

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT**

A20130007632

UNDER Sections 237 and 238, Te Ture Whenua Māori
Act 1993

IN THE MATTER OF Waiwhakaata 3E4C Lot 2A Māori
Reservation, known as Hiiona Marae

BETWEEN TAMATI TATA, ANNETTE TATA, ALVY
TATA-HOHEPA, NATHAN WHANGA,
RODNEY WHANGA, LISA KIRI
Applicants

AND NGAITU KARA, BOYD KATIPA,
EDWARD WHANGA-KATIPA, RENE
KATIPA, ISAAC KATIPA (JNR), JOE TE
PAPA ELLIOTT, CLAUDE WALKER,
RODNEY WHANGA (SNR), ALBERT
WHANGA, SHARINA TAWHI, DAVE
(MANNY) TATA
First Respondents

AND TANIA MARTIN
Second Respondent

Hearing: 19 May 2016
(Heard at Whangarei - Judge's Chambers)

Judgment: 19 May 2016

JUDGMENT OF JUDGE M P ARMSTRONG

Introduction

[1] The applicants apply for an order for particular discovery against a non-party, namely ANZ Bank New Zealand Limited (“ANZ”), concerning the ‘4060 APA’ bank account (“the bank account”).¹

[2] The application is opposed by the first and second respondents.

[3] Pursuant to my directions, ANZ were served with a copy of the application. ANZ have not filed a response to the application, and it appears that they will simply abide the decision of the Court.

[4] In a minute dated 29 March 2016, I indicated that I would determine this application on the papers, although I granted leave for ANZ, or the second respondent, to seek to be heard in person. No request was made to have the application heard in person and so I have determined this application on the papers.

[5] The issue in this case is whether the order for non-party discovery should be granted.

The Law

[6] The making of an order for non-party discovery is discretionary. Three criteria in respect of the document or documents sought must be satisfied:²

- (a) The document or class of document must be identified in specific terms;
- (b) It must appear that the document may be or may have been in the possession, custody, or power of the non-party; and
- (c) The documents must be relevant.

¹ For security purposes, the account number for this account has not been reproduced in this judgment.

² *Laws of New Zealand Discovery: Persons Subject to Discovery: Discovery against persons not party to proceedings* (online ed) at [7]. Also see *AMP Society v Architectural Windows Limited* [1986] 2 NZLR 190; *F and L Valks Limited v Bank of New Zealand Officers' Provident Association* [1996] 1 NZLR 735.

[7] The Court will also have regard to the likely probative value of the documents being sought. The order will not be granted unless it is necessary at the time it is made.³

[8] The fact that the non-party against whom discovery is sought in this case is a bank raises further considerations, as a bank has a duty of confidentiality in respect of its customers' transactions. However, the duty of confidentiality is not absolute, and where the law requires disclosure, any contractual duty of confidentiality is overridden by the duty of a bank to submit to the requirements of the law.⁴

[9] In *Taylor Preston Limited v Algie*, Associate Judge Gendall had to consider an application for non-party discovery against Westpac New Zealand Limited, ASB Bank Limited and B J King & Associates Limited.⁵ Associate Judge Gendall referred to the commentary on discovery against non-party banks in *McGechan on Procedure*, which states that:⁶

The appropriate time for the application is after general discovery and interrogatory processes: *Wallis Bros Limited v Canterbury Bye Products Lt* (1985) 5 PRNZ 590 (CA); *Butler v Holden* (1990) 3 PRNZ 660.

[10] Associate Judge Gendall held that an order for discovery and inspection of banking records is only to be made where necessary. He found that the application in that case was premature as general discovery had not been completed, and that when this occurred, non-party discovery against the banks may not be required.

Discussion

[11] The class of documents sought in the present application has been identified in specific terms. The applicants have identified the specific bank account number and the period for which banking records are required.

[12] It is also clear that these documents are in the possession, custody or power of ANZ. In the present case it is accepted that the bank account is held with ANZ.⁷

³ Ibid.

⁴ *Laws of New Zealand Discovery: Persons Subject to Discovery: Banks* (online ed) at [16]. Also see *Parry-Jones v The Law Society* [1968] 1 All ER 177.

⁵ *Taylor Preston Limited v Algie* HC Wellington CIV-2007-485-1443, 5 September 2007.

⁶ *McGechan on Procedure* (online looseleaf ed, Westlaw NZ) at HR8.21.07 (previously HR302.07).

⁷ See the affidavit of Tania Martin sworn 28 October 2015, at [21].

[13] I also consider that these banking records are relevant. The applicants allege that funds belonging to Hiiona Marae were paid into the bank account and have not been accounted for by the trustees who were in office at the relevant time. The applicants argue that the banking records are required to determine how the trust funds were applied, and in particular, whether it was applied for trust purposes.

[14] The second respondent, Tania Martin, accepts that the bank account is in her name.⁸ Ms Martin states that, at that time, she was assisting the then trustees of Hiiona Marae with several projects. Ms Martin says that she carried out research and feasibility work for a Marae building project and was paid for those services. Ms Martin also states that she was part of a Marae sub-committee in relation to that project. Ms Martin states:⁹

Subsequently the Trust made a number of payments to an ANZ account I had opened for the project for stage 1 work that had been approved. I then made payments to a number of other parties for the project work as well as what was due to me for the research and feasibility work.

[15] As such, Ms Martin accepts that the trustees in office at that time paid funds into the bank account which was in her name. According to Ms Martin, some of those funds were paid to her for services rendered, whereas other payments were made so that Ms Martin could pay relevant third parties on behalf of the trustees.

[16] Ms Martin, along with the first respondents, also claim that they complied with the Marae Charter, that the payments were not made in breach of trust, and that the funds were properly accounted for.

[17] The bank records concerning the bank account are clearly relevant in the present case. These records will not only show the funds paid into the bank account by the then trustees, but also what those funds were expended on. I accept the submission on behalf of the applicants that the bank records are relevant as to whether trust funds were expended for proper purposes. The probative value of those records is sufficient to justify an order for non-party discovery in this case.

⁸ Affidavit of Tania Eris Martin (Answers to Interrogatories) sworn 6 May 2016, at [4].

⁹ Affidavit of Tania Eris Martin sworn 28 October 2015, at [21].

[18] Finally, I consider that an order for non-party discovery against ANZ is necessary. On 13 November 2015, I directed the first and second respondents to provide discovery of the documents set out in the application for discovery dated 3 September 2015. That application sought discovery of documents relating to the transfer of money from the Hiiona Marae bank account to the bank account in question. Neither the first nor second respondents complied with those directions. They may well be in contempt as a result. The applicants now seek an order for non-party discovery against ANZ as a practical approach to ensure that they can obtain the relevant information, which they say is required in order to prosecute the application. I am therefore satisfied that the order is necessary.

[19] I note that the first and second respondents have raised a number of grounds upon which they oppose the application for non-party discovery. Those grounds include:

- (a) Omission of information;
- (b) Unauthorised access to information;
- (c) Return of trust property;
- (d) Imposition on rights of privacy; and
- (e) Basis for review of information.

[20] I have taken into account the arguments raised by the first and second respondents. Most of those arguments are irrelevant and do not relate to the factors I must take into account in considering an application for non-party discovery. I do not consider that the arguments raised in opposition displaces my overall assessment as set out above that I should exercise my discretion in this case to order non-party discovery against ANZ.

[21] As is standard practice with discovery orders against non-parties, the applicants will need to meet ANZ's reasonable costs in complying with the orders granted.

Decision

[22] I grant the following orders:

- (a) The applicants are to serve a copy of this decision on ANZ Bank New Zealand Limited within 10 working days of this judgment;
- (b) ANZ Bank New Zealand Limited are to provide discovery of:
 - (i) Bank statements for the period 31 January 2007 to 31 December 2010, for the bank account identified in para [1] of the application for non-party discovery dated 14 April 2016; and
 - (ii) Any further documents in the possession, custody or power of ANZ Bank New Zealand Limited identifying payments made from that account for the period 31 January 2007 to 31 December 2010, including, where possible, who such payments were made to.
- (c) ANZ Bank New Zealand Limited are to file and serve within 15 working days after being served with a copy of this decision, an affidavit of documents identifying the documents set out in order (b) above;
- (d) Inspection of those documents is to be completed within a further 15 working days of the affidavit being filed and served.
- (e) The applicants shall pay the reasonable costs and disbursements of ANZ Bank New Zealand Limited in complying with these orders.

[23] I direct that a telephone conference is to be convened following the above dates, to monitor compliance with these orders, and to timetable the substantive applications towards hearing.

Pronounced at Whangarei at 3.20 pm this 19th day of May 2016.

M P Armstrong
JUDGE