

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

**A20170005453
2017/15**

UNDER Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF ARATAUA 4C AHU WHENUA TRUST
BETWEEN RICHARD THOMAS CHARTERS
Applicant
AND WALTER PERERIKA RIKA, ROWENA RIKA,
LANI RANGITAIARI KEREOPA AND DONOVAN
KAHU JOYCE
Respondents

Hearing: 22 February 2018
(Heard at Rotorua)

Court: Judge M J Doogan (Presiding)
Chief Judge W W Isaac
Judge S R Clark

Judgment: 7 March 2018

JUDGMENT OF THE COURT

[1] This is an appeal by Richard Charters against a decision by Judge Coxhead on 5 July 2017, appointing three trustees to the Arataua 4C Ahu Whenua Trust.¹

Background

[2] The Arataua 4C Ahu Whenua Trust administers the land block Lot 1-2 Deposited Plan South Auckland 74705 (the land).² Mr Charters is not an owner of the land but is a trustee of the Arataua 4C Ahu Whenua Trust. Mr Charters is also a trustee of Te Uruoteao Rika Will Trust, an estate trust which owns three of the five shares in the land.

[3] Mr Charters told us that he has been in practice as a Barrister and Solicitor for 49 years. When the application to appoint trustees came before His Honour Judge Coxhead Mr Charters appeared to object. He did not file a notice of intention to appear or supporting evidence.

Discussion

[4] After hearing from Mr Charters, we advised the parties that the appeal would be dismissed, with reasons to follow.

[5] We now set out our reasons.

Request to adduce further evidence

[6] A good deal of the material filed by Mr Charters since the notice of appeal was lodged comprises a mixture of submission and evidence none of which was before the Lower Court. Rule 8.18 of the Māori Land Court Rules 2011 provides:

8.18 Hearing of further evidence

- (1) The parties to an appeal may not adduce further evidence at the hearing of the appeal but are restricted to the evidence recorded as adduced before the Court that made the order or determination appealed from.
- (2) However, the Māori Appellate Court may grant leave to a party to adduce further evidence if it is satisfied that the further evidence may be necessary for it to reach a just decision.
- (3) An application for leave to adduce further evidence must –

¹ 166 Waiariki MB 181 (166 WAR 181).

² Also known as Arataua 4C

- (b) be filed and notified to the other parties to the appeal not less than 1 month before the hearing of the appeal; and
- (c) clearly disclose the nature and the form of the evidence to be adduced.

[7] We drew this provision to Mr Charters' attention and he acknowledged the issue, and as we understand it, abides the Court's decision. While the Court recognises its power to grant leave to adduce further evidence, no application or supporting affidavit was filed by the appellant nor served to the other parties to the appeal.

[8] This Court has previously adopted certain tests to be met before it will allow further evidence on appeal:³

- (a) It must be shown the evidence could not have been obtained with reasonable diligence for use at trial;
- (b) The evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive; and
- (c) The evidence be such as is presumably to be believed although it need not be controvertible.

[9] The following principles are also considered relevant where rule 8.18 has not been met:⁴

- (a) Litigants have a duty to adduce at trial all their evidence, reasonably discoverable.
- (b) The constraints on the admission of further evidence are very strict. Evidence which is not fresh should only be admitted in exceptional and compelling circumstances, and will also need to pass the tests of credibility and cogency.
- (c) While a balancing of the interests of the applicant and opposing parties is required, the aim is to ensure that parties put their best case at trial and that the public resources of the Court system are not wasted.

[10] The evidence produced by Mr Charters was reasonably obtainable and could have been put before the Lower Court given that Mr Charters clearly knew the meeting to elect new trustees was being held and the outcome of this meeting could be expected to come before the Māori Land Court. We do not think it is necessary to allow this evidence in order to reach a just decision and these

³ *Faulkner v Hoete - Motiti North C No 1* [2017] Māori Appellate Court MB 188 (2017 APPEAL 188) at [22].

⁴ Above n 1 at [25].

circumstances are neither exceptional nor compelling. Accordingly, Mr Charters has failed to meet the requirements of the test. In the circumstances of this case and having regard to the fact that Mr Charters is an experienced lawyer, we decline to grant leave to adduce further evidence.

Does Mr Charters have capacity to bring the appeal?

[11] This appeal can be dismissed on the issue of further evidence alone, however, for the sake of completeness we also consider whether Mr Charters has capacity to bring the appeal.

[12] As stated, Mr Charters is not an owner of the land administered by the Arataua 4C Ahu Whenua Trust. Mr Charters purported to bring his appeal firstly on behalf of Te Uruoteao Rika Will Trust and then on behalf of his mother's estate as an executor of that estate.

[13] With his notice of appeal Mr Charters filed "Further Submissions" dated 5 September 2017. Mr Charters there says:

I am a trustee of the Te Uruoteao Rika Will Trust which holds 3.0 of the 5.0 shares of the Trust.
In that capacity, I wish to appeal against the Court decision to appoint the new trustees.

[14] Documents filed in opposition to the appeal include a sworn statement from his fellow trustee, John Te Uruoteao Rika, dated 1 February 2018. Mr John Rika deposes:

5. As far as I am concerned the appeal has not been brought on behalf of the Te Uruoteao Rika Will Trust.
6. Richard claims at paragraph 3(g) of his submissions dated 3 September 2017, that he is the "sole trustee" of the Te Uruoteao Rika Will Trust, the major owner of the Arataua 4C Ahuwhenua Trust, and that as such his views should be "accorded sufficient weight".
7. Richard is not a sole trustee; he and I are co-trustees.
8. I dispute Richard's recollection of the meeting held on 30 October 2016.
9. I do not recall Richard leaving the meeting during the meeting.
10. My recollection is that Richard did not raise any objections about the calling of the meeting, which I understood our Aunty Miriata Groves had asked Walter Rika to call, before she passed away. She was a trustee of the Arataua 4C Ahuwhenua Trust. This was explained to us at the meeting.
11. I also do not recall Richard raising any objections to the appointment of any of the trustees elected at the meeting.

12. He has not consulted me, as a co-trustee of the Te Uruoteao Rika Will Trust, about his appeal against Judge Coxhead's order appointing new trustees for the Arataua 4C Ahuwhenua Trust.

...

13. I do not agree with the appeal brought by Richard, and I do not support it.

[15] Mr Charters acknowledged that testamentary trustees must act unanimously and accepted that in light of the evidence of John Rika he could not purport to bring the appeal on behalf of the Te Uruoteao Rika Will Trust. We note that examples exist of trustees who are not owners in the land and are acting apart from their co-trustees successfully bringing an application to the Court as interested parties.⁵ However the Court will not accept less than very good reason for allowing trustees to act unilaterally and such an application will have an effect on the Court's view of the merits of the appeal.⁶

[16] It is arguable that Mr Charters has capacity to bring this appeal as a trustee of Te Uruoteao Rika Will Trust, but a high threshold must be met to convince the Court to depart from the usual expectations of trustees to act unanimously. The evidence brought by Mr Charters in this appeal has failed to meet that threshold.

[17] Mr Charters argued in the alternative that he had brought the appeal as a representative of his late mother's shareholding in the land block (Ihipera Charters). Mr Charters stated he has been an executor of his mother's estate for 20 years, alongside his two brothers. There was no evidence brought before this Court or the Lower Court as to the views of the estate beneficiaries, or Mr Charters' authority to speak for them nor even a copy of his mother's will.

[18] In our view, Mr Charters has not established requisite standing to bring the appeal and on this ground it must also fail. We acknowledge that Mr Charters is the sole surviving foundational trustee, having been appointed when the Arataua 4C Trust was established in 1984. Ordinarily we would be reluctant to dispose of an appeal from a person with such longstanding involvement with the land on the grounds of capacity alone however in this case we are also satisfied that the appeal lacks merit.

Appointment of the trustees

⁵ *In re Puketiti 4A, Von Dadelszen v Goldsbury* [1982] 16 Waikato Maniapoto Appeal MB 328 (16 APWM 328) and *Re Waiomu 3B2B2B3B1B* (1989) 17 Waikato Maniapoto Appeal MB 74 (17 APWM 74).

⁶ *Re Waiomu 3B2B2B3B1B* above n 3 at 230.

[19] Despite not filing an intention to appear in the Lower Court, Mr Charters voiced his objection to the appointment of the trustees. The minutes of that hearing include the following exchanges:⁷

The Court: I've been through the consents and they all look in order. Notice is in order and the minutes are there. Any other –

R Charters: May it please the Court, I did not attend this meeting and I certainly do not think it is fully represented with all the people. I've been a trustee and at times, a sole trustee of the records.

...

W Rika: Sir, at the hui, Richard was present with his two older brothers and when the elections were called and nominations were made, [it's] set out in the minutes that nominations were called for and they were made, they were accepted and then the resolution was put and everybody voted unanimously. Including Richard and his two brother.

R Charters: I definitely –

W Rika: They were present at the hui.

R Charters: That is utterly and completely untrue. I will be able to call my [brothers] as well if that was required. They are not owners in the block –

The Court: You were at the hui?

R Charters: Pardon?

The Court: You were at the hui?

R Charters: I cannot recall being at that hui with my [brothers] on the 30th of October. I can't recall my [brothers] – either of them, being there.

[20] In subsequent submissions and in argument before us, Mr Charters changed his position and accepted that he had been at the hui but had been feeling unwell and spent much of the time in his car. The minutes of the hui however record Mr Charters taking an active part in the business of the hui both before and after the vote to elect trustees. The minutes record that the vote to elect new trustees was unanimous. Mr Charters raised no objection to the accuracy of the minutes in the Lower Court. We do not think it plausible that Mr Charters was absent for significant parts of the hui or failed to appreciate the nature of the business being conducted.

[21] Judge Coxhead was entitled to rely on the minutes of the hui and the supporting documents for appointment of trustees. We see no error that would warrant intervention.

⁷ 166 Waiariki MB 181-186 (166 WAR 181) at 183 and 185.

[22] Mr Charters also sought to challenge the basis upon which the meeting appointing the trustees was called. Mr Charters notes that the trust order requires trustees to call a meeting of owners to appoint new trustees and in this case Mr Walter Rika (one of the newly appointed trustees) had called the meeting.

[23] While this is technically correct, we do not place much weight on this issue for the following reasons:

- a) Mr Walter Rika in uncontroverted evidence and submissions opposing the appeal (which include the notice of the meeting and accompanying minutes) records that not long before she died another of the foundational trustees (Miriata Rose) asked him to call a meeting to elect new trustees. The meeting, which was held on 30 October 2016, lists as in attendance representatives of approximately 94% of the total 5000 shares.
- b) Richard Charters was present at that meeting and raised no objection at that time to either the validity of the meeting or to the election of the new trustees.

Result

[24] The appeal is dismissed.

[25] As neither party was represented by counsel there will be no order as to costs.

Dated this 7th day of March 2018.

M J Doogan
JUDGE
(Presiding)

W W Isaac
JUDGE

S R Clark
JUDGE