

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

A20170002368

UNDER Section 231, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Ngātītara 26B Block

BETWEEN JENNIFER RAUKURA JONES
Applicant

AND DIANE MARY KUMEA RATAHI ON
BEHALF OF THE NGĀTITARA 26B TRUST
Respondent

Hearings: 20 June 2017, 372 Aotea MB 59-70
19 February 2019, 397 Aotea MB 46-52
(Heard at Te Hāwera)

Appearances: J Jones in person
P Bulfin for the Trust

Judgment: 29 July 2019

JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Jennifer Jones has applied for a review of the Ngātītara 26B Trust in relation to the actions of the trustees in leasing the land. She argued that the trustees have leased the land to a whānau member at below market rent for the past seven years, resulting in disadvantage to the beneficial owners.

[2] The trustees deny the claim. They argue that they have acted responsibly concerning the lease. They took advice and carried out a tender process obtaining the best rental possible considering factors existing in the market at the time.

[3] The issue for determination is whether the trustees have acted prudently.

Background

[4] Ngātītara 26B is Māori freehold land, 40.5733 hectares in area created by partition order dated 17 April 1953.¹ There are currently 35 owners holding a total of 2,160 shares.

[5] The Ngātītara 26B Trust is an ahu whenua trust constituted over the land on 29 February 1996.² The original trustees were Leslie Ratahi, Whiro Ratahi, Janet Ratahi, Willis James, Phillip Ratahi and Rangī Ratahi. At the time proceedings were filed, the trustees were Diane Ratahi, Piki Sinclair and Bronwyn Ratahi.³

[6] On 1 June 2010, the trustees entered into a lease with the Kent Helms Family Trust and the Jems Family Trust for a period of six years, ending on 31 May 2016 with no right of renewal. The lease provided for an annual rental of \$44,000, with a review on 1 June 2013.

Procedural history

[7] The application for review of trust was filed by Jennifer Jones on 21 March 2017. A related application to replace trustees was then filed by Diane Ratahi on 3 April 2017.⁴

¹ 59 Taranaki MB 97D (59 TAR 97D)

² 57 Aotea MB 89-91 (57 AOT 89-91)

³ 203 Aotea MB 7-9 (203 AOT 7-9)

⁴ Application A20170002682

[8] Both applications were heard on 20 June 2017.⁵ At the hearing, the issue of the lease was discussed, and the positions of the parties put forward. The accountant, who acted for both the trust and the applicant, also attended the hearing and provided his views regarding the lease and tender process. At the end of the hearing, I appointed an interim replacement trustee and signalled that an independent person would be engaged to conduct an inquiry and provide a report to the Court concerning the former lease.⁶ I adjourned the applications for directions to issue regarding the scope of the inquiry and terms of reference.

[9] Directions were issued on 3 August 2017 for the Registrar to engage Dean MacFater, a consultant of Whanganui to meet with the trustees and applicant to obtain their views on how the lease situation arose; to calculate the market rental for the period of the expired lease and compare it with the rental received; and to prepare and file a report with the Court within two months.⁷ Following the report, the parties were to be given an opportunity to provide their comments and a further hearing was to be scheduled.

[10] After a period of some delay, the report of Mr MacFater was eventually filed on 18 December 2018. It was distributed to the parties and the matter set down for further hearing.

[11] A final hearing was held on 19 February 2019.⁸ Evidence was presented by counsel for the trustees regarding the lease tender process for both the former and current leases. At the end of the hearing, I was satisfied that the lease process undertaken by the trustees was correct. I concluded the review of trust and dismissed the proceedings, indicating that my decision would be confirmed in writing in due course.

Applicant's submissions

[12] Mrs Jones sought to review the conduct and actions of the trustees regarding the leasing arrangements. She made several allegations:

- (a) The trustees have continued a lease to a family member on an agreement that is below market price for a period of at least seven years;

⁵ 372 Aotea MB 59-70 (372 AOT 59-70)

⁶ An election of trustees was subsequently held at the trust's annual general meeting and replacement trustees appointed by the Court on 18 December 2018, 395 Aotea MB 73-75 (395 AOT 73-75). The current trustees are Diane Ratahi, Les Ratahi and Susan Stevenson

⁷ 373 Aotea MB 108-110 (373 AOT 108-110); 397 Aotea MB 12-13 (397 AOT 12-13)

⁸ 397 Aotea MB 46-52 (397 AOT 46-52)

- (b) The land was not advertised for tender upon lease expiry, so there was no opportunity for others to tender to lease the land;
- (c) The owners are being disadvantaged as a larger payment would be received if the land was tendered to the public and greater revenue received by the trust;
- (d) The trustees have been told by owners to administer a tender process and ignored the views of the owners and, through restricting the flow of information to owners, have continued to lease without regard to the owners;
- (e) The lease is invalid as its renewal of three years was unsupported by a vote of owners and no quorum was evident; and
- (f) The lease expired on 31 May 2016 and was renewed on 3 October 2016 to a trustee's family member, without tender, without a rent increase and without consultation with the owners. This land has now been rented at below market rent for seven years.

[13] Ms Jones submitted that she had raised her concerns around the lease process with one of the trustees prior to filing the application with the Court. She also argued that the tender process for the current lease was undertaken in a very short timeframe, noting that she and her husband also submitted a tender bid for the lease, which was not successful.

Trustees' submissions

[14] Mr Bulfin filed copies of relevant documents relating to the former and current leases, along with a brief of evidence of trustee Diane Ratahi. He submitted that the trustees have acted responsibly throughout their tenure and in relation to the leasing.

[15] Concerning the former lease, Mr Bulfin submitted that, prior to the time lease tenders were called for, there had been wild fluctuations in milk pay-outs from Fonterra, which had created uncertainty in the dairy industry. Against that background, the trustees instructed their solicitors to seek tenders in early February 2010, following advice from the existing lessee that he would not be seeking a further lease. The lease was advertised, and two tenders were received for \$26,000 and \$40,000. A further late tender of \$44,000 was received from the partnership of the Kent Helms Family Trust and the Jems Family Trust. Mr Bulfin submitted that, at that point, none of the trustees were aware there was any family

connection with the partnership. He argued that, in any case, the partnership's bid was clearly the highest tender and, as the trustees were of a mind to obtain the highest bid possible, it was accepted.

[16] Counsel noted that the former lease provided for a rent review after three years and the trustees considered the matter in 2013. At that time, the trustees sought advice from their solicitor and accountant and considered options. It was noted that all options involved considerable cost, which included researching current market rents and obtaining valuations from both parties, along with legal services and administration costs. Given that the lessee had made improvements to the land, that the land was well maintained and that there had been no issues, the trustees elected to retain the rent at the existing amount for the remainder of the lease. Mr Bulfin also advised that the milk pay-out had dropped significantly. He noted the decision of the trustees was reported at the trust meeting held on 27 July 2013, which was attended by the applicant.

[17] In her affidavit, Mrs Ratahi noted that the lease expired on 1 June 2016 and the trustees were of a mind to grant the lessee a further three-year lease, given they had looked after the land particularly well. There was some delay whilst the lessee considered the matter but eventually they sought only a one-year extension. This was agreed to at the existing rental as the milk pay-out had again dropped and was extremely low.

[18] Mr Bulfin submitted that the trustees then undertook a further tender process for a new six-year lease. In anticipation, the trustees had obtained a market rental valuation from Telfer Young, which suggested a valuation of \$59,250. The lease was advertised twice in late May and early June 2017 in two newspapers. While the trustees accepted that the tender process was conducted a little late, it was argued that this had no significant effect on the result as several information packs were collected and six tenders were received, as opposed to the two tenders received in relation to the 2010 lease. Mr Bulfin submitted that it was a well-conducted and successful tender process.

[19] Overall, counsel argued that the trustees behaved responsibly regarding the lease.

Report of Mr MacFater

[20] As foreshadowed, Mr MacFater was engaged by the Court to conduct an independent inquiry regarding the former lease. He filed his report with the Court on 18

December 2018, which included summaries of discussions with the trust solicitor, trustee Diane Ratahi and the applicant Jennifer Jones.

[21] The report notes that the trust solicitor outlined the events surrounding the former lease and he was questioned regarding several matters. These included alternative attempts to market the land, lessee circumstances such as timing of bids and availability of a competitive market, milk pay-outs and valuation information. Mr MacFater found that the rental offered was fair and, for the relevant period, at the correct level.

[22] Following Mr MacFater's discussions with Mrs Ratahi, he found that she had completed a diligent undertaking on behalf of the owners and acted with due care to ensure that all processes and undertakings of a business and professional practice had been completed, with the backing of sound advice. Mr MacFater's evaluation of the events was that the former lessee should be confirmed as the lessee of the land.

[23] The report also records that it was Mrs Jones' aim to ensure that, whoever is the lessee, a fair process has been undertaken to conclude who they are and how much should be paid. She also expressed her approval and satisfaction that a competitive lease had been achieved for the future. In summary, Mr MacFater concluded that there "is an overwhelming sentiment of success here with Ngātītara 26B".

The Law

[24] Section 231 of Te Ture Whenua Māori Act 1993 provides:

231 Review of trusts

- (1) The trustees or a beneficiary of a trust (other than a kai tiaki trust) constituted under this Part may apply to the court to review the terms, operation, or other aspect of the trust.
- (2) There can be no more than 1 review of a trust within a period of 24 consecutive months.
- (3) The court may, on any review,—
 - (a) confirm the trust order for the trust without variation; or
 - (b) exercise its powers under section 244; or
 - (c) terminate the trust if the court is satisfied that there is a sufficient degree of support for termination among the beneficiaries.

[25] In carrying out a review of trust, the Court will often have regard to a trust's performance and the competence of its trustees. The Court will generally focus on higher level matters of governance and policy rather than the day-to-day operational issues of the

trust.⁹ However, where warranted, the Court may need to review matters of operational management, particularly where there is an apprehension of risk to the assets of the trust or a serious allegation requiring intervention.¹⁰

[26] Upon review, the Court can invoke where necessary, any of the armoury of powers available to it under the Act in relation to trusts, such as for the enforcement of obligations under s 238 or the removal of trustees under s 240.¹¹

Discussion

The former lease

[27] The applicant's main concerns regarding the former lease were that the land had been leased to a family member at a rental price that was below market value, causing a disadvantage in terms of loss of potential revenue for the beneficial owners. Mrs Jones was also critical of the fact the trustees sought to extend the lease to the existing lessee after expiry, without further tender or consultation with the beneficial owners.

[28] The trustees however, argued that, at the time the lease tender was made, they were not aware of any whānau connection to the lessee partnership. While there was some initial debate over when the trustees became aware that the partnership involved a whānau member, the issue was not pursued, and I accept that the trustees were initially unaware of any relationship. I also note that the trust order does provide a discretion for the trustees to lease to beneficial owners or blood relatives on more favourable terms, albeit following approval by a meeting of owners. In any event, the trustees note that the tender put forward by the former lessee was in fact the highest bid and the trustees accepted it on that basis.

[29] Clauses 3(b)(xii) and (xiii) of the trust order empower the trustees as follows:

- xii To make other special provisions for beneficiaries
At their discretion to alienate by way of lease or licence to any beneficial owner or to any blood relative of a beneficial owner at a reduced rent or otherwise upon terms more favourable to the lessee than those obtainable on the open market for so long as that person or his executor or administrator remains in possession of the land PROVIDED THAT such

⁹ *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999

¹⁰ *Corrigan – Ngatihine H2B* (2014) 71 Taitokerau MB 72 (71 TTK 72); and *Tupe Snr v Everton – Manunui No 1 4th Residue Ahu Whenua Trust* (2015) 334 Aotea MB 227 (334 AOT 227)

¹¹ *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999

proposal has first been approved by the resolution of a meeting of beneficial owners called by the Trustees.

xiii To lease

To lease the whole or any part of parts of the said lands from year to year and for any term of years at such rent and upon such covenants and conditions as the Trustees shall think reasonable and to any person, corporate body and/or Her Majesty the Queen and to accept surrenders of and vary the leases thereof AND PROVIDED FURTHER that any lease or licence for a term exceeding three years shall ensure compliance under Section 160 or 161 of The Act (as may be applicable) for any alienation (as defined under Section 4 of The Act).

[30] These provisions make it plain that it is for the trustees to make decisions regarding leases. The trustees have the power to lease the land at such rent and upon such covenants and conditions as they think are reasonable.

[31] I consider that the trustees' actions were prudent. They met with their solicitors and instructed them to conduct a tender process, which ultimately resulted in three tenders being received. As the documents provided by counsel confirm, the trustees were committed to obtaining the best price and accepted the highest tender from the Kent Helms Family Trust and the Jems Family Trust. Although Mrs Jones argues the lease was below market rental, having regard to the state of the dairy industry at the time, the rental secured by the trustees seems reasonable. This was also the view of independent consultant Mr MacFater, who noted the rental was fair and at the correct level for the relevant period. There is no evidence that the trustees gave special consideration to the lessee due to a whānau connection.

[32] I also consider that the trustees actions were reasonable in terms of the rent review and in granting a one-year extension of the lease. The trustees outlined the factors they considered when making their decision, including the fluctuations in the milk pay-outs, the costs involved in obtaining valuations and the good state of the land under the care of the lessee. They also took advice from their solicitors and subsequently communicated their decision to the beneficial owners at a trust meeting. I can discern no breach of trust in such actions.

The current lease

[33] Regarding the current lease, there appeared to be no disagreement amongst the parties that the level of the lease rental was competitive and a significant improvement from the former lease. Indeed, I note that it is almost on par with the rental valuation suggested by Telfer Young.

[34] Mrs Jones did express concern with the process for the tender, particularly the short timeframe allowed for tenders to be received. However, I note that the lease was well-advertised and, while not ideal, I accept the trustees' claim that the shortened timeframe had no significant effect on the outcome, given that six tenders were received. Following that process, the trustees met and accepted the highest tender.

[35] Again, I find no error in the approach taken by the trustees. They sought an independent valuation, the tender process was conducted by the trust solicitors in a professional manner and they made their decision based on the highest rental they could obtain for their beneficial owners.

Decision

[36] The trustees' actions concerning the lease of their land were prudent.

[37] There has been no breach of trust requiring the Court's intervention.

[38] I confirm my earlier orders and the application for review is now concluded.

[39] There is no order as to costs.

Pronounced at 2.15pm in Whanganui on Monday this 29th day of July 2019

L R Harvey
JUDGE