

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

A20180001061

UNDER Sections 231, 237 and 240 of Te Ture Whenua
Māori Act 1993

IN THE MATTER OF Rangitatau Waitōtara 3C2B2 and 3C2B3 Trust

D J BETHEL FAMILY TRUST
Applicant

Hearing: 19 February 2019, 397 Aotea MB 114
(Heard at Whanganui)

Appearances: Reece Pritchard in person
Stephen Toa-Wairere, Patrick Toa-Wairere in person

Judgment: 4 December 2019

INTERIM JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] The last hearing of this proceeding concerning the Rangitatau Waitōtara 3C2B2 and 3C2B3 Trust and an application for review occurred at Whanganui on 19 February 2019.¹ At that time, I directed that a block inspection report be undertaken because of conflicting evidence between the trustees of the land and the current lessee, the trustees of the D J Bethel Family Trust.

[2] A suitable independent consultant was engaged for that purpose and the report was referred to me on 1 May 2019. Following that, I directed that the report should be circulated to parties for their review and comment. Correspondence in response to the report was received from the trustees of the D J Bethel Family Trust, received 28 and 31 May 2019, from Stephen Toa-Wairere and from Kieron and Laran Te Awhe received 24 May 2019. Since then, further correspondence has been received from D J Bethel Family Trust, Stephen Toa-Wairere and Kieron and Laran Te Awhe.

¹ 397 Aotea MB 114 (397 AOT 114)

[3] The issues for the Court include what steps if any need to be taken to review the current use of the land. The eligibility of the current lessee for consideration for any future use of the land is also an issue. Finally, the role of the current responsible trustees needs to be carefully considered in the context of whether they have fulfilled their duties. For completeness I note that under the terms of the current trust order the trustees were due to retire so that an election could take place in July 2019.

[4] However, before those issues can be properly determined, and included in any future final decision, the expert report of Mr Young needs to be considered along with the responses of the parties before any further directions or decisions can be taken.

Background

[5] Rangitatau Waitōtara 3C2B2 and 3C2B3 are blocks of Māori freehold land 2.85 and 12.13 ha respectively, with a combined area of 14.992 ha according to the Court's records.² There are currently 14 owners holding 0.9739 shares. The land is administered by an ahu whenua trust and the current trustees are Stephen Toa Wairere and Patrick Toa Wairere.³

[6] Messrs Toa Wairere are also two of six trustees of the Toa Wairere Whānau Trust, which holds 0.155 shares in Rangitatau Waitōtara 3C2B2 and 3C2B3.

[7] The D J Bethel Family Trust is the largest single owner in the lands holding 0.296 shares. The trustees are Reece and Kui Pritchard.

Report of Mr Young

[8] The report of Mr Young records that, in his opinions, there was very limited interaction with the current occupier with the result that some of the detail of the report may not be entirely correct.

[9] He states that Rangitatau Waitōtara 3C2B2 is 2.85 hectares in area to the left of the road with the western boundary being the river. Most of this block is 60 to 65 percent of the total area covered in manuka scrub estimated to be 4 to 5 years old.

² 313 Aotea MB 233-246

³ 355 Aotea MB 274-275 (355 AOT 274-275)

[10] Mr Young confirms that it was difficult to determine whether this was a general reversion to native manuka caused by below average farming practices or that the land is being allowed to revert to produce manuka honey. Mr Young noted that the current occupier has approximately 100 beehives servicing the combined blocks.

[11] Rangitatau Waitōtara 3C2B3 is situated to the left of the Waitōtara Valley Road with a road fence being post and 6/7 wire. There was a major flood in 2015 which deposited significant river silt. There is no fence along the river boundary.

[12] Regarding the pasture, according to Mr Young, because of the “lax grazing” and because of the floods in 2015 and 2005, the pasture cover is understandably poor with a high infestation of native cutty grass unpalatable to stock except where there is severe feed shortage. Pennyroyal, another weed unpalatable to stock, is also present and has taken over the area. The balance of the pasture contains low fertility native grass with limited stock carrying capacity. As foreshadowed, the area of manuka appears to be increasing which will reduce stock capacity but increase ability for the carrying of beehives.

[13] Overall, Mr Young states that the area has deteriorated in the last five to ten years since the significant flooding event. The deterioration in pasture quality naturally affects the potential rental income. Mr Young confirmed that there is also a very small area of gorse which the occupier has recently cut noting that this is not a normal method of control. Mr Young also confirms that there is a small set of sheep yards in the corner of the property to fair condition.

[14] Further in his report, Mr Young states that Rangitatau Waitōtara 3C2B2 to the right of the Waitōtara Valley Road has a contour of 50 percent flat and the balance rising to a steeper hill while noting that the flat is currently wet and swampy as at the date of inspection in April 2019 and therefore unable to be grazed intensively. The balance of the property is steep hill with a northerly aspect. The flat area is covered in bull rushes with low fertility native grasses with strong evidence of reversion to native secondary wood species including manuka.

[15] He then records that there is no boundary fence on the southern side with the Rangitatau Waitōtara 3D block, no evidence of a fence having been erected in the past nor any electric fencing or hot wires. Mr Young notes that this has caused “considerable ill feelings” between the occupiers in the past and gives the impression that the block has previously been grazed in conjunction with 3D. There is further little fencing on the

property. Regarding drainage there is strong evidence of a drains coming from the adjoining Rangitatau Waitōtara 2C1 block with a result that there are three to four ponds within the bull rush area further limiting the ability to graze the land.

[16] Mr Young suggests that future management could include mowing the rushes with a heavy-duty mower and spraying them with a weed wiper to prevent spray drift followed by cultivation of the area with associated fertiliser and lime and the sowing of English grasses. If this programme were to be implemented, then he considered that the land would improve its overall productive capabilities.

[17] Mr Young's overall summary is that these are small parcels of land in an isolated area subdivided by the road and bounded by the river with limited fencing and pasture showing, generally, signs of neglect. Mr Young's opinion was that the property has deteriorated over the last five to ten years with evidence of reversion to manuka scrub which may be to enable the production of honey.

[18] Equally importantly, Mr Young suggests that the wet areas over the land have increased over time due in part at least to the actions of neighbouring occupiers. He estimates that the carrying capacity would be 100 stock units which could be increased with capital input to deal with the issues of fencing, reversion, rushes, drainage and stock handling facilities.

[19] Finally, Mr Young's assessment is that rental could be struck between \$1,800 and \$2,200 depending on the term of lease, its covenants, compensation for improvements including capital improvements, payment of rates while noting that his estimates do not include potential income from beehives.

Submissions for Reece Pritchard

[20] Reece Pritchard for the D J Bethel Family Trust disputes much of the content of the Young report. He referred to an earlier report prepared by Morgans on 7 March 2008 which also confirmed the existence of scrub and gorse infestation, ongoing reversion including various thistle species. The Morgan report also referred to limited fertiliser application.

[21] Mr Pritchard asserted that the Young report is more opinion than fact due to the limited interaction with the current occupier. He contended that all work undertaken for improvements over the last 10 years was at the cost of the D J Bethel Family Trust.

[22] He also noted that where grass is overgrown by fencing this is mostly for beekeeping purposes as spraying is not helpful for regular and successful honey production. Where there is no flooding or drainage problems then it is evident that the pasture is in much better condition.

[23] Further, Mr Pritchard stated that there has been internal fencing at both ends of Rangitatau Waitōtara 3C2B2. Regarding drainage, Mr Pritchard mainly agrees with Mr Young as well as the impact of a natural spring which compounds difficulties. There are also points of contention concerning the boundaries and related matters, he stated. Mr Pritchard also made annotations which provide more detailed comments and criticism of the Young report.

Submission for Stephen Toa-Wairere

[24] A further written submission was received from Stephen Toa-Wairere, an existing trustee of the land. In short, he reiterates his support for a lease of the trust land to the Te Awhe whānau while underscoring, in his view, the lack of co-operation by the D J Bethel Family Trust.

Submissions for Kieron Te Awhe and Laran Te Awhe

[25] A written submission was also received from Kieron and Laran Te Awhe where they, like Mr Pritchard, expressed concerns at the Young report. For example, they say there is no mention of any boundary fence between Rangitatau Waitōtara 3F1 and 3C2B3. They also make the point that there is no mention of a stream that comes down from the hills between Rangitatau Waitōtara 3D and 3C2B2 which they say is a principal contributor to the swamping and ponding.

[26] Mr and Mrs Te Awhe then submit that there is no mention of the gorse ridden covered hill on the northerly side of the land and the manuka.

[27] In short, the Te Awhes express disappointment with the Young report which they believe has been influenced, ironically, by Mr Pritchard.

The Law

[28] Reviews of trust are provided for under s231 of the Act:

231 Review of trusts

- (1) The trustees or a beneficiary of a trust (other than a kai tiaki trust) constituted under this Part may apply to the court to review the terms, operation, or other aspect of the trust.
- (2) There can be no more than 1 review of a trust within a period of 24 consecutive months.
- (3) The court may, on any review,
- (a) confirm the trust order for the trust without variation; or
 - (b) exercise its powers under section 244; or
 - (c) terminate the trust if the court is satisfied that there is a sufficient degree of support for termination among the beneficiaries.

[29] The Supreme Court in *Fenwick v Naera* confirmed the broad powers of this Court when acting on an application for review of trust:⁴

[121] Ahu whenua trusts are also unusual in the way in which they are established and closely supervised by the Maori Land Court. The Beneficiaries argue that, while the Maori Land Court has broad powers, the High Court has similar broad powers of review, but these do not supplant the specific rules of the common law and equity setting out what forms of relief ought to be available and in what circumstances. While that may be true, the Maori Land Court's role is very different from that of the High Court. The Maori Land Court is actively involved in the setting up of trusts under the Act, sets the contents of the trust order, appoints the trustees, and has a major role in the governance and review of Maori trusts. While the High Court has jurisdiction over trusts, its role in trusts is not comparable to the Maori Land Court's special involvement in trusts created under the Act.

[30] The removal of trustees is covered by s240:

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.

[31] The leading authorities on the removal of trustees are the Court of Appeal judgments *Rameka v Hall Naera v Fenwick* and *Adlam v Savage*.⁵ I adopt the reasoning set out in those decisions.

Discussion

[32] One of the key problems that has faced this trust has been the ongoing failure by the trustees to fulfil their duties and protect the interests of their beneficiaries. The evidence confirms that the trustees have failed to properly administer and manage the trust for a period of time, given the background to this proceeding which including earlier litigation involving essentially the same parties. Unfortunately, despite the passage of time, the relationships between the trust, Mr Pritchard and Mr Te Awhe remain strained to the point of

⁴ [2016] 1 NZLR 354

⁵ [2013] NZCA 203; [2013] NZCA 353; and [2016] NZCA 454

open hostility. Mr Pritchard and Mr Te Awhe, as potentially competing lessees, remain in dispute over each other's use of both trust land and their own with allegations and denials of interference with their respective farming and related activities.

[33] There have also been unsubstantiated claims concerning drug cultivation, unlawful use of firearms, stock being shot and threatening behaviour, amongst other things-hardly what might be expected by the owners as conduct becoming potential and current lessees. I also had the impression from Mr Pritchard's evidence that he was inferring some of the owners or their associates might also be involved in such conduct. The allegations made between these competing parties do not make for pleasant reading and it is unsurprising that the owners of the land would be uncomfortable with the conflict that has arisen between the Pritchards and the Te Awhe whānau, given that it is their land that is at the centre of the disputes.

[34] A further complication has been the allegation that, as lessee, Mr Pritchard has been distributing rental from the land directly to owners rather than to the trust directly, as would be required under any orthodox lease. To avoid doubt, if Mr Pritchard and the D J Bethel Family Trust are ever put in the position of lessees again then they need to take heed of this direction and pay without failure any rental proceeds to the trustees.

[35] The trustees, as foreshadowed, have continued to fail in the adherence to their duties as trustees. All of this had been put before them, yet they were unable to articulate any reasonable grounds for their conduct in the circumstances of this case. They had not had regular trustee, let alone owners' meetings; they had not opened a bank account and had not inspected the land. Their failure to act as and when required and to take their roles seriously and act responsibly, has been one of the central challenges compromising the ability of the trust to work effectively for the benefit of the owners.

[36] Moreover, when the trustees had encountered problems, they could have sought directions in an efficient and timely manner. The fact that for a long period of time they struggled to even open a bank account or hold regular meetings is testament to their collective inability to act in accordance with their duties. For these reasons alone, I consider that their conduct has fallen short of the standard expected of trustees sufficient to warrant their removal. This was also expressed as a possibility during the last hearing.

[37] Conversely, it would be wrong to suggest that Mr Pritchard and the trust he represents have been model lessees – far from it, according to the Young report, the evidence

of landowners and the material currently before the Court over Mr Pritchard's conduct in seeking to by pass the trustees and pay rental to owners directly. Whether there should be a dividend or not out of rental proceeds is a decision for the trustees to make, not the owners and Mr Pritchard. His conduct in by passing the trust has compounded an already problematic set of circumstances.

[38] In these circumstances it would be inappropriate for the Court to micro manage the trust and make the decisions for the owners and their representatives over who should have the lease of the trust's land. The proper authority for that decision are the owners in a meeting convened under the Māori Assembled Owners Regulations 1995 if there was no governance body in place, or in this case, where there is, by the trustees. No one has yet convincingly suggested that the trust should be terminated - rather it is the trustees who need to face re-election to test their mandate, or for a new set of trustees to be elected and appointed. The election itself is now well overdue.

[39] My conclusion is that, armed with the Young report and the content of this judgment, the owners should be brought together in a duly convened meeting by the deputy registrar early in the new year to discuss both the trustees and an election of replacements, along with the Young report, the responses of the parties, and what if any indication of preference the owners may give their newly elected trustees regarding the future use of the land.

[40] To avoid doubt, it is not for the Court to make the decision on who should have the lease of the land. It is for the owners where there is no trust in place, or where there is, it is for the trustees to decided. A wise trustee will always consider the views of the trust beneficiaries, safe in the knowledge that it is the trustees ultimately who must make the decision and be held to account for their choice should problems arise in the future. Put another way, it will be for the trustees to make the decision, based on evidence and a rational process that can withstand independent scrutiny.

Decision

[41] The current trustees have breached their duties sufficient to warrant their removal for cause. They will be ineligible for re-election for a period of one term of appointment being three years, given their continued and persistent failure to fulfil their duties.

[42] The deputy registrar is to convene a meeting of owners on or before 31 January 2020. The purpose of the meeting is to hold an election of trustees and to consider the future use and development of the land.

[43] Following the meeting the file will be referred to me along with the draft minutes of the owners' hui for further directions.

[44] Leave is reserved for any party to seek further directions at any time.

These orders are to issue immediately, per r 7.5, Māori Land Court Rules 2011

Pronounced at 4.55pm in Hastings on Thursday this 4th day of December 2019

L R Harvey
JUDGE