

**IN THE MĀORI LAND COURT OF NEW ZEALAND  
TAKITIMU DISTRICT**

**A20110011130**

UNDER Sections 238, 239 and 240, Te Ture Whenua  
Māori Act 1993

IN THE MATTER OF Matahiwi 1A & 2 Blocks

BETWEEN MARK WILLIAM MANSFIELD  
Applicant

AND JOHN POMANA, ROSANNA ELOISE  
(DAWNIE) KINGI, SEYMOUR WALKER,  
SHARON ALMA EDWARDS-WALKER AND  
TE HEMOATA DAWN POMANA  
Respondents

Hearing: 4 July 2013  
(Heard at Hastings)

Appearances: Wilhelm Studer, John Pomana, Rosanna Eloise (Dawnie) Kingi,  
Seymour Walker, Sharon Alma Edwards-Walker and Te Hemoata  
Dawn Pomana, in person

Judgment: 05 July 2013

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**INTERIM RESERVED JUDGMENT OF OF JUDGE L R HARVEY**

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**Introduction**

[1] On 2 November 2011 Mark Mansfield filed proceedings per s238 of Te Ture Whenua Māori Act 1993 seeking financial information from the trustees of Te Raniera Huango Trust. He claimed that they had failed to hold general meetings, provide annual accounts and be accountable to the beneficial owners. More seriously Mr Mansfield alleged that the trustees had “embezzled” trust funds and accordingly had to be brought before the Court to account for this conduct. I note that Mr Mansfield had made these claims of lack of financial accountability against the trustees in 2009 and the proceedings had been before the Court since then.

[2] The trustees had given assurances that the accounts would be prepared and that a general meeting of owners would be convened soon after the completion of the accounts. However, by the

time of the first hearing before me on 8 February 2012 the accounts had still not been finalised let alone subject to audit.

[3] I then issued a decision dated 28 March 2013 where Wilhelm Studer was appointed as an additional responsible trustee.<sup>1</sup> The trustees were directed to obtain audited accounts, recover any misappropriated funds, review the leases and attend to payment of outstanding tax liabilities and to ensure that the trustees were adhering to their duties without exception. A meeting of owners was also foreshadowed as a necessary step to resolving the various concerns that had been raised.

[4] Annual accounts have now been prepared and the trustees have also paid the Inland Revenue Department all outstanding taxes. However, during the course of preparing the accounts several additional concerns have arisen. The trust's new accountant, Ashley Nuttal of BDO Spicers of Gisborne, has prepared a report dated May 2013 highlighting what may be the misappropriation of funds exceeding \$50,000. In addition the report discloses that particular beneficial owners, including several closely connected with certain trustees, have been overpaid in the amount of \$122,000. Further, concerns have arisen as to the validity of certain leases of trust land where valuations were obtained but rentals were subsequently agreed that were significantly less than a market rate. It also appears that not all of the leases were executed correctly.

### Issues

[5] The issues for determination are:

- (a) Have any of the trustees misappropriated trust funds?
- (b) Have any of the trustees overpaid beneficial owners?
- (c) Has the trust suffered unnecessary loss from the lease of trust land?
- (d) Should any of the trustees be removed?
- (e) What steps should be taken regarding recovery of misappropriated and overpaid funds?

[6] The current structure of the trust including the role of responsible and advisory trustees along with further directions to inform the owners by way of general meeting are also considered at the end of this judgment.

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<sup>1</sup> *Mansfield v Pomana – Matahiwi 1A and 2 other blocks* (2013) 22 Takitimu MB 123 (22 TKT 123)

## Background

[7] The background to the trust and the procedural history to the present proceedings have already been outlined in my previous judgment so this decision need not be encumbered with that detail. The parties are referred to paragraphs [6] to [13] for that information.

## The Law

[8] It is trite law that trustees must adhere to their duties and any claim as to a lack of knowledge of such responsibilities is no defence against a claim of breach of duty. The Court of Appeal in a recent judgment *Rameka v Hall* underscored the relevant duties including the principal obligation of being familiar with the terms of the trust:<sup>2</sup>

[28] The general responsibilities of responsible trustees are set out in s 223 of the Act. That section refers to the following:

- (a) Carrying out the terms of the trust;
- (b) The proper administration and management of the business of the trust;
- (c) The preservation of the assets of the trust;
- (d) The collection and distribution of the income of the trust.

[29] As we have noted, these statutory duties are not exhaustive and general trustee law principles are also relevant. Further, the trust order applicable to the trust may add other responsibilities. The relevant obligations of trustees have been described by the Maori Appellate Court in these terms:

- a) A duty to acquaint themselves with the terms of trust;
- b) A duty to adhere rigidly to the terms of trust;
- c) A duty to transfer property only to beneficiaries or to the objects of a power of appointment or to persons authorised under a trust instrument or the general law to receive property such as a custodian trustee;
- d) A duty to act fairly by all beneficiaries;
- e) A duty of trustees to invest the trust funds in accordance with the trust instrument or as the law provides;
- f) A duty to keep and render accounts and provide information;

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<sup>2</sup> [2013] NZCA 203

- g) A duty of diligence and prudence as an ordinary prudent person of business would exercise and conduct in that business if it were his or her own;
- h) A duty not to delegate his or her powers not even to co-trustees;
- i) A duty not to make a profit for themselves out of the trust property or out of the office of trust: *Garrow and Kelly Law of Trusts and Trustees* (sixth edition, pp 523–582 inclusive)

[9] Section 240 of the Act states:

**240 - Removal of trustee**

The Court may at any time, in respect of any trustee of a trust to which this [Part] applies, make an order for the removal of the trustee, if it is satisfied—

- (a) That the trustee has failed to carry out the duties of a trustee satisfactorily; or
- (b) Because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[10] In *Rameka v Hall* on the issue of the relevant principles regarding removal the Court of Appeal citing with approval the approach of the Māori Appellate Court stated:<sup>3</sup>

[30] The settled approach in the Māori Appellate Court in applying s 240 is to make an assessment of these standard duties together with what the Court has described as:

... the broader approach having regard to the special nature of Māori land trusts and the provisions of [the Act]. Thus the prerequisite for removal of a trustee was not a simple failure or neglect of duties, but a failure to perform them satisfactorily. Accordingly an assessment of the trustee’s performance was essential when applying s 240.

We endorse this approach as part of the first stage inquiry.

[31] This was the test Judge Harvey set out as applicable to his decision. As to what is encompassed by the term “satisfactory” in the context of s 240, Judge Harvey also discussed *Bramley v Hiruharama Ponui Inc – Committee of Management – Hiruharama Ponui Inc*.<sup>14</sup> In *Bramley* the Māori Appellate Court rejected the appellant’s argument that all members of the committee be removed, stressing the importance of measuring unsatisfactory conduct against the principles of the Act as found in the Preamble and s 2. The key principles for these purposes are that the Court should encourage retention of Māori land in its owners’ hands, the use and development of that land, and control of the land by the owners, through their representatives.

[11] That Court also confirmed that trustees are not to be removed lightly and a careful assessment of a trustee’s performance will be necessary:

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<sup>3</sup> [2013] NZCA 203

[90] We agree that there is a need for caution before a trustee is removed. The issue of removal cannot be determined by viewing each relevant factor in isolation from others. The Māori Land Court must consider the bigger picture which may involve examining the history of the trust as well as each trustee's performance.

[12] In addition, the issue of removal of trustees has been considered by the Māori Appellate Court in *Marino – Repongaere 4G (Part)*, *Perenara v Pryor – Matata 930* and *Te Whata v Paku*.<sup>4</sup> I adopt the reasons set out in all of these judgments.

## Discussion

### *Have any of the trustees misappropriated trust funds?*

[13] Mr Nuttal alleges that one of the trustees, Sharon Edwards-Walker, is responsible for unaccounted funds through misappropriation or otherwise in the amount of approximately \$57,000. He claims that, in the absence of supporting evidence to the contrary, it appears that Mrs Edwards-Walker as the trust's "administrator" was responsible for the issuing of funds to various parties and cannot account for this expenditure. At the hearing Mrs Edwards-Walker suggested that some of the amounts included in this total were not misappropriated or unaccounted for but rather had simply been coded incorrectly. However, having had the Nuttal report for over a month she failed to contact BDO Spicers and challenge the allegations or make any comment other than to acknowledge to the trustees at a subsequent meeting that she would take responsibility for her conduct. Mrs Edwards-Walker also claimed that she was not in any fit mental state to deal with all of the concerns and challenges confronting the trust and that she had used her best endeavours to manage as "administrator" to the best of her ability.

[14] Regrettably for Mrs Edwards-Walker, I find her explanations to date implausible and without merit. Overall her evidence was confused at best and at times contradictory and self serving. Several illustrative examples are sufficient to demonstrate that it would appear she has indeed misappropriated funds and been a party to, if not the guiding hand, in significant and unjustified overpayments either through incompetence or by design, in the absence of any tenable defences.

[15] The financial records of the trust disclosed four payments amounting to \$6,500 made in February and March 2009 with the narration "wedding." When asked about this reference Mrs Edwards-Walker acknowledged that these were funds taken from the trust, without the authority of

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<sup>4</sup> (2004) 34 Gisborne Appellate MB 98 (34 APGS 98), (2004) 10 Waiariki Appellate MB 233 (10 AP 233) and (2011) Māori Appellate Court MB 55 (2011) Appeal 55.

the trustees it would appear, to pay for her wedding to Mr Walker in 2009. Other items of expenditure inappropriately paid for from the trust included medical insurance for her husband of \$699 on more than one occasion. Her explanation was that this was intended to be part of a payment series of dividends in advance. It will be remembered that by this time Mr Walker had not only been paid his dividends but had in fact been grossly overpaid. And all by the hand of Mrs Edwards-Walker, his de facto and now de jure wife.

[16] Then there is the amount of \$6,000 that has been referenced as a charge against Seymour Walker allegedly in connection with a tangi or unveiling when it is said that Mr Walker has no knowledge of this payment.

[17] Another example of financial accountability concerns relates to the unclaimed dividends for Mary Waaka in excess of \$6,000. I note that the tax deduction certificate lists Mary Waaka's postal address as the same address used by Mrs Edwards-Walker. In the absence of alternative evidence, it may be that the recipient of all unclaimed dividends is the trust itself holding those liabilities for the day when the relevant owners emerge to claim their dividends and consequently the trust's then physical address was used. There are many other examples of expenditure that appear, at first blush, to be questionable.

[18] The transfer of \$16,000 allegedly being payment of shares that the trust purchased from an owner is another example of obvious concern. A brief search of the Court's records has not revealed any s164 vesting applications transferring the shares to the trustees on behalf of the trust or to any other person. It was then suggested that a subsequent general meeting of owners agreed to convert this "purchase" into an advance on dividends. The evidence of the trustees on this point was confused and somewhat implausible. Moreover, in my assessment based on the available evidence the payment amounts to unauthorised expenditure made by several of the trustees with Mrs Edwards-Walker as "administrator" and without legitimate justification to a beneficial owner in excess of their entitlement.

[19] Then there is the matter of the \$12,000 taken from the trust's account by Roberta Karangaroa. In my earlier judgment I directed the trustees to recover the outstanding \$2,500 from Karangaroa following her repayment of \$9,500. It now emerges that Ms Karangaroa claims she has returned that amount to Mrs Edwards-Walker directly, which the latter denies.

[20] It will be remembered that Ms Karangaroa had been approached to provide "governance training" to the trustees at the request of Mrs Edwards-Walker. At the hearing yesterday Mrs Edwards-Walker confirmed that she had known Ms Karangaroa for many years and had asked her to provide "governance training" to the trustees. At the previous hearing the trustees accepted they

had been persuaded by Ms Karangaroa to add her, a non-owner and a non-beneficiary of the land, to become a signatory for the trust using the pretext that having siblings as trustees signing cheques was not best practice. Ironically, as mentioned, Ms Karangaroa then proceeded to withdraw \$12,000 from the trust for her own personal use with \$9,500 recovered from her following a complaint to the Police.

[21] Ms Edwards-Walker subsequently claimed that the trust's then bankers had paid the money out to Ms Karangaroa on only one signature and that on her return from overseas Mrs Edwards-Walker had gone to the bank to sign a withdrawal slip to approve the payment after the fact. The trustees had been directed to use their best endeavours to contact Ms Karangaroa to give her opportunity to respond to the allegations that had been made against her. To date no such response has been forthcoming. Indeed, Mrs Edwards-Walker claimed that whenever arrangements were made with Ms Karangaroa to hold a meeting she was invariably unavailable at the last minute. As I mentioned in my previous judgment the trustees are liable to repay this amount if it could not be recovered from Ms Karangaroa. As it was Mrs Edwards-Walker who signed the withdrawal or payment slip, and without the approval of the trustees, I find that she is responsible to repay this amount to the trust. That said, it may now be appropriate for the trustees to put the matter in the hands of a collection agency, in the absence of either repayment or a tenable defence from Ms Karangaroa.

[22] The short point is that I have real concerns as to the veracity and legitimacy of the financial records of the trust during the tenure of Mrs Edwards-Walker. My initial impression is that there have been serious breaches of various trustee duties including not to profit, conflict of interest, failing to protect the trust assets and failing to treat beneficiaries impartially. Her own admissions in open Court on oath are clearly sufficient to warrant her removal for cause per s240 of the Act.

[23] As foreshadowed, I put it to Mrs Edwards-Walker that it seems surprising that on learning of the serious allegations as contained in Mr Nuttal's report that she had not soon after made contact with the accountant to at least question if not reject outright the allegations of misappropriation of funds. Mrs Edwards-Walker's response was confused and unhelpful. Even so, as I indicated at the hearing, it is appropriate that she be given opportunity to challenge the allegations made against her and take legal advice. I give Mrs Edwards-Walker 60 days from the date of this judgment to seek legal advice and respond to the allegations set out in Mr Nuttal's report.

[24] My conclusion is that, in the absence of any tenable defence supported by evidence, there has been significant maladministration of the trust's finances if not outright misappropriation. The fact that Mrs Edwards-Walker has failed to respond in any meaningful way to the allegations when

she has been on notice to do so is inexplicable. In addition, the fact that she wilfully overpaid her husband in amounts approaching \$50,000 and made payments to his siblings far beyond their entitlements for a combined total exceeding \$120,000 is as surprising as it is unacceptable.

[25] I therefore direct the trustee to carefully consider Mrs Edwards-Walker's response, should any be forthcoming, and then to take legal advice as to what possible remedies may be available to them to either recover these amounts or to involve the relevant enforcement authorities to undertake an appropriate prosecution. The trustees should also carefully review the veracity of the trust's financial information and satisfy themselves that what has been presented is reliable. The trustees will have 90 days from the date of this judgment to consider their responses to this serious set of allegations.

*Have any of the trustees overpaid beneficial owners?*

[26] Mrs Edwards-Walker acknowledged that she had overpaid her husband John Walker, in excess of \$48,000 in dividends. When I asked her how this could have occurred she simply said that she had been bullied by owners including her husband. When I put to Mrs Edwards-Walker that taking for example the 2011 financial year and the profit of \$30,000, John Walker's entitlement being 6.4 %, would amount to \$1,900 as a dividend for the year, she failed to provide any useful response. A review of the annual accounts discloses that the trust has not made that kind of surplus consistently so it would be impossible for John Walker to receive a dividend of anything approaching \$48,000 if the correct proportion of the profit was allocated to him according to his shareholding. And it should be underscored that the amount of \$48,000 is an overpayment beyond Mr Walker's dividend entitlement which he had been paid.

[27] The inference to draw from this conduct is, as I put it to Mrs Edwards-Walker, that she has abused her position of trust to enrich her husband and by extension herself through these deliberate overpayments when she knew or ought to have known that they were both unauthorised and unjustified. Once again, Mrs Edwards-Walker's response to the allegation was to accept that she had overpaid John Walker and other owners without justification. Her only defence, as mentioned, was that she felt that she had been "bullied." Mrs Edwards-Walker also accepted that she had overpaid members of Mr Walker's whānau.

[28] Some of the beneficial owners have not received any dividend at all. Others have received far in excess of their entitlement. Using a rough estimate, it would take over 20 years using the trust's current profitability as a guide for those owners who have been significantly overpaid to restore those funds back to the trust. There can be no justification for these overpayments and they



amount to the unauthorised retention of trust capital in the hands of trustees and beneficial owners. This issue is considered further later in this decision.

*Has the trust suffered unnecessary loss from the lease of trust land?*

[29] Mr Studer advised that on enquiry the lease for the Matahiwi 1A block was questionable for two reasons. Firstly, the trustees had commissioned a valuation which disclosed that a fair market value for the lease of the land was \$12,500. However, the trustees, or one of them, entered into a lease for well below this amount. I put it to Seymour Walker that this had meant the trust had forgone \$4,000 per annum over the last five years in income for no apparent reason. His response was that the lessee had claimed that he could not afford the market rental and so this assertion was simply accepted. Equally concerning, Mr Walker admitted that he alone had signed the lease without a majority of trustees.

[30] The difficulty the trust faces now is that the lessee could arguably rely on the representations made by Mr Walker that he had the authority of the trust to enter into the lease. I direct the trustees to enter into further discussions with the current lessee as to whether or not new terms can be agreed that reflect more fairly a market valuation. As the valuation was obtained 5 years ago a fresh valuation may now be appropriate.

[31] Regarding the lease of the trust's largest block, WaipukaNo.3D No.1, Mr Studer confirmed that on his review of both the lease and the land that arrangement had been entered into in the best interests of the owners. He was satisfied that the terms of the lease were appropriate, that the rental being paid was sufficient in the circumstances and, just as important, the lessees were looking after the land as if it were their own. For completeness I note that a rent review is due next year.

*Should any of the trustees be removed?*

[32] All of the trustees with the exception of John Pomana expressed a desire to remain on the trust but three of them including Mr Pomana said that they would resign if that was in the best interests of the trust. Mr Walker stated that he would prefer to stay as did Mrs Edwards-Walker.

[33] *Horsfall v Marino* is authority for the proposition that a trustee who is indebted to a trust is in an untenable position and cannot remain in office.<sup>5</sup> I agree. Even so, I acknowledge that Ms Kingi and Mr Walker wish to assist the trust to deal with its present challenges. In my assessment, their role should be altered by consent from responsible to advisory trustees. At the hearing both

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<sup>5</sup> (2004) 34 Gisborne Appellate MB 98 (34 APGS 98)

Mr Walker and Ms Kingi agreed. I expect that they, like all other owners who had been overpaid, will now enter into an arrangement to repay those amounts directly or through the forfeiture of future dividends.

[34] I also consider that, notwithstanding the past difficulties of the trust, the best interests of the beneficial owners will be served by the retention of Dawn Pomana and John Pomana as responsible trustees, along with Mr Studer as chairman. From a practical perspective, the trust's accountants are now located in Gisborne and Mr Studer will be able to travel from Whakatāne to Gisborne for meetings with the two other responsible trustees and the accountant. Mr Walker and Ms Kingi can also attend meetings in Gisborne in person if they wish or by telephone. For the avoidance of doubt the responsible and advisory trustees are appointed until 30 November 2013 or until further order of the Court.

[35] The position of Mrs Edwards-Walker is quite different. The trust, on the available evidence, has lost significant sums of money during her tenure as "administrator." Her explanations have at best been unsatisfactory. Her acknowledgments must also be noted. In short, Ms Edwards-Walker, despite her plea to remain a responsible trustee, has by her conduct placed herself in an untenable position. Her maladministration of the trust's finances cannot be justified. The payment of her wedding and that of Mr Walker from trust funds was inappropriate as it was unacceptable. There can be no justification for this conduct and in the absence of alternative evidence my conclusion is that Ms Edwards-Walker has abused her position as a trustee for personal gain, has placed herself in a conflict of interest position, and has made an unauthorised profit from her office. As foreshadowed, these cumulative breaches of general trust law principles are sufficient to warrant her removal as a trustee.

[36] When I put it to Mrs Edwards-Walker that she could either resign or face removal, she elected to resign. Despite this resignation, which was accepted and orders issued to effect this, Mrs Edwards-Walker is still under an obligation to provide a response to the claims of misappropriation set out in BDO Spicer's report. I expect Mrs Edwards-Walker to cooperate fully with the trustees in their ongoing efforts to resolve all of the trust's outstanding accountability challenges.

*What steps should be taken regarding recovery of misappropriated and overpaid funds?*

[37] I note the submissions of Dawn Kingi and other trustees that those owners who have been paid in excess of their entitlement had acknowledged this and were prepared to repay these amounts either directly or from future dividends. It is important therefore that the trustees enter into deeds of acknowledgement of debt with those owners who have been overpaid and that some sensible arrangement is entered into to achieve repayment of these amounts either from the

beneficial owner or through forfeiture of future dividends. The trustees are directed to make arrangements for deeds of acknowledgement of debt with the affected owners within 60 days following the next general meeting of owners.

### **General meeting of owners**

[38] The present application was precipitated by allegations made against the trustees by Mark Mansfield. His original complaints concerned the lack of information available to beneficiaries, lack of meetings and lack of annual accounts. On the face of the evidence before the Court it would appear that many of Mr Mansfield's concerns have been borne out and his complaints justified.

[39] It is now essential that a general meeting of owners be held as soon as possible. The owners need to be informed as to recent developments and how the current trustees have been attending to the various challenges that have vexed the operation of this trust for some time. A detailed package of information should be prepared by the trustees to send out to owners for whom addresses are known that is to include copies of the annual accounts for the last five years, copies of Mr Nuttal's report and the distribution of dividends schedule which outlines the overpayments that have been made to date. An independent facilitator will be procured to chair the meeting. I expect Mr Nuttal to be available for the meeting to answer any questions concerning the trust's accounts. In due course, following the completion of the various tasks that have been outlined, it may be necessary to have an election of trustees at a subsequent general meeting of owners.

[40] Following the next general meeting of owners a further hearing will be necessary to determine what future steps if any will be required to restore the trust to its previous position of stability and credibility amongst the ownership in the wake of the difficulties that have emerged in recent times. A report from the trustees on their activities on a regular basis will also be required for at least the next 6 months.

### **Decision**

[41] By consent Seymour Walker and Rosanna Kingi are appointed advisory trustees and the number of trustees is reduced on account of the resignation of Sharon Edwards-Walker, per ss 222 and 239 of Te Ture Whenua Māori Act 1993.

[42] Sharon Edwards-Walker has 2 months from the date of this judgment to file any response to the allegations made against her in the report of BDO Spicers dated May 2013.

