

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND  
TAITOKERAU DISTRICT**

**A20170002696**

UNDER Section 58 Te Ture Whenua Māori Act 1993

IN THE MATTER OF An appeal against An injunction order of the  
Māori Land Court made on 31 January 2017 at  
146 Taitokerau MB 190 in respect of  
Mangakahia 2B2 No 2A1A block

BETWEEN KEVIN TITO  
Appellant

AND AROHA TITO AS TRUSTEE OF THE  
MANGAKAHIA 2B2 NO 2A1A AHU  
WHENUA TRUST AND GORDON LITTLE  
AS A BENEFICIARY OF MANGAKAHIA 2B2  
NO 2A1A AHU WHENUA TRUST  
Respondents

Hearing: 11 August 2017  
(Heard at Whangārei)

Court: Judge Savage (Presiding)  
Judge Reeves  
Judge Doogan

Appearances: T Phillips for the Appellant  
The respondents in person

Judgment: 29 September 2017

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Introduction

[1] Mangakahia 2B2 No 2A1A (the block) is a 41.1843ha block of Māori Freehold Land. Since 1995 it has been leased to neighbouring farmers (the Booths). Kevin Tito owns approximately 66% of the shares and is also a trustee of the Ahu Whenua Trust which administers the land. In January 2017 his fellow trustees obtained an injunction to prevent Kevin from taking steps to cancel, terminate, frustrate or otherwise interfere with the lease to the Booths. Kevin appeals that decision.

## Background

[2] In December 2016 Mr Tito sent a letter to the Booths' solicitor giving notice that the lease was to terminate on 31 January 2017 and that the Booths were to remove all stock. On 13 January 2017 Mr Tito emailed the Booths saying he may "consider retaining any remaining stock on the land for non-payment of rent, and will be locking all gates".

[3] These steps prompted Mr Tito's fellow trustees (Aroha Tito and Gordon Little) to seek an injunction.

[4] On 31 January 2017 Judge Armstrong granted an interim injunction in the following terms:

"...pursuant to Section 19(1)(b) of Te Ture Whenua Māori Act 1993 prohibiting Kevin Tito, his agents, workers, contractors, employees or invitees from taking steps to cancel, terminate, frustrate or otherwise interfere with the lease of Mangakahia 2B2 No 2A1A to Richard and Sharon Booth."

[5] The injunction came about in the context of long running related litigation, in this Court, the Māori Land Court, and the Court of Appeal.<sup>1</sup>

[6] A number of applications in this Court are yet to be determined. Of concern is the fact that in 2011 the Court issued an interim injunction prohibiting Webb Ross Lawyers from disbursing the rent money and accumulated interest paid into that firm's trust account

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<sup>1</sup> For instance: *Tito — Mangakahia 2B2 No 2A1A* (2009) 130 Whangārei MB 134 (130 WH 134); 141 Whangārei MB 117-131 (141 WH 117); 143 Whangārei MB 271; 1 Taitokerau MB 8-9 (1 TTK 8); 50 Taitokerau MB 26-27 (50 TTK 26); *Tito – Mangakahia 2B2 – No 2A1A* (2011) Māori Appellate Court MB 86 (2011 APPEAL 86); *Tito v Tito* [2012] NZCA 493; 6 Taitokerau MB 43-50 (6 TTK 50); 19 Taitokerau MB 172-190 (19 TTK 172); *Tito – Mangakahia 2B2 No 2A1A* [2016] Chief Judge's MB 398 (2016 CJ 398); *Tito v Tito – Mangakahia 2B2 No 2A1A Ahu Whenua Trust* (2017) 146 Taitokerau MB 135 (146 TTK 135).

by the Booths.<sup>2</sup> That injunction remains and substantial funds have accumulated in the solicitors trust account. We are told that there are debts due that have not been paid. The owners have not had any distributions while that injunction remains in place.

### Lower Court decision

[7] The Court found that:

- (a) Mr Tito’s argument that, as the major owner of the block, he has authority to make decisions in relation to the block was misconceived.<sup>3</sup> That argument was contrary to the well-established principle that the power and obligation of trustees of an Ahu Whenua Trust to manage the land “cannot be overridden by any owner or group of owners...so long as the trustees are acting within their terms of trust and the general law...”;<sup>4</sup>
- (b) A majority of the trustees of the trust (Aroha Tito and John Andrews) did not wish to terminate the lease nor to evict the Booths from the block. Therefore the applicants were prima facie entitled to injunctive relief;
- (c) Damages would not be an adequate remedy in this case. The Booths may suffer significant loss were Mr Tito to lock the gates to the block or remove stock from the block. Mr Tito may not have the means to pay damages to the Booths in respect of such a loss, and it may fall on the trust to compensate the Booths were Mr Tito to carry out his threats;
- (d) There was insufficient evidence to support Mr Tito’s contention that the trustees had failed to discharge their duties;
- (e) Mr Tito’s contention that the Booths were not paying rent was incorrect. They were paying rent but, pursuant to an interim injunction, no

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<sup>2</sup> 26 Taitokerau MB 267-269 (26 TTK 267).

<sup>3</sup> Judge Armstrong records that Mr Tito was seeking to terminate the lease in his capacity as the major owner of the block, and not in his capacity as a trustee. See 146 Taitokerau MB 190-209 (146 TTK 190) at 208.

<sup>4</sup> *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) 15 Aotea Appellate MB 192 (15 WGAP 192) at [5].

distributions could be made from the account into which the rental monies were paid.

### **The argument for the appellant**

[8] Submissions made on behalf of Mr Tito by his partner Tui Phillips were comprehensive. The core of the argument was that the correct process for extending the Booths' lease when it expired was not followed, and therefore Mr Tito, as the owner of a majority of the shares in the block, was entitled to cancel the lease.

[9] It was further submitted that Mr Tito's actions were necessary because the trust was dysfunctional and the owners were not receiving any distributions from the trust.

### **The law**

[10] An injunction is a discretionary remedy. The grounds for a successful appeal are narrow. For this Court to overturn a lower Court's exercise of its discretion, it must be shown that the lower Court erred in law or principle; took into account irrelevant considerations; failed to take account of a relevant consideration; or that the decision was plainly wrong.<sup>5</sup>

### **Discussion**

[11] We see no errors which would warrant this Court overturning the lower Court's decision.

[12] The lower Court did not err in law or principle. The letter and email Mr Tito sent to the Booths constituted 'threatened trespass' in terms of s 19(1)(a) of the Te Ture Whenua Māori Act 1993, and so the Court's jurisdiction to issue an injunction was engaged. The lower Court applied a principle of long-standing: that the decisions of trustees of an Ahu Whenua Trust cannot be overridden by any owner, so long as the decision does not contravene the general law, is within the terms of trust, and it reasonably appears that the

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<sup>5</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

trustees are acting for the benefit of the beneficial owners as a whole.<sup>6</sup> Trustees can act by majority and a majority of the trustees were in favour of the Booths' lease continuing to roll over on a periodic basis. Mr Tito's purported cancellation of the lease was not legally effective. This formed the basis of the lower Court's decision that a prima facie case for injunctive relief had been made out. We see no error in that reasoning.

[13] Neither did the lower Court err in determining that damages would not be an adequate remedy and that the balance of convenience weighed in favour of injunctive relief being granted. The Court took into account relevant considerations, namely the significant loss which the Booths could suffer if Mr Tito interfered with their stock and the possibility that Mr Tito may not be able to compensate the Booths for any such loss. The Court did not take into account any irrelevant considerations.

[14] We do not consider that the decision of the lower Court was plainly wrong.

### **Concluding remarks**

[15] We consider that the delay in resolving the outstanding applications is unsatisfactory. It is clearly the cause of considerable frustration to Mr Tito. It is unsatisfactory that longstanding issues over trustee performance, appointments, and access to funds have yet to be resolved. They must now be given priority.

### **Decision**

[16] For the reasons given above the appeal is dismissed.

This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

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P J Savage  
**JUDGE**  
(Presiding)

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S F Reeves  
**JUDGE**

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M J Doogan  
**JUDGE**

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<sup>6</sup> *Eriwata*, above n 4, at [5] approved recently by this Court in *Davies v Trustees of Te Tii (Waitangi) B3 Ahu Whenua Trust - Te Tii (Waitangi) B3 Trust* [2015] Māori Appellate Court MB 611 (2015 APPEAL 611).