IN THE MĀORI LAND COURT OF NEW ZEALAND
TĀKITIMU DISTRICT

A20180005670

UNDER	Sections 231, 238 and 240 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Te Koau A
BETWEEN	WERO KARENA Applicant
AND	DAVID WAKA STEEDMAN, JORDAN HAINES-WINIATA, LEWIS WINIATA, PETER STEEDMAN, RHONDA TOA TOA, RUKA WAAPU AND SHERYLE ALLEN AS TRUSTEES OF TE KOAU A Respondents

Hearings: 3 October 2018, 72 Tākitimu MB 191-210
(Heard at Hastings)

Appearances: W Karena in person
A Sykes for the respondents

Judgment: 21 June 2019

JUDGMENT OF JUDGE L R HARVEY

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Introduction

[1] Wero Karena seeks the removal of trustees and a review of the Te Koau A Trust. He says the trustees have not exercised their powers prudently as they failed to apply for a review of the trust, neglected to investigate historical boundary issues, refused to attempt to solve issues surrounding a lease of the land and have also misappropriated trust funds.

[2] The trustees denied the allegations. They submitted that the proceedings should be struck out because Mr Karena's arguments are without foundation. The trustees also argue that Mr Karena is attempting to re-litigate matters that have been dismissed by the Court.

[3] In addition, the trustees submitted that Mr Karena should be subject to an order restraining him from commencing proceedings concerning the trust in this Court.

Issues

[4] The issues for determination are:

(a) Should the application should be struck out?

(b) Should Mr Karena be restrained from commencing further proceedings on this case?

(c) Should the application for removal of trustees and review of trust be granted?

Background

[5] Te Koau A is Māori freehold land 1,396.5701 hectares in area located in Okawa. It was created by partition order in 1921.[1] There are currently 569 owners holding a total of 552,160 shares. An ahu whenua trust was constituted in 1975 and the terms of trust issued on 8 June 1978.[2] The current trustees are David Waka Steedman, Jordan Haines-Winiata, Lewis Winiata, Peter Steedman, Rhonda Toa Toa, Ruka Waapu and Sheryle Allen.

[6] Te Koau A has been the subject of litigation generated by Mr Karena for several years. In 2015, he filed applications per ss 19 and 239 of Te Ture Whenua Māori Act 1993, seeking an injunction to prevent the trustees from dealing with the land. On 30 September 2015 an interim judgment was issued determining that the application could not proceed.

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1 69 Napier MB 332 (69 NA 332)
2 112 Napier MB 36 (112 NA 36)

Mr Karena was directed to file further and better particulars of the allegations. Subsequently, he was given an opportunity to file an amended claim which was done on 2 June 2016, with Mr Karena seeking the removal of the trustees and a review of trust.

[7] Ms Sykes then applied for, effectively, a strike out of that application. On 9 December 2016 a judgment was issued dismissing the application because Mr Karena had not articulated the allegations in sufficient detail and clarity to enable a meaningful response. It was also found that some of the arguments were untenable.[3]

[8] On 27 June 2017, Mr Karena sought a rehearing of this decision under s 43 of the Act. That application was dismissed on the papers. Mr Karena appealed to the Māori Appellate Court where his appeal was also dismissed.[4]

Procedural history

[9] Mr Karena filed his current application on 13 June 2018. The case was heard before me on 3 October 2018 where the possibility of a restraining order per s 98C of the Act was raised.[5] The parties were given one month to file any additional submissions on this and other points following receipt of the hearing transcript.

[10] On 13 December 2018, Ms Sykes filed further submissions on the question of a s98C order. Mr Karena replied on 28 February 2019 and Ms Sykes made further submissions in reply on 11 April 2019.

Should the application be struck out?

Wero Karena's submissions

[11] Mr Karena argued that the trustees failed to carry out a review of the trust between June 2016 to June 2018, have misappropriated trust funds, and have failed to solve issues around the lease or support his application to gain legal access. He has also made several allegations relating to theft of trust funds. As a result, he requests that the Court exercise its

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3 *Karena v Allen – Te Koau A* (2016) 55 Tākitimu MB 148 (55 TKT 148)
4 *Karena v Te Koau A Ahu Whenua Trust – Te Koau A Ahu Whenua Trust* [2018] Māori Appellate Court MB 154 (2018 APPEAL 154)
5 72 Tākitimu MB 207-210 (72 TKT 207-210)

powers to review the trust's terms and operations with the view to having the current trustees "stood down" until a new election of trustees occurs.

[12] Mr Karena contended his application does not seek a rehearing of the earlier decision of the Māori Appellate Court, rather it is intended to address matters Mr Karena has "maintained silence" on with the hope of addressing them in a more "lenient" manner. He also claims that he has endeavoured, unsuccessfully, to negotiate with the chairman of the trust on several occasions regarding his concerns.

[13] In addition, Mr Karena disputed two points regarding the "Heads of Agreement" he entered into with the trustees in 2012 which provided him with a lease. First, he claimed clause 3 of the agreement provided that the lessee will re-fence as necessary and indemnify the owners of any obligation to restore the boundary fence. However, while this clause was included in the agreement the trustees have continued to deal with the erection of the fence with the neighbouring land and the trustees have been ignorant of the Crown's historical actions in making the legal arrangements that they have. Second, his daughter, Jessica Karena, had been excluded from the 2012 agreement, when in previous versions she has been a party along with her father. He says the exclusion of his daughter was unknown to him and made without his authority, although in his later submissions he says he does not wish to proceed further with this ground.

[14] Further, Mr Karena submitted that there has been theft of trust funds and the trustees have failed to account for them. He relied on the following:

(a) It was agreed that the trust would provide a budget of $1,000 to be used for administration, research and court costs to investigate the boundary. However, a report was never produced with this research.

(b) Trust funds were being claimed and paid outside of registered addresses and this could equate to theft under the Crimes Act 1961.

(c) Mr Steedman's attempt to charge Ngā Whenua Rāhui for his time in undertaking inspections on various parts of the block as part of their case studies, and the subsequent invoice issued to the trustees by Mr Steedman, were doubtful and fabricated to benefit Mr Steedman. While he has tried to confirm the details of the inspection by contacting the Ngā Whenua Rāhui Manager he has not received any communication to date.

[15] Mr Karena filed further submissions before the hearing which repeated these grounds. He stated that the trustees have failed to support his application to obtain legal access or pursue their own application. Mr Karena believes this was a disservice to the beneficiaries of the trust as the application would have had a good chance of success. Regarding access he claimed that the Department of Conservation had breached principles of natural justice by wrongfully manipulating the paper road to suit the neighbouring owner.

[16] Regarding the boundary, Mr Karena contended that there were historical omissions of facts and mistakes. He filed submissions and argued that the boundary issue should be dealt with by the Chief Judge pursuant to ss 44 and 45 of the Act. However, this application does not appear to have been filed.

[17] Although I directed Mr Karena to file further submissions on the issue of ss 98C and 98D, his submissions reiterated the grounds he previously submitted. Mr Karena made no submissions relating to those provisions. However, he then stated that he would not be proceeding with the allegations relating to Mr Steedman.

[18] Mr Karena disagreed with the trust's argument that his proceedings were vexatious and frivolous, on the basis that he had no desire to further his misappropriation claims with the relevant authorities unless events were discovered and became subject to the Crimes Act 1961, justifying an inquiry.

Te Koau A Trust's submissions

[19] Ms Sykes submitted that the application should be struck out as it was made without foundation and without merit. The serious allegations of fraud were not supported by any factual evidence. She also contended that the basis for this application was essentially an attempt to re-litigate matters that have already been dismissed. Counsel argued that the trustees have been subject to repeated costs of attending proceedings initiated by Mr Karena. She further submitted that frivolous applications by Mr Karena have caused prejudice to the trust who have not had any income from the land since 2014 due to his refusal to pay the outstanding rent.

[20] Ms Sykes argued that the allegations of misappropriation of trust funds was not supported by any evidence. The budget of $1,000 to be set aside to investigate the boundary issue was completed in line with standard trust processes. The trustees were responsible for the maintenance and development of the block and therefore entitled to set money aside for

this work. As for the allegations of misappropriation relating to travel reimbursements, counsel submitted that Mr Karena's belief that these issues equated to a crime under the Crimes Act was misguided. The trust's policy stated that travel costs would be reimbursed at actual and reasonable rates as determined by the trust and could be claimed for completing any business on behalf of the trust.

[21] Counsel submitted that the allegation relating to Mr Steedman's interaction with Ngā Whenua Rāhui was an "outlandish accusation". Ms Sykes argued that Mr Karena had not provided evidence to show that any misappropriation of funds occurred. Furthermore, counsel claimed that Mr Steedman followed the trust policy by seeking and receiving pre-approval to undertake the work he did with Ngā Whenua Rāhui. He then presented a report following that work and sought reimbursement, at a significantly undercharged amount.

The Law

[22] The law on striking out proceedings has been summarised in *Taueki v Horowhenua Sailing Club Ltd – Horowhenua 11 (Lake) Māori Reservation*:[6]

> [22] There are no provisions within the Act or the Māori Land Court Rules 2011 which specifically address an application to strike out proceedings. The powers of the High Court in relation to striking out a pleading may therefore provide some guidance.
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> [23] Rule 15.1 of the High Court Rules provides that the High Court can strike out all or part of a pleading or can dismiss or stay the proceedings:
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> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

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6 (2015) 337 Aotea MB 68 (337 AOT 68) at [22]-[26]

> [24] The established criteria for striking out was summarised by the Court of Appeal in *Attorney-General v Prince*, where the Court noted that it is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. The jurisdiction is one to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material. The fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction.
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> [25] This approach was followed by the Supreme Court in *Couch v Attorney-General*, where the Court stated:
>
> > [33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.
>
> [26] In the recent decision of *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the Court of Appeal also considered the requirements for striking out an application:
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> > [89] The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[23] The allegations made by Mr Karena against the trustees are similar to those he made earlier and can be summarised as they were in my decision of 9 December 2016: [7]

> The trustees have failed in their fiduciary duties and in their duty to exercise their discretionary powers carefully, properly and reasonably by:
>
> (a) Failing to maintain the value of the improvements of the block and prevent deterioration.
>
> (b) Failing to support Mr Karena's application to obtain legal access.
>
> (c) Failing to address issues concerning the lease and termination of the lease.
>
> (d) Allegations of Mr Steedman attempting to unsuccessfully charge Ngā Whenua Rahui for his time, and;
>
> (e) Failing to address the historical boundaries used.

[24] Mr Karena's previous application was dismissed in my December 2016 judgment. As foreshadowed, he had been granted several opportunities to file further and better

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[7] *Karena v Allen – Te Koau A* (2016) 55 Tākitimu MB 148 (55 TKT 148)

particulars, but he failed to specify how the alleged inaction of the trustees was detrimentally affecting the beneficial owners. Nor did it particularise what trust actions were "unsatisfactory" so as to meet the high standard for removal of trustees.

[25] In the present application, the grounds relied by Mr Karena are very similar to those that were raised by him 2016. Again, the Court has given Mr Karena several opportunities to particularise his claims against the trustees. While Mr Karena has made several amendments to his application, including appropriately withdrawing some of his allegations, he has not provided any new evidence apart from filing meeting minutes as evidence of the arguments he makes in relation to Mr Steedman's involvement with Ngā Whenua Rāhui. Moreover, it is unclear how they add to Mr Karena's case. Surely the best place to challenge these minutes would have been at the meeting of owners or in the earlier application filed by Mr Karena in 2015?

[26] In terms of the historical boundary issues, Mr Karena contended that the trustees have failed to address these and that to him it was one of the most important things to correct. However, I noted (and Mr Karena has acknowledged) that there are other fora, namely the Waitangi Tribunal and the Chief Judge's powers under s 44 of the Act, where these historic issues can and are being addressed. Such issues cannot be resolved in an application for the removal of trustees and review of trust. It is arguably beyond the scope of the trustees' duties to address such historic title issues, and I do not see any evidence filed by Mr Karena that the trustees' actions were detrimental to the owners. As I stated in 2016, I cannot discern that there is any reasonably arguable cause of action here.

[27] Mr Karena has claimed that the trustees have acted arbitrarily in their dealings with the lease agreement, in particular in relation to the boundary fence and access to the land. I note that cl 6 of the lease agreement states the lessee acknowledges that the land has no legal access and it shall be entirely their business to negotiate with neighbours or otherwise to provide or maintain such means of access. Put simply, as I stated in my 2016 decision, Mr Karena took the lease knowing that access was limited. Again, I cannot see any reasonably arguable cause of action in relation to this aspect of the application.

[28] In summary, I agree with Ms Sykes that, once again, the allegations raised in these proceedings have not been articulated in sufficient detail or with sufficient supporting evidence to enable a meaningful response from the trust, and in some instances are untenable. As foreshadowed, they also repeat, in part, earlier claims that have been disposed of in earlier proceedings. The application should therefore be struck out and dismissed.

Should Mr Karena be restrained from commencing further proceedings on this case?

Te Koau A Trust's submissions

[29] Ms Sykes referred to ss 98C and 98D of the Act and contended that these sections should be utilised in these circumstances as Mr Karena's arguments were totally without merit. She referred to factors set out by the Ministry of Justice's Departmental Report to the Justice and Electoral Committee on the Judicature Modernisation Bill as relevant to whether a proceeding was totally without merit.

[30] Counsel stated as there were no previous cases before this Court where ss 98C and 98D have been exercised, it would be appropriate to have regard to the antecedent provisions set out in s 88B in the Judicature Act 1908, and the case law on these provisions. Ms Sykes submitted that the applicant's causes of action were never clear, and his alleged concerns were not supported by evidence. His concerns with Mr Steedman were unfounded and unsubstantiated. Mr Karena was given multiple opportunities to better particularise his allegations and provide evidence to support them and he has failed to do so.

[31] In addition, Ms Sykes contended that if the Court granted an order restricting Mr Karena from commencing or continuing proceedings related to the trust, this would not bar him from filing new proceedings. It would instead mean that, before any other person may be required to respond to new proceedings filed by the applicant, the Court would need to grant leave for the proceedings to be accepted.

Wero Karena's submissions

[32] Mr Karena did not provide any detailed arguments in response on this issue. I apprehend that, at best, his submissions could be interpreted as making the point that he is entitled as an owner to bring applications to the Court for review which are permitted under the Act.

The Law

[33] Sections 98C and 98D were inserted into the Act in 2016 and are changes that give this Court boarder powers regarding proceedings that are without merit. It confers powers on a Judge to make a limited or an extended order restricting a person from commencing or continuing proceedings in the Court. Section 98C of the Act provides:

> **98C Judge may make order restricting commencement or continuation of proceeding**
> (1) A Judge may make an order restricting a person from commencing or continuing proceedings in the court.
> (2) The order may have—
> (a) a limited effect (a **limited order**); or
> (b) an extended effect (an **extended order**).
> (3) A limited order restrains a party from commencing or continuing proceedings on a particular matter in the court.
> (4) An extended order restrains a party from commencing or continuing proceedings on a particular or related matter in the court.
> (5) Nothing in this section limits the court's inherent power to control its own proceedings.

[34] The grounds for making such an order are set out in s 98D of the Act:

> **98D Grounds for making section 98C order**
> (1) A Judge may make a limited order under section 98C if, in proceedings about the same matter in the court, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.
> (2) A Judge may make an extended order under section 98C if, in at least 2 proceedings about any matter considered by the court, the Judge considers that the proceedings are or were totally without merit.
> (3) In determining whether the proceedings are or were totally without merit, the Judge may take into account the nature of any other interlocutory application or appeal involving the party to be restrained, but is not limited to those considerations.
> (4) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.
> (5) For the purpose of this section and sections 98E and 98F, an appeal in a proceeding must be treated as part of that proceeding and not as a distinct proceeding.

[35] In *Rudd – Horowhenua 11 Part Reservation Trust*, these new provisions were noted as being part of a policy of increasing the jurisdiction of the courts to regulate their own proceedings and to effectively deal with applications that are totally without merit.[8] In addition, this policy position is also reflected in the strengthening of the existing contempt provisions and the draft legislation currently before Parliament, the Administration of Justice (Reform of Contempt of Court) Bill. This concerns the publication of incorrect or inflammatory material on the internet as it concerns the judiciary and the discharge of their functions. In short, the ability of the Court to manage its proceedings has been enhanced by these changes and will be strengthened further once that Bill has passed into law.

[36] While there are no cases decided in this jurisdiction to date under s 98C, several other Acts have had similar provisions inserted. The Senior Courts Act 2016 has at ss 166-169 provisions identical to ss 98C-98F of Te Ture Whenua Māori Act 1993. Under s 166,

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[8] (2018) 390 Aotea MB 31 (390 AOT 31) at [17]-[18]

the court may make an order restricting a person from commencing or continuing a civil proceeding. A Judge may make a limited or an extended order if in at least two proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.[9]

[37] Recently, the High Court in *Auckland Council v Mawhinney* provided a useful analysis of the application of these provisions:[10]

> [45] "Proceeding" is not defined in the Act. Under the High Court Rules, a "proceeding" is defined as, "any application to the court for the exercise of the civil jurisdiction of the Court other than an interlocutory application".
>
> [46] "The court" is defined in the High Court Rules as referring to the High Court, but s 167 of the Act makes clear that it captures proceedings brought in "any court or tribunal". With that modification, I consider the term "proceeding" has the same meaning under ss 166-169 of the Act as it does under the High Court Rules.
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> …

[38] To determine whether a case was "totally without merit", the Court considered:[11]

> [48] In determining whether proceedings are or were totally without merit, the Court may take into account the nature of any interlocutory applications, appeals, or criminal prosecutions involving the party to be restrained, but is not limited to those considerations.
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> [49] The qualifying proceedings concerned must be proceedings commenced or continued by the party to be restrained, but may be against the same person or different persons.
>
> [50] The term "totally without merit" is not defined in the Act. In *Genge v Visiting Justice Christchurch Mens Prison*, Nation J referred to the factors identified by the Ministry of Justice in its report on the Judicature Modernisation Bill as being relevant to determining whether a proceeding is totally without merit:
>
> > (a) the proceeding has no prospect for success, whatsoever;
> >
> > (b) the proceeding exposes the defendants to inconvenience, harassment and expense out of all proportion to the gain a plaintiff is likely to receive;
> >
> > (c) the proceeding is brought at the drop of a hat despite the lack of merit;
> >
> > (d) the litigant has paid no regard to the merits, proportionality or costs of the proceeding;
> >
> > (e) the statement of claim or defence discloses no reasonable grounds of bringing or defending the claim;
> >
> > (f) the statement of claim is an abuse of the Court's s process or is otherwise likely to obstruct the just disposal of the proceeding; and
> >
> > (g) the litigant has failed to comply with a rule, practice direction or court order.

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9 Senior Courts Act 2016, ss 166-169

10 [2019] NZHC 299 at [45]-[46]

11 Ibid, at [48] – [53]; See also *Siemer v The Attorney-General* [2018] NZHC 3406; *Singh v Boutique Body Corporates Limited* [2018] NZHC 3233

> [51] Some of these factors are obviously more relevant than others.
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> [52] Under s 88B of the Judicature Act 1908, the predecessor to s 166, the proceedings complained of were required to be vexatious. While no longer an explicit requirement, the test for vexatiousness is still relevant as to whether an order is necessary. A Full Bench of this Court in *Attorney-General v Heenan* identified features that will indicate a claim is vexatious:
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> > (a) a pattern of complex, prolix, and sometimes incomprehensible pleadings;
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> > (b) the proceedings showing the respondent to be an almost compulsive litigant against a widening circle of defendants;
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> > (c) extravagant claims or scandalous allegations which the litigant has no prospect of substantiating or justifying;
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> > (d) the frequency with which part or all of the respondent's statements of claim have been struck out; and
> >
> > (e) the extent to which the respondent allows their proceedings to lie dormant.
>
> [53] A proceeding may be vexatious even if it contains the germ of a legitimate grievance, or may disclose a cause of action or a ground for institution. The conduct and outcome of such a proceeding when viewed in the overall light of the institution, conduct, and outcome of other proceedings may well demonstrate its own vexatiousness and unreasonableness. I consider these statements are equally applicable to whether a proceeding is "totally without merit" under s 166.
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> …

[39] Similar provisions have also been inserted as ss 228C – 288F of the Resource Management Act 1991 and have been considered by the Environment Court in *Page v Whanganui District Council*:[12]

> [54] There is no previous case before this Court where these provisions have been considered or where these powers have been exercised, and few examples of the use. of the similar powers conferred on other courts. I was referred to a decision of the High Court in *Meenken v Family Court at Masterton*, where Cull J made a limited order restricting the applicant from commencing any further proceedings concerning his "double/split person" concept on the basis that more than two proceedings had been brought that, viewed objectively, are or were totally without merit.
>
> **Restricting vexatious actions**
>
> [55] It is therefore appropriate to have regard to the antecedent provisions of section 88B of the Judicature Act 1908 and the case law in relation to that section. Section 88B provided:
>
> > **88B Restriction on institution of vexatious actions**
> >
> > (1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall

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12 [2018] NZEnvC 94 at [54]-[67]

> without the leave of the High Court or a Judge thereof be instituted by him in any court and that any civil proceeding instituted by him in any court before the making of the order shall not be continued by him without such leave.
>
> (2) Leave may be granted subject to such conditions (if any) as the court or Judge thinks fit and shall not be granted unless the court or Judge is satisfied that the proceeding is not an abuse of the process of the court and that there is prima facie ground for the proceeding.
>
> (3) No appeal shall lie from an order granting or refusing such leave.

[56] There are some obvious similarities between s88B of the Judicature Act 1908 and ss288C - 288F RMA. Both have as their purpose the control of legal proceedings to address abuses of process by empowering a court to restrict the right of a person to commence or continue proceedings without the leave of the court. The main differences, for present purposes, are:

> (a) The former only allows the Attorney-General to apply, while the latter can be the basis of an application by any party to a proceeding or by a Judge on his or her own initiative;
>
> (b) The former can only be exercised by the High Court while the latter (and corresponding provisions in other statutes governing other courts) enable other courts to exercise such powers; and
>
> (c) The test in the former is whether "any person has persistently and without any reasonable ground instituted vexatious legal proceedings" while in the latter it is whether the proceedings are or were "totally without merit."

…

[57] In that context, I set out extracts from case law containing the well-established principles relating to the former provision.

[58] In *Attorney-General v Hill* a full court of the High Court held that s88B was a justified limitation on the rights in s27 of the New Zealand Bill of Rights Act 1990 (NZBORA) in terms of ss 4, 5 and 6 of that Act and, in particular, was not capable of being overridden by s27(2) of that Act.

…

[61] The High Court noted that there were comparable provisions to the predecessor provision to s88B in legislation in the United Kingdom, Australia and Canada. It quoted with approval the following statement from an English decision in *Attorney-General v Jones:*

> The power to restrain someone from commencing or continuing legal proceedings is no doubt a drastic restriction of his civil rights, and is still a restriction if it is subject to the grant of leave by a High Court Judge.

[62] It is, respectfully, appropriate also to quote the rest of that passage, as cited in other New Zealand decisions:

> But there must come a time when it is right to exercise that power for at least two reasons. First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievances, and should not be squandered on those who do not.

[63] The High Court in *Hill* also stated the following principles, as summarised in the headnote:

> (a) The power is not to be lightly exercised.

> (b) The reasons for restraining a vexatious litigant are:
>
> (i) The entitlement of the defendants to protection.
>
> (ii) The need to use the limited resources of the judicial system for the resolution of genuine proceedings.
>
> (iii) The interests of the vexatious litigant him/herself.
>
> (c) The issue whether the defendant has persistently and without any reasonable ground instituted vexatious proceedings is to be determined objectively, not in relation to the defendant's subjective beliefs or motives.
>
> (d) The totality of the proceedings must be looked at.
>
> (e) The issue is not whether the proceeding was instituted vexatiously, but whether it is a vexatious proceeding.
>
> (f) A proceeding may be vexatious, notwithstanding that it may disclose the germ of a legitimate grievance, a cause of action, or a ground for institution.
>
> (g) "Legal proceedings" include civil proceedings In the High Court, District Court, and Disputes Tribunal.
>
> (h) Only proceedings instituted by the defendant are within s 88A. The section does not extend to a proceeding in which the defendant, as an executor, has been substituted as plaintiff.
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> …
>
> [67] It is apparent from this survey that in the context of court proceedings, the meaning of "vexatious" incorporates the sense of being totally without merit. At least to that extent, in my view, the case law under s88B of the Judicature Act is therefore relevant to how the Environment Court should approach any exercise of ss 288C - 288F of the RMA.

[40] In terms of litigants that bring repeated applications, the Court of Appeal in *Trustees of the Pukeroa Oruawhata Trust v Mitchell*, has stated that repeated applications are acceptable when there is no express statutory prohibition limiting them. The Court noted:[13]

> [25] But the doctrine of res judicata can have no application in cases where, as here, the statute permits successive applications to be made. Section 231(2) permits the trustees or beneficiaries to apply for review at intervals of not less than 24 months. Section 244, which may be activated only by trustees, does not contain any limit on the intervals at which applications can be made. While that section does not refer explicitly to the power to apply repeatedly, s 16 of the Interpretation Act 1999 states:
>
> **16 Exercise of powers and duties more than once**
>
> (1) A power conferred by an enactment may be exercised from time to time.
>
> (2) A duty or function imposed by an enactment may be performed from time to time.

[41] This Court in *Ashby – Oromahoe 17B1* also arrived at a similar conclusion and confirmed that where an owner is entitled to bring successive applications, these should be

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[13] [2008] NZCA 518 at [25]

considered on their merits. However, the applicant faces the risk of having the same outcome as previously decided should they wish to bring repeated applications:[14]

> [35] Given that an owner is entitled to bring successive applications under section 135 I must consider the present application on its merits. If an applicant simply repeats the grounds litigated in an earlier application, then the applicant risks ending up with the same result and a substantial award of costs, but there is no bar to my considering this further application.

[42] In *Matchitt v Matchitt – Te Kaha 65 Block*, the Māori Appellate Court also referred to making further applications on the same subject matter:[15]

> [54] We also take into account that partition or occupation order applications are different in nature to civil proceedings in the District or High Courts. They are not "litigation" in the truest sense, where the court provides a final ruling on a controversy between the parties. Applications for partition or occupation orders involve the lower Court exercising a statutorily prescribed discretion to invoke legal tools to address the circumstances of multiply-owned land. Like applications for review of trusts, they are not subject to the doctrine of *res judicata*: further applications can be brought in relation to the same subject matter. Importantly, as is demonstrated in the present case, the proceedings involve whānau members, most of whom are siblings, who will continue to live alongside each other for years to come. While there is undoubted value in ensuring the certainty of outcome of proceedings in the lower Court, this Court is also minded to ensure that the outcome of these types of proceedings is durable and does not lead to further disruptive proceedings.

Discussion

[43] Owners may bring applications for review every two years, and the Court of Appeal's ruling in *Trustees of the Pukeroa Oruawhata Trust v Mitchell* confirms that repeated applications are permissible where there is no express statutory prohibition. However, when the filing of repeated applications becomes an abuse of process, that is another issue again, as intimated in *Ashby – Oromahoe 17B1*.

[44] The new provisions inserted into the Act, ss 98C and 98D, allow the Court to issue an order restricting the commencement or continuation of a proceeding. One of the grounds for making such an order is whether the Judge considers that at least two or more of the proceedings are or were totally without merit. The phrase "totally without merit" is not defined in the Act. Ms Sykes referred me to the Report of the Ministry of Justice to the Justice and Electoral Select Committee on the Judicature Modernisation Bill dated April 2014, which set out relevant factors to consider. The High Court in *Auckland Council v Mawhinney* has adopted these factors.

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14 (2009) 136 Whangarei MB 74 (136 WH 74) at [31]
15 [2015] Māori Appellate Court MB 433 (2015 APPEAL 433) at [54]

[45] Ms Sykes submitted that Mr Karena's applications have had no real prospects of success. In the 2016 decision, I dismissed the application on the basis that Mr Karena had not filed sufficient evidence or particulars relating to the allegations he made to enable a meaningful response from the trustees. The present application relies on similar grounds to those he previously submitted in earlier proceedings that were dismissed.

[46] In addition, Ms Sykes confirmed that the proceedings exposed the trustees to inconvenience, delays and expense. This has also prevented the trustees from development of the land, along with Mr Karena's failure to pay rent. I have no doubt that the process has been time consuming and costly for the trust, a situation exacerbated by the non-payment of rent. These and earlier proceedings have also consumed the trustees personal time on more than one occasion. It is unsurprising that they are now seeking orders under ss98C and D.

[47] Mr Karena is a regular user of the Court processes and has been for many years. That in itself is not a criticism. The law permits applications of this kind being filed. However, there comes a time where repeated applications over the same or largely the same subject matter can only be interpreted as either seeking to relitigate already determined issues or they become an abuse of process. This is even more relevant where there have been unsuccessful appeals. In the absence of new and relevant evidence and particularised pleadings, then Mr Karena is likely to face the same outcome along with an award of costs against him. He may by then have increased his eligibility for orders per s98C and D.

[48] In my assessment orders under s98C and D are premature, but only just. If there are further attempts to relitigate these matters again, it is unlikely that the Court will countenance hearing what will be, essentially, the same case that has now been decided on two separate occasions. Moreover, Mr Karena should be under no illusion that if the same or similar pleadings are presented to the registrar of this Court, he may refuse to accept them for filing.

Should the application for removal of trustees and review of trust be granted?

[49] Mr Karena's application for a review of trust and removal of trustees is now redundant, given this decision. Even so, the law remains that any owner can file a review application within twenty-four months. Where that period has elapsed from the last review, then any owner my file for a review of trust. That said, if the review is articulated in the same or similar terms then it may not be accepted for filing by the registrar.

Decision

[50] The application is dismissed.

[51] The application for orders per s98C and D of the Act is dismissed.

[52] Counsel may submit a memorandum on costs.

Pronounced at 11.55 am in New Plymouth on Friday this 21st day of June 2019

L R Harvey
JUDGE