

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

A20180007805

UNDER Section 240, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Te Atuareretahi and other blocks

BETWEEN HAARANGI MANAENA-BIDDLE
Applicant

AND BELLA MARY BIDDLE-BASSETT,
MAVIS W M BIDDLE ALSO KNOWN AS
WINNIFRED MAVIS BIDDLE AND
PANIA KING AS TRUSTEES OF THE
TEKIATO SONNY RĀUA KO AMELIA
MARGARET BIDDLE WHĀNAU TRUST
Respondents

Hearings: 29 January 2019, 205 Waiariki MB 198-207
26 July 2019, 217 Waiāriki MB 25-32
(Heard at Ōpōtiki)

Judgment 13 November 2019

JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Haarangi Manaena-Biddle applies for the removal of three trustees, Bella Biddle-Bassett, Mavis Biddle and Pania King, from the Tekiato Sonny rāua ko Amelia Margaret Biddle (nee Manaena) Whānau Trust. She claims that the trustees have consented to a harvesting contract with Kaitoa Logging on trust land without proper authorisation from the trust and have also failed to act in the best interest of the beneficiaries.

[2] The affected trustees oppose the application. They say that the trust authorised the contract with Kaitoa Logging, and that many of the allegations made by the applicant stem from personal tensions between whānau members. They also submit that they have always had acted in the best interest of the trust and the beneficiaries.

[3] The issue for determination is whether the trustees should be removed.

Background

[4] The Tekiato Sonny rāua ko Amelia Margaret Biddle (nee Manaena) Whānau Trust was constituted on 5 June 2012.¹ The original trustees were Sonny Junior Biddle-Tawhara, Haarangi Manaena-Biddle, Bella Mary Biddle-Bassett, Elizabeth Veronica Lydia Biddle, Harai Biddle-Hutching, Winnifred Mavis Biddle, Awhi Biddle and Sonia Anne Biddle.

[5] The current trustees are Elizabeth Veronica Lydia Biddle, Haarangi Manaena-Biddle, Sonia Anne Biddle, Awhi Biddle, Winnifred Mavis Biddle, Bella Mary Biddle-Bassett and Pania King.² The beneficiaries of the trust are the descendants of Takiato Sonny rāua ko Amelia Margaret Biddle (nee Manaena).

[6] The trust holds several Māori land interests and one relevant to this application is the Hapenui block, being Māori freehold land, approximately 39.52 hectares in size. The trust has a shareholding of 5,931.17 shares (out of 35,979 total shares) in this block.

[7] The trust is also involved in parallel civil proceedings in the District Court filed by Kaitoa Logging to compel payment from the trust for harvesting work carried out on the Hapenui block. On 30 November 2018, judgment was given to Kaitoa Logging by default for \$26,899.30.

Procedural history

[8] An application for the removal of trustees was filed on 18 October 2018. The first hearing was held on 29 January 2019 with Haarangi Manaena-Biddle, Bella Biddle-Bassett and Mavis Biddle in attendance.³ The applicant raised issues concerning the harvesting contract carried out by Kaitoa Logging on trust land, submitting that the trustees have failed to act in accordance with their duties. Judge Coxhead raised concerns about the lack of evidence before the Court regarding the removal of the trustees. As a result, he directed that the applicant file reasons for the trustees' removal and any other evidence as necessary. Following this, the respondents would be given an opportunity to reply.

¹ 55 Waiariki MB 201-209 (55 WAR 201-209)

² 89 Waiariki MB 13-18 (89 WAR 13-18)

³ 205 Waiariki MB 198-207 (205 WAR 198-207)

[9] On 19 February 2019, the applicant filed their evidence and submissions. Subsequently, the respondents provided their response.

[10] The case was heard before me on 26 July 2019, with Bennett Hutching, director of Kaitoa Logging and nephew of the applicant, also in attendance.⁴ I provided the parties with an opportunity to make any further submissions. The applicant made several comments relating to the civil proceedings in the District Court. The respondents did not make any further responses and at the end of the hearing, the case was reserved.

Applicant's submissions

[11] As foreshadowed, the application for removal arose because of harvesting undertaken by Kaitoa Logging on the Hapenui block. The applicant argued that this contract was carried out 'illegally' as it was never authorised by all of the trustees. Kaitoa Logging, having unsuccessfully demanded payment for its services, then proceeded with civil proceedings in the District Court and now has a judgment by default for the sum of \$26,899.30 from the trust.

[12] Ms Manaena-Biddle filed many documents to support her assertions, including a report completed by Fishers Quay Chartered Accountants. The report provided an expert opinion on the invoices issued and the expenditure declared by Kaitoa Logging in relation to the harvesting of logs from the forestry block administered by the trust. The report states that, according to the trustees, the harvesting contract commenced without their authorisation. While Mr Hutching, director of Kaitoa Logging, contended that he had evidence of such authorisation, it was not provided to Fishers Quay.

[13] Further findings were made about the proceeds from the sale of the logs. The proceeds from the first harvest, amounting to \$13,133.90, were paid directly to Kaitoa Logging. Proceeds of \$27,880.51 from the second harvest were paid to the trust, after the trustees "intercepted" payment from being made to Kaitoa Logging. The report also states that on 28 February 2018 the trustees approved that the second harvest to be removed from the land, citing e-mails from Awhi Biddle as evidence.

[14] The report concluded that, based on the information Fishers Quay was given, the total costs to be reimbursed to Kaitoa Logging is \$11,425.00. In terms of remittances

⁴ 217 Waiariki MB 25-32 (217 WAR 25-32)

received by Dodd Forestry for marketing services provided for the sale of the logs, Fishers Quay advised that further investigation should be carried out by Adam Mills, a forestry specialist.

[15] The applicant also filed a report from Woodlands Pacific International Forestry Consultants (WPC) completed by Adam Mills. This report assessed the value of log volume sold from the forest block and a review of the costs associated with the harvest to ultimately estimate a fair revenue due to the trust from the sale of the logs. The report concluded that in their opinion, the costs presented in Kaitoa Logging Limited's invoice to the trust for machine support, being \$2,008, was fair. However, the invoice submitted to the trust for \$4,200 for unexplained wages were not fair costs chargeable to the trust, unless they could be justified. Ultimately, in WPC's opinion, the fair net revenue the trust should receive for the logs sold, after all fair operational costs are removed, is \$16,874 excluding GST.

[16] Additionally, Ms Manaena-Biddle argued that Ms King should be removed as a trustee since Ms King has withdrawn her shares from the trust. This, the applicant contended, is a sign of disrespect. The applicant also made allegations related to Ms Biddle-Bassett, namely, that as the chairwoman she has failed to show respect when chairing trust hui and has failed to act in the best interest of all owners. In terms of the civil proceedings, Ms Manaena-Biddle asserted that the decision to hire Holland Beckett Law to represent the trust was an individual decision taken by Ms Biddle-Bassett, without the trust's authorisation.

[17] Ms Manaena-Biddle noted that Mr Bennett had submitted that a logging contract (in the form of a 'harvesting prescription') that was signed by her on behalf of the trust. She also contended that this was not a true contract as it lacked consent from the other trustees and details such as the trust's bank account number.

[18] The applicant made allegations about funds withdrawn from her father's estate by Mavis Biddle without proper authorisation of the trustees, and noted that the trust account has been frozen by the bank pending the outcome of this application.

Respondents' submissions

[19] The respondents denied the allegations made by the applicant and submitted that many of the arguments made by the applicant arise from personal conflicts between whānau members.

[20] On 8 March 2019, Ms King sent an email to the Court resigning as a trustee, as she stated she does not have the time to engage in constant disputes with the current trustees. She submitted that the trustees do not communicate clearly with each other, fail to run the trust efficiently and allow personal conflicts to interfere with decision-making. Ms King further stated that for the trust to move forward and work together to achieve the 'visions and goals' of the trust, it is essential to pay their outstanding 'bills'.

[21] Ms Biddle-Bassett confirmed that she supports Mr Hutching being paid for the work he has undertaken. She submitted that he supplied the trust with a harvesting prescription on 1 July 2018, which was read and signed by the applicant. This, she contended, implied that Mr Hutching could proceed with the harvesting. In addition, Ms Biddle-Bassett argued that a trustee hui was held on 23 September 2018 regarding Kaitoa Logging being paid for the work they completed. Ms Biddle-Bassett filed e-mails sent from Awhi Biddle to Matt Dodd (buyer of the logs) on 28 February 2018 stating that the trust would pay Kaitoa Logging seven days after receiving the sale proceeds of \$27,880.51. Ms Biddle-Bassett also submitted that the applicant has 'personal issues' with her stemming from the fact she was nominated as the chairperson of the trust, rather than the applicant.

[22] Mavis Biddle submitted that she was never informed of this application and that this is the third application filed to have her removed as a trustee. In response to some of the allegations made by the applicant, Mavis Biddle says the decision to hire Holland Beckett Law was made with the consent of the trustees on 5 June 2018. She also reiterated that many of the allegations made by the applicant are a result of personal issues between Kaitoa Logging and the trustees.

[23] Ultimately, the respondents argued that they have always acted in the best interest of the trust and the beneficiaries while underscoring that it was and remains the applicant who brings personal issues to the trust.

Interested parties' submissions

Francis Pederson nee Thompson

[24] Francis Pederson nee Thompson (daughter of Mavis Biddle and a beneficiary of the trust) also filed a letter. She submitted that current tensions between the trustees have been on-going for the past 12 years and were motivated by “greed, nastiness and power control”. She claimed there has never been a beneficiary hui held where their voices could be heard.

[25] In terms of the logging, Ms Thompson contended that this was carried out by her cousin Mr Hutching as trees were blocking the roadways to the koroua whare and required clearing. In addition, the removal of the trees would have provided the whānau with some putea to be used for the welfare of the land, such as the purchase of blackberry spray and fertiliser for the paddocks. Essentially, Ms Thompson sought that the trust be “shut down” so the next generation can carry it forward.

Bennett Hutching

[26] Mr Hutching filed a letter stating that many of the arguments of the applicant were motivated by personal conflict. He contended that the current trustees should be removed as they are unable to work together for the benefit of the trust. Mr Hutching also submitted that he had consent from the trustees for the work carried out in the form of e-mails and the harvesting prescription signed by the applicant. These e-mails have not been filed.

[27] In addition, Mr Hutching made submissions relating to the numerous planting activities he had undertaken on the block and recorded his disapproval of the appointment of Adam Mills to investigate the work carried out by Kaitoa Logging.

The Law

[28] Section 240 of Te Ture Whenua Māori Act 1993 relates to the removal of trustees. In particular, s 240(a) provides that I may remove a trustee if I am satisfied that the trustee has failed to carry out their duties satisfactorily. The general duties of a trustee are listed in s 223 of the Act. However, that list is not exhaustive and general trustee obligations apply.⁵

⁵ *Kawiti v Kawiti – Motatau 2 Section 65A* (2016) 162 Taitokerau MB 269 (162 TTK 269)

[29] Section 240 of the Act is set out below:

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.

[30] The leading authority on the removal of trustees is the judgment *Rameka v Hall*.⁶ The Court of Appeal identified a two-staged test for the removal of trustees. Firstly, it must be satisfied that the trustees have failed to carry out their duties satisfactorily. Secondly, if there are findings of unsatisfactory conduct, then the Court must consider whether to exercise its discretion in deciding whether to remove the trustees.

[31] The Court of Appeal in *Rameka v Hall* endorsed the findings of the Māori Appellate Court in applying s 240 to assess the standard trustee duties together with:⁷

...the broader approach having regard to the special nature of Maori 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.

[32] More recently, the Māori Appellate Court in *Smith v Smith – Nuki o Te Hapū Tahawai* confirmed that removing a trustee requires a careful approach that must include proper notice of the risk of removal, an assessment of the trustee's performance and consideration of any possible defences and relief. In addition, decisions by beneficiaries, while often highly persuasive, were not binding on the Court nor the trustees unless there was an express provision to this effect in the trust order.⁸

[33] In summary, the decision to remove trustees is not one made lightly. It requires an assessment of the trustees' overall performance and will need to consider the impact of the trustees' actions on the beneficiaries and any apprehension of risk to the assets.

⁶ [2013] NZCA 203

⁷ At [30]

⁸ *Smith v Smith – Nuki o Te Hapū Tahawai* [2019] Māori Appellate Court MB 110 (2019 APPEAL 110)

Discussion

[34] It is trite law that the paramount duty of trustees is to obey their terms of trust and adhere to trust duties at all times. They equally have crucial duties of protecting the assets of the trust and acting prudently when investing trust funds:⁹

...Breaches of trust are of many different kinds. A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers; it may consist of a failure to carry out a positive obligation of the trustees or merely a want of skill and care on their part in the management of the trust property, it may be injurious to the interests of the beneficiaries or be actually for their benefit. **By consciously acting beyond their powers as for example in making an investment which they know to be unauthorised the trustees may deliberately commit a breach of trust but if they do so in good faith and in the honest belief they are acting in the interests of the beneficiaries their conduct is not fraudulent...**

[35] On this basis, the critical issue is whether the trustees have acted prudently in consenting to the harvesting by Kaitoa Logging and in considering that point, several important considerations are relevant. Firstly, neither party have filed any documents to demonstrate that the harvesting contract was discussed and consented to at a properly convened hui of trustees. Second, Bennett Hutching says he has consent for the work undertaken, yet he has not filed any document as evidence. Even so, a harvesting prescription issued by Kaitoa Logging has been signed by the applicant. The harvesting prescription was filed by Bella Biddle-Bassett. There is also e-mail correspondence from Awhi Biddle sent on February 2018 confirming the trustees' consent for Bennett Hutching to carry out the harvesting of the second lot of logs. So there as clearly come confusion as to what had been agreed and by whom.

[36] Third, the meeting minutes of the hui held on 23 September 2018 confirms that the trustees disagreed about paying Kaitoa Logging's fees. But there is some further confusion over whether the dispute concerned the quantum or whether there was in fact a contract or both. Fourth, there is no evidence to show that the trustees have personally profited from the harvesting.

[37] Fifth, Kaitoa Logging has secured a judgment in the District Court against the trust, and it would appear, on a default basis. While it is evident that the trustees have been haphazard in their management of the trust's activities, the more disconcerting aspect of

⁹ Dal Pont and Chalmers *Equity and Trusts in Australia* (4th ed The Law Book Company, Sydney, 2007) at para 22.15 cited in *Hall v Opepe Farm Trust* (2010) 19 Waiariki MB 258 (19 WAR 258) at [156]

their misconduct was the enabling of Kaitoa Logging to secure judgment, apparently by default, against the trust for \$26,899.30. It is trite law that the trustees must obey their terms of trust and general trust law principles. Permitting Kaitoa Logging to obtain a significant judgment against them, without much it would appear by way of defence or exploring settlement options was both inexplicable as it was unacceptable. While there may have been deficiencies in some of the evidence in this case, there was evidently a sufficient amount for the District Court to be satisfied to enter judgment against the trust. How the trustees could have permitted this to occur without either defending the claim or exploring settlement options to a successful conclusion is very concerning.

[38] Moreover, that the trustees have evidently failed to properly address their internal personal conflicts as trustees or attempted a resolution by seeking directions will understandably be both disappointing and disconcerting to the trust beneficiaries. It would appear that these disputes have distracted the trustees from fulfilling their obligations and attending to the proper management of the trust. In such circumstances, I am satisfied that the trustees have failed to protect the assets of the trust by permitting the entry of judgment by Kaitoa Logging. The evidence confirms that the trustees have also failed to resolve their personal conflicts to the point where the trust has become incapable of fulfilling its core duties to the beneficiaries. While the activities of the applicant, it was said, were at the centre of the evident dysfunction, in my assessment, all of the trustees must accept some responsibility for the position that the trust now finds itself in. That there have been claims of a lack of beneficiary hui is another sign of the trustees' inability to fulfil their functions effectively.

[39] In such circumstances, I consider it appropriate that all trustees resign from their roles to allow an election to take place as soon as possible. The beneficiaries should be given the opportunity to properly assess the trustees conduct before contemplating what remedies if any they may seek. For example, in the absence of tenable defences, there might be an argument that the trustees may need to reimburse the trust for any funds that have been lost by inaction or imprudence. There are certainly precedents for that approach.

Decision

[40] The current trustees are invited to resign within 1 month from the date of this judgment. Failing that they will be removed as responsible trustees for cause per s 240 of Te Ture Whenua Māori Act 1993.

[41] In the meantime, an injunction is issued preventing the trustees from taking any steps regarding the trust's accounts or business whatsoever without the prior written approval of the Court, per ss19 and 238 of Te Ture Whenua Māori Act 1993.

[42] The deputy registrar is directed to convene a meeting of beneficiaries within 3 months from the date of this decision either personally or with the assistance of an external facilitator (per ss40 and 98 of Te Ture Whenua Māori Act 1993) for the purpose of electing trustees.

[43] An application for the appointment of replacement trustees should then be filed by the meeting facilitator, along with consents and draft minutes within a further month from the date of the meeting.

Pronounced in Rotorua at 9:30 am on Wednesday this 13th day of November 2019.

L R Harvey
JUDGE