

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

A20170004759

A20190007272

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

IN THE MATTER OF Rotopounamu 1B3A2C Ahu Whenua Trust

BETWEEN CLINTON HEMANA AS RESPONSIBLE
TRUSTEE OF ROTOPOUNAMU 1B3A2C
AHU WHENUA TRUST
Applicant

Hearing: On the papers

Judgment: 15 August 2019

JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Recently the sole responsible trustee of Rotopounamu 1B3A2C, Clinton Hemana, has sought directions from the Court regarding the procedure for completing a housing project on trust land.

[2] Mr Hemana requests urgent directions to enable the papakāinga project to be completed and tenanted within the trust's available resources without jeopardising its sustainability through further delays and potential insolvency. Mr Hemana submitted that he had convened two meetings of owners on 25 May and 25 August 2018 to discuss important aspects of the project and that the meetings supported, by a majority, his approach to the outstanding issues.

[3] One of the advisory trustees, Tania Huata Kupa, objects to Mr Hemana's approach and asserts that he has failed to keep the trustees properly informed and has proceeded with a mortgage when this may have not been necessary. She also claimed that Mr Hemana had

retained the original project manager against her advice when the individual concerned had been responsible for delays and problems with the project.

[4] The issue for determination is whether the directions sought should be granted.

Background

[5] Rotopounamu 1B3A2C is Māori freehold land, 7.9804 hectares in area. It was created by partition order dated 11 December 1962.¹ There are currently 41 owners holding 2,765.67 shares. The Rotopounamu 1B3A2C Trust is an ahu whenua trust, which was constituted on 15 March 1978.² The original trustees were Paora Puna, Haemania Puna, Pirihira Kupa and Peter Bloomer. At the start of these proceedings in 2017 the trustees were Anna Bartlett, Donna Puna-Mangu, Sharon Huata, Tania Huata and Te Roera (Royal) Puna.³ Mr Hemana is the sole responsible trustee. Donna Puna-Mangu, Sharon Huata and Tania Huata are advisory trustees.

Clinton Hemana's submissions

[6] Mr Hemana confirms that the initial funder of the project, Te Puni Kōkiri, following meetings with an advisory trustee, Tania Huata-Kupa, has now raised the concerns that the owners' wishes for housing allocation and rental have not been accepted by the responsible trustee. As a result, Mr Hemana says that local Te Puni Kōkiri representatives have intimated to him that the project may not be able to progress further, because, it was said, the outcomes arising from two meetings of owners in 2018 did not achieve a "full consensus."

[7] Further, Mr Hemana underscored that, given the difficulties with the project to date, including problems with the original builder and a roading contractor, any further delays could seriously compromise its completion. Mr Hemana also indicated that some of the concerns expressed by Mrs Huata-Kupa and her husband, Mark Kupa, were centred on a potential conflict of interest over the choice of tenants and the amount of rental to be paid.

[8] In summary, Mr Hemana seeks urgent directions that he:

¹ 96 Napier MB 149 (96 NA 149)

² 111 Napier MB 380-381 (111 NA 380-381)

³ 59 Tākitimu MB 252-253 (59 TKT 252-253)

- (a) Proceed with the letting process that is underway consistent with the outcomes of the owners meeting of 25 August 2018 as recorded; or
- (b) Seek ratification/confirmation of the recorded outcome of the meeting of 25 August 2018 from the Owners as below:
- (i) That the letting allocation process be halted.
 - (ii) That the following confirmation process is to be conducted by the Trustee:
 - Circulate this application and resend the minutes of the owners meeting of 25 August to the owners (through the normal means of communication-email), to seek reaffirmation of the outcomes relating to the “*Tenancy Kaupapa – housing policy consultation*” section of the meeting, addressing the housing eligibility criteria and allocation policy.
 - Owners responses to be provided within one week to the trustee (so as to minimise expense or delay); with responses to provide the name, address and contact phone number of the relevant owner.
 - The Trustee to retain confidentiality of responses and report to the Court on the outcome of the process.

[9] Finally, Mr Hemana underscored that time was of the essence.

Tania Huata-Kupa’s submissions

[10] Mrs Huata-Kupa filed a submission refuting the claims made by Mr Hemana. She alleged that he had not kept herself or her fellow advisor trustees properly informed. She also claimed that the project had been compromised from the outset by Mr Hemana’s stance that the project manager, whom she regarded as incapable, was not dismissed and instead continued under Mr Hemana’s trusteeship.

[11] In addition, Mrs Huata-Kupa claimed that Mr Hemana was seeking to obtain a mortgage for the project without undertaking sufficient due diligence and without obtaining the support of the owners. She contended that there were sound alternative approaches available that should have been properly reviewed and considered by the responsible trustee before he decided to commit the owners to a loan.

[12] Mrs Huata-Kupa was supported in her allegations by her husband Mr Kupa, not an owner but a trustee of their family whānau trust.

[13] In rejoinder, Mr Hemana underscored that he had been appointed because of the dysfunction of the previous trustees including Mrs Huata-Kupa. He emphasised that recent communications, both in person and written, between Mrs Huata-Kupa and those opposed to her within the ownership group again underscored the fractious nature of their personal relationships which had caused terminal distractions for the completion of the project. Moreover, Mr Hemana emphasised that the only way the financiers would continue to support the project with a loan was if Mrs Huata-Kupa and her colleagues were no longer involved in a decision-making role.

Discussion

[14] Unfortunately, this is not the first time this trust has been before the Court. My judgment of 31 July 2018 confirmed that, had they not resigned, the then responsible trustees would have been removed for cause.⁴ The decisions also sets out much of the background to the trust and the present proceedings. For convenience, the relevant paragraphs are reproduced below.

[15] On the dysfunction between the then trustees, the failure of the appointed builder and the appointment of Mr Hemana, the following is recorded:⁵

[1] Clinton Hemana is the independent responsible trustee of the Rotopounamu 1B3A2C ahu whenua trust with the oversight of the completion of a social housing project valued at approximately \$1 million to build dwellings on the trust's land. Mr Hemana was appointed after the current trustees sought directions in 2017 due to friction within the trust that had compromised its ability to complete the project. Then in March 2018 Mr Hemana sought directions regarding the conduct of his fellow trustees. In short, he requested their removal because he asserted they were compromising the completion of the project, due he claimed, to their inaction, delayed responses and apparent inability to act cohesively. Unless the trustees were removed, or moved to an advisory role, then Mr Hemana contended that the project was at risk of failure.

[2] Even when, A1 Homes (Hastings) Ltd, the then builder, failed, Mr Hemana confirmed that a fresh agreement had been reached with a reputable alternative contractor. The central issue at that time was the raising of finance to complete the project. Mr Hemana contended that the trustees had failed to respond to requests to furnish the necessary applications and failed to reply to the trust's solicitor, to ensure that the deadlines were met. He confirmed that significant progress towards completion had been made but warned without the Court's intervention, the project may have failed.

⁴ *Puna - Rotopounamu 1B3A2C* (2018) 70 Tākitimu MB 143 (70 TKT 143)

⁵ *Ibid*

[3] Most of responsible trustees denied that they had been impeding progress. Tania Huata Kupa rejected the assertion that she had delayed the project. Te Roera (Royal) Puna contended that, because of the dysfunction within the trust, all trustees needed to resign and allow Mr Hemana the opportunity to finish the dwellings. Some trustees claimed that they have been left out of the process, had not had a trustees' meeting for some time and did in fact attempt to comply Mr Hemana's requests including financing. In addition, Mr Puna and Anna Bartlett confirmed that they have been suffering from illness and receiving treatment, which inevitably has had an impact on them. However, they reiterated that they had always been willing to progress the project to a successful conclusion.

[16] As to the background to the papakāinga housing project:⁶

[8] The project received a grant of \$800,000 from the Māori Housing Network through Te Puni Kokiri ("TPK"), with the intention of borrowing \$200,000 from Kiwibank. Rental income from the completed houses was to service the mortgage and repay the principal. Mr Puna stated that the project was 75 per cent completed. The trust therefore needed to secure the balance of the funding urgently so the project could be finished and the houses tenanted to begin generating income.

[9] Mr Puna also claimed that there had been dysfunction within the trust, with Ms Bartlett and Ms Puna-Mangu supporting him as chairman, while the remaining two trustees, Ms Huata and Mrs Huata-Kupa, taking a contrary view. Kiwibank had also observed the disagreement between the trustees and refused to deal with them until their disputes were resolved. The trust's application for a kainga whenua loan had unsurprisingly been declined. Mr Puna contended that if the Court directed most trustees to proceed with the loan and complete the project, it was possible that Kiwibank would review their position. The application therefore sought directions and an order to enforce of the obligations of trust to proceed with the uplifting of the loan and the completion of the project.

[17] On the issue of the trustees' prudence or otherwise, the following is recorded:⁷

[37] As foreshadowed, a pressing issue for the trust in relation to the papakainga project is the lack of funding to complete the building of the houses. As both Mr Puna and Mr Hemana pointed out, that while the project and the houses are seventy five per cent complete, there is a funding shortfall of approximately \$230,000. The trustees attempted to obtain a loan from Kiwibank. When Mr Puna filed the original application for the enforcement of obligations, he stated that Kiwibank had declined the application and refused to deal with the trust until the trustees' apparent dysfunction had been resolved.

[38] Following Mr Hemana's appointment, he engaged Ms Nathan to assist and she then set about exploring options for securing funding to complete the project. While other banks had been approached regarding loans, Ms Nathan advised that they required financial statements, tax returns and bank records, all of which do not exist for this trust, which appears to have operated through another entity called the 'Puna Whānau Trust'. The BNZ bank also sought security over the land itself, which the trustees and owners did not support. The only option available to the trust was a kainga whenua loan from Kiwibank.

[39] Kiwibank was not prepared however, to advance the loan directly to the trust, given its existing relationship with some of the trustees. The trust set up a limited liability partnership as a commercial vehicle to complete and manage the papakainga project. To progress the loan, credit application and check forms were required from each of the trustees as a first step prior to any application being made. Ms Nathan sought these on 27 January 2018,

⁶ *Puna - Rotopounamu IB3A2C* (2018) 70 Tākitimu MB 143 (70 TKT 143)

⁷ *Ibid*

however, both Mr Puna and Ms Bartlett had not completed the forms. The correspondence on file shows repeated attempts by both Mr Hemana and Ms Nathan to obtain this information. They provided explanations regarding the necessity of the information and attempted to address the trustees' concerns directly, all the while emphasising the need for urgent action for the success of the project. Ms Nathan informed both Mr Puna and Ms Bartlett that their refusal to complete the forms would prevent the trust from being able to safeguard the papakainga houses and would be a breach of their obligations as trustees. Despite this, inexplicably, the outstanding forms were still not completed until after I issued a direction at the judicial conference held on 19 February 2018.

...

[44] The trustees have an obligation to ensure not only the proper administration and management of the business of the trust but also the preservation of trust assets. The fact that the trustees at key moments could not appear to work together on the matter of completing documents to make an application for a loan, especially when the securing of funding is urgent, is unacceptable. I consider that the failure to respond in a timely manner and to cooperate with the requests of the chairman and the trust's legal adviser was imprudent and unreasonable. These delays and failures increased the risk that the project might not proceed to a successful completion. Moreover, if the trustees had concerns then at any time they could have sought directions.

...

[50] The papakainga project is a significant for the trust involving substantial funds already invested, which is close to completion. The actions of the trustees however, or more accurately their inaction, has put both the project and the assets of the trust at risk.

[51] As Mr Hemana and Ms Nathan have been at pains to point out, the trust needs to urgently secure funding to complete the papakainga houses. That urgency originally arose from the fact that the building work was underway and the trust's obligations needed to be met to ensure completion. However, with the building contractor now going into liquidation, this has added a further layer of urgency to ensure that the trust will be able to engage a new builder and to ensure that the insurance over the houses is maintained.

[52] However, the trustees have failed at the initial hurdle. The original application by Mr Puna to enforce the obligations of the trust noted that the trustees were dysfunctional and sought an order directing the trustees to uplift a loan from Kiwibank. The appointment of Mr Hemana as an independent trustee was intended to assist the trustees to cut through their interpersonal issues and progress the project to completion. However, despite the efforts of Mr Hemana and Ms Nathan, the trustees were not able to make an application for the loan, let alone secure funding for immediate use. There had been no practical progress in almost six months.

[53] The trustees have also delayed action on other critical matters, such as the variation of the lease, and have suggested that an audit be undertaken during the time when their attention was demanded on minimising risk to the assets of the trusts. The fact that the project was undertaken without formal documentation regarding the existing lease and that the lease and other areas of trust operations have been administered by an entity separate to the trust, is also concerning. Added to those matters was the fact that two of the trustees were at the time dealing with serious health issues requiring treatment. Understandably, at times those trustees needed to focus on their own wellbeing.

[54] I consider that the trustees' actions demonstrated an inability to perform their duties satisfactorily at key moments. That is not to say that they were all dysfunctional all the time. Credit must be given where it is due. However, their inability to work collaboratively for the benefit of the trust has been evident throughout these proceedings. The constant back and forth exchanges between the trustees and the need for the independent trustee and trust solicitor to engage repeatedly with the trustees on simple matters, suggests the existence of mistrust that impeded progress. By their actions, some of the trustees also demonstrated

their inability to appreciate the risks the trust faced or to act decisively to mitigate if not eliminate those risks.

[18] That decision was never subject to any appeal.

[19] Moreover, the Court receives regular reports from Mr Hemana as to the progress for the project, its finances and any challenges the project has been experiencing. I am satisfied that Mr Hemana's approach is sound and is in the best interests of the beneficial owners as a whole.

[20] I also accept Mr Hemana's submission that finance to complete the project has been, effectively conditional on the former trustees' dysfunction being isolated so that it no longer forms part of the previous distraction and delay that had so marred the project. The transcript of earlier hearings as well as the correspondence on the voluminous file also is a testament to the rancour and hostility as between factions of the owners.

[21] Mr Hemana makes a fair point that he was only brought in as an independent trustee because the then trustees were unable to work cohesively and with any dint of coherence towards completing the project. That there have been complications caused by the failure of the original building company and the problems associated with the roadway are acknowledged. However, without any corroborating evidence, I reject the assertions that Mr Hemana is not attending to his responsibilities prudently and with the best interests of the owners as a whole at the forefront of this project.

[22] I therefore direct that Mr Hemana take whatever steps he considers appropriate, in terms of gauging the views of the owners, either by convening a further meeting, conducting a survey of the owners or simply proceeding based on the outcomes of the two general meetings held in 2018.

[23] One last point. It would be unusual for a funder or financier of a project to seek to convene meetings of the beneficial owners. If a mortgage had been granted by Te Puni Kōkiri then the mortgage document would set out the powers of the mortgagee in clear terms. To avoid doubt, to be valid, the only person who may convene a general meeting of owners is the responsible trustee either at his own initiative or by direction of the Court. The alternative to these approaches is where the owners themselves initiate a general meeting using the protection of minorities clause in the trust order. If Te Puni Kōkiri representatives have any further queries on this point, then through Mr Hemana, they may request a judicial conference for that purpose.

Decision

[24] The application for directions is granted.

[25] The responsible trustee is free to take whichever option set out in the application he considers appropriate and in the best interests of the trust.

[26] Given the passage of almost 12 months since the last general meeting, he may wish to confer with the owners again, either through a general meeting or by way of a survey.

[27] There will be no order as to costs.

[28] Leave is reserved for any party to apply for further directions at any time.

Pronounced in open Court at 11.55am in Whanganui on Thursday this 15th day of August 2019

L R Harvey
JUDGE