

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

**A20150001866
A20160005018**

UNDER Sections 67 and 240, Te Ture Whenua Māori
Act 1993

IN THE MATTER OF Mangamaire B2 Block

BETWEEN JAMES ROBERT HUTCHESON
Applicant

AND CATHERINE CLARKSON, KETEPUNGA
CLARKSON, MATANA ERIHA, AND
SHARLENE KING, THE TRUSTEES OF
MANGAMARIE B2 TRUST
Respondents

Hearings: 6 May 2015, 40 Tākitimu MB 188-193
7 September 2016, 53 Tākitimu MB 81-89
8 November 2016, 55 Tākitimu MB 54-63
8 June 2017, 60 Tākitimu MB 220-227
2 May 2018, 68 Tākitimu MB 125-132

Appearances: C Bennett, for Applicant
A Hope, for Trustees

Date: 18 December 2018

INTERIM JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] This decision considers preliminary issues of discovery and access to trust information and records, in relation to the application filed by James Hutcheson for removal of the trustees of Mangamaire B2 Trust.

[2] Following the filing of the application, the Court engaged accountant John Francois to conduct an audit of the financial information and to investigate any matters of concern regarding the administration of the trust by the trustees. The report subsequently filed by Mr Francois identified the difficulties he encountered during the investigation and the lack of key information received. He made several recommendations that the Court request or compel the relevant financial information from the trust's accountant, the trustees and the bank. Such information would include contact details of those people who have contracted with or others dealt with the land such as to provide income to the trust.

[3] By memorandum dated 23 August 2018, counsel for the applicant sought orders for the production of the information set out in Mr Francois' report. In response, counsel for the respondents filed a memorandum dated 24 October 2018. The respondents claim the information has been provided, with the exception of that material claimed as confidential. Respondent counsel also seeks orders suppressing details of the trust's contractual relationships and directing the accountant not to contact or question such contractors.

Issues

[4] The issues for consideration include:

- (a) Are suppression orders regarding the trust's current contracts appropriate?
- (b) Should the trust's accountant provide copies of his files to the investigator?
- (c) Should the trustees provide copies of all minutes of meetings to the investigator?
- (d) Should the payments for repairs and maintenance remain 'confidential'?
- (e) Are the trustees required to provide details to the investigator on dividends?

[5] The issue of whether the investigator should be provided with access to the trust's banking records is also considered in this judgment.

The Law

[6] Section 69 of Te Ture Whenua Māori Act 1993 relates to the provision of evidence in proceedings. It states:

69 Evidence in proceedings

- (1) The court may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter that, in the opinion of the court, may assist it to deal effectively with the matters before it, whether the same would, apart from this section, be legally admissible in evidence or not.
- (2) The court may itself cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence, as it considers may assist it to deal effectively with the matters before it, but shall ensure that the parties are kept fully informed of all such matters and, where appropriate, given an opportunity to reply.
- (3) Subject to the foregoing provisions of this section, the Evidence Act 2006 shall apply to the court, and to the Judges of the court, and to all proceedings in the court, in the same manner as if the court were a court within the meaning of that Act.

[7] The Court therefore has a wide discretion as to the evidence it receives. The Court may cause inquiries to be made, call witnesses and seek and receive such evidence as it considers may assist it to deal effectively with the matters before it. Subject to these provisions, s 69 also provides that the Evidence Act 2006 applies to all proceedings in this Court.

[8] In terms of the Evidence Act 2006, s 69 is relevant in the context of confidential information. It states:

69 Overriding discretion as to confidential information

- (1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
 - (a) a confidential communication;
 - (b) any confidential information;
 - (c) any information that would or might reveal a confidential source of information.
- (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
 - (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
 - (b) preventing harm to—
 - (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
 - (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
 - (c) maintaining activities that contribute to or rely on the free flow of information.
- (3) When considering whether to give a direction under this section, the Judge must have regard to—

- (a) the likely extent of harm that may result from the disclosure of the communication or information; and
 - (b) the nature of the communication or information and its likely importance in the proceeding; and
 - (c) the nature of the proceeding; and
 - (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
 - (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
 - (f) the sensitivity of the evidence, having regard to—
 - (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
 - (ii) the extent to which the information has already been disclosed to other persons; and
 - (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
- (4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
- (5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[9] In addition, s 6(2) of Te Ture Whenua Māori Act 1993 provides:

6 Maori Land Court to continue

...

- (2) In addition to the jurisdiction and powers expressly conferred on it by this or any other Act, the Maori Land Court shall have all the powers that are inherent in a court of record.

[10] The ability of a court of record to deal with evidence, its admission and suppression, was considered by the Court of Appeal in *Brown v Attorney General*:¹

Before setting out what is in issue, we should make clear one matter which was not in issue: that is the jurisdiction of the District Court to make suppression orders in civil proceedings. Judge Ongley concluded that the District Court did have jurisdiction pursuant to its “inherent power to regulate its own proceedings”: DC WN NP37/03 29 April 2003 at [2]. On appeal, Miller J held, in reliance on *Mc Menamin v Attorney General* [1985] 2 NZLR 274 at 276, that the District Court had the right to do what was necessary to enable it to exercise the functions, powers and duties conferred on it by statute. A power to order suppression was implied if suppression was necessary to regulate the court's process or prevent an abuse: HC WN CIV 2003-485-1132, 2 July 2004 at [18] – [25]. Before us, Mr Keith, for the Crown took no point as to the jurisdiction to make the order. That is accordingly not a matter we have considered. We have proceeded on an assumption that, in appropriate cases, the District Court would have jurisdiction to suppress names and particulars.

[11] The suppression of evidence in this Court is not unprecedented. For example, see *Rangipo North 8* where His Honour Judge Savage suppressed evidence of whakapapa.² Then in *Naera v Fenwick – Whakapoungakau 24* suppression orders were issued concerning

¹ *Brown v Attorney General* CA 196/04, 26 September 2005 at [6]

² *Rangipo North 8* (1997) 70 Aotea MB 18 (70 AOT 18)

information deemed confidential and commercially sensitive over the proposed construction of a geothermal power station.³

[12] With these principles in mind, I consider whether the information sought should be directed from the necessary parties or whether suppression orders are necessary.

Discussion

Are suppression orders regarding the trust's current contracts appropriate?

[13] It is trite law that trustees are ultimately responsible as the legal owners of the land by long established common law principles and in accordance with Te Ture Whenua Māori Act 1993 and the Trustee Act 1956. They are responsible for every aspect of a trust's business affairs. The office of trustee is an onerous responsibility, more so when the reality of unlimited personal liability is considered. Put simply, trustees make the decisions and must do so cognisant of their duties and responsibilities. It would be inconceivable that any trustee could properly fulfil the duties of that office without knowing what is going on with the business of the trust.

[14] Equally importantly, it is well settled that trustees cannot delegate their responsibilities to any other person, except limited circumstances by deed of delegation where a trustee may be overseas or otherwise unavailable. They can engage and employ anyone to undertake tasks on their behalf as employees, contractors or agents. But it is the trustees alone who retain ultimate responsibility.

[15] Mr Hope, in an earlier memorandum, sought orders suppressing the details of contractual relationships with various contractors and lessees and directing Mr Francois not to contact the persons who have contracted with the trustees. Ms Bennett opposes this request. While I am prepared to order the suppression of details of the identity of the contractors and lessees, which I note is a curious request given that any party could simply go out to the land whenever one of the contractors or lessees was engaged and ascertain the identity themselves, I have difficulty with the suggestion that Mr Francois should not contact anyone who has contracted with the trustees. There was a suggestion that somehow, such contact might imply wrong-doing on the part of the current trustees. While that may be a

³ *Naera v Fenwick – Whakapoungakau 24* (2009) 348 Rotorua MB 297 (348 ROT 297)

possibility, I do not consider that it is sufficiently serious to warrant limiting the ability of Mr Francois to complete his inquiry.

[16] The short point is, that the superior courts have underscored repeatedly the special jurisdiction of this Court over trusts constituted under Part 12 of Te Ture Whenua Māori Act 1993.⁴ That includes the ability of the Court, consistent with its jurisdiction set out in ss 236-242 of the Act, to secure answers to its questions from trustees, especially in the context of accountability. In my experience, the material provided by the trustees purporting to be accounts falls short of what would be expected of trustees responsible for trusts of comparable size and income. As Ms Bennett points out in her memorandum, the trustees have asserted previously that the income falls below the threshold necessary for the filing of proper accounts, yet the evidence makes it plain that such an assertion is wrong. So already the trustees would appear to be in breach of their trust order in failing to file the accounts of the trust.

[17] I am satisfied therefore that a proper inquiry as to the financial position of the trust and the processes adopted by the trustees in their management of the trust's business is of direct relevance to the proceedings presently before the Court. Moreover, even if there were no proceedings filed by the present applicant, s 238 of the Act does not require any such application for the enforcement of obligations of trust. While I appreciate that, where appropriate, trustees will seek confidentiality, such a request must be made on a reasonable basis. I do not see how it is reasonable to constrain the ability of Mr Francois to contact persons who may have relevant information to assist in the completion of his enquiries. If there is something more specific that counsel and his clients can point to that requires particular sensitivity and caution, then that can be considered further. Until then, I decline to issue an order confining Mr Francois' enquiry in terms of third parties.

[18] For completeness, I take no issue with counsel's criticisms of Mr Francois' approach and with his report of 2 July 2018. For example, Mr Hope makes a fair point that the current trustees can only be held accountable for their own actions arising from the date of their appointment. The exception to that would be where, a prudent trustee acting reasonably, would have taken steps to either secure the trust's records from previous trustees or sought directions from the Court. In addition, I would expect Mr Francois' approach to third parties

⁴ *Naera v Fenwick* [2013] NZCA 353; *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999; *Rameka v Hall* [2013] NZCA 203

to be couched in neutral language so as not to create unintended consequences and excite unfounded suspicions.

Should the payments for repairs and maintenance remain 'confidential'?

[19] Regarding the reference in Mr Francois' report to repairs and maintenance, Mr Hope seeks an order that the information is confidential. The trustees must be able to identify where a payment of trust funds has been made, for what purpose, to whom, and this should also show that the payment was duly authorised in a manner consistent with their duties. To suggest that persons paid for repairs and maintenance is confidential, in the absence of further submissions, is not acceptable. It will be remembered that the trustees are holding funds that belong to others. While there is cross-over between trusteeship and ownership, the trustees do not hold 100 per cent of the shares in the land. It ought to be obvious to trustees that they must be able to account for expenditure of trust funds and provide copies of invoices of any payments made, receipts issued and other relevant information, when required to do so by the Court.

[20] I direct counsel to provide me with a copy of that information so that I may then determine whether his submission is correct. He should file that information as soon as possible.

Are the trustees required to provide details to the investigator on dividends?

[21] I expect that a prudent and responsible trustee acting reasonably would have proper records for the payment of dividends during their tenure. That would include a list of owners, details of their shareholding, their bank account details, the amounts they were paid and the dates. There would also be a list of owners for whom addresses or account numbers are not held, which would form the unclaimed dividend part of the statement of financial position under the heading "liabilities-unclaimed dividends". As I recall, I did not see reference to unclaimed dividends when this issue was first being considered.

[22] I also agree with Mr Hope that if Mr Hutcheson has any insight or information into record keeping concerning the payment of dividends while the latter was a trustee, then he should proffer that at the earliest opportunity. The short point is, that trustees, past and present, should have at their disposal correct and accurate records of dividend payments to beneficial owners. If they do not they will be held accountable.

[23] Regarding the applicant's motives, they are of no relevance to the Court. As foreshadowed, the enforcement of obligations of trust, particularly in the context of accountability for trust funds, does not require an application. I do acknowledge however, that the unnecessary elongation of time in these proceedings has been because of the failure of compliance with timetabling directions and the provision of information concerning the trust and its accounts. I also take no issue with Mr Hope's request for undertakings from counsel, which I note have been provided.

[24] I therefore direct the trustees to provide the information from their records regarding the dividend payments to Mr Francois. Mr Hutcheson should also provide any information he may hold from his time as a trustee.

Should the trust's accountant provide copies of his files to the investigator?

[25] Ms Bennett requests an order that the trust accountant hand over all information he has in relation to the trust and that he answer any questions posed by Mr Francois. Mr Hope says, to the best of his knowledge, the accountant has already provided the information sought. It would be helpful therefore if Mr Hope could obtain from the trust accountant a letter confirming the same as soon as possible.

Should the trustees provide copies of all minutes of meetings to the investigator?

[26] Ms Bennett sought details of minutes of trust and owner meetings. I cannot see how minutes of trustee and owners meeting should be confidential. If there are specific matters that need to be raised and considered, then counsel needs to make the case for suppression. Mr Hope, if he has not done so already, is directed to confirm that copies of all relevant minutes have been provided to Mr Francois.

What access is required to the trust's bank records?

[27] Ms Bennett sought an order to enable Mr Francois to approach the Bank of New Zealand to seek details of the persons who banked a selected sample of cheques. She says this would then provide feedback on the accountant's coding of owner advances and enable cross-checking of who has been paid as against the trustees' manual records. Unless there are issues of confidentiality, articulated with some precision, then I see no reason why Mr Francois should be prevented from obtaining access to the trust's bank records for the purpose of completing his report to the Court. The order as sought by counsel is granted.

Further hearing

[28] If he has not done so already, Mr Francois should finalise his report by the beginning of February 2019. The application will then be set down for further proceedings at the March 2019 sitting of the Court. The case manager is directed to liaise with counsel to ascertain their availability in the month of March 2019.

Decision

[29] The request for an order confining Mr Francois' enquiry in terms of third parties is declined. Accordingly, there will be no order of suppression regarding the trust's current contracts.

[30] Mr Hope is to provide the Court with copies of invoices for payments made and receipts issued in relation to repairs and maintenance costs, so that I may determine whether such information should remain confidential.

[31] The trustees are directed to provide the information from their records regarding the dividend payments to Mr Francois. Mr Hutcheson should also provide any information he may hold from his time as a trustee.

[32] Mr Hope is directed to confirm with the accountant that he has provided all the information sought by Ms Bennett and to obtain a letter from the trust accountant confirming the same.

[33] Mr Hope, if he has not done so already, is directed to confirm that copies of all relevant minutes have been provided to Mr Francois.

[34] The order as sought by counsel is granted to enable Mr Francois to approach the Bank of New Zealand to seek details of the persons who banked a selected sample of cheques for trust business.

Pronounced in open Court at 3.15pm in Hāwera on Tuesday this 18th day of December 2018



L R Harvey
JUDGE