

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

A20190001001

UNDER Section 240 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF Waihi Kahakaharoa 3B2A and Waihi Kahakaharoa
9A
ROSALI THERES PAI
Applicant

Hearing: 13 March 2019, 397 Aotea MB 259-269
17 June 2019, 404 Aotea MB 28-63
(Heard at Taumarunui)

Judgment: 25 October 2019

JUDGMENT OF JUDGE M J DOOGAN

Introduction

[1] This is an application by Rosali Theres Pai, known as Zoe Pai to remove David Livingstone as a trustee of the Waihi Kahakaharoa 3B2A & 9A Trust.

[2] Ms Pai alleges that Mr Livingstone has breached his duties as a trustee by placing beehives on trust land without the knowledge or consent of his fellow trustees, and that his behaviour has led to a deterioration of relationships within the Trust to such a degree that the other trustees do not believe they can continue working with him.

[3] Mr Livingstone opposes the application.

Background

[4] The Waihi Kahakaharoa 3B2A & 9A Trust is an ahu whenua trust holding two blocks of Māori land on the northern shoreline of Lake Taupo. The responsible trustees are Ms Pai, Mr Livingstone, Bernadette Johnson, Tania Kelland and Tina Johnston-Downs.¹

[5] In September 2015 not long after his appointment as a trustee Mr Livingstone contacted his fellow trustees with a proposal to place beehives on the Trust's land as a way to generate income for the Trust. He suggested that two beehive sites could be established on the land immediately, in order to test the amount and quality of honey that might be produced. He was at that time working with a company known as Watson and Son. He was to receive a finder's fee if the hives were put on the trust land.

[6] In an exchange of emails, the trustees expressed support for Mr Livingstone's proposal, but asked that he provide further details, and a formal written agreement be put in place, before any action was taken to place beehives on the land. Zoe Pai, trust secretary at the time, said in an email dated 3 September 2015:

David please do not go ahead and put any beehives on the land until you have consulted with the trustees – this will cause rivalry with the trustees. Please be patient and wait.

¹ 339 Aotea MB 26-27 (339 AOT 26-27).

[7] On 8 September 2015, Mr Livingstone wrote to trustees saying:

I am just emailing to see if you support putting beehives on our land this year. We have the potential to earn good money depending on quality and quantity of honey. Just need your input-a-YES or NO before I proceed please - as Zoe said. THERE IS A ONE WEEK WINDOW FOR ALLOCATION OF HIVES.

[8] In either late 2015 or early 2016 (the exact date is unclear), Mr Livingstone placed 40 beehives on the Trust land. They were in fact hives from his own company, Manaianui Native Manuka Honey Limited, and not those of Watson and Son.

[9] It was not until 14 June 2016 that the trustees met to discuss Mr Livingstone's proposal. The minutes record:

Bee hives – David shared history and information about putting bee hives on Trust land, which he also communicated to the Trustees earlier this year. The Trustees found this opportunity very interesting and worthwhile and agreed to engage with the honey company Manaianui Native Honey Ltd.

The Trust notes that David Livingstone is the sole Director of Manaianui Native Honey Ltd. To avoid any conflict of interest, while Mr Livingstone can participate in conversations around the topic of bee hives with the Trustees, he cannot vote or influence any Trust decisions on matters concerning Manaianui Native Honey Ltd.

Moved: Tania

Second: Zoe

Carried unanimously.

[10] After the meeting closed and Tania (who had taken over the role of secretary and had been attending by phone) was offline, Ms Pai says that Mr Livingstone revealed to trustees that he had already placed hives on the land. Mr Livingstone says he does not recall in any detail discussions that occurred after the meeting, but disputes Ms Pai's recollection of these events, which he describes as hearsay.

[11] In the following months there was further correspondence between the trustees regarding the placement of the beehives on Trust lands, with Ms Pai and other trustees

expressing concern that the hives had been placed on land without notice to the trustees or a formal agreement being reached between the Trust and Mr Livingstone's company. Ms Pai characterises Mr Livingstone's approach towards his fellow trustees in this correspondence as "belligerent, disrespectful, unprofessional, and conducted in a bullying manner". Mr Livingstone disagrees. Not all of this correspondence is before the Court.

[12] On 19 September 2016, Mr Livingstone wrote to his fellow trustees concerning the hives on the land. The following extracts from that email are of relevance:

Just for clarity this trust has nothing to do with my new bee business. I have many other whānau who want bees on their land. I am going to pull my hives off Waihi Kahakaharoa and put them where the money will be appreciated. I do not need this continued abuse from so called whānau. I will deposit \$3,900 into a bank account of trust. I will not support any of this money to be used to support trustees or workings of the trust. There is funding available for this. So it is our job to raise money. This money should be put in a savings account. This is a one off payment to the trust for the rental of land. This amounts to \$100 per hive x 39 hives. This is above what companies pay for better sites. To note other whānau have offered me land for free to support my business to help it get off the ground. I did not accept and still pay them money. Why do you not want to support your own ... I remind the trustees I gladly gave \$100 for Bernie's travel. The payment for beehives would have been \$4,000. I have deducted less dollars one hundred. There will be no support from me for future travel ... I am dismayed to be part of a trust that doesn't know a good thing when it is staring them in the face. I hope things improve dramatically.

[13] On 25 February 2017 another trustee meeting was held, with Mr Livingstone absent (he said at hearing that he attempted to be connected into this hui by telephone). The minutes record that the trustees resolved that "the Trust has decided not to engage with Mr David Livingstone and his Manaianui Native Honey Limited, and the Trust no longer wish to take the matter any further. A letter is to be sent to Mr Livingstone advising him of the Trust's decision." Ms Pai also put a motion to the meeting that the Trust apply to the Māori Land Court to remove Mr Livingstone as a trustee, "because of his deceit to the Trust and breaching his dutyship". This motion was supported by the trustees present.

[14] A further trustee meeting was held on 12 August 2017, which Mr Livingstone was not advised of. Ms Pai said that trustees did not invite Mr Livingstone to this meeting because the process for his removal as a trustee would be discussed, and the other trustees "didn't trust him [and] didn't feel like engaging or having a discussion with him or any communication with him at that time."

[15] Matters did not progress until late 2018, when the trustees called a meeting of beneficial owners on 1 December 2018 at Tokaanu Marae. This meeting was advertised in the *Taupo and Turangi Weekender*, with one of the topics for discussion noted as ‘Replace responsible and advisory trustees’. On 5 November 2018, the Trust emailed Mr Livingstone advising that a motion would be put to owners at the meeting for his removal as a trustee.

[16] The meeting of owners took place on 1 December 2018. Mr Livingstone did not attend due to a conflicting appointment. At the meeting the motion that Mr Livingstone be removed as a trustee was put to the owners, with all present voting in support.

Procedural history

[17] The matter originally came before Judge Savage on 13 March 2019. Judge Savage recused himself and the matter was adjourned for a special sitting of the Court.² I heard the matter on 17 June 2019.³

[18] At the conclusion of the hearing I reserved my decision and directed that further information be filed. Various documents referred to at hearing were subsequently filed with the Court, including minutes of Trust meetings and the email correspondence between the trustees. Information was received from Mr Livingstone on 8 and 26 August 2019 and from the trustees on 29 August 2019.

The hearing and arguments

[19] When questioned at the hearing, Mr Livingstone was unable to say when he first placed the hives on the land, how many hives there were and when he removed them. In response to questions, Mr Livingstone said he put the hives on the land because “you can’t muck around with honey you are either going to get honey or you’re not.” He intended to let the trustees know at the next trust meeting. He stated that he had not completed a written proposal at the time of the meeting because it would be “a waste of time doing a written proposal if they were going to say no and it is only a small family trust.”

² 397 Aotea MB 259-269 (397 AOT 259-269).

³ 404 Aotea MB 28-63 (404 AOT 28-63).

[20] The following exchanges are noteworthy:

Court: There is nothing wrong with you being involved in the honey business, but the complaint being made is that you did not properly declare your personal interests in the business at the right time or in the right way.

D Livingstone: I did, Your Honour. Sir, if you look at the full minutes I straight away declared that I am the owner of the honey business. I declared it straight away in the minutes. I declared that straight away and then came back with the wording agreed subject to a written proposal.

...

The Court: If you already have hives on the land for some months why hadn't you notified the trustees earlier?

D Livingstone: Because we had our trustee meeting coming up. Your Honour, seriously, its timing of the hives to the trustee meeting and I can't give you the exact amount of time that those hives were on the land previous, it is just a fact of trying to catch the honey season.

...

The Court: But when you first moved hives onto the land did you think that that time that you should be talking to the trustees before you put them on the land and if not, why not?

D Livingstone: Because the timing thing, I don't know if our trust had even been in place, Your Honour.

Submissions of the Trustees

[21] Ms Pai submits that Mr Livingstone should be removed as a trustee of the Waihi Kahakaharoa 3B2A & 9A Trust on the following grounds:

- (a) Mr Livingstone breached his duties as a trustee by allowing his company, Manaianui Native Manuka Honey Ltd, to place beehives on the Trust's land

without notice to the Trust or any formal agreement between the Trust and Mr Livingstone's company being in place;

- (b) Mr Livingstone has behaved, in Ms Pai's words, in a 'repugnant and bullying' manner towards his fellow trustees, to the point that the relationship between him and the other trustees has broken down; and
- (c) The beneficial owners of the Trust have voted to remove Mr Livingstone as a trustee at a properly convened meeting of owners.

Submissions in response

[22] Mr Livingstone submits, in response to Ms Pai, that:

- (a) While he acknowledges that he placed beehives on the land without notice to the other trustees or any written agreement in place, this was only due the importance of having the hives in place at the right point in the season, and he submits that his actions in doing so are an insufficient ground for his removal as a trustee. Mr Livingstone also submits that he is the only trustee who has taken action to develop and produce revenue from the land, and he should not be penalised for doing so;
- (b) The characterisation of his communication with other trustees as 'belligerent' or 'bullying' is incorrect – Mr Livingstone submits that the communication between trustees can best be understood as a whānau squabble, and that he will be able to work constructively with his fellow trustees in the future; and
- (c) Some owners who support him did not receive email notification (or any other form of direct notice) of the 1 December 2018 meeting of owners, and accordingly the resolution to remove him as a trustee should not be treated as representing the view of all owners.

Law

[23] Section 240 of Te Ture Whenua Māori Act 1993 sets out the basis on which a trustee may be removed from a Māori land trust:

240 Removal of trustee

The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—

- (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
- (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[24] In *Rameka v Hall* the Court of Appeal held that, in applying section 240, the Māori Land Court must carry out a two-stage test: first, it must ask if the relevant trustee has breached his or her responsibilities as a trustee; and second, if it finds that the trustee has breached their trustee responsibilities, it must decide whether a removal order is appropriate.⁴ The Court of Appeal defined the responsibilities of a trustee as follows:⁵

[28] The general responsibilities of responsible trustees are set out in s 223 of [Te Ture Whenua Māori] Act. That section refers to the following:

- (a) Carrying out the terms of the trust:
- (b) The proper administration and management of the business of the trust:
- (c) The preservation of the assets of the trust:
- (d) The collection and distribution of the income of the trust.

[29] As we have noted, these statutory duties are not exhaustive and general trustee law principles are also relevant. Further, the trust order applicable to the trust may add other responsibilities. The relevant obligations of trustees have been described by the Maori Appellate Court in these terms:

...

⁴ *Rameka v Hall* [2013] NZCA 203 at [2].

⁵ At [28]-[30].

- i) A duty not to make a profit for themselves out of the trust property or out of the office of trust: *Garrow and Kelly Law of Trusts and Trustees* (sixth edition, pp 523–582 inclusive).

[30] The settled approach in the Maori Appellate Court in applying s 240 is to make an assessment of these standard duties together with what the Court has described as:

... the broader approach having regard to the special nature of Maori land trusts and the provisions of [the Act]. Thus the prerequisite for removal of a trustee was not a simple failure or neglect of duties, but a failure to perform them satisfactorily. Accordingly an assessment of the trustee's performance was essential when applying s 240.

[25] In *Ellis v Faulkner*, Judge Carter held that where a breach of trustee duties has been established, and owners pass a resolution for the removal of the relevant trustee, the Court will generally be guided by the wishes of these owners.⁶ While such a resolution of owners is not determinative of an application for removal, Judge Carter noted that it nonetheless accorded with the overall principles of the Act “that the Court in exercising its jurisdiction should have regard to the wishes of owners and that trustees should be broadly acceptable to the owners.”⁷

[26] The following observations from the same case are also pertinent:⁸

...all trustees must be prepared to work with the majority to implement the decision which has been made. Where a trustee still takes a different view or regards themselves as being separate from the majority of the trustees then dangers arise. If there are to be negotiations of a commercial nature then such attitude will be seen to be a sign of weakness... This is not the first time Mr Faulkner has been on his own and while one can perhaps overlook a failing at a first occasion the fact that it has continued shows a propensity for it to happen again. This Court therefore finds that Mr Faulkner's inability to team and work with the trustees is enough to be considered as a failure to carry out his duties satisfactorily and for this reason the Court agrees he should be removed as trustee.

⁶ *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7).

⁷ At 7.

⁸ At 9.

Discussion

[27] A duty of loyalty to the trust is a core responsibility of a trustee:⁹

It is an inflexible rule of a Court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit is not allowed to put himself in a position where his interests and duty conflict.

[28] The evidence clearly shows that Mr Livingstone has allowed his personal interest in the success of his honey business to come into conflict with his duty of loyalty to the trust and its beneficiaries. Mr Livingstone came across as single minded and driven in his approach. There is no doubt his proposal for income from honey has merit but he was clearly intolerant of any differing view or procedural delay. His evidence on critical matters was at times vague. Where there is a direct conflict, I prefer the evidence of the trustees.

[29] Even though he was asked to wait until trustees could consider his proposal, Mr Livingstone went ahead and placed his hives on the trust land. He did not disclose this to his fellow trustees for at least six months. He also initially misled trustees during the 14 June 2016 meeting where he spoke to the honey proposal. The breach of conduct is serious.

[30] It is clear to me that there has been unsatisfactory conduct which would justify removal. The remaining question is whether I ought to exercise discretion to remove. The principal duty of the Court is to see that trusts are properly executed, and the main guide must be the welfare of the beneficiaries.¹⁰

[31] The Court does not lightly exercise jurisdiction to remove a trustee. I conclude however, that this is a case where such an order is required.

[32] I have particular regard to the following:

- (a) Mr Livingstone's breach of duty was deliberate and knowingly made.

⁹ *Bray v Ford* [1896] AC 44 (HL) at 51 per Lord Herschell.

¹⁰ *Letterstedt v Broers* (1888-84) LR 9 App Cas 371.

- (b) Mr Livingstone does not appear to fully understand the seriousness of the conduct and attempts to blame his fellow trustees for a lack of business acumen.
- (c) The relationship between Mr Livingstone and his fellow trustees has broken down to an extent that it is affecting the proper functioning of the trust.
- (d) Despite his assertion that he could work constructively with his fellow trustees the evidence tells against this. Mr Livingstone is strong willed and impatient, and I have serious doubts that he is able or willing to work with fellow trustees to come to consensus decisions.

[33] I also have regard to resolution of beneficial owners which expressed unanimous support for the application for removal. It is noteworthy that Mr Livingstone was appointed trustee on 9 June 2015 on a conditional basis because the Court required information about a District Court proceeding concerning Mr Livingstone.¹¹ On clarification the Court confirmed the appointment noting that it was a matter known to the owners who nominated Mr Livingstone and should not therefore prevent his appointment.¹² It is also appropriate to have due regard to the views of owners who now support his removal.

[34] As I noted during the hearing, there is nothing wrong in principle with Mr Livingstone's wish to develop a honey business and neither is there anything wrong in principle with Mr Livingstone's seeking approval from the trust for the placing of hives on the land. Had proper process been followed there would be no issue. It would in fact be more straightforward for Mr Livingstone had he not been a trustee.

[35] Because Mr Livingstone decided to proceed unilaterally in breach of his duties of loyalty to the trust, the usual outcome would not only be removal as a trustee but also orders requiring him to disgorge profits (otherwise known as an account for profits). This remedy tends to be strictly applied:¹³

¹¹ 339 Aotea MB 26 (338 AOT 26).

¹² 339 Aotea MB 327 (339 AOT 337).

¹³ *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n (HL) at 144-145.

The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.

[36] However, I am mindful that neither Mr Livingstone nor the trustees have had any opportunity to comment on an account for profits. I will first hear from the parties before determining whether additional orders or remedies are appropriate.

[37] I therefore make only the order removing Mr Livingstone. This is to take effect immediately.

[38] The trustees are directed to file a submission clarifying whether they seek an account for profits with respect to any income Mr Livingstone received for the period the hives were on the land. Such submission is to be filed on or before 4.00pm Friday 29 November 2019.

[39] Mr Livingstone may respond to the trustees' submission providing that any such response is filed on or before 4.00 Friday 13 December 2019.

Pronounced at 4:30pm in Wellington on this 29th day of October 2019.

M J Doogan
JUDGE