10 Māori." The criteria for making such an order are set out in subsection (3):

> **133 Change from General land or General land owned by Māori to Māori freehold land by status order**
>
> …
>
> (3) The court shall not make a status order under this section unless it is satisfied that—
>
> (a) the land is beneficially owned by 1 or more Māori; and
>
> (b) the owners have had adequate opportunity to consider the proposed change of status; and
>
> (c) either—
>
> (i) all the owners agree to the proposed change of status; or
>
> (ii) the land can be managed or utilised effectively as Māori freehold land and a sufficient proportion of the owners agree to the proposed change of status; and
>
> (d) it is desirable that the land become Māori freehold land having regard to the history of the land, and to the identity of the owners and their personal association with the land.

[47] Part 12 is concerned with trusts. It confers exclusive jurisdiction on the Māori Land Court to constitute five specific kinds of trust: putea trusts, whānau trusts, ahu whenua trusts, whenua topu trusts and kai tiaki trusts.[19]

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[19] Section 211(1).

[48] Putea trusts may be established in respect of any interests in Māori land or General land owned by Māori, or shares in a Māori incorporation,[20] in the circumstances prescribed in s 212(2):

> **212 Putea trusts in respect of land interests**
>
> …
>
> (2) A putea trust may be constituted under this section where—
>
> (a) it is impractical, or otherwise undesirable, because of the minimal value of the interests or share, or because any person beneficially entitled, or the present whereabouts of any such person, is unknown,—
>
> (i) to continue to pay the income derived from the interests to the persons beneficially entitled to that income; or
>
> (ii) to allow further succession to the interests; or
>
> (b) all the persons beneficially entitled to the interests or shares agree to the constitution of the trust.
>
> …

[49] The assets of a putea trust are held for Māori community purposes.[21] Section 218 provides for the income of such a trust to be applied for the benefit or advancement of beneficiaries, or of the interests of hapū associated with land belonging to the trust and the members of that hapū.[22] A putea trust thus operates as a form of discretionary trust. But s 213 provides that notwithstanding the constitution of a putea trust, the beneficial interests in the land or shares in respect of which the putea trust is constituted remain vested in the persons entitled to those interests when the trust was constituted.[23]

[50] Sections 214 to 217 provide for constitution of other forms of trust by the Māori Land Court. For present purposes it is not necessary to discuss those provisions in detail. It is sufficient to note that in each case the Act proceeds on the assumption

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20 Section 212(1).
21 Section 212(6).
22 Section 218(1).
23 Section 213(1).

that at the time the trust is established there will be identifiable owners of (vested) beneficial interests in the relevant land.[24]

[51] Section 236 is at the heart of this appeal. It provides:

> **236 Application of sections 237 to 245**
>
> (1) Subject to subsection (2), sections 237 to 245 shall apply to the following trusts:
>
> (a) every trust constituted under this Part:
>
> (b) every other trust constituted in respect of any Māori land:
>
> (c) every other trust constituted in respect of any General land owned by Māori.
>
> (2) Nothing in sections 237 to 245 applies to any trust created by section 250(4).

[52] Section 237(1) provides that in respect of any trust to which Part 12 applies the Māori Land Court has and may exercise all the same powers and authorities as the High Court has in respect of trusts generally (subject to any express provisions to different effect in Part 12). Section 237(2) provides that nothing in s 237(1) limits or affects the jurisdiction of the High Court in relation to such trusts. So the Māori Land Court and High Court have concurrent jurisdiction in respect of trusts to which s 237 applies.

[53] The provisions that are brought into play by s 236 are, in summary, as follows:

(a) Section 238, which provides for the Court to make orders enforcing the obligations of trustees.[25] Section 238 also provides that the Court may require any trustee to file in the Court a written report, and to appear before the Court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.[26]

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[24] See for example s 214(1); s 215(5), (7) and (8); s 216(3)(a), (7) and (8); and s 217(1), (4) and (10).
[25] Section 238(2).
[26] Section 238(1).

(b) Section 239, which provides for the Court to make orders adding to or reducing the number of trustees or replacing one or more of the trustees.[27]

(c) Section 240, which provides for the Court to make an order for the removal of a trustee in certain circumstances.[28]

(d) Section 241, which provides for the Court to make an order terminating a trust in respect of the whole or any part of the land or interest in land subject to the trust "by making an order vesting that land or that part of that interest in land in the persons entitled to it in their respective shares, whether at law or in equity, or in such other persons as the beneficial owners may direct".[29]

(e) Section 242, which provides for the Court to make orders that any money held in trust be paid to the person or persons beneficially entitled to it.[30]

(f) Section 243, which provides for certain orders to be made in respect of land acquired by trustees out of revenue from the operation of a trust.[31]

(g) Section 244, which provides for the Court to make orders varying a trust.[32]

(h) Section 245, which confers on the Court a power to make orders that income derived by a trust be held for charitable purposes.[33]

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27 Section 239(1).
28 Section 240(1).
29 Section 241(1).
30 Section 242(1)
31 Section 243(2).
32 Section 244(2).
33 Section 245(1).

[54] The supervisory jurisdiction of the Māori Land Court in respect of trusts to which s 236 applies is, generally speaking, broader and more intensive than the supervisory jurisdiction of the High Court under the Trusts Act. For example, the Trusts Act does not contain any direct equivalent to the power in s 238(1) to require a trustee to file a written report on the administration of the trust, and be questioned on that report. That power is considerably broader and more "hands on" than the powers of investigation conferred by ss 126 and 127 of the Trusts Act.

[55] Similarly, the Māori Land Court has broader powers than the High Court in relation to removal and appointment of trustees. The High Court may make an order removing a trustee only if certain criteria are met and it is difficult or impracticable to do so without the assistance of the Court.[34] The High Court may make an order appointing a new trustee whenever it is necessary or desirable to do so and (as with removal) it is difficult or impracticable to do so without the assistance of the Court.[35] The requirement that it be difficult or impracticable to remove or appoint a trustee does not appear in the corresponding provisions of Te Ture Whenua Māori Act.[36]

[56] The Trusts Act does not contain any direct parallel to s 242 of Te Ture Whenua Māori Act, conferring a power to direct application of trust assets. And the power to vary a trust under s 244 of Te Ture Whenua Māori Act is broader than the power conferred on the High Court by s 130 of the Trusts Act.

[57] The issue raised by this appeal is whether the Māori Land Court can exercise the broader and more intensive supervisory jurisdiction provided for in Part 12 of Te Ture Whenua Māori Act in relation to the Trust. If so, that jurisdiction would be available in addition to the High Court's more narrowly expressed supervisory jurisdiction under the Trusts Act (and in the exercise of its general equitable jurisdiction). If not, then any challenge to the administration of the Trust would need to be resolved under cl 19 of the Trust Deed or pursued in the High Court.

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34 Trusts Act 2019, s 112.
35 Section 114(1).
36 See Te Ture Whenua Māori Act, ss 239–240.

Decisions of the Māori Land Court and Māori Appellate Court

The decisions in Moke

[58] It is convenient to begin by summarising the decision in *Moke v Trustees of Ngāti Tarāwhai Iwi Trust*, before turning to the decisions in the present case.

[59] In *Moke* the applicant sought a review of aspects of the governance of the Ngāti Tarāwhai Iwi Trust (NTI Trust). The NTI Trust was also a PSGE, established to hold assets for the benefit of Ngāti Tarāwhai.

[60] The Māori Land Court convened a preliminary hearing on jurisdiction. Judge Coxhead gave an oral ruling that he did not have jurisdiction.[37] The issue was whether the NTI Trust came within s 236(1)(c) of the Act, as a "trust constituted in respect of any General land owned by Māori". The Judge found that the constitution of the NTI Trust was primarily for the holding and administration of settlement assets which included properties. The primary purpose of the NTI Trust, unlike most trusts which come before the Māori Land Court, was to hold and administer settlement assets which included property, money or other types of assets. The Judge said:[38]

> I do not think it matters whether receiving properties is the primary purpose or secondary purpose of the [NTI Trust], the point being that I think it stretches the wording and the intention of s 236 to read it in a very wide way to apply to a trust that was constituted for settlement purposes and one of those purposes included receiving properties.

[61] Ms Moke appealed to the Māori Appellate Court. The appeal was successful. That Court considered that neither the text nor the purpose of s 236 supported a narrow approach to the jurisdiction of the Māori Land Court in respect of trusts holding General land owned by Māori. On an ordinary meaning, a trust holding even one parcel of General land owned by Māori would be sufficient to trigger jurisdiction.[39]

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37 *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* 197 Waiariki MB 141–217 (197 WAR 141–217) at 158–217.

38 At [41].

39 *Moke*, above n 2, at [75].

[62] It was common ground before the Māori Appellate Court that the NTI Trust held some General land blocks.[40] At first instance Judge Coxhead had proceeded on the basis that those blocks of land were General land owned by Māori because the majority of the trustees were Māori. However as the Māori Appellate Court observed, the trustees were not the beneficial owners. The Māori Appellate Court proceeded on the basis that "beneficial ownership in the land remains with the shareholder/beneficiaries."[41] The beneficiaries of the NTI Trust were defined as "every person of Ngāti Tarāwhai Iwi descent."[42] Thus, the Māori Appellate Court said, whether one looked to the trustees or the beneficiaries "it is clear that these parcels of general land are owned by a group of persons of whom a majority are Māori."[43]

[63] The Māori Appellate Court noted that the jurisdiction of the Māori Land Court is concurrent with that of the High Court. Under s 18(2) of Te Ture Whenua Māori Act the Māori Land Court has a discretion to transfer a proceeding commenced in that Court to the High Court. If there are genuine issues as to the appropriate forum for a particular application, the Māori Appellate Court said, this discretion provides a means to consider them on a case by case basis.[44]

The Māori Land Court decision in this case

[64] Mr Nikora's application was heard by Judge Coxhead. It was heard at the same time as a parallel application by Mr Buddy Nikora seeking the removal of all trustees of the Trust, and the appointment of an administrator.

[65] As already mentioned, the trustees did not participate in the hearing before the Māori Land Court.

[66] On the question of jurisdiction, the Judge followed *Moke*. The trustees were the registered proprietors of fee simple titles of a number of parcels of General land. So, the Judge said, the trustees hold General land on behalf of beneficial owners, the

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40 At [69].
41 At [71].
42 At [71].
43 At [72].
44 At [79].

majority of whom are Māori.[45] The Māori Land Court therefore had jurisdiction to deal with the matters before it on the basis that the Trust is a trust constituted in respect of General land owned by Māori for the purposes of s 236(1)(c) of Te Ture Whenua Māori Act.[46]

[67] The Judge then went on to deal with the applications before the Court. He found that there had been breaches of the Trust Deed.[47] He dismissed the applications by Mr Buddy Nikora for removal of all trustees and appointment of an administrator.[48] He declined to make the order sought by Mr Nikora removing Mr Kruger and Mr McGarvey as trustees.[49] But he made orders under s 237 of Te Ture Whenua Māori Act requiring fresh elections to be held within six months in respect of their positions as trustees.[50]

The Māori Appellate Court decision in this case

[68] The trustees appealed to the Māori Appellate Court, arguing that *Moke* was wrongly decided. The trustees submitted that both the text and the purpose of the Act require that holding land must be the primary reason for a trust's establishment before s 236 applies. The Māori Appellate Court did not accept that argument. It concurred with the *Moke* analysis, and in particular the following principles which it identified as underpinning that decision:[51]

> (a) Consistent with the Court of Appeal's analysis in *Grace v Grace*, there is a discernible statutory scheme that carefully identifies where the jurisdiction of the Māori Land Court is to be exclusive and non-exclusive.
>
> (b) Section 236(1)(c) expressly confirms that the Court has jurisdiction over trusts constituted in respect of General land owned by Māori.
>
> (c) The words "constituted in respect of" have wide import, and the word "constitute" in this context appears to be equivalent to "established".

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45 Māori Land Court judgment, above n 1, at [46].
46 At [47].
47 At [51]–[55] and [64].
48 At [82]–[83].
49 At [84].
50 At [85].
51 Māori Appellate Court judgment, above n 3, at [18] (footnotes omitted).

(d) There is an absence in Part 12 of any clear limitation on the extent of the Court's jurisdiction with respect to a trust constituted in respect of any General land owned by Māori.

(e) There is nothing in Part 12 or the overall statutory scheme to conclude that there is a clear legislative purpose to limit the Court's jurisdiction when it comes to trusts that are post-settlement governance entities.

[69] The Māori Appellate Court accepted the trustees' submission that s 236(1)(c) requires an assessment of the purpose of a trust. A trust must have been constituted or established in respect of General land owned by Māori for s 236(1)(c) to apply. That requires an assessment of the background to the trust's constitution, including its purpose.[52] However the Court did not accept that s 236(1)(c) requires that the *primary* purpose of a trust must relate to land before the trust will fall within the scope of that provision, for the following reasons:[53]

(a) First, the plain words of the provision do not expressly call for an assessment of the *primary* purpose of the trust.

(b) Second, the broader scheme in Part 12 does not support such a narrow reading of s 236(1)(c). Those provisions, particularly ss 237-245, do not focus on land, and instead deal with matters such as the enforcement of trustee obligations, the appointment and removal of trustees, and termination and variation of trusts. The focus is not limited to land.

(c) Third, the Act's clear focus on the retention of land undermines, rather than supports, the argument that the Court should assess the primary purpose of a trust. The Preamble confirms that land is a taonga tuku iho to be retained in the hands of its owners. This strong statutory language regarding the significance of land to Māori, together with the statutory direction that the Act be interpreted in a manner that best furthers this principle, supports an approach that invokes the Court's jurisdiction simply if land is owned by a Māori trust.

[70] In the present case, the Trust had been created in order to hold real and personal property on the trusts established by the Trust Deed. Clause 3.5 provided that land held by the Trust and situated within the Tūhoe ahikāroa could not be sold or otherwise disposed of by the trustees. Those provisions illustrated that assessment of the purpose for which a trust is constituted based on some form of "primacy test" is not

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52 At [19].
53 At [20] (emphasis in original).

straightforward, and would unnecessarily strain the clear statutory words and clear statutory scheme.[54]

[71] The Court concluded that if a Māori trust owns land from inception, or is set up to hold land that will be transferred to it in the future, it is constituted in respect of that land. That is the case for PSGEs. They are constituted to receive and manage land, together with other assets. It is therefore a purpose of these entities to receive and hold land. They are captured by s 236(1)(c).[55]

[72] The Court acknowledged that "there may be some uncertainty in respect of Māori trusts that are not established initially to hold land, but subsequently acquire it."[56] But that was not the present case. The nature and extent of any such uncertainty was difficult to assess in the abstract, and any uncertainty did not affect the statutory interpretation analysis in *Moke*.[57]

[73] In addition to the reasons expressed in *Moke*, the Court identified two further reasons why PSGEs fall within s 236(1)(c). First, like s 236(1)(c), s 236(1)(b) also uses the phrase "constituted in respect of". It captures trusts that are constituted in respect of Māori land. If the Court adopted the Trust's "primacy of purpose" approach in respect of that subsection, only trusts the primary purpose of which is to hold Māori land would be captured. Some trusts that hold Māori land could fall outside the Act. That result, the Court said, would clearly be contrary to the principles and objectives of the Act. If the primary purpose test cannot be sustained in s 236(1)(b), it cannot be sustained in s 236(1)(c).[58]

[74] Second, the Court considered there is a discernible scheme in Part 12 that is designed to capture any trust that holds Māori land or General land owned by Māori, including trusts not constituted under Part 12. That scheme did not easily permit a reading that would exclude some trusts that hold land with these statuses.[59]

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54 At [24].
55 At [25].
56 At [26].
57 At [26].
58 At [30].
59 At [31].

[75] Finally, the Court considered whether any inference could be drawn from the fact that since *Moke* was decided, Te Ture Whenua Māori Act had been amended by the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020. That Amendment Act did not amend s 236 to either confirm or overturn *Moke*. The Court considered it would go too far to say that Parliament endorsed the outcome in *Moke* because it passed an Amendment Act that did not contradict it.[60] However the Court observed that the Amendment Act, and the Parliamentary process that preceded it, "evinced no policy concern with the Māori Land Court's general jurisdiction over post-settlement governance entities."[61] If anything, the comments in the Departmental Report, the Committee report and Hansard suggested an acknowledgement of (rather than concern with) the status quo.[62] But the Court took little from the Amendment Act. Rather, the Court relied on statutory interpretation to support its conclusion that *Moke* was correctly decided.[63]

Issues on appeal

[76] The principal issue to be determined by this Court is whether the Trust falls within the jurisdiction of the Māori Land Court. It is convenient to address this issue in two stages:

(a) Is the General land held by the Trust "General land owned by Māori" for the purposes of Te Ture Whenua Māori Act?

(b) If so, is the Trust a trust constituted in respect of General land owned by Māori for the purposes of s 236(1)(c) of Te Ture Whenua Māori Act?

[77] Before this Court Mr Nikora sought to raise a further issue that he says arises because a small number of parcels of Māori freehold land are held by the trustees of the Trust on a transitional basis, while new ownership arrangements are put in place. These parcels of land were not referred to in the courts below. Mr Nikora argues that Part 12 of Te Ture Whenua Māori Act applies to the Trust because it holds these parcels

60 At [42].
61 At [43].
62 At [43].
63 At [44].

of land, by virtue of s 236(1)(b). The trustees say that the Trust was not constituted in respect of these parcels of Māori freehold land, so s 236(1)(b) does not apply. We address this further issue briefly at [125]–[129] below.

Is the General land held by the Trust "General land owned by Māori"?

[78] As already mentioned, in the courts below it was assumed that the land held by the Trust qualifies as General land owned by Māori for the purposes of Te Ture Whenua Māori Act. This Court invited the parties to address that question.

Submissions on appeal

[79] Mr Colson KC, who appeared for the trustees, submitted that the Trust is a discretionary trust. No individual beneficiary or group of beneficiaries can be said to have beneficial ownership of the trust property. So the land is not "owned for a beneficial estate" by Māori. A beneficial interest short of beneficial ownership is not enough. The Māori Land Court recently confirmed in *McCaw Lewis Trustee (No 1) Ltd* that a discretionary beneficial interest in property does not constitute ownership for the purpose of assessing whether land is General land owned by Māori.[64]

[80] Mr Smith, who appeared for Mr Nikora, submitted that the relevant land is General land owned by Māori for the purposes of Te Ture Whenua Māori Act. The land is held for the benefit of a group of persons all of whom are Māori. The nature of the trust is not relevant. Nor is whether any interest has vested in one or more beneficiaries. The purpose of the legislation would be undermined by adopting a narrow approach to the application of Part 12 to trusts holding land for the benefit of Māori. It is much easier and less expensive for beneficiaries to access the Māori Land Court than the High Court. The protections provided by Part 12 should be available to beneficiaries under a trust of this kind that has received land as part of a Treaty settlement, and holds that land for the benefit of the hapū and whanau of the iwi. The principles of Te Tiriti support adopting a broad approach to the concept of land "owned" by Māori, to give effect to active protection and option principles and the principle of redress.

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64 *McCaw Lewis Trustee (No 1) Ltd (as trustee of the Tuala-Warren Family Trust) – Rakautatahi 1B2B1A* (2022) 97 Tākitimu MB 232 (97 TKT 232).

Discussion

[81] Is the General land held by the trustees on the trusts set out in the Trust Deed "owned for a beneficial estate in fee simple by … a group of persons of whom a majority are Māori"?

[82] The trustees are not the beneficial owners of the land held by the Trust.[65] Te Ture Whenua Māori Act expressly provides that the terms "beneficial estate" and "beneficial interest" do not include an estate or interest vested in any person by way of trust, mortgage or charge.[66] So the trustees are not the relevant owners for the purpose of the definition of the term "General land owned by Māori". Rather, it is necessary to consider the position of the beneficiaries under the Trust.

[83] The beneficiaries (or the vast majority of them) are by definition Māori. Do they own the land that forms part of the Trust Fund for a beneficial estate in fee simple for the purposes of Te Ture Whenua Māori Act?

[84] That is a question of statutory interpretation. Section 10(1) of the Legislation Act 2019 provides that the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

[85] We begin with the text. The definition of the term "General land owned by Māori" uses technical terms drawn from property law and trust law. So a helpful starting point is to ask whether, reading the definition in light of the established legal meaning of the technical terms it employs, the beneficiaries of the Trust can be said to own a beneficial estate in fee simple in the land.

[86] It is common ground that the Trust is a discretionary trust. The beneficiaries are current and future Tūhoe iwi members. The Trust Deed does not provide for any individual member or group of members to hold a vested beneficial interest in the Trust Fund or in any asset forming part of that Trust Fund. In particular, the current beneficiaries of the Trust do not, individually or collectively, hold any vested beneficial interest in the land that forms part of the Trust Fund. As already mentioned,

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65 See *Moke*, above n 2, at [71]; and Māori Land Court judgment, above n 1, at [44]–[46].
66 Te Ture Whenua Māori Act, s 4.

no perpetuity period applies to the Trust: so there will never be a point in time at which the Trust Assets vest in specified beneficiaries entitled to a residual interest in those assets.

[87] The orthodox understanding of the interest of a beneficiary of a discretionary trust is summarised in *Lewin on Trusts* as follows:[67]

> The term "discretionary interest" is convenient to describe the interests of the object of a discretionary trust. An object of a discretionary trust has no proprietary interest in the trust assets or capital and no right to a definable part of the trust income. In general, a discretionary trust has no one in whom the beneficial interest in the trust property can be said to be vested because vesting is contingent upon the selection of an object from a nominated class. …
>
> (footnotes omitted)

[88] The beneficiaries of a discretionary trust have no interest in possession in the assets of the trust.[68] It would not be open to the current beneficiaries at any given time to terminate such a trust under s 121 of the Trusts Act, as they do not together hold all of the beneficial interest in the trust property.

[89] The beneficiaries of a discretionary trust have the right to compel due administration of the trust, to bring claims for breach of trust, and to obtain certain trust information and accounts.[69] They have a sufficient interest to trace and recover assets transferred by a trustee in breach of trust, and secure the return of those assets to the trustees. But whether taken separately or together, these interests fall well short of beneficial ownership of trust assets.

[90] A reading of the text of the definition by reference to established principles of trust law suggests that the discretionary beneficiaries of the Trust do not own a beneficial estate in fee simple in the land, and thus that the land is not General land owned by Māori.

[91] We turn to the wider statutory context. Te Ture Whenua Māori Act appears to consistently use technical legal terms in a manner consistent with their established

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67 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [1-061].

68 See [1-062] and the cases there cited.

69 See [1-061]; and Trusts Act, ss 50-55.

technical meaning. That is unsurprising in a statute designed to sit alongside, and interact with, other legislation governing interests in land including the Land Transfer Act 2017, legislation governing trusts, and the principles of equity and common law concerning trusts. The statute is replete with references to estates and interests in land, trusts and trustees, vesting of land (or interests in land), leases (and terms relating to leases such as "tenancy at will" and "leasehold interest … whether at law or in equity") and other legal terms.[70] The legislature can be expected to have used these terms in their technical sense to promote understanding and consistency across statutes dealing with the same subject-matter. It would be surprising and unhelpful to use these technical terms in a materially different sense from how they would normally be understood. It seems most unlikely that the legislature did so.

[92] At various points the statute uses terms such as "beneficial owners" in a manner that is clearly intended to refer to persons holding vested beneficial estates or interests in land. So for example s 133(3), set out at [46] above, provides for the status of land to be changed where the land is beneficially owned by one or more Māori and the owners have had adequate opportunity to consider the proposed change of status, and either all the owners agree or a sufficient proportion of the owners agree. This provision proceeds on the basis that the entire beneficial ownership of the land is held by the beneficial owners for the time being. The provision would make no sense in the context of a discretionary trust with no vested beneficial interests. Section 18(1)(ba) expressly distinguishes between beneficial owners and beneficiaries of a trust whose trustees own land that is or will become Māori freehold land (that is, beneficiaries with interests falling short of beneficial ownership). Similarly, s 141 expressly distinguishes between beneficial owners of land (in s 141(1)(b)(ii)) and beneficiaries under a form of statutory discretionary trust (s 141(1)(b)(iii)).

[93] The way in which Te Ture Whenua Māori Act uses technical legal terms provides considerable contextual support for the view that the terms used in the definition of "General Land owned by Māori" are likely to have been used in their established technical sense.

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[70] See for example ss 2, 18, 20, 22A, 25, 76, 84, 100, 101, 107A, 108, 117, 118, 132, 134, 150A, 210 and 220; and Parts 4, 11 and 12 more generally.

[94] That approach to the defined term "General land owned by Māori" is also in our view consistent with the purposes of the Act. The Act is primarily concerned with Māori land: Māori customary land and Māori freehold land. Māori customary land is collectively held by the relevant whanau or hapū. Māori freehold land is typically in multiple ownership, with the owners being the customary owners at the time the land was converted from customary title to a fee simple title by a freehold order made by the Māori Land Court and/or their descendants.

[95] There is also a great deal of General land owned by Māori that was formerly Māori land, as a result of the regime described by this Court in *Nicholas v Commissioner of Police*:[71]

> [14] In 1968, [the land in issue] was subject to a status declaration of the Māori Land Court changing it from Māori land to European land (later to become known as general land). Such status declarations were routinely made by the Registrar of the Māori Land Court pursuant to s 6 of the Māori Affairs Amendment Act 1967. Where the provisions were satisfied, a status change was mandatory. No application was required for such status change and the owners were unlikely to know of it beforehand. Rather, the Amendment Act provided that any Māori land owned by not more than four owners could cease to be Māori land simply by administrative action of the Registrar of the relevant Māori Land Court district. The Amendment Act is generally regarded as having triggered the major Māori land protests of the 1970s and the policy reversal that ultimately led to the enactment of Te Ture Whenua Māori Act 1993. Had the Whakamārama land not lost its Māori land status, it would not have been alienable without first being offered to members of the Pirirākau hapū.
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> (Footnotes omitted)

[96] Where Māori land has been converted into General land the beneficial owners of the Māori land become the beneficial owners of the fee simple estate in that General land. Such land will generally have originated as Māori customary land, which may or may not have been converted into Māori freehold land before being converted into General land. Before conversion that land will be held, or will in the past have been held, collectively by the members of the relevant whanau or hapū. So the same issues of traditional connection to the land, and multiple ownership, can be expected to arise in relation to General land owned by Māori where this (typical) trajectory has been followed.

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71 *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172.

[97] But the same issues do not arise where land is held under an express discretionary trust. The terms of the trust will specify one or more trustees, the powers of those trustees, the identity of the beneficiaries, and the circumstances in which the trustees may apply trust property for the benefit of those beneficiaries. The trustees are responsible for decisions about the occupation, development and utilisation of the land for the benefit of the beneficiaries. The discretionary beneficiaries do not have decision-making powers or responsibilities in relation to the land. So the issues raised by collective ownership and multiple ownership do not arise in relation to such land. Such land may or may not be land with which the beneficiaries have a customary connection: it may simply have been acquired as a family home in the city in which the family currently lives, using a family trust as a vehicle. Or as an investment property by a family trust.

[98] Where an express discretionary trust has been created with (majority) Māori beneficiaries, and that trust has acquired General land, there is no reason to think that retention of that land in the hands of the trustees as part of the trust's assets should be a priority, as contemplated by the Preamble and by s 17(1)(a). (If it is, the trust deed can expressly provide for this, as the present Trust Deed does in respect of land within the Tūhoe ahikāroa but not other land.) Nor is there likely to be any need for the Māori Land Court to bring to bear its special expertise concerning Māori land and collective or multiple ownership: other mechanisms exist, as outlined above, to secure the effective use, management and development of such land.[72] Thus there is no reason to think that in such cases, the primary objective of the Court set out in s 17(1) is relevant. And the objectives set out in s 17(2), which focus on ascertaining and giving effect to the wishes of the owners of land, and facilitating discussions and resolving differences between members, are not relevant or applicable in the context of express discretionary trusts where the beneficiaries are not "owners" and do not have any decision-making role in relation to dealings in trust assets.

[99] That is not to say that the concerns to which the Act is addressed can never arise in relation to General land held on a discretionary trust. But often they will be wholly absent, and in other cases they will be present in a much attenuated form. It is

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[72] Compare Te Ture Whenua Māori Act, s 17(1)(b).

not necessary for the Act to apply to land held in this way in order for its purpose to be achieved. And in many cases it would be arbitrary and surprising if the Act were to apply.

[100] Consider for example the acquisition by a Māori investor of a commercial investment property, which the investor decides to hold in a discretionary family trust for the benefit of themselves, their partner, their children and any future grandchildren or remoter issue. The trustees are the investor, their partner and their accountant. There is no reason to promote the retention of this property in the hands of the trustees, if they consider that it is commercially desirable that it be sold. Its occupation, development and utilisation will be determined by the trustees for the long term benefit of current and future beneficiaries: those beneficiaries do not need to make decisions about such matters, and have no voice in those decisions. The trust will be subject to the Trusts Act and the general law of equity. The High Court will have jurisdiction to consider any issues that may arise in relation to the administration of the trust. It seems to us that in these circumstances the primary objective of the Māori Land Court is not relevant, the specialist expertise of that Court is not engaged, and there is no identifiable rationale for that Court having the extensive powers of supervision of such a trust contemplated by Part 12 of Te Ture Whenua Māori Act, in addition to the role of the High Court with respect to such trusts. It seems to us that it would be surprising if such a trust came within Part 12, in circumstances where an identical discretionary trust established for investment purposes by a non-Māori investor would not.[73]

[101] The peculiarity of that outcome is underscored once one appreciates that if Part 12 could apply to a discretionary trust of this kind, its application would come and go over time depending on the relative number of discretionary beneficiaries who are Māori. Consider for example a scenario where a non-Māori investor with a non-Māori partner establishes a trust along the lines described above. They have two children. One of the children subsequently marries a Māori partner. If that couple has (say) four children, then on the birth of the fourth grandchild Part 12 would apply to the trust. If the other child marries a non-Māori partner and they have a child, the trust

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[73] Depending of course on whether any current partner, children, grandchildren or remoter issue are Māori: see for example the scenario described at [101].

would again cease to be subject to Part 12. That result seems arbitrary and unsatisfactory.

[102] If Part 12 applied to discretionary trusts of the kind described above, difficult issues about the jurisdiction of the Māori Land Court would also arise depending on whether the trust held land from time to time. If the trusts in the scenarios above sold the commercial property and replaced it with other more diversified investments, there would be no reason for the Māori Land Court to have a broad supervisory role in relation to the administration of the trust. But depending on how s 236 is read, either that Court would continue to have that role because the trust was originally constituted in respect of the commercial property (a result which lacks any apparent policy rationale) or that Court's jurisdiction would cease. Would it then revive if the trust acquired a different investment property? What if the investment property was in Sydney? It would be odd if the application of Part 12 to a discretionary trust turned on such matters.

[103] Similar points can be made in relation to a discretionary family trust established to own a family home. Mr Smith accepted that there is no clear reason why such a trust should be subject to the jurisdiction of the Māori Land Court simply because the family is Māori. We agree.

[104] As Mr Smith submitted, the principles of te Tiriti/the Treaty are highly relevant when interpreting Te Ture Whenua Māori Act. Te Tiriti/the Treaty provides foundational context for the Act, as the Preamble recognises, and provides critical guidance on the Act's purpose. But we do not consider that those principles provide any real support for Mr Smith's argument that the term "General land owned by Māori" extends to land held under an express discretionary trust. The active protection and option principles are not engaged in relation to such trusts, for the same reasons that the policy underpinning Te Ture Whenua Māori Act is not squarely engaged. Nor do we obtain any assistance from the redress principle, for two reasons. First, the vast majority of such trusts will not hold land provided by way of redress for breaches of te Tiriti/the Treaty. The existence of a modest number of discretionary trusts established for that purpose, including PSGEs, does not support the application of Part 12 to all such trusts. Second, there is some force in the trustees' argument that the

principle of effective redress must include respect for the decision-making autonomy of the iwi, hapū and whanau receiving that redress. Supervision of how that redress is administered by the Māori Land Court is not self-evidently more consistent with the redress principle, seen in that light.

[105] In summary, the policy considerations raised by Mr Smith do not provide any material support for an interpretation of the definition of "General land owned by Māori" that departs from an orthodox legal reading of the text of that definition. Land is classified as "General land owned by Māori" if and only if the fee simple estate in that land is beneficially owned by a Māori or a group of persons of whom a majority are Māori. Where General land is held on a discretionary trust, the discretionary beneficiaries do not own a fee simple estate in that land. So that land is not treated as General land owned by Māori for the purposes of Te Ture Whenua Māori Act, even if a majority (or all) of the discretionary beneficiaries at any given time are Māori.

[106] That conclusion is consistent with the view expressed by the Māori Land Court in *McCaw Lewis Trustee (No 1) Ltd* that a discretionary beneficial interest in property does not constitute ownership for the purpose of assessing whether land is General land owned by Māori.[74] We need not express a view on whether residual ownership under an otherwise discretionary trust constitutes ownership for that purpose, as the issue does not arise in relation to the Trust: as explained above, the Trust is not subject to perpetuity rules and will continue indefinitely. So there is not now, and never will be, any class of contingently entitled residual beneficiaries.

Is the Trust *constituted in respect of* general land owned by Māori?

[107] In light of our answer to the first issue above, the second issue does not strictly speaking arise. However in deference to the decisions of the courts below, and the submissions of counsel, we will address it briefly.

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[74] *McCaw Lewis Trustee (No 1),* above n 64, at [22].

Submissions on appeal

[108] Mr Colson submitted that the approach adopted by the courts below in this case, and by the Māori Appellate Court in *Moke*, was wrong. A trust is *constituted in respect of* General land owned by Māori only where the primary or dominant reason for the trust's establishment, or the trust's primary or dominant purpose, is to hold General land. That is not the case in respect of the Trust, which was established for much broader purposes as set out in the Trust Deed. Holding land was contemplated as a purpose of the Trust, but was not and is not a primary or dominant purpose of the Trust. The Trust owns land, but this is only a minor part of the Trust Fund, and ownership of that land is incidental to the Trust's broader purposes.

[109] The trustees consider that an expansive interpretation of the Māori Land Court's jurisdiction over trusts to include PSGEs such as the Trust would be inappropriately paternalistic. The Trust, having settled with the Crown on behalf of Tūhoe, should have autonomy to use its trust assets as it sees fit within the scope of its Trust Deed without oversight from the Māori Land Court. That would better reflect the principle of tino rangatiratanga in the post-settlement context.[75]

[110] Mr Smith submitted that the Māori Appellate Court's approach was correct. The Trust was established to receive redress pursuant to the Tūhoe Claims Settlement Act. As is common, that redress included land: return of various properties vested in the trustees in fee simple, deferred selection rights to further fee simple properties, and rights of first refusal in respect of properties held by the Crown. The trustees now hold legal ownership of parcels of General land. That was expressly contemplated by the Trust Deed, which provides for the trustees to hold such land and – if that land is within the Tūhoe ahikāroa – to retain such land and not sell or otherwise dispose of it. The Trust's beneficiaries are by definition members of Tūhoe, and therefore Māori. They alone are entitled to the benefit of the land. So the land held by the Trust is General land owned by Māori, and the Trust Deed envisaged and authorised ownership of that land. It follows that the Trust was constituted in respect of that land. There is no good reason to read down the language of s 236: to do so would undermine the

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[75] See for example Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2022) at 81.

objectives set out in the Preamble and s 17 of Te Ture Whenua Māori Act, including recognising the special collective relationship that Māori have with land as a taonga tuku iho, supporting the retention of land, and affirming rangatiratanga through the holding of land.

[111] Mr Smith emphasised that the jurisdiction of the Māori Land Court exists in parallel to the jurisdiction of the High Court (s 237), and that where appropriate the Māori Land Court can remove proceedings into the High Court (s 18(2)). Having the option of choosing to raise issues relating to the administration of the Trust in the Māori Land Court would enhance the rangatiratanga of members of Tūhoe in a manner consistent with Tiriti/Treaty principles of active protection and options. Undermining access to the Māori Land Court, which has relevant expertise and is more accessible and more affordable, would undermine those Treaty principles and the policy objectives of Te Ture Whenua Māori Act. It would also be inconsistent with the Treaty principle of effective redress, and with the corresponding requirement in art 8 of United Nations Declaration on the Rights of Indigenous Peoples to provide effective redress in response to any action that has the effect of depriving indigenous peoples of their cultural values, or the aim or effect of dispossessing them of their lands, territories or resources.[76]

[112] Mr Smith noted that s 236(1)(c) does not refer to the primary or dominant purpose of a trust being ownership of general land. He submitted that there was no warrant for reading in such a requirement. Moreover any such test would be problematic to apply in practice, and would raise difficult issues about whether one focused on the provisions of the relevant trust deed, or the quantity of land held by the trust, or the relative value of the land and other assets held by the trust (in turn raising difficult issues about how those values would be assessed). He added that if such a test were to be adopted in relation to s 236(1)(c), it would presumably apply equally to s 236(1)(b). But that would produce the problematic result, inconsistent with the purpose of the legislation, that some trusts holding Māori freehold land or Māori customary land would fall outside the Act.

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[76] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 8.

Discussion

[113] It became common ground in the course of the hearing that a trust cannot be described as "constituted in respect of" any General land owned by Māori merely because at some point in time the trust holds such land. If the test was simply whether the trust *holds* such land, it would have been a simple matter to say so. The intended scope of s 236 is clearly narrower than that: it extends to the five specific kinds of trust that the Māori Land Court may constitute for the purpose of holding and administering land, and other trusts *constituted in respect of* Māori land or General land owned by Māori — implicitly, constituted by the owners of that land rather than by the Court.

[114] It also became common ground that the time at which the s 236(1) test must be applied is when the trust is first established, not at some subsequent time if and when a trust acquires a qualifying parcel of land. The broad approach adopted in *Moke* is difficult to reconcile with the language of the relevant provisions, and in particular the requirement that the trust be *constituted in respect of* relevant land.

[115] The five specific kinds of trust that the Māori Land Court has power to constitute all take as their starting point a particular parcel of land, or interests in a particular parcel of land. The Court constitutes a trust in respect of that land (or those interests) in order to secure the administration of that land in a manner consistent with the purposes of Te Ture Whenua Māori Act, in circumstances where difficulties would otherwise arise in relation to the administration of that specific land (or interests in that land). None of the five types of trust that the Court can constitute is set up to hold land generally, or to acquire and hold land at some later date.

[116] Consistent with the scheme of the Act in respect of those five types of trust, we consider that the concept of constituting a trust in respect of land requires that the trust be established in respect of one or more identified parcels of land, with a view to providing for the ownership and administration of that land. Generally, this will occur where the current owners of that parcel of land agree to establish a trust to hold and administer that land on their behalf.

[117] The establishment of a trust to hold and administer assets generally, which may include subsequently acquired parcels of land, is not in our view sufficiently closely

linked to the ownership and administration of one or more particular parcels of land for the trust to be described as constituted in respect of any land. As a matter of ordinary language, it seems to us that the statement "this trust was constituted in respect of Māori land/General land owned by Māori" invites the response "what was the land in respect of which it was constituted?". If that question cannot be answered at the time the trust is established, then that trust is not as matter of ordinary language constituted in respect of any land.

[118] Thus both the text and the immediate statutory context of s 236(1)(c) support a focus on the time of establishment of the trust, and whether at that time a purpose of establishing the trust was to provide for the holding and administration of one or more identified parcels of General land owned by Māori.

[119] We add that if a trust meets this test, it is irrelevant that it may also hold other assets at the time it is established, or acquire other assets at a later date. We accept Mr Smith's criticisms of the "primary purpose" test contended for by the trustees. The Act does not contain any such requirement, and it would be difficult to apply in practice.

[120] We do not consider that a broader reading is required by the purpose of the Act, or by relevant Tiriti/Treaty principles. As illustrated by the competing submissions made by the parties in this case, those principles pull in different directions. They do not provide clear support for a reading that departs from the reading indicated by the text and the statutory context.

[121] We note that where Māori land is acquired by the trustees of a trust to which Part 12 does not apply, Te Ture Whenua Māori Act will apply to that land in the hands of the trustees. Our approach to s 236 does not result in Māori land ceasing to be subject to Te Ture Whenua Māori Act if it is acquired by trustees for the benefit of one or more Māori beneficial owners some time after the relevant trust was established: it simply means that the Act will apply to the trustees as the legal owners of the land, but Part 12 will not apply to the administration of the trust. Relief in respect of the administration of the trust will need to be sought in the High Court. That outcome is consistent with the purpose of Te Ture Whenua Māori Act, as the nexus between such

a trust and the objectives of that Act is insufficiently close to engage the need for supervision of the trust (as distinct from the land) by the Māori Land Court.

[122] We agree with the Māori Appellate Court that no useful inferences can be drawn from the amendments that were made to Te Ture Whenua Māori Act by Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Act. The silence of that Amendment Act in relation to *Moke* cannot be taken as an endorsement of that decision.

[123] Some modest support for the trustees' argument is provided by the Maniapoto Claims Settlement Act 2022, s 23 of which provides:

> **23 Limits on effect of Te Ture Whenua Māori Act 1993**
>
> (1) Te Nehenehenui is not a trust constituted in respect of—
>
> (a) any Maori land for the purpose of section 236(1)(b) of Te Ture Whenua Maori Act 1993; or
>
> (b) any General land owned by Māori for the purpose of section 236(1)(c) of that Act.
>
> (2) In this section, Māori land and General land owned by Māori have the meanings given to those terms in section 4 of Te Ture Whenua Māori Act 1993.

[124] This provision tends to suggest that when Parliament has expressly turned its attention to whether a PSGE should come within s 236 of Te Ture Whenua Māori Act, the policy factors emphasised by Mr Smith were not seen as sufficient to justify that outcome. But Treaty claim settlement legislation often reflects the particular circumstances of the settling iwi, and the specific negotiations that led to the settlement. Considerable caution is required before drawing wider inferences concerning other settlements and other PSGEs. We prefer to rest our decision on our analysis of Te Ture Whenua Māori Act and the application of that Act to the Trust, having regard to its terms and the Tūhoe Claims Settlement Act.

Māori freehold land held by the trustees

[125] For the sake of completeness, we record that the trustees advised this Court that the Tūhoe-Waikaremoana Māori Trust Board (Tūhoe Trust Board) was wound up

as part of the Treaty settlement arrangements.[77] The Tūhoe Trust Board acted as trustee for approximately 10 trusts that held Māori freehold land. The intention was, and remains, to replace the Tūhoe Trust Board with trustees associated with the land. That has occurred for eight of the trusts. It has not yet occurred for two of the trusts because of issues over the appropriate hapū/hapū māngai (representative), though that remains the intention. Meanwhile, the trustees of the Trust are temporary trustee for those two trusts.[78]

[126] Mr Smith submitted that the fact that the Trust holds Māori freehold land confirms that it is subject to Part 12 of Te Ture Whenua Māori Act, by virtue of s 236(1)(b). Mr Colson says that holding this land was not a material purpose of the establishment of the Trust: the Trust was not constituted in respect of this land.

[127] We do not consider that this argument assists Mr Nikora, putting to one side the fact that it was not raised or considered in the courts below.

[128] First, we accept Mr Colson's submission that it would be artificial to describe the Trust as constituted in respect of this land given the temporary role of the trustees in holding this land. Holding these lands was not a material purpose for which the Trust was established.

[129] Second, and more fundamentally, these lands do not form part of the Trust Fund, and are not held on the trusts set out in the Trust Deed. They are held by the trustees on the pre-existing trusts that applied to these lands when held by the Tūhoe Trust Board.[79] So the trustees of the Trust are the trustees of this land, but it is a misnomer to describe *the Trust* as holding these lands. The same trustees hold different assets on different trusts. Even if the trusts in respect of these parcels of Māori freehold land come within Part 12, an issue on which we are not in a position to express any view, that would not mean that the Māori Land Court had jurisdiction over the trustees in respect of their appointment as trustees of the Trust, or in respect

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77 Tūhoe Claims Settlement Act, s 89.
78 Sections 89–91.
79 Section 91.

of the administration of the Trust. That Court's jurisdiction would be confined to the separate trusts relating to those parcels of Māori freehold land.

Costs

[130] Mr Smith submitted that regardless of the outcome of the appeal, this Court should direct that Mr Nikora's actual and reasonable legal costs and disbursements should be reimbursed by the trustees out of the assets of the Trust. The issue raised by the appeal is an important one. The appeal will clarify the legal position for current and future trustees, and for all beneficiaries of the Trust.

[131] We agree.

[132] We add that the need for Mr Nikora to take proceedings before the courts arose because his attempts to invoke the dispute resolution regime provided for in cl 19 of the Trust Deed were unsuccessful. If the trustees had established a Disputes Committee, as contemplated by cl 19, no court costs would have been incurred by either party. In the absence of any response from the trustees as required by cl 19, it was reasonable for Mr Nikora to commence proceedings to seek resolution of the issues he had raised on a number of occasions. And in light of *Moke*, it was reasonable for him to commence those proceedings in the Māori Land Court. He should not be out of pocket as a result of seeking resolution of his concerns about the administration of the Trust before the courts, in the circumstances of this case.

Result

[133] The appeal is allowed.

[134] The orders made by the Māori Land Court in relation to elections of trustees of the Trust are set aside.

[135] The trustees of the Trust must pay Mr Nikora his actual and reasonable legal costs and disbursements in connection with the appeal to this Court out of the assets of the Trust. If the parties are unable to agree on the amount of costs and disbursements payable, that will be determined by the Registrar of this Court.

[136] Any outstanding issues relating to costs in the courts below are to be determined by those courts, in light of this judgment.

Solicitors:
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G E Morrell, Pukekohe for Respondent