IN THE MĀORI LAND COURT OF NEW ZEALAND
TAIRAWHITI DISTRICT

A20130004580

UNDER	Section 227 and 238, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Te Rimu Trust (Tokata A14 and other blocks) - Enforcement of obligations of Trust
BETWEEN	NGARANGI BIDOIS AND HORIMATUA EVANS Applicants
AND	TRUSTEES OF TE RIMU TRUST - RICHARD CLARKE, JOHN CLARKE AND HOHEPA AKUHATA-BROWN Respondents

Hearing: 31 Tairawhiti MB 67-91 dated 19 June 2013
(Heard at Gisborne)

Appearances: Ngarangi Bidois, Horimatua Evans, in person
Richard Clarke and Hepa Akuhata-Brown, in person
John Akuhata-Brown and Poihipi-Akuhata, in person

Judgment: 9 July 2013

RESERVED JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] By application received on 17 May 2013 Ngarangi Bidois and Horimatua Evans seek the protection of s 227(6) of Te Ture Whenua Māori Act 1993. Recently the trustees of Te Rimu Trust to enter into a lease with TBS Partnership. The applicants say that they did not have sufficient opportunity to discuss the proposed lease with their fellow trustees and claim that instead they were presented with, in effect, a fait accompli. The applicants therefore seek to be absolved from any personal liability arising out of the implementation of that decision to enter into the lease.

[2] The applicants also raise various concerns as to the administration of the Trust including issues over proper process, the future use and development of the land, the rights of beneficial owners, proposals for owners to receive a licence of the land and related matters.

[3] Richard Clarke, the chairperson of the Trust, says that while the trustees would strongly prefer that the issues be resolved between the trustees, both he and Hepa Akuhata Brown do not

oppose the application. They do however object to a number of matters that have been raised by the applicants concerning the previous and current use of the land. In particular, the trustees raise issues of non payment of rent by a previous lessee, Eastern Pacific Holdings Limited, conflict of interest and the involvement of the Trust in development proposals with the Māori Trustee and related external agencies.

[4] Poihipi Akuhata and John Akuhata-Brown also raised issues for the direction of the Court concerning the role of the advisory trustees, the previous and current role of the responsible trustees, the participation of descendants of owners in general meetings of the Trust, previous share transfers between owners, the election of trustees and the payment of dividends and grants.

[5] At the conclusion of the hearing the application per s 227(6) of the Act was granted with written reasons to follow. For completeness I record that the parties were informed that if Ms Bidois and Mr Evans required the issue of further directions regarding any of the other matters that had been raised they would need to amend their application and advise the case manager accordingly. Following the afternoon adjournment the case manager confirmed that Ms Bidois requested the Court issue directions on the other points raised during the hearing. I accept her request as an amendment to her original application.

Background

[6] This Trust has been before the Court on previous occasions which resulted in the issue of a reserved judgment by Deputy Chief Judge Fox on 23 November 2010.[1] In that decision the Deputy Chief Judge outlines the background to the Trust and a number of important issues that were raised in earlier proceedings that were the subject of her decision. Accordingly the parties are directed to that earlier judgment for the comprehensive background contained therein.

Submissions of the applicants

[7] Ms Bidois submitted that the procedure for the entering into of the lease by the trustees was flawed as the timeframes were too constrained and did not provide adequate opportunity for the trustees to consider the lease proposal. She also said that concerns were raised as to the content of the lease. Mr Evans, in support of Ms Bidois, also stated that he was concerned with the process adopted by the trustees.

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1 (2010) 10 Tairāwhiti MB 137

[8] The applicants say that the majority trustees did not provide sufficient opportunity for consideration of the lease. They also claim that the trustees had been unprofessional in their conduct towards Eastern Pacific Holdings Limited to the point where relationships between the trust and the company had broken down. Similarly, the applicants say that the trustees' conduct towards a Mr Carter, another prospective lessee, has been less than appropriate with the result that the latter, despite intensive negotiations, is no longer interested in leasing the trust's land.

[9] Mr Evans made the point that the largest shareholders in the block had not received any return for many long years. He says further that when he sought to obtain a license to occupy a significant area of trust land, some 24 hectares, was put to the trustees, they declined to accept this proposal. He says the trustees also refused to co-operate at the last general meeting of owners to provide him the opportunity to address his proposals to the meeting. Mr Evans explained by way of background his acquisition of shares from other beneficial owners and their elders over many years and the reasons and conditions for those purchases.

Submissions for the trustees

[10] Richard Clarke, supported by Hohepa Akuhata-Brown, rejected the claims that the trustees were not provided with adequate time to consider the lease. He emphasised that the terms of the lease were near identical to previous leases and so the trustees ought to have been familiar with that document long before the current lessee's tenure was agreed. Mr Clarke underscored that, in all the circumstances, the current lease arrangements are in the best interest of the trust.

[11] He pointed to the trust's relationship with Eastern Pacific Holdings Limited and how this had broken down due to the non-payment of outstanding rental by that company. Regarding the proposals by Mr Carter, Mr Clarke stated that negotiations were almost concluded, including the instructions being issued to the trust's solicitors to prepare a lease, when at the eleventh hour Mr Carter declined to proceed further. This was contrary, according to Mr Clarke, to a previous understanding in writing that Mr Carter was prepared to proceed. He referred to comments made to Mr Carter by Mr Evans as to particular conditions that would incorporate Mr Evans desire to obtain a licence over 24 hectares of trust land. Mr Clarke stated that the trustees had gone to considerable lengths to negotiate with Mr Carter but without success.

[12] Mr Clarke confirmed that the trustees had considered Mr Evan's proposal for use of 24 hectares of trust land but explained that this had been rejected as being inconsistent with the trust's current and long term development plans. Mr Clarke pointed out that the continuing viability of the trust as an economic unit would be completely undermined if Mr Evan's proposal had been

accepted by the trustees. In this context, Mr Clarke and Mr Akuhata Brown referred to the proposals by an informal group known as Pōtikirua ki Whangaokena (PKW) where a co-operative approach to consolidation of effort between neighbouring land owners was being contemplated with assistance from external agencies including the Māori Trustee, Te Tumu Paeroa. Mr Clarke emphasised that the ongoing viability of the land was of paramount concern to the trustees and all of their actions to date which included accepting a surrender of lease from Marphona.

[13] Mr Akuhata Brown endorsed the submissions of Mr Clarke and also stressed that the majority of trustees were attempting to work in the best interests of the owners as a whole and not any particular group or faction. He also expressed considerable concern at the actions of the applicants in filing applications to the Court which he considered had distracted the trustees from their principal objectives.

[14] Mr John Clarke was not able to attend the hearing due to prior commitments overseas but provided a detailed written submission received on 14 June 2013 setting out his reasons for supporting his colleagues in their decisions for the trust.

Submissions for the advisory trustees

[15] Mr Poihipi Akuhata submitted that the current responsible trustees had become dysfunctional and were alienating many of the owners with their conduct. He implored the Court to order an election of trustees as soon as possible. In addition, Mr Akuhata contended that the trustees had been incorrect in refusing to allow descendants of owners the opportunity to speak and vote at meetings of owners. Mr Akuhata also submitted that it was essential for the ongoing viability of the land that the conduct of the present trustees be further reviewed and that the owners have opportunity to elect new trustees.

[16] John Akuhata-Brown submitted that the beneficial owners had resolved that the trustees should pay a dividend but noted that this had been ignored. He also considered that the role of the advisory trustees remained confused from time to time and he was unsure as exactly what responsibilities they had.

[17] Both Mr Akuhata and Mr Akuhata-Brown raised concerns over the transfer and acquisition of shares by Mr Evans and contended that those transactions should also be the subject of enquiry by the Court.

Discussion

Conduct of the trustees

[18] The trust has at its disposal a wide array of skills. Richard Clarke is a successful businessman with considerable experience. Hohepa Akuhata-Brown has formal qualifications relevant to farming and psychology which he considered are highly relevant to the operations of the trust. John Clarke is a senior civil servant who has served in a number of prominent roles including as Race Relations Conciliator, head of Manatū Māori, member of the Waitangi Tribunal, a director within the Ministry of Justice and as a consultant to the Office of Treaty Settlements. Ngarangi Bidois is a chartered accountant in public practice. Horimatua Evans is a valuer and expert witness with a long experience of that profession with a particular emphasis on Māori land and development. It would not be unreasonable to expect therefore that the diverse and complimentary range of professional skills and experience of this group would be brought to bear for the benefit of the trust. I am confident that each responsible trustee considers that this is exactly what is occurring.

[19] However, as is common place, the trustees from time to time do not agree and nor are they required to in the discharge of their functions and responsibilities. Ultimately, the trustees must conduct themselves in accordance with the terms of the trust order, general trustees' duties and according to law. A wise trustee, while not being bound by resolutions of beneficial owners, will always consider their views. This is especially the case where a significant new initiative or policy is being contemplated. That said, the decisions for the trust are the decisions taken by the trustees. Their responsibilities also include being accountable for those decisions.

[20] Whether or not the trustees have acted prudently in entering into the various arrangements that they have over the years is not a matter currently before the Court. While submissions were made questioning the process for entering into the lease, the resolution of that issue was not the principal remedy sought. The applicants seek, as foreshadowed, to invoke s227(6) of the Act. In any event, having considered the evidence, there is nothing obviously askew that would excite the concern of the Court to precipitate intervention. Nor do I encourage the filing of any further applications for enforcement of obligations of trust or review of trust unless the trustees consider that their own relationships have broken down so irretrievably that the involvement of the Court is necessary. I emphasised at the hearing that it would be preferable for the trustees to attempt to resolve any outstanding differences between themselves. In an extreme case they may even consider the involvement or input of an outside external independent facilitator. I note Mr Akuhata-Brown's comment at the hearing that he might contemplate filing an application for the

removal of trustees. As I also underscored at the hearing, it would be prudent for all trustees to carefully consider involving the trust in further litigation without exhausting all other avenues to attempt to settle any issues that may remain unresolved. Certainly the trustees can seek the directions of the Court from time to time if they consider that necessary.

[21] Ideally trustees' decisions should be unanimous. Where that is not possible, the Act provides that trustees may act by a majority where there are three or more trustees. In addition, where trustees disagree with the majority they may apply to the Court per s 227 of the Act so that they are absolved from any liability arising from a decision to which they dissent. This is what the applicants have decided to do in this case. This step is available to them and I can see no reason why they should be criticised for seeking the shelter of the law where they have disagreed with their colleagues. Ultimately, the administration of the trust is vested in the trustees and where they are acting according to the trust order, general trust principles that include the duty to act prudently, then in the absence of compelling evidence to the contrary, the Court will not interfere.

Horimatua Evans' proposal

[22] Then there is the matter of Mr Evans' proposal to utilise up to 24 hectares of trust land around what is described as the old Evan's homestead for himself and his whānau. Mr Akuhata-Brown and Mr Clarke submitted that their understanding of Mr Evans' original proposal was that it would be limited to two hectares of trust land. I acknowledge Mr Clarke's submission that any proposal to take such a significant area of trust land out of its usual operations would have a major impact on the ongoing viability of the trust. The converse argument, as Mr Evans has contended, is that the largest owners in terms of the shareholding have not received a tangible benefit from the trust for many years.

[23] In this context it is important to note the submission of Mr Akuhata-Brown that the trust had been laden down with debt which some of the current responsible trustees had incurred. Put another way, while it is correct the owners, including those with significant shareholdings, have not received a tangible benefit for some time that was due in part to the actions of some of the current responsible trustees which required a diverting of trust income to pay down debts. What I understood Mr Akuhata-Brown to suggest was that if that debt had not been incurred then the possibility of owners receiving a benefit from the land would have been less remote.

[24] The real point, once again, is that any decisions concerning the use of this land are the responsibility of the trustees. Even so, if Mr Evan's wishes to address the next general hui of owners concerning his proposal then the trustees should ensure he is provided with adequate

opportunity to do so. The trustees must then consider all relevant information including the views of the owners and the best interests of the Trust beneficiaries as a whole before making a decision.

[25] Mr Evans is also entitled, as are any of the owners, to file applications for partition. It will be remembered that the Act continues to provide for partition while at the same time imposing significant restrictions on the ability of owners to successfully secure a partition when compared with the previous regime under the Māori Affairs Act 1953. No doubt Mr Evans and his whānau will consider the implications of a partition should they wish to proceed down that path.

Voting at meetings

[26] Another issue that arose during the hearing was the matter of voting at meetings of beneficial owners. There is authority from the Court of Appeal, the Māori Appellate Court and this Court that supports the following propositions:

(a) The Māori Assembled Owners Regulations 1995 do not apply to general meetings of owners called by trustees of a trust constituted under part 12 of the Act: *Clarke v Karaitiana*;[2]

(b) The Court should fashion its processes for elections and meetings of owners to ensure the widest possible participation of the owners and this may include the use of powers of attorney to ensure the views of those owners who cannot attend meetings are considered by the trustees;

(c) Unless the trust order provides specific references, voting by owners will not be binding on trustees: *Proprietors of Mangakino Incorporation v Hemi*;[3]

(d) Beneficial owners means those individuals who are recorded in the schedule of ownership held by the Court. Descendants of deceased owners are not entitled to speak at meetings of owners without the approval of the trustees who will usually put the matter to the meeting for consideration before making a decision: *re Parihaka X Trust*.[4]

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2 [2011] NZAR 370
3 (1999) 73 Taupo MB 30 (73 TPO 30)
4 154 Aotea MB 45 (154 AOT 45)

(e) Advisory trustees provide advice to the responsible trustees but their presence cannot be counted toward the quorum and they cannot move or second resolutions at meetings of trustees.

[27] On the issue of voting by shares or show of hands in *Thomson v Newton – Pokuru 1A1B2 and 1A2D2* the Māori Appellate Court stated:[5]

> Section 222 of Te Ture Whenua Māori Act 1992 provides that the Court is appointing trustees, must be satisfied inter alia that the trustee/trustees to be appointed "would be broadly acceptable to the beneficiaries'. The meeting of beneficial owners was arranged by the court under the chairmanship of an officer of the Court. This was a meeting of beneficial owners not a meeting of assembled owners, summoned in terms of Part IX of the Act. It was sought merely to enable to owners to decide who should e nominated to the trust for appointment for the purposes of satisfying the provisions of section 222 of the Act. **Such meetings have no formal requirements as to quorum or voting and since a consensus only is sought, voting by a show of hands is appropriate.** Trustees are appointed in accordance with statute or the trust document. In this present instance the trust document is silent as to the matter of appointment of trustees and neither the Trust Act 1956 nor te Ture Whenua Maori Act 1994[sic] make any provision as to the manner or voting on these matters. **A vote by poll is not essential nor warranted and a consensus is more appropriate and better meets the provisions of section 17 (2)(c) of the Act, whereby a balance is achieved between major and minor owners.**
>
> (Emphasis added)

[28] An arguable counterpoint to this view is s215(5) of the Act which states that the land and assets of a trust shall be held for the beneficial owners by the trustees in "proportion to their several interests" in the land. The short point is that either way meetings of owners voting by shares or by show of hands do not bind the Court or the trustees except where the trust order makes explicit provision for this. The Court, like the trustees, will take into account a range of relevant considerations before making a decision including the views of the owners. This is the essential point made on this issue in the Deputy Chief Judge's earlier judgment.

Previous share transfers

[29] This issue, while being raised in submissions during the hearing, is not the subject of any current application before me. If any owner seeks to challenge an earlier decision of the Court on transfers by way of sale, exchange or gift, then the remedies available to them are to appeal out of time, to seek a rehearing out of time, to file for judicial review in the High Court or to make application per s45 of the Act to the Chief Judge.

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[5] (1997) 19 Waikato Maniapoto Appellate MB 66 (19 APWM 66)

Conflicts of interest

[30] It is trite law that any trustee who is interested in any contract with the trust cannot be involved in any discussion or decision making relevant to that interest. Section 227A of the Act also makes this plain. The minutes of any trustees' meeting should record the withdrawal of any conflicted trustee from the meeting while the discussion as to their interest or potential interest is being considered. Where trustees are unsure they should seek directions from the Court. It is essential that any conflicts of interest, actually or perceived, are managed appropriately.

Trust order review

[31] Finally I note that the current trust order is inconsistent with the standard form wide powers trust order currently used in many ahu whenua trusts in this and other districts. The trustees may wish to consider raising the issue of varying the trust order to conform with the latest version of the standard wide powers ahu whenua trust order for consideration at the next general meeting of owners. That is a decision for the trustees in any event.

Decision

[32] The application by Horimatua Evans and Ngarangi Bidois to be absolved from any personal liability arising out of the implementation of the decision of the majority trustees Richard Clarke, John Clarke and Hohepa Akuhata-Brown to enter into a lease with TSB Partnership is granted.

[33] The trustees are directed to ensure that at the next general meeting of owners Horimatua Evans is permitted sufficient opportunity to present a proposal for use of part of the Trust's lands.

[34] The trustees will file with the Registrar for the Court's attention a copy of the minutes of the next general meeting of owners.

[35] The application for directions is concluded and dismissed.

Pronounced in open Court at am/pm in on the day of 2013

L R Harvey
JUDGE