

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

A20150006053

UNDER Section 240 of Te Ture Whenua Māori Act
1993

IN THE MATTER OF Te Wirihana Tawake Whānau Trust

BETWEEN DONATA KAUIKA-STEVENSON
Applicant

TIAKI TUME
Respondent

Hearings: 348 Aotea MB 131-142 dated 20 January 2016
350 Aotea MB 54-63 dated 8 March 2016
(Heard at Whanganui)

Appearances: D Kauika-Stevens in person

Judgment: 31 May 2016

RESERVED JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Donata Kauika-Stevens sought the removal of Tiaki Tume as trustee of Te Wirihana Tawake Whānau Trust. On 20 January 2016 I issued an order reducing the number of trustees as Mr Tume decided to resign.¹

[2] In the midst of dealing with this application, Scott Wirihana-Tawake, the current chairman of the trust, raised concerns about the conduct of Ms Kauika-Stevens and in effect sought her removal from the trust. At the conclusion of the hearing held on 20 January 2016 I issued directions to the parties to file further documents in relation to the allegations against Ms Kauika-Stevens and to take steps to formalise a tenancy agreement for the dwelling owned by the trust.

¹ 348 Aotea MB 131-142 (348 AOT 131-142)

[3] A further hearing was held on 8 March 2016.² Mr Wirihana-Tawake confirmed that as a result of Mr Tume's resignation the remaining trustees are deadlocked in terms of decision making and have not been able to formalise a tenancy agreement as directed.

Issue

[4] The issue for determination is whether I am satisfied that Ms Kauika-Stevens should be removed as a trustee per s 240 of Te Ture Whenua Māori Act 1993.

Background

[5] On 31 March 2014 I determined the legal owners of the dwelling and small shed immediately adjacent to the dwelling situated on Rangitatau 1D5A1 block to be Clark Kauika-Stevens and Clark Wirihana Tawake who were to hold the dwellings on trust for the uri of Te Wirihana Tawake.³

[6] Following that on 14 April 2015 I constituted Te Wirihana Tawake Whānau Trust to administer and manage the dwelling and shed situated on Rangitatau 1D5A1 block.⁴ I subsequently appointed Scott Wirihana-Tawake, Ms Kauika-Stevens, Benjamin Wirihana-Tawake, Sandy Kauika-Stevens and Tiaki Tume as responsible trustees and vested ownership of the dwelling and shed in the trust.⁵

The Law

[7] Section 240 of Te Ture Whenua Māori Act 1993 provides:

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.

² 350 Aotea MB 54-63 (350 AOT 54-63)

³ 318 Aotea MB 217-241 (318 AOT 217-241)

⁴ 335 Aotea MB 295-315 (335 AOT 295-315)

⁵ Ibid

[8] The settled approach in applying s 240 is to make an assessment of the standard trustees' duties together with an assessment of the trustee's performance.⁶ The prerequisite for removal of a trustee is not a simple failure or neglect of duties, but a failure to perform them satisfactorily.⁷ In determining whether removal is appropriate I will also need to consider the impact of the trustee's actions on the beneficiaries and any apprehension of risk to the assets.⁸

Should Ms Kauika-Stevens be removed?

Submissions of Scott Wirihana-Tawake

[9] Mr Wirihana-Tawake argues that Ms Kauika-Stevens should be removed for what he considers to be unacceptable trustee behaviour. He says she has interfered with matters concerning the occupiers of the dwelling and has also failed in her duty as secretary of the trust.

[10] Mr Wirihana-Tawake submits that he initially notified the Court some time ago about concerns he had about the behaviour of Ms Kauika-Stevens at their first trustee meeting. He says that behaviour led to the question of whether she should be removed as a trustee.

[11] In addition, Mr Wirihana-Tawake submits that at that trustee meeting Ms Kauika-Stevens was asked to go and see the occupants of the dwelling and invite them to the meeting to discuss their tenancy "kanohi ki te kanohi". Mr Wirihana-Tawake alleges that Ms Kauika-Stevens did not return until 40 minutes later at which point she advised she had talked to the occupants and advised them of the trust's position and that the occupants refused to meet with the trustees. Mr Wirihana-Tawake argues that it was not Ms Kauika-Stevens' role to talk to the occupants she was only asked to go and ask them to attend the meeting rather than attempting to discuss their occupancy.

[12] Further, Mr Wirihana-Tawake submits that email correspondence with Ms Kauika-Stevens demonstrates that she has had various reasons and excuses for delaying meetings.

⁶ *Rameka v Hall* [2013] NZCA 203 at [30]

⁷ *Ibid*

⁸ *Ibid* at [33]; see also *Bramley v Hiruharama Ponui Inc – Committee of Management* (2006) 11 Waiariki Appellate MB 144 (11 AP 144)

Mr Wirihana-Tawake also argues that Ms Kauika-Stevens has failed to provide or prepare the minutes for the trustees' meetings.

Submissions of Ms Kauika-Stevens

[13] Ms Kauika-Stevens refutes the allegations. She says that she has not meddled with the matters concerning the dwelling, has attended trustee meetings and says she did not refuse to provide the minutes.

[14] Ms Kauika-Stevens adds that she was present at every trustee meeting and acknowledges that she is the acting secretary for the trust. Ms Kauika-Stevens says she did not refuse to provide the minutes, rather she did not agree with what was recorded.

[15] In addition, Ms Kauika-Stevens argues that there was no impropriety regarding her conversation with the occupants of the dwelling. She reiterates that the occupants did not want to come and see the trustees because they had past unresolved issues with them and did not trust them. Ms Kauika-Stevens also denies the allegations regarding her alleged interaction with Mr Wirihana-Tawake's employer.

Discussion

[16] In the earlier judgment of 31 March 2014, concerning the very property over which the current trustees have authority, I noted:

[59] The hostility and rancour between the principal parties continues to distract the trustees from their obligations to the beneficiaries. In one sense, when the evidence is carefully considered, the present situation could unflatteringly be characterised as an extreme case of bad neighbours. The ongoing conflict between the applicant and his first cousin Scott Wirihana Tawake over quite mundane matters – access to the tools and appliances required to maintain the marae grounds and the urupā - is an example *par excellence* of the depths to which the more impertinent aspects of this dispute have sunk. It is against this background that the legal issues must be determined. Cut to the core this proceeding is about who owns a house, an outside bathroom and a shed.

[17] Unfortunately, despite the passage of over 2 years, relationships do not appear to have improved. This is a regrettable situation for the beneficiaries of this trust. Mr Wirihana-Tawake and Ms Kauika-Stevens are clearly on opposing sides as trustees making their ability to work together very difficult. At the hearing Ms Kauika-Stevens acknowledged that it is unlikely that they will be able to overcome their differences:⁹

The Court: There is mutual antipathy between the principal protagonists?

D Kauika-Stevens: Yes.

The Court: And this is not going to change any time soon, ne?

D Kauika-Stevens: No.

[18] In *Ellis v Faulkner – Poripori Farm A Block* Judge Carter considered the issue of the removal of a trustee where there was dissent and disagreement among the trustees:¹⁰

This Court accepts that part of the duties of trustees is to consider fully matters that are put to the trustees and affect the operations and administration of the Trust, that they will have diverging views and that they are entitled to put their various views forward and have them considered. Healthy discussion and argument are part of any commercial forum. However, the Trust order indicates, as does section 227 of Te Ture Whenua Māori Act, that once a decision is made it is the majority that rules. Trustees who dissent are entitled to apply to the Court for directions, although as I have commented, their performance may be judged as the result of such action. They may also under section 227(6) have their dissent recorded.

Other than that, all trustees must be prepared to work with the majority to implement the decision which has been made. Where a trustee still takes a different view or regards himself as being separate from the majority of the trustees then dangers arise. ... This is not the first time that Mr Faulkner has been on his own and while one can perhaps overlook a failing at a first occasion the fact that it has continued shows a propensity for it to happen again. This Court therefore finds that Mr Faulkner's inability to team and (sic) work with the trustees is enough to be considered as a failure to carry out his duties satisfactorily and for this reason the Court agrees that he should be removed as trustee.

[19] As foreshadowed, the threshold for removal is high. It is not a simple failure or neglect of duties, but a failure to perform them satisfactorily which the Court is concerned with.¹¹

[20] There has been no evidence that Ms Kauika-Stevens interfered with the issues concerning the occupiers. That she spoke to them and invited them to attend the hui is clear. Their refusal to attend has been put down to Ms Kauika-Stevens' involvement however there is no independent evidence of this. For occupiers to be called on, seemingly at the last minute, to essentially report to the dwelling owners does not strike me as giving them a fair opportunity to present their case without preparation. In all I do not consider that instance alone to be sufficient to warrant removal. More importantly, as the occupiers include Ms Kauika Stevens' brother, then the perception of a conflict of interest is likely to arise with the result that she should not participate in any decisions concerning the use of the dwelling where it involves such a close familial relationship.

⁹ 350 Aotea MB 54-63 (350 AOT 54-63) at MB 57-58

¹⁰ *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 at 15 (57 T 7)

¹¹ *Rameka v Hall* [2013] NZCA 203

[21] There is then the claim that Ms Kauika-Stevens refused to take the minutes of trustee meetings despite the fact that she is the acting secretary for the trust. As I made clear at the initial hearing the role of secretary is to write the minutes, and not only the parts you agree with. I have reviewed the transcript provided by both Mr Wirihana-Tawake and Ms Kauika-Stevens both versions include similar details of how events transpired. I find nothing exceptional about them.

[22] That said, it remains a fact that Ms Kauika-Stevens did not agree with the minutes and was at the very least reluctant to record all aspects of the trustee hui. Whilst this alone is not of itself sufficient to warrant removal some responsibility needs to be taken by Ms Kauika-Stevens for the current dysfunction. A secretary's role is to record, with judgement and professionalism. It is not to make seemingly unilateral decisions on what might or might not be included. That is a decision for the trustees as a whole when they decide to approve or amend the minutes. As Judge Carter considered in *Ellis v Faulkner – Poripori Farm A Block*:¹²

...all trustees must be prepared to work with the majority to implement the decision which has been made. Where a trustee still takes a different view or regards himself as being separate from the majority of the trustees then dangers arise. ...

[23] The orthodox position is that where trustees cannot work together those out of step with the majority should either dissent in writing, per s227A of the Act or resign. The current situation is not aided by the fact that following the removal of Tiaki Tume there is now an even number of trustees making the trustees' ability to make decisions problematic. The trustees should therefore call a hui of the beneficiaries to appoint a replacement trustee to avoid a stalemate.

[24] Having regard to all the circumstances I consider that the allegations for the removal of Ms Kauika-Stevens have not been made out. Her actions though causing the trustees some angst have not been sufficiently detrimental so as to warrant her removal. Even so, if the current atmosphere of hostility persists to the point that the trustees cannot properly make decisions then the exploration of other options may prove necessary. One option might include the replacement of all trustees with a sole independent trustee unconnected with any of the parties until such time as the arrangements concerning the dwelling are conclusively resolved. That such a drastic step is even in contemplation is a poor reflection on the behaviour and conduct of individuals embroiled in these proceedings.

¹² *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7)

Occupation of the dwelling

[25] This trust was constituted only two years ago and has already encountered problems in administering ownership of the dwelling – a relatively simple task. There is currently no formal tenancy in place with the current occupiers. Although Mr Wirihana-Tawake has obtained rent appraisals the occupiers do not appear eager to enter into a formal tenancy agreement. They are now on notice that such a stance is unlikely to assist their plans in remaining as tenants. Should a sole independent trustee be appointed, failing resolution by the current trustees and a replacement for Mr Tume, then all options will need to be carefully considered.

[26] As I explained to the parties it is the legal owners of the dwelling who have the right to determine who occupies the dwelling and on what terms.¹³ This matter needs to be progressed as soon as possible. Whilst there is no formal agreement in place the trust is failing to receive rent for the dwelling. There is also the added problem of the dwelling being on the land without the trustees of the marae granting a licence to occupy or an occupation order being made in favour of the owners.

Decision

[27] The application is dismissed.

[28] The trustees are directed to convene a meeting of beneficiaries to elect a trustee in place of Tiaki Tume and to take steps to enter into a formal tenancy agreement with the current occupiers. To avoid doubt the hui must be convened within 2 months from the date of this judgment and the tenancy agreement must be completed within 1 month following the appointment of a replacement trustee.

Pronounced at 2.50 pm in Rotorua on Tuesday this 31st day of May 2016

L R Harvey
JUDGE

¹³ See *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) 15 Whanganui Appellate Court MB 192 (15 WGAP 192) and *Eriwata - Waitara SD Sections 6 and 91 Land Trust* (2005) 155 Aotea MB 269 (155 AOT 269)