IN THE MĀORI LAND COURT OF NEW ZEALAND
TĀKTIMU DISTRICT

A20160005018

UNDER	Section 240 and 67, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Mangamaire B2 Trust
	JAMES ROBERT HUTCHESON Applicant
	CATHERINE CLARKSON, KETEPUNGA CLARKSON, MATANA ERIHA, AND SHARLENE KING, THE TRUSTEES OF MANGAMAIRE B2 TRUST Respondents

Hearing: 4 December 2019, 81 Tākitimu MB 38-51
2 May 2018, 68 Tākitimu MB 125-132
8 June 2017, 60 Tākitimu MB 220-227
8 November 2016, 55 Tākitimu MB 54-63
7 September 2016, 53 Tākitimu MB 81-89
6 May 2015, 40 Tākitimu MB 188-193
(Heard at Hastings)

Appearances: C Bennett for the Applicant
A Hope for the Trustees

Judgment: 24 December 2019

INTERIM JUDGMENT OF JUDGE L R HARVEY

Copies to:

C Bennett, Langley Twigg Solicitors, 66 West Quay, Napier cara@langleytwigg.co.nz
A Hope, Puna Chambers, P O Box 19342 Hamilton 3244 alex@punachambers.co.nz

Introduction

[1] These proceedings for the removal of trustees have been before the Court for approximately five years. Counsel for the applicant Ms Bennett seeks further information, inter alia, as to the trust's accounts as part of her client's application for removal of trustees. In short, Ms Bennett submits that the current trustees should be removed for cause immediately because they have failed to account to the beneficiaries in terms of the trust's finances, the lease arrangement and overall because of their misconduct in refusing to comply with Court directions to provide information, contrary to the express terms of the trust order for the Mangamaire B2 Trust.

[2] Mr Hope for the trustees has applied for the removal application to be struck out. He contends that all the necessary and available information concerning the trust and its accounts has been provided to the applicant and to John Francois, accountant of Hastings, who was appointed by the Court to provide a report on the trust's finances. Counsel also confirmed that Catherine Clarkson, one of the trustees, is undergoing medical treatment and is not available to engage meaningfully in the proceedings until at the earliest May 2020.

[3] Mr Hope also submitted that, if the Court was so minded, it could undertake its own inquiry rather than have matters examined through the removal proceedings of the applicant.

[4] Owner representatives also attended the last hearing confirming that their support for Ms Clarkson and the trustees had changed in that they too were concerned with the activities of the trustees which they considered should be properly examined and resolved.

Issues

[5] There are two issues for determination in this interim decision:

(a) Should the removal proceedings be struck out?

(b) Should the Court undertake its own inquiry into the conduct of the trustees?

[6] The background to this case is set out in my earlier decision and need not be repeated here, suffice to say that the proceedings are overdue for disposal.[1]

---

[1] *Hutcheson v Clarkson - Mangamaire B2* (2018) 73 Tākitimu MB 88 (73 TKT 88)

Should the application for removal be struck out?

Respondents' submissions

[7] Mr Hope submitted that the applicant, Mr Hutcheson, is not a beneficiary of the trust but rather is a beneficiary of a whānau trust that is an owner in the land. However, counsel also contended that Mr Hutcheson is not a trustee of that whānau trust and it remains unclear as to whether it supports these proceedings. The question of the applicant's standing therefore remains relevant.

[8] In addition, counsel submitted that clause 6 of the trust order for Mangamaire B2 Trust, the protection of minorities clause, was relevant to the application for a strike out or dismissal.[2] Under that provision, any owner has a right to effectively petition the trustees if they feel aggrieved by any direction, determination or resolution which then requires the trustees to convene a general meeting of owners within a reasonable period. Failing that, the aggrieved owner can then have the matter complained of referred to the Court. Mr Hope underscored that there is no evidence that any of these steps have been carried out by the applicant and nor has there been an order of the Court for the convening of the general meeting for such a purpose.

[9] In the context of access to information, counsel cited the decision of the Supreme Court *Erceg v Erceg* where it was determined that beneficiaries are entitled to receive information which will enable them to ensure the accountability of trustees.[3] Ms Clarkson's position is that, according to counsel, she is managing the trust in accordance within the terms of the trust order but in a situation where both she and Mr Hutcheson have different view of the interpretation of those terms.

[10] In any case, Mr Hope submitted that a meeting was held on 6 August 2016, at the Court's direction, between the parties where Stephen Paewai facilitated the hui and subsequently reported to the Court. The applicant confirmed at that time that he had been satisfied with the outcomes of the meeting and so for the trustees, they remained unsure as to the applicant's motives in continuing to pursue their removal, given the discussions that had already occurred. This was another reason why the removal application should be dismissed.

---

2 141 Napier MB 80-81, 6 July 1995 (141 NA 80-81)
3 [2017] 1 NZLR 320

[11] Mr Hope submitted that, given the applicant's lack of standing, the application should be struck out. Alternatively, he contended that the proceedings should be adjourned so that the Court might properly deal with the issue of standing but to also allow Ms Clarkson appropriate time to recover from illness and treatment.

[12] Finally, counsel submitted that, given the history between Ms Clarkson and Mr Hutcheson, including a successful criminal prosecution against the latter, it is unsurprising that difficulties have arisen. If the Court were to be concerned as to the conduct of the trustees, then it may instead wish to initiate on its own motion a review of the trust. The Court could then take charge of any inquiry on a neutral basis which would then provide independent outcomes and decisions.

Applicant's submissions

[13] Ms Bennett submitted that the matter of standing has been raised and disposed of previously.[4] The point had also been argued by Ms Clarkson personally in an earlier hearing. Counsel expressed surprise as to why therefore this matter of standing had been raised again since it had been dealt with in 2015 and before Judge Doogan in 2017.

[14] On the issue of clause 6 of the trust order, counsel contended that the protection of minorities remedy was not mandatory given that the clause used the word "may" in the context of making an application to file a requisition. According to counsel, it is not a condition for any owner or beneficiary of the trust seeking relief from the Court.

[15] Counsel argued that the decision *Erceg v Erceg* is entirely distinguishable on its facts given that it relates to a discretionary trust which can be contrasted with Māori land trusts created under Te Ture Whenua Māori Act 1993. In any case, Ms Bennett submitted that these arguments had also been raised previously, yet to no avail for the respondents.

Discussion

[16] I am not persuaded that the application for removal should be struck out. The trustees need to answer questions concerning their activities and the annual accounts. For example, clause 7 (c) (i) of the current trust order requires that the accounts be audited and filed with the Registrar within six months of the balance date if the trust's income exceeds

---

[4] Refer 60 Tākitimu MB 223 (60 TKT 223)

$10,000. The only exception for the audit requirement is where the accounts have been prepared by a chartered accountant. Even so, that does not absolve the trustees from their duty to file the accounts. As Ms Bennett pointed out, the trust's income has exceeded $10,000 for at least three years and yet the trustees have not had the accounts filed in accordance with the trust order.

[17] I also do not accept that the trustees have provided answers to all the questions that have been put to them regarding the trust's activities by Mr Francois. For these two reasons alone, there are enough grounds for the Court to undertake its own inquiries and to entertain applications for third party discovery where the trustees have been unwilling or are unable to provide the documents sought.

[18] Regarding the issue of standing, I accept Ms Bennett's submission that that issue has already been dealt with. In any case, s240 simply requires notice to the affected trustee of the potential for removal. Section 240 provides that the Court may "at any time" invoke its removal jurisdiction.[5] The application to strike out the removal proceedings is dismissed.

Should the Court undertake its own inquiry?

Applicant's submissions

[19] Ms Bennett argued that, despite the clear directions of the Court, the trustees continued to fail to adhere to those directions and to provide relevant information to the Court, to Mr Francois and to the applicant. Despite the issue of several directions and decisions over several years, the trustees had still failed to properly comply with the Court's directions and with their own trust order. For these reasons alone, counsel argued, the Court should initiate its own inquiries into the conduct of the trustees, if it was not moved to invoke s240 of the Act and have the trustees removed forthwith.

[20] Then in her detailed written submissions dated 29 November 2019, Ms Bennett submitted the following timeline of events she argued made it plain that the trustees were failing in their duties and were defying the Court's directions:

---

5 *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233)

(a) 4 May 2016 – the trustees are directed to file by the end of June 2016 all annual accounts, as well as lease documents, licences and minutes of meetings;

(b) 26 July 2016 – the trustees file "financial information" for 2013-2015 which was not prepared by a chartered accountant and was not audited per clause 7 (1) (c) of the trust order and so the Court directs that further disclosure is required;

(c) 6 August 2016 – a general meeting of owners held at the Court's direction where the 2013,2014 and 2015 annual accounts were not presented;

(d) 29 August 2016 – a failure to provide the information directed by the Court precipitates an application for discovery from the applicant's counsel. In a written direction dated 14 November 2016, the trustees were directed to submit all the accounts and especially for the 2013, 2014 and 2015 years while underscoring the consequences of non-compliance;

(e) 8 November 2016 – the trustees acknowledged the timeframe for the filing of information in accordance with the Court's previous direction;

(f) 14 November 2016 – the trustees seek a filing extension to 21 November 2016 and on 23 November 2016 a further extension is sought for 2 weeks which was granted to 7 December 2016. This period was then extended to April 2017;

(g) 8 June 2017 – some accounts prepared by an accountant were filed which were significantly at variance with what the trustees had provided, and this difference has never been explained;

(h) 20 February 2018 – the Court directs the trustees to provide answers to Mr Francois' questions without further delay. Responses were provided which Mr Francois considered were inadequate;

(i) 2 May 2018 – the Court confirms that the trustees must provide the information sought or face the consequences;[6]

---

[6] 68 Tākitimu MB 132, 2 May 2018 (68 TKT 132)

(j) 22 May 2018 – the trustees seek to withhold information claiming confidentiality in the context of questions put to them by Mr Francois and this was followed by a further email exchange between counsel;

(k) 18 December 2018 – the Court issues interim judgment setting out further directions for the release of information by the trustees;

(l) 18 March and 16 May 2019 – counsel for the trustees files information and confirms that nothing further is available;

(m) 29 November 2019 – Mr Francois confirms that he has still not received all the information he had requested from the trustees.

[21] In addition, Ms Bennett submitted that the Court's supervisory jurisdiction over trusts is well known and in this case the Court had already initiated action with the appointment of Mr Francois. More importantly, counsel underscored that Mr Francois' appointment was to assist the parties and the Court in ascertaining whether the trustees had been complying with their trust order. As foreshadowed, it provides that where the income of the trust exceeds $10,000 then accounts must be prepared and filed with the Registrar. The evidence confirms that accounts have not been filed since 2016 and yet the trust's income has far exceeded $10,000 for at least three years. Again, Ms Bennett underscored that a failure to comply with clause 7 (c) (i) was, under clause 8 (b) (i), a sufficient reason to remove the trustees.

[22] Further, counsel noted that the trust order requires at least triennial meetings, yet the last general meeting of owners was held in 2016 and even then, it was only convened because of the Court's direction.

[23] On the issue of trustee fees and expenses, counsel submitted that the trustees had failed to file sufficient information on their costs so that the Court and the owners could make a proper assessment as to their reasonableness. The information that was eventually provided does not include a breakdown of what individuals fees and expenses were received by each trustee. Equally importantly, counsel submitted that fees were only permitted where the trust was meeting annually and as it had not been, the trustees were taking fees in breach of this provision.

[24] Ms Bennett argued that the trustees have had ample opportunity to comply with the trust order. They have continuously delayed providing relevant information to Mr Francois and to her client and the beneficial owners concerning, in particular, the trust's accounts as well as regarding the lease of the land. The trustees, and Ms Clarkson especially, have sought to delay the proceedings by claiming competing commitments and related impediments that they say have prevented them from complying. Counsel contended that it was unacceptable for the trustees to persist with their refusal or strategy of delay in providing the Court and the owners with the information to which they are entitled.

[25] Ms Bennett also submitted that there did not appear to be any confirmation that the trustees had applied for and had been granted a *Beddoe* order. Citing this Court's decision in *Rātima v Sullivan & Ors*, counsel emphasised the need for such an application if the trustees are seeking to be indemnified for their defence from the trust.[7]

Respondents' submissions

[26] Mr Hope argued that the trustees were complying with their duties and obligations set out in the trust order and in terms of trust law principles generally. As foreshadowed, they had been working with Mr Francois to provide relevant information to the Court and, in effect, would continue to do so in accordance with the Court's earlier directions. The illness of Ms Clarkson was also a factor in the context of the trustees' ability to respond.

[27] That said, counsel submitted that, if the Court was so minded, it could invoke its supervisory jurisdiction and undertake an inquiry into the activities of the trust. This would be undertaken on a more independent and neutral basis than having the applicant continue to pursue his litigation against the trustees.

Len Maraki's submissions

[28] Mr Maraki submitted that he was the spokesman for the Iritana Houkamau Trust. He confirmed that in 2016 his trust supported the stance adopted by Ms Clarkson and her fellow trustees in that they agreed, at that time, that Mr Hutcheson's application should be dismissed.

---

7 (2017) 64 Tākitimu MB 121 at 125 (64 TKT 131 at 125)

[29] However, Mr Maraki confirmed that, over the years, there has been a delay in the calling of meetings and an apparent reluctance to provide information in a timely manner or in his words, "they are giving everyone the run around." Mr Maraki submitted that the Court needed to "make a brave decision on going forward," given that the land has been "misused and abused."

Keith Paringatai's submissions

[30] Mr Paringatai confirmed that he had considered the attitude of Mr Hutcheson as being characterised by frustration. It was necessary, he contended, that the matter had to move forward, despite the ups and downs, and challenges that face the trust from time to time, given the necessity to make provision for both current and future generations of owners and their whānau.

Morehu Smith's submissions

[31] Morehu Smith expressed surprise that only 25 cheques had been issued over the years noting that three owners she represented were paid annually by cheque. Ms Smith emphasised that it was "time for judgment," which she noted was in the hands of the Court.

Discussion

[32] Section 238 of the Act states:

> (1) The Court may at any time require any trustee of a trust 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.
>
> (2) The Court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligations of his or her trust (whether by way of injunction or otherwise).

[33] In *Hall v Rameka – Opepe Farm Trust* I issued directions per section 238 of the Act that the trustees of Opepe Farm Trust prepare a report and attend Court to answer questions on that report.[8] The directions set out in some detail the matters that needed to be reported on by the trustees. Having carefully considered the submissions of the parties, I adopt the

---

[8] *Hall v Opepe Farm Trust* (2010) 19 Waiariki MB 258 (19 WAR 258). See also *Rameka v Hall* [2013] NZCA 203 at [43].

same approach in this case. There are several serious questions to be answered concerning the trustees' management of the business of this trust over the last several years. The short point is that, had the accounts been properly prepared by a chartered accountant and filed with the registrar in accordance with the trust order and had annual general meeting been held regularly, then many of the issues that have arisen to date might have been resolved before any proceedings were ever issued.

[34] It should also be remembered that all the trustees are responsible for the decisions that are taken and that they are joint and severally liable for any losses that the trust may have made and for any breach of the trust order and of their duties generally. The trustees are therefore directed to file and serve a report with the Registrar at Hastings on or before 31 March 2020 answering the following questions:

(a) What years did the trust's income exceed $10,000?

(b) Have the trustees had the accounts audited or prepared by a chartered accountant and filed with the Registrar for all the years when the income exceeded $10,000 and if not why not?

(c) Have the trustees continued to pay themselves fees and expenses without holding annual general meeting and thereby breaching clause 3 (b) (viii) of the trust order and if so, why?

(d) What fees and expenses have been paid to individual trustees since their appointment and have they been approved by the Court?

(e) Have the minutes of all trustees' meetings for the last three years been filed, and if not why not?

(f) Have copies of the current and previous lease arrangements been filed with the Court, and if not why not?

(g) What provision has been made for unclaimed dividends in the accounts and what efforts have the trustees made to locate the owners of unclaimed dividends?

(h) Have the trustees filed copies of the minutes of the last four general meetings of owners and if not why not?

[35] To avoid doubt, per sections 37, 223, 237, 238 and 240 of the Act, the trustees are directed to file, on or before 31 March 2020, copies of the following documents as

appendices to the report referred to in the preceding paragraph, if they have not done so already:

(a) All bank statements in their possession or control.

(b) All minutes of trustees' meetings.

(c) All minutes of general meetings of owners.

(d) All lease documents including correspondence with lessees.

(e) Details of any payments made to trustees in terms of fees and expenses.

(f) Details of all dividend payments made to beneficial owners of the last five years.

[36] While I acknowledge Mr Hope's submission that Ms Clarkson is gravely unwell, that does not absolve her nor the other trustees from their duties and responsibilities. The trustees, apart from Ms Clarkson while she remains unwell, need to ensure that the report as directed is prepared, filed and served by 31 March 2020. Any further failure to provide the information that has been sought may result in the Court exercising any of its powers set out under Part 12 including the removal of trustees.

[37] At the last hearing I confirmed that an independent farm consultant and valuer would be commissioned to provide reports for the benefit of the owners on the status of the land, a fair market value for the use of the land and its general state. I therefore direct the Registrar to engage a suitable independent farm consultant and a valuer to prepare appropriate reports by the end of February 2020. If those reports are subject to challenge, then the authors will be made available for cross-examination at the next hearing of this matter which I intend to confirm for April 2020.

[38] Regarding an application for a *Beddoe* order, I refer counsel to this Court's decision *Rātima v Sullivan & Ors* cited in paragraph [25] above. In addition, I also refer counsel to *Rātima v Sullivan - Tataraakina C* where paragraphs [48] to [60] are relevant.[9] The judgment underscores the potential risks to trustees where such an order has not been granted.

---

9 (2019) 79 Tākitimu MB 103 (79 TKT 103)

Decision

[39] The application to strike out the current removal proceedings is dismissed.

[40] The trustees are directed, per section 238 of the Act, to file a report on or before 31 March 2020 in terms of paragraph [34] above.

[41] The application is set down for further hearing at the April 2020 sitting of the Court in Hastings and the case manager is to liaise with counsel as to their availability during that month. The trustees are directed to attend the hearing and to answer questions on their report. For the avoidance of doubt, the Registrar will serve a summons on the trustees.

[42] Leave is reserved for any party to apply for further directions at any time.

[43] Costs are reserved.

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

Pronounced at 11.45am in Rotorua on Tuesday this 24th day of December 2019

L R Harvey
JUDGE