IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20130002088

UNDER	Section 18(1)(a), 19 and 20(d), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Rangihamama X3A and Omapere Taraire E (Aggregated)
BETWEEN	RANIERA TE TEINGA SONNY TAU, BRUCE ARNOLD CUTFORTH, TAOKO WIHONGI, TE TUHI ROBUST AND COLLEEN BIRMINGHAM-BROWN AS TRUSTEES OF THE OMAPERE TARAIRE E AND RANGIHAMAMA X3A AHU WHENUA TRUST Applicants
AND	FLETCHER TAHERE, TOKO TAHERE AND CANADIAN TAHERE Respondents

A20150006201

UNDER	Section 240, Te Ture Whenua Māori Act 1993
AND BETWEEN	FLETCHER TAHERE, TOKO TAHERE AND CANADIAN TAHERE Applicants
AND	RANIERA TE TEINGA (SONNY) TAU, BRUCE ARNOLD CUTFORTH, TAOKO WIHONGI, TE TUHI ROBUST AND COLLEEN BIRMINGHAM-BROWN AS TRUSTEES OF THE OMAPERE TARAIRE E AND RANGIHAMA X3A AHU WHENUA TRUST Respondents

Hearing:	26 April 2013, 59 Taitokerau MB 98-138 22 July 2013, 62 Taitokerau MB 268-272 11 March 2015, 99 Taitokerau MB 59-97 21 December 2015, 117 Taitokerau MB 194-205 17 and 18 March 2016, 130 Taitokerau MB 31-134 (Heard at Kaikohe)
Appearances:	P Jones on behalf of the Applicants K Brown on behalf of the Respondents
Judgment:	20 September 2016

RESERVED JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Rangihamama X3A is vested in the trustees of the Omapere Taraire E and Rangihamama X3A Ahu Whenua Trust. Fletcher Tahere, Toko Tahere, and other members of the Tahere whānau, are occupying part of the land.

[2] The trustees have filed an application per ss 18(1)(a), 19(1)(a) and 20(d) of Te Ture Whenua Māori Act 1993 ("the Act") seeking:

> (a) A determination that the Tahere whānau have no right to possession of the land;
>
> (b) An order for recovery of the land; and
>
> (c) An injunction requiring the Tahere whānau to vacate the land.

[3] Fletcher Tahere, Toko Tahere and Canadian Tahere have filed an application per s 240 of the Act seeking the removal of the trustees for cause.[1]

[4] These applications were heard on 17 and 18 March 2016.[2]

[5] At the commencement of that hearing, Mr Brown, a lay advocate for the Tahere whānau, argued that I should recuse myself from hearing and determining these applications. I declined the application for recusal with reasons to follow.

[6] This judgment sets out the reasons for refusing the application for recusal, and determines the substantive applications.

Background

[7] The Omapere Taraire E and Rangihamama X3A Ahu Whenua Trust ("the trust") administers the following blocks of land: Rangihamama X3A, Omapere Taraire E,

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1 Kenneth Brown is also listed as an applicant on this application. Mr Brown is assisting the Tahere whānau as a lay advocate and so I have not included him as an applicant for the purpose of this judgment.

2 130 Taitokerau MB 31 (130 TTK 31-134).

Kohewhata 27C2A, Kohewhata No. 27B, Papakauri A No. 1, Papakauri A No. 2, and Papakauri A No. 3.

[8] The trustees are Raniera Sonny Tau, Bruce Cutforth, Taoko Wihongi, Colleen Birmingham-Brown and Te Tuhi Robust ("the trustees").[3]

[9] Rangihamama X3A is 573.8837 hectares in size. On 6 May 1987, an order was granted aggregating the owners of Rangihamama X3A and Omapere Taraire E.[4] There are 3,482 aggregated beneficial owners in Rangihamama X3A and Omapere Taraire E.

[10] For almost 30 years, the Tahere whānau have occupied an area of the Rangihamama X3A block ("the land") formerly known as Punakitere 4J2B. The members of the Tahere whānau who have been, or who are, in occupation of the land, are recorded in Schedule 1 attached to this judgment ("the Tahere whānau"). Some members of the Tahere whānau are beneficial owners in the land.

[11] The occupation of this land has been a long source of contention between the trustees and the Tahere whānau. Various attempts have been made to try and resolve the issue by agreement, and a number of proceedings have been initiated in this Court, and in the District Court. Despite these steps, final resolution of this matter has remained elusive.

Procedural History

[12] On 25 February 2013, the trustees filed the current application seeking (inter alia) the removal of the Tahere whānau from the land ("the injunction application"). On 26 April 2013, the injunction application came before Judge Doogan.[5] Judge Doogan adjourned the application to appoint counsel to assist the Tahere whānau.[6]

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3 17 Taitokerau MB 261-275 (17 TTK MB 261-275).

4 15 Kaikohe MB 337 (15 KH 337).

5 59 Taitokerau MB 98-138 (59 TTK 98-138).

6 Counsel was engaged to act for the Tahere whānau but his instructions were subsequently terminated. The Tahere whānau then engaged Mr Brown to act as a lay advocate.

[13] On 22 July 2013, Judge Doogan conducted a site visit and then convened a hearing to discuss the injunction application. At that hearing, the parties agreed to adjourn the application in order to hold a settlement conference.[7]

[14] The settlement conference was held in Kaikohe on 6 August 2013. By agreement, the injunction application was further adjourned in order to enable Mr Tau, the chair of the trust, and Toko Tahere, an elder of the Tahere whānau, to attempt to resolve the issue according to tikanga. The parties subsequently met, however, a final agreement was not reached.

[15] By memorandum dated 28 January 2015, counsel for the trust, Mr Jones, advised that the discussions had been unsuccessful and sought to have the injunction application returned to the Court for determination.

[16] On 11 March 2015, the injunction application came back before Judge Doogan.[8] At that hearing, the parties agreed to one final meeting to try and resolve the issue according to tikanga.

[17] That final meeting took place on 13 March 2015 in Kaikohe. An oral agreement was reached between the parties, which was to be confirmed in writing.

[18] Following that meeting, a dispute arose over the way in which the agreement should be documented.

[19] On 12 May 2015, Judge Doogan met with the parties on a 'without prejudice' basis, to try and assist the parties with documenting the terms of the agreement. Despite that, the parties were unable to resolve the terms of the agreement.

[20] By memorandum dated 11 June 2015, Mr Jones advised that negotiations were at an end, and the injunction application should be determined by the Court.

[21] On 26 June 2015, Judge Doogan directed that the injunction application was to be referred to another Judge for hearing and determination.[9]

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7 62 Taitokerau MB 268-272 (62 TTK 268-272).
8 99 Taitokerau MB 59-97 (99 TTK 59-97)

[22] The injunction application was then referred to me pursuant to Judge Doogan's direction.

[23] On 2 September 2015, I convened a telephone conference with the parties. During the course of that conference, Mr Brown advised that the Tahere whānau were filing an application with the Chief Judge per s 45 of the Act. Mr Brown also advised that the Tahere whānau were seeking a stay of the injunction application pending determination of the s 45 application. I directed that the Tahere whānau were to file the s 45 application, and the application seeking a stay, within 6 weeks.[10]

[24] On 16 October 2015, the Tahere whānau filed the s 45 application with the Office of the Chief Registrar. On 30 October 2015, the Tahere whānau filed the application seeking a stay of proceeding ("the stay application"). On 30 October 2015, the Tahere whānau also filed a further application seeking the removal of the trustees for cause per s 240 of the Act ("the trustee removal application").

[25] On 21 December 2015, I issued a decision dismissing the stay application.[11]

[26] The injunction application, and the trustee removal application, were then heard on 17 and 18 March 2016.[12] At the conclusion of that hearing, I directed the parties to file further submissions in writing. Those submissions were filed by Mr Jones on 29 March 2016, and by Mr Brown on 2 April 2016.

The application for recusal

[27] At the commencement of the hearing on 17 March 2016, Mr Brown filed a document titled "Notice of objection against the judgment of Judge M P Armstrong dated 21 December 2015 118 Taitokerau MB 194". As the title would suggest, this document objected to my decision of 21 December 2015, where I dismissed the stay application.

[28] While the status and purpose of that document was unclear, Mr Brown clarified that the Tahere whānau were seeking that I recuse myself from hearing the injunction

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9 106 Taitokerau MB 204-206 (106 TTK 204-206).
10 109 Taitokerau MB 199-200 (109 TTK 199-200).
11 118 Taitokerau MB 194-205 (118 TTK 194-205).
12 130 Taitokerau MB 31-134 (130 TTK 31-134).

application, and the trustee removal application. Mr Brown argued that the comments in my judgment of 21 December 2015, demonstrated that I had formed a view of the Tahere whānau, and as such, it would be unfair if I were to hear the substantive applications.[13]

[29] Although a formal application seeking recusal was not filed, I treated Mr Brown's submission as an application for recusal for the purpose of this proceeding.

The Law

[30] Bias is unfairly regarding with favour or disfavour the case of a party to the issue under consideration. There are three main types of bias: actual, apparent and presumptive bias. Actual and apparent bias involve the principle that a decision maker should not impartially favour one side over another. Presumptive bias involves the principle that it is improper for a decision maker, who has an interest in the outcome of a case, to decide that case.[14]

[31] Mr Brown did not clarify the type of bias that is alleged in this case. Despite that, it is clear from Mr Brown's submission that the Tahere whānau are alleging apparent bias.

[32] In *Muir v Commissioner of Inland Revenue,* the Court of Appeal held that the test for determining apparent bias is as follows:[15]

> In our view, the correct inquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case….

[33] This approach was largely adopted by the Supreme Court in *Saxmere Company Limited v Wool Board Disestablishment Company Ltd.*[16] In that case, the Supreme Court held that a judge was disqualified if a fair minded lay observer might reasonably apprehend that there was a real and not remote possibility that the judge might not bring an impartial

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13 Ibid at MB 34-35.
14 *Law of New Zealand* Administrative Law: Procedural Impropriety, The Rule Against Bias (online ed) at [87]
15 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at [62]
16 *Saxmere Company Limited v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

mind to the resolution of the question the judge was required to decide. There was to be no attempt to predict or inquire into the actual thought processes of the judge. Rather, it was necessary first to identify what it was said might lead a judge to decide a case other than on its legal and factual merits and, secondly, to articulate the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

Discussion

[34] The Tahere whānau argued that, in my decision of 21 December 2015, I made comments which either suggested or demonstrated that I had formed a view of the Tahere whānau. Mr Brown further argued that in these circumstances, it would be unfair if I were to hear the substantive applications.

[35] While Mr Brown did not expressly say so, I assume he is arguing that those comments demonstrate that I had formed an unfavourable view of the Tahere whānau.

[36] The stay application was an interlocutory application. The factors to which courts conventionally address themselves when considering an application seeking a stay include:[17]

(a) If no stay is granted will the applicant's right of appeal be rendered nugatory;

(b) The bona fides of the applicants as to the prosecution of the appeal;

(c) Will the successful party be injuriously affected by the stay;

(d) The effect on third parties;

(e) The novelty and importance of the question involved;

(f) The public interest in the proceeding; and

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[17] See *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239; *Tito v Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 527 (2011 APPEAL 527); *Clarke v Karaitiana* [2010] NZCA 485.

(g) The overall balance of convenience.

[37] When determining the stay application, I was exercising a judicial function of this Court. In doing so, I addressed the above factors as part of the conventional approach in considering such an application. That necessarily required some comment to be made on the stay application, and the Tahere whānau, within the context of that application.

[38] My decision of 21 December 2015 simply determined the stay application having regard to established principles. While that involved making some comment with respect to the Tahere whānau, these are not circumstances which might lead a fair minded lay observer to reasonably apprehend that I might not bring an impartial mind to the resolution of the substantive case.

[39] If the argument by the Tahere whānau were accepted, this would require every judge to recuse him or herself from hearing a substantive application where that judge had previously determined an interlocutory application in the same proceeding. This cannot be correct and does not satisfy the test for determining apparent bias.[18]

[40] For these reasons, the application seeking recusal was dismissed.

Should the trustees of the trust be removed?

[41] At the hearing on 17 March 2016, the parties agreed that I should first determine the trustee removal application, as if that order is granted, that may affect whether the orders can or should be granted for the injunction application.[19]

The grounds for removal

[42] Mr Brown contends that the trustees should be removed for failing to discharge their duties. In particular Mr Brown argues that:

(a) The trustees failed to give effect to an agreement reached which would have allowed the Tahere whānau to remain on the land;

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18 For example, see *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA).

19 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 36.

(b) The trustees failed to put a resolution to a meeting of beneficial owners concerning proposed amendments to the trust order;

(c) The trustees breached their duties by seeking the removal of the Tahere whānau from the land; and

(d) There is support from beneficial owners of the land seeking the removal of the trustees.

[43] In his closing submission dated 1 April 2016, Mr Brown also seeks a number of additional orders including directing the trustees to call a general meeting of beneficial owners, and directing the trustees to provide further information and financial records. There are no applications before me concerning these matters.[20] The only outstanding application filed by the Tahere whānau seeks the removal of the trustees and I address the application on this basis.

The Law

[44] Section 240 of the Act states:

> **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.

[45] In *Perenara v Pryor* the Māori Appellate Court held:[21]

> As a general approach the Court should proceed with caution when asked to consider removal. Conversely, we also endorse the notion that immediate removal should follow obvious abuse, failure or malfeasance. However, as pointed out by Mr Kahukiwa, the test to apply is not one confined to obvious abuse, failure or malfeasance. Rather the legislation may, depending on the circumstances of each case, also require consideration of trustees' performance to assess whether they have carried out their duties satisfactorily. In considering performance, the rules of

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20 Such as an application to enforce the obligations of trust per s 238 of the Act.
21 *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate Court MB 233 (10 AP 233) at MB 241.

natural justice must be observed, the appropriate legal thresholds as provided for in the Act, the Trustee Act 1956 and the Reservation Regulations have to be reached and the Court must consider whether there is any positive defence or reasonable excuse for unsatisfactory performance.

[46] In *Rameka v Hall*, the Court of Appeal held:[22]

> [28] The general responsibilities of responsible trustees are set out in s 223 of the Act. That section refers to the following:
>
> (a) Carrying out the terms of the trust:
>
> (b) The proper administration and management of the business of the trust:
>
> (c) The preservation of the assets of the trust:
>
> (d) The collection and distribution of the income of the trust.
>
> [29] As we have noted, these statutory duties are not exhaustive and general trustee law principles are also relevant. Further, the trust order applicable to the trust may add other responsibilities. The relevant obligations of trustees have been described by the Māori Appellate Court in these terms:
>
> (a) A duty to acquaint themselves with the terms of the trust;
>
> (b) A duty to adhere rigidly to the terms of trust;
>
> (c) A duty to transfer property only to beneficiaries or to the objects of a power of appointment or to persons authorised under a trust instrument or the general law to receive property such as a custodian trustee;
>
> (d) A duty to act fairly by all beneficiaries;
>
> (e) A duty of trustees to invest the trust funds in accordance with the trust instrument or as the law provides;
>
> (f) A duty to keep and render accounts and provide information;
>
> (g) A duty of diligence and prudence as an ordinary prudent person of business would exercise and conduct in that business if it were his or her own;
>
> (h) A duty not to delegate his or her powers not even to co-trustees;
>
> (i) A duty not to make a profit for themselves out of the trust property or out of the office of trust: *Garrow and Kelly Law of Trusts and Trustees* (sixth edition, pp 523-582 inclusive).

22 *Rameka v Hall* [2013] NZCA 203; [2013] NZAR 1208 (CA) at [28] – [30].

> [30] The settled approach in the Māori Appellate Court in applying s 240 is to make an assessment of these standard duties together with what the Court has described as:
>
> > … the broader approach having regard to the special nature of Māori 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.
>
> We endorse this approach as part of the first stage inquiry.

[47] In *Bramley v Hiruharama Ponui Incorporation – Committee of Management,* the Māori Appellate Court stressed the importance of measuring unsatisfactory conduct against the principles of the Act as found in the Preamble and section 2.[23]

[48] In *Rameka v Hall* the Court of Appeal adopted this approach with respect to trustee removal per s 240. The Court of Appeal also found:[24]

> … that in determining whether removal is appropriate the Court will need to consider the impact of the trustee's actions on the beneficiaries and any apprehension of risk to the assets.

Should the trustees be removed for failing to give effect to an agreement reached?

[49] Mr Brown argues that on 13 March 2015, the parties reached agreement to allow the Tahere whānau to remain in occupation of the land. Mr Brown contends that the agreement could have been recorded by "a simple letter on an A4 paper" and did not need to be confirmed in a formal agreement prepared by the trust's solicitor. Mr Brown contends that the trustees have failed to give effect to this agreement and as such should be removed.

[50] While Mr Brown's submission is somewhat ambiguous, it appears that he is criticising the trustees for returning to Court, and asserts that the trustees should have continued to work with the Tahere whānau to document the agreement reached. This is confirmed in Fletcher Tahere's evidence where he said:[25]

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23 *Bramley v Hiruharama Ponui Incorporation – Committee of Management* (2006) 11 Waiariki Appellate MB 144 (11AP 144).

24 *Rameka v Hall* [2013] NZCA 203; [2013] NZAR 1208 (CA) at [33].

25 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 81.

> My whānau and I do not understand why the trust chairperson Sonny Tau will not sit down and work through the fine print of the agreement already reached between us.

[51] Mr Jones accepts that an oral agreement was reached on 13 March 2015, but argues that this was subject to the agreement being confirmed in writing. Mr Jones contends that the parties were unable to settle on the written terms of the agreement and as such those negotiations came to an end.

[52] Mr Jones further argues that this issue was raised before Judge Doogan, and Judge Doogan determined that the trustees were entitled to withdraw from the negotiations and proceed with the application before the Court. Mr Jones contends that Judge Doogan's finding was not challenged and this issue cannot be re-litigated.

[53] Mr Jones' argument raises the question of whether issue estoppel arises in this case.

Does issue estoppel arise?

[54] *Estoppel per rem judicatam*, or *res judicata*, arises where a party seeks to re-litigate a cause of action, or an issue, which has previously been determined. When res judicata is pleaded to an entire cause of action it is generally referred to as a cause of action estoppel. However, if it is raised only as to some particular point which it is alleged was directly in issue and finally determined by an earlier decision, it is generally referred to as issue estoppel.[26]

[55] In *Shiels v Blakely*, the Court of Appeal held: [27]

> The rule is, so far as material to the present case, that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits.
>
> …
>
> The reasons for the existence of the rule are not in doubt. They were stated by Lord Blackburn in *Lockyer v Ferryman* (1877) 2 App Cas 519, 530:

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26 *The Laws of New Zealand* Estoppel, Part II, Estoppel Per Rem Judicatam (online ed) at [2] and [17].
27 *Shiels v Blakeley* [1986] 2 NZLR 262 at 266.

> "The object of the rule of *res judicata* is always put upon two grounds – the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause."

> In one branch of the law of res judicata the cause of action put in suit in the first proceeding passes into judgment so as no longer to have an independent existence. There is both a merger of the cause of action in the judgment and a cause of action estoppel. While in the case of what is commonly caused issue estoppel a particular matter of fact or law in issue in the second proceeding is held to have been decided by the prior judgment but may or may not be determinative of the second proceeding.

Discussion

[56] As noted, this proceeding has a long history. While the proceeding was before Judge Doogan, adjournments were granted to allow negotiations to take place. Judge Doogan also attempted to assist the parties to reach agreement through settlement conferences.

[57] On 26 June 2015, Judge Doogan issued a minute addressing the agreement reached on 13 March 2015, and the subsequent attempts to document that agreement. The relevant section of that minute states:[28]

> 9. When the matter came before me in Whangarei on 11 March 2015 the parties agreed to one final meeting in order to attempt to resolve matters under tikanga. That meeting took place on 13 March 2015 in Kaikohe. Following the commencement of the meeting the Trust Chair and Toko and Fletcher Tahere travelled to the lands and had further discussions. It was clear to me from information subsequently filed that agreement was reached that day as to a basis on which the whānau could remain in occupation of a specified area subject to certain conditions.
>
> 10. Disagreement subsequently arose over the way in which the agreement should be documented. With the consent of the parties I met with counsel and whānau representatives on a without prejudice basis in Kaikohe on 12 May 2015. This was to try and assist the parties with documenting the terms of the agreement.
>
> 11. Despite further endeavours the parties have been unable to resolve the terms of the settlement agreement. By memorandum dated 11 June 2015 counsel for the Trust advised that latest changes proposed by the Tahere whānau to the settlement agreement had effectively brought the negotiation process to an end. Accordingly the matter must now proceed to hearing and the following orders were requested:
>
> i. An order directing a hearing; and

[28] 104 Taitokerau MB 204-206 (104 TTK 204-206).

> ii. An order recording that all discussions, negotiations and draft documentation as to settlement are without prejudice and are not to be taken into account in any ultimate decision by the Court; and
>
> iii. An order recusing me given my participation in the without prejudice attempts to negotiate a compromise or settlement and assignment of the matter to hearing by another judge.
>
> 12. I have reviewed the information filed by the parties recording attempts to negotiate the terms of the settlement agreement. Those documents include what I understand to be the last draft of the settlement agreement with amendments proposed by both parties. I am satisfied that some of the changes proposed by the Tahere whānau go beyond implementation of the agreement reached on 13 March 2015, in particular proposed clause 3.7 (holding as Māori customary land) and clause 7 relating to the shared use of the area nominated for the Rakete whānau. On that basis it is open to the Trust to decline to re-negotiate the agreement reached on 13 March 2015 and to seek to have the matter returned to Court.
>
> 13. Accordingly this matter is to be referred to another judge for hearing and determination. Correspondence and documentation recording the attempts of the parties to document the agreement reached on 13 March 2015 are to be removed from the Court file. The status of other information on the Court file including memoranda and evidence as to the agreement reached on 13 March 2015 is a matter that should be raised with the judge who will now hear the matter.

[58] As noted in the minute, Judge Doogan referred to the agreement reached on 13 March 2015, and the subsequent attempts to document the agreement. Judge Doogan found that it was “open to the Trust to decline to re-negotiate the agreement reached on 13 March 2015 and to seek to have the matter returned to Court.”

[59] This is a judicial decision pronounced by a judicial tribunal of competent jurisdiction. I also consider that this decision was final.

[60] The trustees wanted to return to Court. The Tahere whānau wanted to finalise the agreement reached on 13 March 2015. Judge Doogan made a decision on this and referred the proceeding back to Court for hearing and determination. Judge Doogan’s decision was not challenged. The Tahere whānau subsequently filed a separate application seeking the removal of the trustees and are now raising this issue once again in support of the removal of the trustees.

[61] The Tahere whānau are attempting to raise the same question which was determined by Judge Doogan on 26 June 2015 and are estopped from doing so.

[62] I note that Judge Doogan only found that it was open to the trustees to decline to "re-negotiate" the agreement reached on 13 March 2015. Judge Doogan left open the question of the status and effect of the agreement already reached on that date. I address that issue below.

Failing to act on a requisition

[63] Mr Brown argues that at a special general meeting on 2 May 2015, Fletcher Tahere handed to the trustees a proposal to make additions to the trust order. Mr Brown contends that the trustees failed to put the proposal to the beneficial owners at that meeting and as such they breached their obligations.

[64] Mr Jones argues that the proposal submitted was not a proper requisition pursuant to the terms of the trust order and no breach has occurred.

[65] The notice relied on states:[29]

> To the trustees of Omapere Taraire E and Rangihamama X3A Ahu Whenua Trust, TAKE NOTICE of Fiduciary Obligations under section 17 of Te Ture Whenua Māori, Māori Land Act 1993

[66] The notice then quotes s 17 of the Act and proposes a new clause 2.7 to the trust order.

[67] Clause 4.6.2(a) of the trust order states:

> 4.6.2 The trustees shall call a general meeting:
>
> (a) Within three months of receiving written notice stating the purpose of the general meeting which notice is signed by not less than 30 beneficial owners or by beneficial owners holding not less than 20% of the shareholding in the land;

[68] The notice relied on by the Tahere whānau does not comply with clause 4.6.2 of the trust order.

[69] Firstly, the notice does not require the trustees to call a general meeting of beneficial owners. It simply proposes an amendment to the trust order. It is implicit within

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29 Exhibit "H" to the 'Notice to Admit the Facts' dated 17 March 2016 filed by Mr Brown.

clause 4.6.2 that any requisition must actually require that a general meeting is to be held and must state the purpose of the meeting. This notice does not do that. While the notice proposes amendments to the trust order, it is not clear in the notice that the Tahere whānau are seeking that the trustees call a general meeting, or that the proposed amendments are to be put to the beneficial owners at that meeting.

[70] Clause 4.6.2 of the trust order also requires that the notice has to be signed by not less than 30 beneficial owners, or by beneficial owners holding not less than 20% of the shareholding in the land.

[71] In the present case the notice is not signed at all. Fletcher Tahere gave evidence that he was representing the Tahere whānau who number more than 30 people and that he was authorised by a resolution from the Tahere whānau to submit the notice on their behalf. Even if that were the case, clause 4.6.2 is clear that the notice must be signed by 30 beneficial owners. That did not occur.

[72] To address this, Mr Brown has attached a further notice to his closing submission which he contends has been signed by over 30 beneficial owners. This is new evidence. No application has been filed seeking to adduce further evidence and I have not taken this new notice into account.

[73] I also note that even if this new notice was accepted on the record, this is not the notice that was served on the trustees at the special general meeting, and so it cannot be said that the trustees have breached their obligations by failing to call a general meeting pursuant to that notice.

The trustees' application for removal of the Tahere whānau

[74] Mr Brown argues that the application by the trustees seeking the removal of the Tahere whānau from the land amounts to a serious breach of trust.

[75] Mr Brown contends that the trustees are required to act in the best interests of the beneficial owners and that the Tahere whānau are a large group of beneficial owners. Mr Brown refers to clause 2.3 of the trust order which provides that the objects of the trust include the trustees providing for the better habitation or use of the land by the beneficial

owners. Mr Brown argues that the application seeking the removal of the Tahere whānau from the land contravenes clause 2.3 of the trust order.

[76] Mr Brown also relies on the Preamble, ss 2, 5 and 17 of the Act.

[77] In *Eriwata v Trustees of Waitara SD Section 6 and 91 Land Trust* the Māori Appellate Court held: [30]

> [5] When trustees are appointed to an Ahu Whenua Trust, they take legal ownership. The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Māori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

[78] The trust order empowers the trustees to grant rights of occupation to beneficial owners. However, that does not mean that the trustees must grant a right of occupation to the Tahere whānau. Nor does it mean that the trustees are breaching their duties by seeking the removal of the Tahere whānau.

[79] Decisions to be taken for the land are to be decisions of the trustees. They decide who can enter and who can reside there and how the land is managed. Trustees are empowered and entitled to take action for recovery of the land even where that may result in the removal of beneficial owners who are in occupation.

[80] Whether orders should be granted requiring the removal of the Tahere whānau from the land is a separate issue considered below. The application by the trustees seeking the removal of the Tahere whānau does not support or justify an order for the removal of the trustees.

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30 *Eriwata v Trustees of Waitara SD Section 6 and 91 Land Trust - Waitara SD Section 6 and 91 Land Trust* (2005) 15 Wanganui Appellate Court MB 192 (15 WGAP 192).

Do the beneficial owners support the removal of the trustees?

[81] In *Ellis v Faulkner - Poripori Farm A Block*, Judge Carter found that in considering removal per s 240 of the Act, the Court must have regard to the views of the owners as provided for in ss 2(2), 17(2) and 222(2) of the Act. Judge Carter held:[31]

> In the previous application to remove Toa Faulkner referred to earlier, in considering the question of satisfactory performance under section 240 I said at Tauranga MB 53/136:
>
> "The test of satisfactory performance need not be judged solely on objective standards. The Court is entitled to consider the nature of the trust, its performance and the views of the owners in coming to a determination."
>
> I still concur with that statement and my view is reinforced by the statutory provisions that I have just referred to. That is not to say that the Court must blindly follow the wishes of the owners. There must still be grounds under section 240 for the Court to exercise its jurisdiction to remove a trustee.

[82] This approach was approved by the Māori Appellate Court in *Perenara*.[32]

[83] In the present case, the Tahere whānau rely on a hui held on 3 October 2015 where the following resolution was passed:

> The meeting accepts the facts presented and that the trustees failed to carry out their duties of a trustee satisfactorily and is unacceptable, and that all the current responsible trustees be removed from office.

[84] In response to questions from the Court, Fletcher Tahere accepted that this was a meeting of the Tahere whānau.[33]

[85] There is no evidence that the removal of the trustees has been raised with the wider beneficial owners at a meeting of owners. While I have taken the views of the Tahere whānau into account, it is not surprising that they support the removal of the trustees given that the trustees are seeking the removal of the Tahere whānau from the land.

[86] It is also clear from *Ellis*, that the Court cannot blindly follow the wishes of the owners. There must still be grounds per s 240 of the Act for the Court to exercise its jurisdiction to remove a trustee.

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31 *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7)
32 *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate Court MB 233 (10 AP 233) at MB 241.
33 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 107.

[87] Some members of the Tahere whānau are beneficial owners. Their views on the removal of the trustees is relevant but not determinative, and is not, on its own, sufficient to justify removal in this case.

[88] I also note that, once again, Mr Brown has attached new evidence to his closing submission in the form of signatures from beneficial owners who he says support the removal of the trustees. As noted above, this is new evidence, no application has been filed to adduce further evidence, and I have not taken this into account.

Should the trustees be removed?

[89] The arguments raised by the Tahere whānau either lack merit, or do not justify the removal of the trustees. The Tahere whānau have not shown that the trustees have breached their obligations, or that they have failed to perform their duties satisfactorily. There is no evidence that the trust assets are at risk.

[90] I also note that Mr Tau's evidence as to the performance of the trustees was not challenged. Mr Tau referred to significant achievements by the trustees including repaying debt, improving the state and productivity of the land, undertaking a dairy conversion on trust land, reducing the shareholding of the Māori Trustee, the establishment of a papakainga scheme on trust land, and regular reporting to the beneficial owners.

[91] In considering the performance of the trustees as a whole, there is no proper basis justifying their removal, and the application seeking their removal should be dismissed.

Do members of the Tahere whānau have a right, title or licence to occupy the land?

Do the Tahere whānau have customary or ancestral rights to occupy the land?

[92] Fletcher Tahere gave evidence of the ancestral connections that he and his whānau share with this land. Mr Tahere recited whakapapa from the paramount tupuna, Rahiri, down to Mahia who lived at Pakinga Pa. Mr Tahere referred to the marriage between Ngahue and Tautahi, their descendants, and where they settled. Mr Tahere also spoke of Ngāti Tautahi, the hapū that associates with these lands in accordance with tikanga Māori. Mr Tahere referred to the connections that he and his whānau have to those tupuna, and to

that hapū. Mr Tahere also referred to the history of his whānau occupying the land, and to the many significant sites and wāhi tapu located on the land.

[93] In his closing submission, Mr Brown raised issues of customary property rights, aboriginal title, and rangatiratanga. While the exact nature of Mr Brown's argument is not clear, it appears that he is arguing that the Tahere whānau have customary rights to occupy the land.

[94] I accept that the Tahere whānau have ancestral connections to this land. However, I do not agree that this results in customary rights to occupy the land.

[95] Section 129(2)(a) and (b) of the Act state:

> **129 All land to have particular status for purposes of Act**
>
> ...
>
> (2) For the purposes of this Act,—
>
> (a) Land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land:
>
> (b) Land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order, shall have the status of Maori freehold land:

[96] The beneficial ownership of this land has been determined by the Court. The Court records show that there are currently 3,482 aggregated owners for Rangihamama X3A and Omapere Taraire E. On 2 April 1993, the Court determined that the status of this land is Māori freehold land.[34] That determination has not been challenged.

[97] There is no evidence or basis to demonstrate that this land is Māori customary land, that the Tahere whānau hold aboriginal title with respect to the land, or that the Tahere whānau have customary rights of occupation which can be recognised and enforced by the Court.

[98] I accept that some members of the Tahere whānau are beneficial owners in the land. That affords them the same rights and privileges as all other beneficial owners. As noted

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[34] 20 Kaikohe MB 243 (20 KH 243).

in *Eriwata*, it is the trustees who decide who can enter the land, who can reside on the land and how the land is managed. The trustees' power and obligation to manage the land cannot be overridden by a beneficial owner or a group of beneficial owners.

[99] Accordingly, I find that the Tahere whānau do not have an ancestral or customary right to occupy the land.

Do the Tahere whānau have a licence to occupy the land?

[100] It is clear that a formal arrangement was never entered into granting the Tahere whānau a right to occupy the land. There is no occupation order, lease, residential tenancy, or other written agreement in place.

[101] It is also clear that there has been a long history of dealings between the trustees and the Tahere whānau concerning their occupation of the land.

[102] The question arises as to whether the action, or inaction, of the trustees over the course of those dealings has resulted in an informal right to occupy the land such as a license.

The Law

[103] There are four traditional classifications of a licence. A bare licence, a licence coupled with an interest, a contractual licence and a licence supported by estoppel.[35]

[104] A bare licence is mere permission to enter for some purpose given gratuitously by the licensor in circumstances which do not speak of contract, estoppel, or trust. Such a licence remains at the whim of the licensor and is revocable at any time. No formalities are required for the creation of a bare licence.[36] The bare licensee's position is precarious.[37]

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[35] John Burrows (ed) *Land Law* (online looseleaf ed, Westlaw NZ) at LC 2.
[36] Ibid at LC2.01.
[37] Bennion, Brown, Thomas and Toomey, *New Zealand Land Law*, (2nd ed, Brookers, Wellington, 2009) at 7.2.01.

[105] Whether such a license exists in the present case requires a review of the dealings between the trustees and the Tahere whānau.

The dealings between the trustees and the Tahere whānau

[106] This land was originally part of a development scheme administered by the Māori Affairs Department.[38] This development scheme, along with a number of others, was disestablished in the late 1980s.

[107] On 6 May 1987, an order was granted aggregating the owners of Rangihamama X3A and Omapere Taraire E.[39] On 4 May 1989, an order was granted vesting these blocks in interim trustees. On 2 July 1990, those interim trustees were appointed as permanent trustees.[40] Those trustees were David Toia, Haki Wihongi, Irihapeti Pou, Hera Motu, Toko Herewini, Isobel Maka-Kea, Hare Taimona, Arthur Harawira and Hamahona Pehi.

[108] Fletcher Tahere gave evidence that he and his whānau first occupied the land while it was still part of the development scheme. Mr Tahere stated that Clive Guest was acting on behalf of the Māori Affairs Department for this development scheme at that time. According to Mr Tahere, Mr Guest agreed that the Tahere whānau could reside on the land although a written agreement was not entered into.

[109] Mr Tahere further advised that when the land was vested in the trustees, David Toia also agreed that the Tahere whānau could reside on the land. According to Mr Tahere, once again, no written agreement was entered into.

[110] On 9 July 1990, Judge Spencer heard an application by the trustees seeking an injunction against the Tahere whānau for trespassing on the land. The minutes for that hearing record Judge Spencer's decision as follows:[41]

> …I am satisfied that a trespass has and still is being committed. I am also satisfied that the situation is one which the trustees are entitled not to entertain a request for a licence to occupy a part of the land by a beneficiary – that they are entitled to exercise their discretion to the benefit of the beneficiaries as a whole. In this case they clearly see the occupation of the land as an interference and hindrance to the

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[38] 4 Kaikohe MB 257 (4 KH 257), 5 Kaikohe MB 161 (5 KH 161) and 8 Kaikohe MB 145 (8 KH 145).
[39] 15 Kaikohe MB 257 (15 KH 257).
[40] 17 Kaikohe 98 (17 KH 98), 69 Whangarei MB 266 (69 WH 266).
[41] 18 Kaikohe 14-15 (18 KH 14-15).

> efficient farming of the property. In all the circumstances I consider the application completely justified and an interlocutory injunction shall issue forthwith as sought.
>
> ….
>
> The application will be set down for a substantive hearing in the next Kaikohe sitting of the Court.

[111] The subsequent order which was drawn and sealed states:[42]

> IT IS HEREBY ORDERED that MANE KIRI TAHERE, TOKO TAHERE, FLETCHER TAHERE, TAMAITI TAHERE and other members of the Tahere family (individually and collectively herein called "the Tahere family") be restrained from actual trespass or threatened trespass or other injury to those parcels of Māori freehold land known as the Rangihamama X3A and Omapere Taraire E blocks ("the land"), from preventing the Trustees of the land and their authorised servants agents and workmen from having access to parts of the land, and requiring the Tahere Family to remove from the land buildings erected by them thereon until further Order of the Court.

[112] According to Mr Tau, on 5 April 1991, the substantive hearing was adjourned with the interlocutory injunction to remain in place in order to preserve the status quo. This was to enable the trustees and the Tahere whānau to enter into negotiations to try and resolve the matter.

[113] The application came back before the Court on 15 October 1999. The minutes for that hearing record that Te Aroha Reihana-Ruka sought:[43]

> …that the injunction ordered on 9/7/90 be cancelled. Discussions are in progress with the Tahere whānau and the cancellation of the injunction would assist in that process.

[114] The interlocutory injunction was cancelled accordingly.[44]

[115] Those negotiations were not successful.

[116] According to Mr Tau, on 19 May 2001 and 24 May 2001, public notices were advertised by the trustees seeking that the Tahere whānau remove their livestock from the land within 28 days.

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[42] 18 Kaikohe 14-15 (18 KH 14-15).
[43] 29 Kaikohe MB 5 (29 KH 5).
[44] Ibid.

[117] On 14 September 2001, this issue came back before the Court. The Court minutes record Ken Marupo as follows:[45]

> This matter was filed by the late Toko Herewini in 1990. We sought to settle it by uplifting the injunction last year. We have failed and now seek the reinstatement of the injunction.
>
> …
>
> As far as I am aware only 1 individual is in occupation. As a first step I seek an order requiring the removal of his livestock.

[118] Judge Spencer granted an order that:[46]

> …CANADIAN TAHERE, his agents or the owners of any unauthorised livestock on the land known as RANGIHAMAMA X3A AND OMAPERE TARAIRE E be and are hereby required to remove the said livestock from the property by no later than 4:00pm Friday 28 September 2001.

[119] It is not clear whether this injunction was complied with or enforced.

[120] On 12 November 2004, a trespass notice was served on Canadian Tahere. It appears that Mr Tahere did not comply with the trespass notice but remained on the land. As a result, Mr Tahere was charged by the police with trespass. A defended hearing concerning this charge was held before Judge McDonald on 7 June 2007. Judge McDonald found:[47]

> I therefore find it proved beyond reasonable doubt that the trust has the legal authority to issue a trespass notice, that it was properly served on the defendant and that after service he went onto the land that he knew was vested in the trust.

[121] Despite that, Judge McDonald found that the trespass notice was defective and so the charge was dismissed.

[122] A further trespass notice dated 18 July 2007 was then served on Canadian Tahere. On 1 August 2007, the solicitor for the trust wrote to Canadian Tahere advising him to remove his stock from the land and threatening further trespass proceedings in this Court.

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[45] 31 Kaikohe MB 88-89 (31 KH 88-89).

[46] Ibid.

[47] *Police v Tahere* (2007) unreported judgment, CRI-2006-027-00923, Judge McDonald.

[123] According to Mr Tau, further proceedings went before the Court in 2009 and 2011 although no orders were granted.

[124] The current application seeking removal of the Tahere whānau was filed on 25 February 2013.

Discussion

[125] Taking into account the dealings between the trustees and the Tahere whānau referred to above, I have doubts as to whether the Tahere whānau ever received a license to occupy the land.

[126] Fletcher Tahere gave evidence that one of the original trustees, David Toia, agreed that the Tahere whānau could occupy the land. There is no objective evidence, other than Mr Tahere's oral evidence, which confirms this.

[127] It is also significant that one week after David Toia and the other trustees were appointed as permanent trustees, an application was heard seeking an injunction to remove the Tahere whānau from the land. That application, and the findings from Judge Spencer, are inconsistent with the Tahere whānau being granted permission to reside on the land.

[128] Even if Mr Toia had given such permission, there is doubt as to whether this would constitute the grant of a licence given that trustees are required to act by a majority.[48]

[129] I accept that there were, at times substantial, periods where the trustees were either in negotiations with the Tahere whānau, or where, on the face of it, they took no action to remove the Tahere whānau from the land. It is arguable that during those periods the trustees allowed the Tahere whānau to reside on the land, giving rise to a bare license. Even then, such an argument is tenuous.

[130] In *Ramsay v Cooke,*[49] Holland J commented that mere toleration of a trespass did not necessarily result in a right to the land. There were also a number of steps taken by the

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[48] See s 227 of the Act and *Kerr v Stewart – Maketu A102* (2012) 58 Waiariki MB 3 (58 WAR 3).
[49] *Ramsay v Cooke* [1984] 2 NZLR 680 at 685.

trustees over that period where trespass notices and court proceedings were issued, which are inconsistent with the grant of a licence.

[131] In weighing all of these factors, I have doubts as to whether a license was ever granted to the Tahere whānau. At best, the Tahere whānau would only have received a bare license. If such a license existed, I consider that it has been revoked.

[132] The Tahere whānau have been aware through the course of this proceeding that the trustees are seeking their removal from the land.[50]

[133] In *Trustees of the Paraire Whānau Trust v Paraire - Part Mangatawa 10 Block*, Judge Clark held:[51]

> [42] A bare licence is revocable at will. The decision to revoke a bare licence must be communicated to the licensee for effective revocation. This may be by express or implicit notice, or by the licensor doing some act inconsistent with the continuance of the licence, or by threatening proceedings for trespass.

[134] In *Crane v Morris*,[52] the English Court of Appeal held that the initiation of a trespass action, without prior notice of revocation, serves to revoke a bare licence. Such revocation may not apply retrospectively, but would apply from the date the proceeding is initiated.[53]

[135] The various trespass notices and court proceedings issued by the trustees as referred to above are inconsistent with the continuation of a licence and may well have revoked any licence at that time. If there was any doubt as to that fact, any licence must have been revoked when the current application was filed on 25 February 2013.

[136] For these reasons, I find that while there is doubt as to whether a licence was actually granted, at best the Tahere whānau received a bare licence which has now been revoked.

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50 See the evidence of Fletcher Tahere, 130 Taitokerau MB 112 (130 TTK 112).
51 *Trustees of the Paraire Whānau Trust v Paraire - Part Mangatawa 10 Block* (2015) 105 Waikato Maniapoto MB 67 (105 WMN 67).
52 *Crane v Morris* [1965] 3 All ER 77.
53 Also see John Burrows (ed) *Land Law* (online looseleaf ed, Westlaw NZ) at LC 4.03.

What is the effect of the agreement reached on 13 March 2015?

[137] As noted, Judge Doogan determined that it was "open to the Trust to decline to re-negotiate the agreement reached on 13 March 2015 and to seek to have the matter returned to Court."

[138] However, Judge Doogan did not expressly determine the status or effect of the original agreement reached on 13 March 2015. In his minute of 26 June 2015, Judge Doogan states:[54]

> [13] Accordingly this matter is to be referred to another judge for hearing and determination. Correspondence and documentation recording the attempts of the parties to document the agreement reached on 13 March 2015 are to be removed from the Court file. **The status of other information on the Court file including memoranda and evidence as to the agreement reached on 13 March 2015 is a matter that should be raised with the judge who will now hear the matter**.
>
> [Emphasis added]

[139] As such, while Judge Doogan determined that further negotiations had come to an end, and the trustees were entitled to return to Court, the status and effect of the original agreement reached on 13 March 2015 remained a live issue.

[140] As noted, Mr Brown argued that the failure of the trustees to give effect to the agreement reached justified the removal of the trustees. I have found that the Tahere whānau are estopped from trying to re-litigate this issue.

[141] Surprisingly, Mr Brown did not argue that the agreement of 13 March 2015 granted a new right for the Tahere whānau to occupy the land. Despite that, the trustees are seeking a determination that the Tahere whānau have no right, title or licence to occupy the land. In considering the trustees' application, I must determine the status and effect of the agreement reached on 13 March 2015.

[142] The affidavit of Fletcher Tahere sworn 21 April 2015 sets out Mr Tahere's evidence on the agreement reached. According to Mr Tahere, the parties met on 13 March 2015 at the Te Runanga o Ngāpuhi office on Mangakahia Road in Kaikohe. After discussing the occupation of the land, Sonny Tau, Taoko Wihongi, Toko Tahere and Fletcher Tahere

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[54] 106 Taitokerau MB 204-206 (106 TTK 204-206).

travelled to the land to view the proposed occupation area. While there, they agreed to the area that the Tahere whānau would occupy. According to Mr Tahere, Mr Tau advised that he would get the trust's lawyer "to write it all up". Mr Tahere states that they then received a draft licence to occupy but did not consider that those terms were agreed to at the meeting. The Tahere whānau then sent an alternative agreement proposing alternative terms, including the grant of an occupation order, which was subsequently rejected by the trustees.

[143] In response to questions from Mr Jones, Mr Tahere accepted that the parties did not discuss an occupation order when agreement was reached on 13 March 2015.[55]

[144] Mr Tau was questioned at length on this issue by Mr Brown. Mr Tau accepted that an oral agreement was reached on 13 March 2015. Mr Tau also advised that he undertook to have the agreement confirmed in writing and sent to the Tahere whānau.[56]

[145] Mr Brown questioned Mr Tau as to whether the written agreement proposed by the trustees included provisions that had not been discussed at the meeting on 13 March 2015. Mr Tau accepted that "administrative issues… were added for legal purposes" and that those provisions may not have been discussed at the hui.[57]

[146] Mr Tau also advised that the original counter-proposal from the Tahere whānau sought a partition of approximately 150 acres of the block. According to Mr Tau, it was in a later proposal that the Tahere whānau sought an occupation order. Mr Tau's evidence is that the amendments proposed by the Tahere whānau had not been discussed or agreed at the meeting on 13 March 2015 either.[58]

[147] Having reviewed the evidence, I consider that an agreement in principle was reached in very broad terms on 13 March 2015. This included that the Tahere whānau could occupy the area of land as identified during that meeting, and that the agreement itself would be recorded and confirmed in writing. This is consistent with the evidence given by both sides in relation to this issue.

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55 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 88.
56 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 64-65.
57 Ibid.
58 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 67 and 77.

[148] I also consider that essential terms of the occupation had not been discussed or agreed at that meeting. In particular, there was no agreement reached as to the nature of the occupation, that is, whether the Tahere whānau were to receive a licence, a lease or some other form of occupation right. This is demonstrated by the subsequent dispute over the nature of the right to be granted. The trustees offered a licence, the Tahere whānau sought firstly a partition, and then an occupation order.

[149] I also consider that other essential terms setting out the rights and obligations of both parties were not discussed or agreed on 13 March 2015. This is not surprising given that the parties did not have legal advisors in attendance when agreement was reached. Either the parties never turned their mind to such matters, or they considered that those matters would be resolved when settling a written agreement.

[150] The parties were then unable to agree on those terms. This is clearly demonstrated by the fact that Judge Doogan met with the parties on a without prejudice basis on 12 May 2015 to try and assist the parties to document the terms of the agreement. Despite that, final agreement was not reached.

[151] I find that although an agreement in principle was reached on 13 March 2015, essential terms of the occupation were not settled and so no final or enforceable agreement was entered into. This is further supported by the fact that the agreement was to be recorded in writing, which ultimately did not eventuate. The failure to record the agreement in writing also means that if final agreement had been reached, it could not be enforced per the Property Law Act 2007.

[152] A final question arises as to whether any equitable considerations apply. There is no evidence that the Tahere whānau altered their position in reliance on the agreement reached on 13 March 2015, and as such equitable estoppel does not arise.

Should a permanent injunction be granted?

The Law

[153] Section 19 of the Act states:

> **19 Jurisdiction in respect of injunctions**
>
> (1) The Court, on application made by any person interested or by the Registrar of the Court, or of its own motion, may at any time issue an order by way of injunction—
>
> (a) Against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land**[**, Maori reservation, or wahi tapu**]**; or
>
> (b) Prohibiting any person, where proceedings are pending before the Court or the Chief Judge, from dealing with or doing any injury to any property that is the subject-matter of the proceedings or that may be affected by any order that may be made in the proceedings; or
>
> (c) Prohibiting any owner or any other person or persons without lawful authority from cutting or removing, or authorising the cutting or removal, or otherwise making any disposition, of any timber trees, timber, or other wood, or any flax, tree ferns, sand, topsoil, metal, minerals, or other substances whether usually quarried or mined or not, on or from any Maori freehold land; or
>
> (d) Prohibiting the distribution, by any trustee or agent, of rent, purchase money, royalties, or other proceeds of the alienation of land, or of any compensation payable in respect of other revenue derived from the land, affected by any order to which an application under section 45 of this Act or an appeal under Part 2 of this Act relates.
>
> (2) Notwithstanding anything in the Crown Proceedings Act 1950, any injunction made by the Court under this section may be expressed to be binding on the Maori Trustee.
>
> (3) Any injunction made by the Court under this section may be expressed to be of interim effect only.
>
> (4) Every injunction made by the Court under this section that is not expressed to be of interim effect only shall be of final effect.

[154] In *Taueki v Horowhenua Sailing Club – Horowhenua 11 (Lake) block*,[59] the Māori Appellate Court discussed the requirements for granting a permanent injunction:

> [15] In applying for a permanent injunction, applicants must also fulfil the legal elements relating to the action of trespass before the court will exercise its jurisdiction to grant the remedy. These elements are set out below:
>
> > The action for trespass to land is primarily intended to protect possessory rights, rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass. Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other person. Either element alone is not sufficient …
>
> [16] Once the elements for the trespass action are made out, the Court then considers what remedy is appropriate. The prima facie rule is that a landowner is entitled to an injunction to restrain a trespass. However, the Court still has discretion as to whether to grant the injunction or not. Matters affecting the exercise of the discretion include the parties' conduct.
>
> [17] In *Te Hokowhitu v Proprietors of Matauri X*, the Court discussed the law as follows:
>
> > [35] The test to ascertain whether the learn judge properly exercised his discretion whether to grant the injunction or not, is that which applies to permanent injunctions.
> >
> > [36] Mr Taylor referred us to *The Law of Torts in New Zealand* and we repeat the following quotes from those learned authors:
> >
> > … the injunction is a discretionary remedy and even in the case of a continuing trespass a court may refuse an in junction if the circumstances of the case bring it within L Smith LJ's "good working" rule" in *Shelfer v City of London Electric Lightening Co*, and possibly in other "exceptional circumstances." If an injunction is refused, equitable damages may be awarded.
>
> …
>
> [39] There are limited Māori Appellate Court authorities on this point. But some guidance can be taken from the Māori Appellate Court decision of *Eriwata v Trustees of Waitara SD Section 6 & 91 Land Trust* (2005). Although involving a Māori Land Trust, the principles concerning the rights that attach to legal owners apply equally to Māori land incorporations. The Court found that legal ownership prima facie entitles the trustees to an injunction where a trespass has been committed. This rule applies whether the tort of trespass is committed by a stranger or beneficial land owner of a trust. The Māori Appellate Court did note that an injunction may not issue where there was some matter that could have influenced the exercise of discretion to the contrary.

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59 *Taueki v Horowhenua Sailing Club – Horowhenua 11 (Lake) block* (2014) Māori Appellate Court MB 60 (2014 APPEAL 60).

Discussion

[155] In *Proprietors of Paraninihi ki Waitotara Block v Manuirirangi,*[60] Harrison J found that the Māori Incorporation in that case, as the registered proprietors of the land, had an absolute right of occupation and possession. This approach was followed by the Maori Appellate Court in *Te Hokowhitu v Proprietors of Matauri X*.[61]

[156] The same applies in the present case. The trustees have legal ownership of the land and are entitled to possession of the land. The Tahere whānau are occupying the land without right, title or licence. The trustees are prima facie entitled to an injunction. I must now consider whether I should exercise my discretion to award an injunction.

[157] In deciding whether to exercise my discretion, there is no strict category of factors to be taken into account. Considerations may include whether the intrusion on the land is minimal, the degree of hardship if an injunction is granted, the balance of convenience, whether an alternative remedy such as damages may be appropriate, and the conduct of the parties. Any equitable considerations should also be balanced against the statutory objectives set out in ss 2 and 17 of the Act.[62]

[158] In the present case, the intrusion on the land is not minimal. At various times, the Tahere whānau have occupied, or utilised for their own benefit, up to 54 hectares of land. This is significant in any assessment. This is not a minor trespass which could be compensated by an award of damages.

[159] I also consider that the trustees are acting for the benefit of the beneficial owners as a whole. The trustees are seeking to use this land as part of their farming operation which will provide a benefit for all of the beneficial owners, not just the Tahere whānau.

[160] Mr Tau advised that he has reported back to the beneficial owners on this issue at a number of general meetings and that there is strong support amongst the owners seeking

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60 *Proprietors of Paraninihi ki Waitotara Block v Manuirirangi* HC New Plymouth.CP 18/99, 31 October 2003

61 *Te Hokowhitu v Proprietors of Matauri X* [2010] Māori Appellate Court MB 566 (2010 APPEAL 566).

62 *O'Malley v Wyborn* [2010] Māori Appellate Court MB 494 (2010 APPEAL 494), *Te Hokowhitu v Proprietors of Matauri X* [2010] Māori Appellate Court MB 566 (2010 APPEAL 566) and , *Taueki v Horowhenua Sailing Club – Horowhenua 11 Lake Block* [2014] Māori Appellate Court MB 60 (2014 APPEAL 60).

the removal of the Tahere whānau from the land. This is confirmed in the minutes for meetings of owners held on 19 June 2010, 26 March 2011 and 21 April 2012.

[161] I am also satisfied that, overall, the trustees have acted reasonably and their conduct does not disqualify them from equitable relief.

[162] The trustees have attempted to resolve this issue by agreement with the Tahere whānau. That is evident in the negotiations that have occurred between the parties over the last 25 years. Even when bringing the present proceeding, the trustees attempted to resolve matters amicably by entering into settlement discussions, participating at judicial settlement conferences, and by proposing terms of occupation which would have allowed the Tahere whānau to remain on the land.

[163] The fact that those negotiations were unsuccessful is most unfortunate. This is a clear case where resolution by agreement would have been the best outcome for all parties. Judge Doogan's minute of 26 June 2015, suggests that it was the provisions insisted on by the Tahere whānau which ultimately resulted in the failure of those negotiations. While the Tahere whānau may not have agreed with the terms proposed by the trustees, the alternative they now face is much worse.

[164] I have taken into account that the land was vested in trustees in 1990, yet there has been a significant delay in achieving final resolution of this issue. In some circumstances delay may go against a party seeking an equitable remedy. In the present case, it is clear from the evidence that the trustees have made several attempts over this period to resolve this issue both directly with the Tahere whānau and through the courts. On the other hand, it is also clear that there have been periods of inaction by the trustees, where steps were not taken, or were not properly concluded, to resolve this issue in a timely fashion.

[165] Ultimately, I do not consider that any delay by the trustees prevents the grant of injunctive relief in this case. Rather, this is relevant in relation to the terms of any injunction that should be granted, and in particular, what is a reasonable period to allow the Tahere whānau to vacate the land.

[166] I accept that the Tahere whānau will suffer hardship if they are required to vacate the land. They have occupied this land for almost 30 years, and unsurprisingly, they consider it to be their home. I have taken into account the heartfelt evidence from Fletcher Tahere setting out their historical and ancestral connections to this land. It is also clear that members of the Tahere whānau occupying the land include the elderly and children making them particularly vulnerable to an injunction.

[167] Against that, I also take into account the fact that the Tahere whānau have received a significant benefit from occupying a large area of the trust's land for almost 30 years without paying rent or rates. The other beneficial owners have not received any benefit which may have derived from the use of this land by the trustees.[63] As such, the hardship that the Tahere whānau would suffer if an injunction is granted must be weighed against the rights and interests of the beneficial owners as a whole, and the rights of the trustees to manage the land.

[168] I also note that the trustees are in the process of establishing a papakainga development scheme on part of the trust's land. The aim is to provide affordable and quality housing to enable beneficial owners to live on the land. The trustees have invited the Tahere whānau to apply to occupy housing to be established as part of the papakainga scheme. While this may not be the Tahere whānau's preferred option, this would nevertheless allow them to move into quality and affordable housing while still remaining on trust land.

[169] I have balanced these various factors against the statutory objectives set out in the Act. While those principles include the retention of land in the hands of the owners, and the effective use, management and development of the land by the owners, I do not consider that those statutory objectives promote the continued occupation of this land by the Tahere whānau to the exclusion of other beneficial owners, and against the authority of the trustees.

[170] This is a difficult and unfortunate case. Granting an order for the removal of such a large family from land they have occupied for such a long time is one of the most

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[63] Fletcher Tahere did give evidence that they gave kai grown on the land as koha for Marae hui.

challenging decisions that a judge of this Court will face. I do not make this decision lightly.

[171] I am satisfied that an injunction should be granted in this case requiring the Tahere whānau to vacate the land.

[172] In doing so, the terms of any injunction should be reasonable and practical taking into account the circumstances of this case and any equitable considerations that may apply.

[173] The Tahere whānau have not suggested how long they would need to vacate the land if an injunction was granted. Fletcher Tahere considered that this should simply be left to the Court to determine.[64]

[174] The trustees accept that a reasonable period of time should be allowed for the Tahere whānau to vacate the land.

[175] I have taken into account the length of time that the Tahere whānau have occupied the land, the number of those in occupation, that members of the Tahere whānau (being the elderly and children) are vulnerable, and that the Tahere whānau will need to vacate the land, remove their possessions and livestock, and find alternative accommodation.

[176] I consider that 90 days is a reasonable period to allow the Tahere whānau to vacate the land and remove their possessions.

Decision

[177] I grant the following orders:

(a) Application A20150006201, seeking the removal of the trustees, is dismissed;

(b) Per ss 18(1)(a) and 20(d) of the Act, I determine that the Tahere whānau are occupying the land without right, title or licence;

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64 130 Taitokerau MB 31-134 (130 TTK 31-134) at MB 104-105.

(c) Per s 19(1)(a) of the Act, an injunction is granted requiring those members of the Tahere whānau listed in Schedule 1 to this judgment, their agents, invitees, family members and guests, to vacate the Rangihamama X3A block, and to remove all of their possessions from the block, within 90 days from the date of this judgment.

Pronounced in Whangarei at 1:30 pm this 20th day of September 2016.

M P Armstrong
JUDGE

SCHEDULE 1 – THE MEMBERS OF THE TAHERE WHANAU WHO HAVE BEEN, OR WHO ARE, IN OCCUPATION OF THE LAND

Fletcher Tahere	Naua Latu
Nora Tahere	Miria Tau Latu
Patsy Tahere	Ezra Latu
Sariatt Tahere	Taycarna Latu
Shuntay Tahere	
Tare Tahere	Grant Tahere
Tukaki Tahere	Hera Tahere
Tracy Leatonga	Grant Jnr Tahere
Lejaron Tahere	Ngakirikiri Tahere
Kimara Tahere	Ngapuna Waiora Tahere
Fayton Tahere	Kararaina Tahere
Tamati Tahere	Paulene Tahere
Coral	Patutahi Tahere
Maiti Tahere	Senal
Monday Mane Jnr Tahere	Sky Tahere
Edith Tahere	Tirenz Tahere
Toko Mane Tahere	Hiri Tahere
Vaiena Tahere	Bailey Tahere
Lehi Tahere	Summer Tahere
Te Ara Rangi Tahere Kiro	Mane Tahere
Noa Tahere	Florence Tahere
Tautahi Tahere	Atahu Tahere
Marama Tahere	Trudy Beazley
Tui Tahere	
Jas Tahere	Johny Moon
Keros Tahere	Mirinoa Pickering
	Nicole Pricila Moon
Tasha Tahere	Tinirau Theodore
Waiwhakaurunga Tahere	Taonga
Te Koikoi Tahere	
Tanya Tahere	Keros Tahere
Adam Tahere	Tekoikoi Tahere
Haydn Tahere	Waiwhakaurunga Tahere
Erana Tahere	Rackael Tahere
Edith Tahere	Shirly Tahere
Hendix Tahere	Natasha Tahere
	Tawhiri Tahere
Mane Kire Tahere (Snr)	Leana Tahee
Toko Mane Tahere	Antonett Kiro
Vaiana Tahere	Angel Kiro
Lehi Tahere	Rangatira Kiro
Te Ara Rangi Tahere Kiro	Mark Kiro
Noa Tahere	Ngapuhi Tahere
Tautahi Tahere	Ame Tahere
Marama Tahere	Mia Tahere
Tui Tahere	Josiah
Jas Tahere	Tumatauinga
	Trudy Beazley
	Marlene