

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

A20190011423

UNDER Sections 18(1)(c), 19(1)(a) and 19(1)(c) Te Ture
Whenua Māori Act 1993

IN THE MATTER OF Himatangi 7 block

BETWEEN EILEEN HENNESSY
Applicant

AND ROBYN PARKINSON and HUIA PETERS AS
TRUSTEES OF THE HIMATANGI 7 WHĀNAU
TRUST
Respondents

Hearing: On the papers

Judgment: 20 December 2019

JUDGMENT OF JUDGE M J DOOGAN

[1] The Himatangi 7 Whānau Trust is an ahu whenua trust administering 21.8 hectares of Māori Freehold land (The Himatangi 7 Block).

[2] Eileen Hennessy is one of six trustees. By application dated 18 December 2019, she has applied for an injunction to prevent the lessee, Grant Barber and/or his contractor from carrying out any further excavation and contouring of the land.

[3] In support of the application, Ms Hennessy says that on 9 December while passing through Himatangi she found a bulldozer demolishing hills and sand dunes. She says:

This desecration of the land was not mandated by a constituted hui of the trustees or beneficiaries. Major structural change to the landscape would never gain the support of everyone. Some trustees have encouraged an action which breaches their duties as responsible trustees. This whenua retains great cultural and spiritual significance to our people. This is papakainga land, my mother was born here, my grandfather died here. We are ahi kaa, mana whenua. We are the land and the land is part of us.

[4] Filed with the application were a number of photographs of the works. These show areas of vegetation cleared from undulating, low-lying land with a sandy base. Also filed were a number of emails between trustees and the minutes of two trustee hui. Ms Hennessy has also sworn a short affidavit (undated) which deposes:

- 1) I have observed Mr Grant Barber (“the lessee) excavating the property referred to as Himatangi Block 7 title WN 23C/203.
- 2) The Lessee does not and has not had permission to excavate the property and has caused a lot of damage.
- 3) Mr Barber was asked by a member of the trust to eradicate the gorse outbreak on the property.
- 4) Unfortunately he has used a bulldozer and significantly changed the contour of the property by flattening out sand dunes.
- 5) This has significantly changed the outlay of the property.
- 6) The trustees of Himatangi 7 Whānau Trust have failed to follow the deed of lease and our constitution by not holding a meeting to discuss the issues.

[5] Through the case manager, I issued directions on 19 December 2019 asking the applicant and Trust Chair to confirm the current status of the works and whether they had been completed. I also asked the case manager to check the availability of the parties for a possible teleconference at 9am Friday 20 December 2019.

[6] The case manager received an email response from the applicant stating:

The Lessee has virtually demolished all the dunes and hills, but one. One tree remains and one dune stands three/four metres is in tact. The gorse, however is still prevalent.

[7] Mr Barber advised the case manager by phone that essentially 7/10ths of the earthworks has been completed. It will take two to three days to conclude the work but until he gets a clear direction he does not intend to recommence the earthworks. The delay in completing the earthworks will cost “you” (presumably the trust) approximately \$3000 due to the bulldozer being on stand by for five days at a cost of \$600 per day. They are in the process of sewing grass which will make the land look better.

[8] The case manager was not able to get hold of the Trust Chair but did speak to the trust secretary, Huia Peters who advised that she was not aware of the current position with the works but was concerned about how the situation may affect their relationship with the lessee. Ms Peters also advised that she was not aware of the sites of historical and spiritual significance referred to by the applicant. She advised that she had spoken with kaumatua that day and that they had no knowledge of such sites either.

[9] I have proceeded to deal with the application on the papers without the need for a teleconference.

[10] The application for interim injunction is made pursuant to ss 19(1)(a) and (c) of Te Ture Whenua Māori Act 1993 (the Act). The Court has jurisdiction to grant both interim and permanent injunctions against any person to prevent actual or threatened trespass or injury to Māori freehold land or to prohibit any person without lawful authority from (among other things) removing or disposing of sand, topsoil or other substances on or from any Māori Freehold land.

[11] An interim injunction is a discretionary remedy designed to protect an applicant from injury to legal or equitable rights that might arise from the delay between the filing of a claim and a hearing, and in circumstances where damages might not be an adequate remedy. Two questions must be addressed. First is there a serious question to be tried and secondly, does the balance of convenience favour the applicant?

A serious question?

[12] Clause 8.14 of the lease provides that the lessee shall not remove or otherwise deal with subsoil or contours of the land without the lessors' prior written consent. Minutes of a trust meeting of 21 October 2019 record that Ms Peters was to contact Grant Barber to get an update on the progress of the gorse control that he is carrying out. This relates to an earlier trust meeting of 23 February 2019 where the minutes record that removal of gorse was discussed. The minutes go on to say:

It is a condition of the lease that the gorse is cleared. Grant Barber would like permission to contour the land to make the gorse removal easier. Gorse is still prevalent on the land.

[13] The minutes then record as an action point:

Huia to write to Grant Barber and ask for a proposal from him for the contouring of the land to make the removal of gorse easier.

[14] Ms Peters then wrote by email dated 26 March 2019 asking for his proposal to contour the land to make it easier to control and remove the gorse. On 10 April 2019, Katrina Barber responded saying that Grant had scheduled the contouring and the gorse removal to occur at the same time. It was anticipated that would start in May with the intention to be completed by the end of June. The contouring would be less than one metre and Grant estimated that he will invest \$5,000.

[15] Ms Peters responded on 14 April 2019, noting that it was good that Grant had a plan for the gorse control and that "we look forward to hearing that this has been completed around the end of June 2019. Please keep us updated".

[16] There was some delay and subsequent emails seeking updates, the most recent being 22 October 2019 when Ms Peters again asked for an urgent update on where the gorse control was at.

[17] Mr Barber responded by email on 9 December 2019 to say that Ms Hennessy had visited the land and asked them to stop the contouring work which is part of the gorse control and prevention. He said that after a lengthy discussion, Ms Hennessy agreed that they could finish the middle section but she wanted to consider whether to allow anymore contouring.

Mr Barber sought written confirmation that he could continue the work. He was due to finish the middle section that morning and it would be inefficient to leave the contouring incomplete as the aim was gorse control management and improving productive capacity and value of the land.

[18] On 10 December 2019, Ms Hennessy wrote to Ms Peters and the other trustees stating that Mr Barber did not have owners consent to proceed, the trustees did not follow the correct process and that Mr Barber was removing more than the agreed metre. Ms Peters responded on 12 December 2019, noting that the current lease agreement requires Mr Barber to keep the land free of noxious plants and vermin. If he is prevented from performing that task, he would have grounds to sue the trust for preventing him fulfilling his obligations. The trustees are empowered to act by majority and all trustees except Ms Hennessy had approved Mr Barber to continue with the gorse control and contouring work. Ms Peters concluded by saying:

If you persist in interfering or preventing Grant Barber from performing this work, then you are in conflict and are putting the trust at risk, and therefore the trustees have grounds to apply to the Court for your removal.

[19] Ms Hennessy responded that day as follows:

I don't agree. Save your threats Huia, Grant has agreed not to continue work. The dunes stay, reconstruction of the whenua is over. As stipulated in the trust order, owners must consent to major decisions. I am not interested in your pathetic criticisms, you are in breach of the terms of the trust order. Follow the correct process. Okay.

[20] On 10 December 2019, Ms Peters also notified Mr Barber that he had approval from five of the six trustees to continue with the gorse control contouring work to a target of one metre.

[21] It is clear to me that Mr Barber has the required authorisation to carry out the contouring work as part of fulfilling his obligation to control gorse. It is also clear that that approval has been given by five of the six trustees. I do not see a serious question arising as to the authority for the work to proceed. The work is therefore not in the nature of a trespass or injury to which an injunction may respond. The application must fail on this ground.

[22] In my view the balance of convenience also tells against the granting of an interim injunction. The work is substantially complete and there are ongoing costs arising from further delay. Those costs may become a charge on the trust. There is no substantive evidence before me to indicate that the works have or are about to disturb particular sites of cultural significance on the land. The works have clearly been authorised by the majority of trustees and should be completed without further delay.

Conclusion

[23] The application for interim injunction is dismissed.

[24] I record my concerns that one trustee has acted unilaterally and caused work that had been approved by the trustees to be halted at possible costs to the trust. This gives rise to a question of possible unsatisfactory conduct on the part of the applicant that may warrant removal.

[25] This application is to be set down for hearing as a special fixture following the completion of the ordinary list of the next sitting of the Court in Palmerston North on 30 January 2020.

[26] I would like to hear from the applicant at that time as to why she ought not be removed as a trustee and I would like to hear from the other trustees on this issue and on any costs that may have been incurred by the trust as a result of delays to the gorse control work.

Pronounced at 4.15pm in Wellington on this 20th day of December 2019.

M J Doogan
JUDGE