

**IN THE MĀORI LAND COURT OF NEW ZEALAND  
TE WAIPOUNAMU DISTRICT**

**A20180001255**

UNDER Sections 43 and 67, Te Ture Whenua Māori Act  
1993

IN THE MATTER OF Te Whe Ariki Hutana - Succession

WAKA NATHAN HUTANA  
Applicant

Hearing: 11 June 2019, 57 Te Waipounamu MB 1 - 17  
(Heard at Christchurch)

Appearances: Waka Nathan Hutana in person  
J Pou for Mrs Huia Williamson  
J Ormsby for Mr Reginald Hutana

Judgment: 1 July 2019

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**JUDGMENT OF JUDGE D H STONE**

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## **Background**

[1] Te Whe Ariki Hutana passed away in 2005. Pursuant to her will, her daughter Huia Christina Williamson and Josette Waina Ngahina Malcolm were appointed as administrators of her estate. Josette Malcolm passed away in 2011. Since then, Huia Williamson has acted as the sole administrator.

[2] There are a number of extant applications before this Court concerning the estate. On 14 February 2019, Judge Reeves issued a preliminary determination regarding who is entitled to succeed to Te Whe Ariki Hutana's Māori land interests under her will.<sup>1</sup> Huia Williamson has appealed that preliminary determination, and the applicant in the extant proceedings, Waka Nathan Hutana, has applied for a rehearing. Both applications remain live.

[3] On 11 June 2019, I heard two applications in relation to the estate. The first was the applicant's rehearing application. I adjourned that application, so that it could be reheard by Judge Reeves at the next available opportunity. The second was an application under s 67 of the Act to consider matters relating to payment of distributions to the estate by the Proprietors of Mawhera Incorporation. The Incorporation had sought guidance from the Court as to whether it should continue to pay those dividends to the estate, in light of Judge Reeve's preliminary determination.

## **Withdrawal of counsel for Huia Williamson**

[4] As a preliminary point, by way of memorandum dated 6 June 2019, counsel for Huia Williamson, Mr Pou, sought to withdraw as counsel. Mr Pou appeared at the 11 June 2019 hearing. He confirmed that, due to his inability to obtain instructions from Huia Williamson, he was ill-equipped to serve his client or the Court. Indeed, he indicated that he was not able to obtain instructions to file his 6 June 2019 memorandum, but did so in any event.

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<sup>1</sup> *Hutana – Estate of Te Whe Ariki Hutana* (2019) 53 Te Waipounamu MB 97 (53 TWP 97).

[5] In advance of the 11 June 2019 hearing, I issued directions that, if Mr Pou sought to withdraw as counsel, Huia Williamson should attend the hearing. Despite my directions, she did not attend. At the hearing I granted leave for Mr Pou to withdraw as counsel. I noted, with concern, that Huia Williamson did not appear to be engaging with the Court on these matters.

#### **Mawhera Inc. dividends**

[6] I was advised that Mawhera Incorporation pays dividends annually in September each year. Accordingly, I considered that there was sufficient time for the parties to agree how those dividends should be treated. I expressed the view that it would seem sensible for all parties to agree by consent for those dividends to be held on trust by the Incorporation pending final determination of the issues before this Court. If agreement is not able to be reached, then the applicant (or any other interested party) may need to seek an injunction in relation to those dividends. I expressed the hope such a step proves unnecessary, although the issue may be moot given the discussion that follows.

#### **Restraining order over the estate accounts**

[7] During the course of the hearing on 11 June 2019, Mr Ormsby as counsel for Mr Reginald Hutana (an interested party) made an oral application for an order freezing the estate accounts. In response to my observation that Huia Williamson may need to access the estate's accounts to meet the reasonable and properly incurred expenses of the estate, Mr Ormsby indicated that the order sought was not a complete freeze of the estate's accounts, but an order to restrain Huia Williamson from distributing the estate or part of it pending determination of the extant proceedings. I approach the matter on the basis that the applicant seeks an order restraining Hui Williamson's powers in relation to the estate's accounts.

[8] Based on the submissions made at the hearing, I granted the order sought, subject to conditions. Firstly, because the application was essentially made *ex parte*, I granted leave for Huia Williamson to apply to the Court for relief if the restraining of the estate's accounts was prejudicial to the estate in any way. Secondly, my order was also conditional on Mr Ormsby filing submissions addressing whether the applicant should provide an undertaking as to damages pursuant to r 32.2 of the High Court Rules 2016 (HCR) and, if so, whether

the applicant is prepared to provide such an undertaking. Mr Ormsby filed submissions on 18 June 2019.

[9] The issues I now need to determine are:

(a) Does r 32.2 of the HCR apply to an order restraining Huia Williamson's powers in relation to the estate's accounts?

(b) If so, should the applicant be required to provide an undertaking as to damages?

*Submissions of the applicant*

[10] Mr Ormsby submits that an undertaking as to damages is not required, because r 32.2 of the HCR does not apply to orders that restrain a trustee under the Court's inherent equitable jurisdiction or the Trustee Act 1956. He submits that Huia Williamson has failed to communicate effectively with, and render accounts to, the beneficiaries, which constitute egregious breaches of her duties as trustee.<sup>2</sup> As a result, he argues it is appropriate for this Court to exercise its supervisory jurisdiction over trusts to essentially freeze the estate's accounts. Mr Ormsby also points to s 19 of the Act as confirming the Court's ability to issue injunctions to prevent trustees from dealing with trust funds.<sup>3</sup>

*Submissions of the respondent*

[11] Huia Williamson is the respondent to the application. Given that her counsel has now withdrawn, and she did not appear in person at the 11 June 2019 hearing as directed, I have not had the benefit of submissions from her. However, during the 11 June 2019 hearing and in response to the oral application to restrain the estate's accounts, Mr Pou raised the prospect that an order to that effect would constitute a *Mareva* injunction, thereby invoking r 32.2. Other than noting that potential issue, Mr Pou did not have instructions to respond to the oral application to restrain the estate's accounts.

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<sup>2</sup> *Lee v Torrey* [2015] NZHC 2135 and *Kemp v Burn* (1863) 4 Giff 348, 66 ER 740.

<sup>3</sup> Citing *Buchanan v Guardian Trustees Kareponia All Saints Anglican Church Trust* (2017) 149 Taitokerau MB 252 (149 TTK 252) and *Sherard v Devereux and others - Otakanini Māori Reservation (Haranui Marae)* (2017) 140 Taitokerau MB 60 (140 TTK 60).

[12] For those reasons, I dealt with, and continue to deal with, the application to restrain the estate's accounts on an *ex parte* basis. I therefore take a cautious approach. I am mindful that the order sought is interim in nature (intended to hold the position until the proceedings relating to the estate are completed) and any factual observations I make at this stage are obviously not final.

## Law

[13] This Court has extensive powers in relation to the supervision of trusts, pursuant to various provisions in the Act:

(a) Under s 237 the Court has and may exercise all the same powers and authorities as the High Court in respect of trusts generally. These are wide powers and extend to granting orders that restrict or otherwise prevent trustees from dealing with trust property.<sup>4</sup>

(b) Under s 238 the Court can enforce the obligations of a trustee in relation to his or her trust. Such obligations can be enforced by way of injunction, including over trust property.<sup>5</sup>

(c) The Court also has the specific injunction jurisdiction set out in s 19 of the Act. Relevantly in the context of pending proceedings (as is the case here), s 19(1)(b) allows the Court to grant an injunction prohibiting any person from dealing with any property that is the subject matter of the proceeding.

[14] The Court has previously used its trust supervisory powers to freeze or otherwise limit trustee powers over trust accounts:

(a) In *Butler v Matchitt*, Judge Savage granted an interim injunction freezing the accounts of the Matangareka 3B Ahu Whenua Trust.<sup>6</sup> The applicants in that case eventually agreed to provide an undertaking as to damages, so the Court was not

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<sup>4</sup> See, for example, *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999 and *Clarke v Karaitiana* [2011] NZCA 154.

<sup>5</sup> Te Ture Whenua Māori Act 1993, s 238(2).

<sup>6</sup> 153 Waiariki MB 59-72 (153 WAR 59-72).

required to deal with the issue of whether such an undertaking would have been required in any event due to r 32.2.

(b) In *Clark v Trustees of Poukawa 9G*, Judge Coxhead granted an order pursuant to s 19(1)(b) prohibiting the trustees from paying any funds from trust bank accounts other than for costs associated with holding a meeting of owners.<sup>7</sup> In *Re Tawhai (Rakautatahi B2)*, the Māori Appellate Court made an order pursuant to s 19(1)(d) restraining the trustees from paying money held and accrued to shares.<sup>8</sup> In granting these orders, both this Court and the Māori Appellate Court did not refer to the High Court Rules or undertakings as to damages.

(c) Mr Ormsby also refers to *Buchanan v Guardian Trustees* and *Sherard v Trustees of the Otakanini Māori Reservation* to confirm the Court's injunctive powers under s19 to prevent or limit trustee powers over trust funds.<sup>9</sup> Again, in granting these orders the Court did not refer to the High Court Rules or any requirement for undertakings as to damages.

[15] In terms of *Mareva* injunctions, the leading Māori Land Court case is *Slade - Parengarenga 3G*.<sup>10</sup> In that case, concerns were raised regarding potential misappropriation of trust funds by certain trustees. A *Mareva* order was sought to freeze the personal bank accounts of those trustees and their related entities and prevent any dealings in shares of a particular company owned by one of the trustees. Judge Ambler considered whether this Court has jurisdiction to grant *Mareva* injunctions and, if so, whether an undertaking as to damages from the applicant is required. He confirmed that the Court has jurisdiction.<sup>11</sup> Further, although an undertaking as to damages would ordinarily be expected, such an undertaking was not appropriate in that case.<sup>12</sup>

[16] Given that s 19 has previously been invoked by this Court to freeze or restrict trust accounts, I should comment briefly on that jurisdiction. In determining whether to grant an interim injunction, I have to consider whether there is a serious question to be tried and

<sup>7</sup> *Clark v Trustees of Poukawa 9G and others trust* (2011) 6 Tākitimu MB 285 (6 TKT 285).

<sup>8</sup> *Tawhai v Tawhai – Rakautatahi B2* (2000) 12 Tākitimu Appeal MB 154 (12 ACTK 154).

<sup>9</sup> Above, n3.

<sup>10</sup> *Slade – Parengarenga 3G* (2014) 87 Taitokerau MB 46 (87 TTK 46).

<sup>11</sup> Above n 10, at [8].

<sup>12</sup> Above n 10, at [37].

where the balance of convenience lies.<sup>13</sup> Ultimately the fundamental question is where the interests of justice lie.<sup>14</sup> I must also consider the statutory objectives set out in the Act.

[17] Finally, given that r 32.2 has been raised, I note that the Māori Appellate Court has held that this Court is not bound by the High Court Rules. In *Henare v Māori Trustee – Parengarenga 3G*, the Māori Appellate Court observed in relation to costs awards:<sup>15</sup>

This Court is not bound by the High Court Rules. However, a comparison can offer a guide. This Court in its discretion and for justified reasons may award an amount of costs far in excess or far less than what a party might be entitled to in the High Court.

[18] This general principle regarding the non-binding nature of the High Court Rules is reflected in other decisions of this Court.<sup>16</sup>

## Discussion

*Can I freeze or restrain the estate's accounts?*

[19] It is clear that this Court has a number of tools available to it to freeze trust accounts, or otherwise limit trustee powers over those accounts. There can be no argument that I have the power to grant the order sought. The issue is one of procedure. Is an order to restrict access to trust accounts a *Mareva* injunction such that r 32.2 applies and, if so, should I require an undertaking as to damages from the applicants?

*Does High Court Rule 32.2 apply?*

[20] Theoretically, the order sought by the applicant could be categorised as a *Mareva* injunction or freezing order. It seeks to restrain Huia Williamson from dealing with assets, thereby freezing them. However, I do not consider that the order sought can properly be described as a *Mareva* or freezing order to which r 32.2 applies.

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<sup>13</sup> *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168 at [35].

<sup>14</sup> See *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA), *Whitmarsh v A'mon Corporation Ltd* (1988) 2 PRNZ 576 at 583, and *Lomax v Apatu – Awarua o Hinemanu Trust* (2013) 22 Takitimu MB 282 (22 TKT 282).

<sup>15</sup> *Henare v Māori Trustee – Parengarenga 3G* [2010] Māori Appellate Court MB 540 (2012 APPEAL 540) at [48].

<sup>16</sup> See, for example, *Manahi v The Māori Trustee – Kapenga A5* (2018) 184 Waiariki MB 168 (184 WAR 168-180) at [50] and *Tauaki v Horowhenua Sailing Club Ltd - Horowhenua 11 (Lake) Māori Reservation* [2015] 337 Aotea MB 68 (337 AOT 68) at [22]-[23].

[21] I accept Mr Ormsby's submission that an order freezing the estate's accounts can be made in reliance on the Court's inherent jurisdiction in equity (conferred on this Court under s 237 of the Act) or under the Trustee Act 1956. In this situation, the Court is not being asked to freeze the personal assets of a defendant who may "dispose of his or her assets so as to defeat [a debt that is due and owing] before judgment".<sup>17</sup> Instead, we are concerned with protecting trust assets, which Huia Williamson holds as trustee for the beneficiaries of the estate. Put simply, the order sought is not over Huia Williamson's own assets.

[22] This distinction is borne out in the way in which this Court has granted orders to freeze, or limit trustee powers over, trust accounts. When granted, these orders have invariably not been described as *Mareva* or freezing orders (as that term is used in the High Court Rules), and there has been little or no discussion regarding the applicability of r 32.2. The Court has seemingly proceeded on the basis that any order affecting trust accounts arises from the Court's supervisory jurisdiction over trusts, coupled with the Court's statutory injunctive jurisdiction in s 19.

[23] This observation is supported by the relative lack of Māori Land or Appellate Court cases that deal expressly with *Mareva* injunctions. The leading case of *Slade – Parengarenga 3G* explicitly engages this jurisdiction because the orders sought were over the personal assets of the relevant trustees, rather than the trust assets or accounts. Such orders were considered necessary by the Court in that instance because of the real risk that unexplained and unusual payments made from the trust accounts to the trustees' personal bank accounts would be dissipated. That is not the case here. The order sought relates to the trust accounts, not Huia Williamson's personal accounts.

[24] Ultimately, on the basis that the grounds for an interim injunction are made out, I propose to rely on the full suite of the Court's powers to restrain Huia Williamson in relation to the estate's accounts.

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<sup>17</sup> *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 (CA) at 510.

*Is an undertaking as to damages required?*

[25] Rule 32.2 is not relevant so an undertaking as to damages is not required. In any event, those Rules are a guide only. The Māori Land Court Rules 2011 do not require undertakings as to damages in relation to injunctions. The applicant has not offered to provide such an undertaking. I am not inclined to require one be given in this instance.

*The grounds for an interim injunction*

[26] I must be satisfied that the grounds for an injunction are made out. I was so satisfied at the 11 June 2019 hearing, and my reasons follow.

[27] There is a serious question to be tried. Indeed, proceedings are in motion, and the preliminary determination regarding the entitled beneficiaries under the will has resulted in both an appeal and an application for rehearing. There is also genuine concern about the welfare of the trust fund and the use of it by the respondent, given the lack of information provided to the beneficiaries. There is a risk that trust funds may have been paid in breach of trust.

[28] In terms of the balance of convenience:

(a) I do not consider that damages will be an appropriate remedy in this instance. Following the *Shelfer* good working rule, I note that the injury to the applicant (and other beneficiaries under the will, as may be finally determined) is potentially significant.<sup>18</sup> As such, and acknowledging that any injury could likely be estimated in monetary terms, I anticipate such a payment could be relatively significant. I am also mindful that the granting of an injunction is not oppressive to the respondent. In any event, at the 11 June 2019 hearing I granted leave to Huia Williamson to apply to the Court for relief if restraining her powers over the estate's accounts was prejudicial in any way. That leave stands.

(b) There is no evidence before me that Huia Williamson has offered to provide an undertaking not to distribute or otherwise dissipate the trust fund pending determination of the substantive issues before this Court.

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<sup>18</sup> *Shelfer v City of London Electric Lighting Co* [188] 1 Ch. 287; [1891] A11 ER 838.

(c) There does not appear to be any effect on third parties by the granting of an order over the estate's accounts. However, as noted above, I have granted leave to the respondent to apply to the Court for relief if necessary.

(d) Given the lack of engagement by Huia Williamson (reflected most recently in her counsel seeking to withdraw and her failure to appear at the 11 June 2019 hearing), some pre-emptive steps are now warranted. Huia Williamson was ordered to provide to the Court a set of accounts and a written report by 14 October 2018. Those accounts are yet to be provided. She was also directed to provide an update to the Court on 5 May 2019 as to the preparation of trust financial accounts. This update was provided by her counsel on 6 June 2019, but without her instructions. Her conduct therefore favours the granting of the injunction sought.

[29] The balance of convenience lies in favour of the granting of the injunction sought, noting that leave is granted to the respondent to seek relief if necessary.

[30] Having considered all relevant matters, I must assess where the overall justice lies in this case.

[31] On the information before me, the applicant has come to this Court with clean hands. There is no evidence that he has acted inequitably or that his conduct disentitles him to equitable relief.

[32] On the other hand, Huia Williamson appears to be taking a hands-off approach to matters. In that context, noting that she is the sole administrator of the estate and is able to act unilaterally in that capacity, her conduct to date indicates that pre-emptive and protective steps are justified. The overall justice of the case leans towards the granting of the injunction sought.

[33] The statutory objectives of the Act reflect the axiomatic principle that the owners of Māori land are able to benefit from it. There is a risk here that the benefits of the Māori land interests of the estate may not ultimately be received by the owners of those interests. That risk, if realised, runs counter to the principles of the Act. The injunction as sought would mitigate, if not eliminate, that risk pending determination of the extant proceedings. The injunction is therefore consistent with the Act's objectives.

[34] I note, for completeness, that Part 9 the Māori Land Court Rules 2011 contemplates affidavit evidence in support of an injunction application.<sup>19</sup> Some evidence was given at the 11 June 2019 hearing, but in any event having regard to the circumstances of the case I am prepared to dispense with the need for formal affidavit evidence.

[35] Accordingly, the grounds for an interim injunction are made out.

#### *The Mawhera Incorporation dividends*

[36] As noted, at the 11 June 2019 hearing I did not consider it necessary to grant any orders in relation to the Mawhera Incorporation dividends that will likely be paid to the estate in September this year. Given that the application for an interim injunction is successful, specific orders in relation to the Mawhera Incorporation dividends may no longer be necessary.

#### **Orders**

[37] I granted the following orders at the 11 June 2019 hearing:

- (a) The Registrar is to prepare a report under s 40 of the Act as to the status of the accounts of the estate, following discussions with the auditor of the estate. In particular, the Registrar is to inquire and report on:
  - (i) the information that has been provided to the auditor to date by the administrator of the estate;

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<sup>19</sup> Māori Land Court Rules 2011, r 9.6.

- (ii) the information that remains outstanding in order for the matters relating to the financial accounts of the estate to be completed;
  - (iii) the degree to which the administrator is actively engaging with the auditor; and
  - (iv) any preliminary issues identified to date by the auditor.
- (b) The administrator is directed to provide a report under s 238 of the Act by **4pm Monday 15 July 2019** providing an update on the finalisation of the accounts for the estate and why the administrator does not appear to be engaging with her counsel, the auditor and the Court in relation to these matters.

[38] In terms of the oral application to restrain the estate's accounts, pursuant to ss 19(1)(b), 237 and 238 of Act, the Court grants an interim injunction prohibiting Huia Williamson, in her capacity as administrator of the estate of Te Whe Ariki Hutana, from dealing with the property that comprises, from time to time, the assets of the estate of Te Whe Ariki Hutana, except to the extent reasonably required to meet the usual and properly incurred expenses associated with the estate. To avoid doubt, Huia Williamson is restrained from making any distributions from the estate.

[39] That injunction is to continue until further order of the Court.

[40] I grant leave to Huia Williamson, in her capacity as administrator of the estate of Te Whe Ariki Hutana, to apply to the Court for relief from the terms of the interim injunction as may be reasonably necessary to avoid prejudice to the estate and the associated beneficiaries.

This order is to issue immediately pursuant to rule 7.5 of the Māori Land Court Rules 2011.

Pronounced at Wellington at 4.30pm on Monday this 1<sup>st</sup> day of July 2019.

D H Stone

**JUDGE**