

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

A20180008556

UNDER Sections 67 and 231 of Te Ture Whenua Māori
Act 1993

IN THE MATTER OF Okaihau 3C2

BETWEEN KEVIN WILLIAMS
Applicant

AND LEANNE COTTER-ARLIDGE AND MERE
MANNING as trustees of Okaihau 3C2 Ahu
Whenua Trust
Respondents

Hearings: 30 January 2019, 74 Tākitimu MB 224-232
(Heard at Hastings)

Appearances: Kevin Williams in person
Leanne Cotter-Arlidge, Mere Manning and Hana Cotter in person

Judgment: 18 July 2019

JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Kevin Williams is an accountant trading as Kevin Williams & Associates. He seeks payment for accounting services he claims were rendered to the Okaihau 3C2 Ahu Whenua Trust. He also says that he was engaged for the work charged for but has not been paid and to that end he has applied for a review of the trust.

[2] The trustees deny the claim. They say that they did not engage Mr Williams for the services he has charged for and in fact requested that he cease to act on their behalf. In addition, the trustees claim Mr Williams' charges are excessive. More seriously, they allege that he has acted dishonestly regarding tax returns and kept money received on behalf of the trust for himself to satisfy the accounts he claims are due and payable.

[3] The issues for determination are:

- (a) Does Mr Williams have standing to file an application for review?
- (b) Was Mr Williams properly engaged to provide accounting services for the trust?
- (c) Does the Court have jurisdiction to provide a remedy to Mr Williams?

Background

[4] Okaihau No 3C No 2 is Māori freehold land of 53.3476 hectares created by partition order in 1907.¹ The current trust was established under s 438 of the Māori Affairs Act 1953 on 8 April 1987. The original trustees were William Wairau, Emily Ramsay and Adam Puriri (Arama Puriri).² Mr Puriri outlived his fellow trustees and held his position until his death on 7 August 2014.³ Ms Cotter-Arlidge was appointed an advisory trustee in 1994.⁴

[5] Although only an advisory trustee at the time, this Court has previously found that Ms Cotter-Arlidge was a signatory to the trust's bank account and refused to sign cheques for payment.⁵ That finding came about in an application for removal of Mr Puriri as a trustee, although orders were never completed due to his passing. The current trustees are Ms Cotter-Arlidge, Mere Manning and Whare Randell as appointed on 7 May 2014.⁶ It is clear is that the trust has a history of dispute between the trustees and some of the owners.

[6] On 8 January 2019, I directed the application be amended to a judicial conference under s 67 of the Act which was held on 30 January 2019. Mr Williams gave evidence of the work he has done for the trust, how he was engaged for that work, and his dealings with Inland Revenue on behalf of the trust. The trustees submitted that they were unhappy with the accounting work rendered and would not be paying any further money to Mr Williams.

Applicant's submissions

[7] Mr Williams filed written submissions on 1 April 2019 in addition to his appearance. Mr Williams submits he was engaged on 15 March 2012 by Arama Puriri, who was the sole responsible trustee at the time and remained in that role until the respondents were appointed in May 2014. He was known to Mr Puriri as he had previously rendered accounting services

¹ 58 Napier MB 243 (58 NA 243)

² 122 Napier MB 353 (122 NA 353)

³ 35 Tākitimu MB 112 (35 TKT 112)

⁴ 137 Napier MB 19 (137 NA 19)

⁵ *Puriri - Okaihau No3C No2* (2013) 28 Tākitimu MB 129 (28 TKT 129) at [32]

⁶ 31 Tākitimu MB 212 (31 TKT 212)

to the trust and was engaged for general accounting and tax matters. Mr Williams believed he was tasked with doing everything required in terms of the tax issues the trust was facing, and to help with the Court's review of the trust.

[8] In addition, Mr Williams says he had previously worked for the trust for some ten years, until the death of one of the trustees in 2002 or thereabouts. Because of this work, Mr Williams submits that he was approached by IRD in early 2012 to assist the trust with its outstanding tax. No tax returns had been received since 2003 and IRD were considering prosecution. No other person was engaged for accounting work by the trust. To obtain financial records, Mr Williams contacted advisory trustee Aoterangi Cotter, who both provided the information and signed Mr Williams' engagement form. The applicant submits this form was signed on 27 April 2012. Mr Williams states he was also approached by the Māori Land Court regarding a review of the trust at a similar time.

[9] Further, Mr Williams submits he was able to bring the trust's tax obligations and returns up to date with the assistance of Mr Puriri. When Aoterangi Cotter passed away, Mr Williams attempted to work more closely with Ms Cotter-Arlidge, who was an advisory trustee at the time, but found that she and Mr Puriri had fallen out. Due to that relationship deterioration, Mr Williams says he was unable to have the trust's tax debts paid.

[10] According to Mr Williams, he was asked by the Court to liaise with auditors who had been appointed because of the review of trust in 2012. Mr Williams submits that due to unavailability of the auditors, he was also asked to present the audit report to a meeting of owners alongside financial returns for 2013 and 2014. These were approved by the owners.

[11] On ceasing to act for the trust in February 2015, Mr Williams tendered his final account, being \$1,989.50 in fees for the services he provided. He also seeks payment for an outstanding account from 30 April 2014 for \$2,337.73. He states that under the agreement between himself and the trustees, he had authority to pay his own accounts from trust money, but instead chose to request payment from Ms Cotter-Arlidge. Mr Williams believes Ms Cotter-Arlidge chose not to pay as she believed the cost should be covered by the Māori Land Court for requiring the review and audit. Unable to reach an amicable conclusion with the trustees Mr Williams felt he was obliged to file the current application. The total amount sought is \$4,327.23.

[12] Payment was received by Mr Williams in 2013 for his accounts from October 2012 and October 2013, but that this was at the request of Mr Puriri. Mr Williams submits his

payment was stalled as Ms Cotter-Arlidge was refusing to co-sign cheques for the trust and was not acknowledging correspondence. Mr Puriri instead offered to pass on the tax refund cheques to Mr Williams. Mr Williams states that these cheques were deposited into his trust account and then transferred to the trust's account with payment sought from Ms Cotter-Arlidge, despite the authority to pay his own fees granted by Mr Puriri.

[13] On 27 February 2015, Mr Williams received notice from Eplett and Co that they had been engaged by the trust for accounting and tax matters. He submits that this was how he learned his services had been terminated by the trust, but that he did not receive any request for account information. Since then, he has offered to help Eplett & Co where he can but says he has not received details of what information they seek.

[14] In his written submissions following the hearing, Mr Williams confirmed that the work he completed for the trust was set out in the accounts rendered. However, he also listed the major items as set out below:

1. Considerable time incurred initially, to try and find who had the Trust records, and collect them.
2. Writing up the Trust books of account for each of the 9 years, 2004 to 2012.
3. Preparing Statements of Financial Performance of the trust, for each of the 9 years.
4. Located details of past Trust dividends to shareholders. Calculated and listed dividends unpaid.
5. Preparing Statements of Financial Position of the Trust, at the end of each of the 9 years.
6. Preparing Income tax returns or the Inland Revenue Department for each year.
7. Filing the returns with IRD for each year, receiving and checking the accuracy of each year's assessments and the correctness of liability, for the interest and penalties charged each year.
8. Contacting IRD as required asking for correction, requesting and checking amended assessments.
9. Preparing, and updating from time to time, various summaries of the Income tax, interest and penalties owing to IRD, and reporting to the Trustees, and the Maori land Court.
10. Considerable time spent trying to get the large amount of taxation arrears paid as soon as possible, to contain the interest and penalties being incurred, with limited success, due to the unwillingness of the Trustees to cooperate with each other, and to co-sign cheques.
11. Spent considerable time in contact with IRD, because of their continuing efforts to enforce payment of the taxation arrears, including stopping IRD from putting a charge on the Trust bank account to enable IRD to extract the funds directly from the Trust bank account.
12. Sought assistance from the MLC to get taxation arrears paid. Prepared reports for the MLC.

13. Ascertaining from the Hastings District Council, the amount of the property rates arrears.
14. Contacting the property tenant to pursue payment of rental and rates arrears.
15. Meeting with the Maori Land Court officers to ascertain details of what was required of the Trust to enable the Courts review requirements to be complied with.
16. Preparing and filing a Review request, and providing all the necessary financial information.
17. Providing Financial accounts to the MLC for the Review, and attending Review hearings.
18. Many meetings with the Auditor appointed. Preparing and providing him with all the financial and taxation details, and explanations as requested.
19. Audit started 26 July 2013, completed 11 April 2014. Continued to prepare and provide him with information and explanations as requested. Received his draft audited statements for comment.
20. Advising the Trustee that there were taxation advantages in the Trust applying to IRD for approval to become a Maori Authority. Completing an application as required by IRD.
21. Request by the MLC to prepare Financial Statements for the 2013 and 2014 years.
22. Eventually obtained trust records from Leanne Cotter with MLC assistance.
23. Wrote up Trust records, and prepared Financial Statements for the 2013 and 2014 years.
24. Prepared and filed taxation returns with the IRD for the 2013 and 2014 years.
25. Travelled regularly to the Trustee, MLC, and the Bank, to report and keep everyone informed.
26. Represented the Auditors, at their request, at the meeting of owners on 26 April 2014, convened by the MLC, to receive the Auditors report and Financial Statements for the 2009 to 2012 years, and I also presented the Financial Statements prepared by me for the 2013 and 2014 years. They were all approved by the Meeting.

Trustees' submissions

[15] Ms Cotter-Arlidge, Mere Manning and Hana Cotter appeared as respondents to the application, although Hana Cotter is not listed as a trustee. The respondents submit they have no personal knowledge of the accounts approved to be paid by Mr Puriri nor is there any evidence of these among trust documents.

[16] Ms Cotter-Arlidge stated that during her time as a trustee, very little work has been required to manage the books. Because the trust has little income and few debts, she does not believe Mr Williams' accounting fees are justified. However, she paid what she thought the trust owed Mr Williams and then asked that he stop acting as the trust's accountant.

[17] Ms Cotter-Arlidge claims that she twice asked Mr Williams to stop acting for the trust, in 2012 and 2016, first in her capacity as an advisory trustee and then as a responsible

trustee after her appointment in May 2014. The trustees submit that shortly before their appointment, they discovered that Mr Williams was taking money from the trust's tax return as a means of paying his accounts. Furthermore, the respondents stated their belief that Mr Williams misrepresented the trust's income to receive an equivalent amount of money back as a tax refund and take his payment. In total, Ms Cotter-Arlidge found the tax returns were incorrect by \$2,337.73 and requested Mr Williams refund this amount to the trust. She disputes his submission that he voluntarily repaid this money into the trust account.

[18] After their appointments, the trustees engaged alternative accountants who assessed the accounts and advised the trustees to obtain Mr Williams' time sheets. The respondents say they found that Mr Williams has been unhelpful and unforthcoming – he has not provided the documents requested by the current accountants, nor records of the work he completed on behalf of the trust. They submit that by comparison to the trust's current accountant, Mr Williams charged very high fees for what the trustees see as uncomplicated accounting matters. As the respondents consider that they have properly met Mr Williams' costs, they do not wish to pay him again.

[19] The trustees raised concerns about some of the work Mr Williams has charged for, including assisting the Court-appointed auditor at the request of the Court and providing documents at the request of the auditor and the accountants currently engaged by trust. They submit that these are not tasks the trust should have to pay him for and regardless, the auditors found it very difficult to obtain the requested information from Mr Williams. The trustees further submit that Mr Williams acted outside his remit by overseeing rent and rates payments on behalf of the trust.

[20] The trustees submitted emails from Eplett and Co, the current accountants for the trust, supporting their claim that Mr Williams undertook "dodgy" transactions with trust money and has not been providing the requested information. The evidence from the current accountants disclose that the record keeping has been poor and that the last annual report for the trust prepared by Mr Williams was at 31 March 2014. Payments are unexplained, balance sheets from year to year do not add up, it is unclear which beneficiaries claimed dividends and which have not, and tax returns were not filed which led to unnecessary IRD penalties.

The Law

[21] Section 231 of the Act 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.

[22] Jurisdiction to bring an application under this section is limited by the wording of the section itself. As this Court has previously recognised, only trustees and beneficiaries of a trust have standing to bring an application for review of trust.⁷

Discussion

Does Mr Williams have standing to file an application for review?

[23] As foreshadowed, Mr Williams does not have standing under the Act to bring this application for review. Although s 37(1) grants the Court jurisdiction to hear any person claiming to have an interest in a matter, its broad application is overridden by the specific wording of s 237. The trust cannot be reviewed without an application from a trustee or beneficiary, which has not been received. While Mr Williams may have standing to appear in a properly brought application for review, his application must fail for lack of jurisdiction.

[24] The matter of standing was not raised by either party at the judicial conference nor in the written submissions. With consideration to the issue of natural justice, and the amendment to hear the application under s 67 of the Act, I will now consider the merits of the case and whether this Court has jurisdiction to make alternative orders.

Was Mr Williams properly engaged to provide accounting services?

[25] This is not the first time that matters relating to this trust have been brought before the Court. In a 2013 decision, I confirmed that Mr Puriri had the authority to act for the trust and to make binding business decisions despite being the sole remaining responsible

⁷ *Nutira v Burns – Ōnuku 886 2B2 Ahu Whenua Trust* (2018) 39 Te Waipounamu MB 34 (39 TWP 34)

trustee.⁸ At the time, it was noted that a more prudent trustee might have sought to replace his deceased fellow trustees by arranging a meeting of owners so that an election of trustees could take place. Ultimately, however, I concluded that Mr Puriri's decisions from his time as sole responsible trustee were made with the necessary authority. That decision was never subject to appeal.

[26] The Court records confirm that Mr Puriri continuously held a position as responsible trustee from his appointment in 1987 until his death in 2014 and during that period there were few instances of formal complaints over his trusteeship and that of his colleagues. That changed once he became the sole responsible trustee. Ms Cotter-Arlidge and Mr Aoterangi Cotter were appointed as advisory trustees in 1994. In September 2012, due to the deaths of all other responsible and advisory trustees, the number of trustees was reduced to Mr Puriri as sole responsible trustee and Ms Cotter-Arlidge as sole advisory trustee.

[27] Mr Williams filed a copy of his letter of engagement. It was signed by Mr Puriri on 15 March 2012 and Mr Aoterangi Cotter on 27 April that same year. I see no reason to doubt Mr Williams' engagement was genuine nor to relitigate the binding effect of Mr Puriri's decisions as sole responsible trustee. Mr Williams was properly engaged to complete accounting work for the trust and did so until the responsible trustees engaged alternative accountants. As an advisory trustee, Ms Cotter-Arlidge had no authority to dismiss Mr Williams and could not do so until her appointment in May 2014. In accepting that Mr Williams was properly engaged, I now consider whether the Court has the jurisdiction to provide the remedy sought.

[28] Before then, I make the observation that if the trustees have been dissatisfied with the level of fees charged and the nature of the work Mr Williams claims he completed, then it would not be unreasonable for them to take that issue further with the relevant professional body.

Does this Court have jurisdiction to provide a remedy to Mr Williams?

[29] Under s 37(3) the Court may exercise any power granted under the Act which is qualified by the need for notice as agreed between the parties. On reflection, there may be a possibility for remedy under four sections of the Act: ss 18(1)(d), 242(1), 83 and 238(2).

⁸ *Puriri - Okaihau No3C No2* (2013) 28 Tākitimu MB 129 (28 TKT 129) at [26]

[30] Section 18(1)(d) sets out the Court’s jurisdiction to hear matters of contract and tort:

18 General jurisdiction of court

(1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:

...

(d) to hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Maori freehold land:

[31] This section appears to give the Court the jurisdiction to grant the relief Mr Williams seeks, however, its application is coloured by the words “relates to Māori freehold land”. The meaning of this term has been considered by this Court and the Court of Appeal.⁹ In considering s 18(1) in the case *Attorney-General v Maori Land Court* the Court of Appeal found that paragraphs (a)-(d) apply only to Māori freehold land.

[32] In *Gardiner v Gorringer*, Judge Clark considered this finding and observed that paragraph (d) does not use the same mandatory language as paragraph (c).¹⁰ On consideration of other authorities, Judge Clark concluded that “relates to Māori freehold land” means “significantly referable to” - there must be a clear nexus between the debt or damage, the contract and the Māori freehold land concerned. In most applications, this translates to damage to Māori freehold land arising from the breach of contract or tortious act. In *Gardiner*, Judge Clark found it was applicable to a contract to plant and maintain pasture on Māori freehold land. The jurisdiction does not extend so far as damage to or loss of chattels.¹¹

[33] Considering these authorities, it is arguable that orders per s 18(1)(d) could be made. The debt Mr Williams alleges he is owed does relate directly to Māori freehold land. He was to complete accounting services for the trust, which derives its income from business it carries out on Māori freehold land. This is arguably a sufficient nexus to invoke s 18(1)(d). Alternatively, it could be said that the debt in relating to the land must be a product of the land or money derived from the use of the land in question.

[34] Section 242 empowers the Court to order payment of money held on trust for several reasons, where the necessary jurisdiction is obtained. The Court may, of its own motion and without application by an interested person, issue orders under s 242 for payment of money

⁹ *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA); *Churton v Trustees of Mangaporou Trust* (2003) 132 Aotea MB 219 (103 AOT 219) and *Gardiner v Gorringer – Tauwhao Te Ngare Block* (2008) 93 Tauranga MB 63 (93 T 63).

¹⁰ *Gardiner v Gorringer – Tauwhao Te Ngare Block* (2008) 93 Tauranga MB 63 (93 T 63) at [56].

¹¹ *Churton v Trustees of Mangaporou Trust* (2003) 132 Aotea MB 219 (103 AOT 219)

to “persons beneficially entitled to the money”. The Māori Appellate Court has found that the consent of trustees is no barrier to any order under this section, although their views should be sought where possible.¹² In keeping with the extensive supervisory powers the Court is granted over trusts under s 237, the wording of s 242 is broad.

[35] Moreover, the common use for s 242 is to require trustees to pay beneficiaries the appropriate share of succession funds or dividends or repay the costs of funeral and unveiling expenses. On consideration of the wording used, and although the powers under this section are wide, it is intended that they be used to benefit only those to whom a fiduciary duty is owed.

[36] While there was a contractual relationship between Mr Williams and the trustees and it appears that a debt may be owed, s 242 does not appear to enable the payment of trust money to a third party in their own right. The courts have recognised a number of relationships based on contract necessitate such extra care as to be fiduciary in nature but I do not consider that to be the case in these circumstances.¹³ The relationship between these parties is purely contractual and brings about no duty of loyalty.¹⁴ Regardless, had a fiduciary duty been found, it could not have been used to grant any greater contractual rights than those already set out in the terms of the contract.¹⁵ My conclusion is that s 242 cannot be used to order payment of trust money to a third party where a beneficial entitlement to that money arising from a fiduciary duty does not exist.

[37] Section 238 empowers the Court to enforce the obligations of a trustee in relation to the trust. An application has previously been made for payment of contractual fees owed by a trust under this section. In similar circumstances, former counsel for the Tokaanu Māori Township 2nd Residue Trust applied under s 238 to require payment of legal fees owed by the trust.¹⁶ Final orders for payment of the debt were not issued in that proceeding but it appears at least arguable that the section could be applied in the current case. When I did not issue the orders sought, the applicant sought alternate orders under s 83 for appointment of a receiver to enforce charges against the trust.¹⁷ That application was dismissed as there was

¹² *Kemp v Kemp - Margaret Marata Kemp* (2010) 2010 Maori Appellate Court MB 7 (2010 Appeal 7)

¹³ John Burrows, Jeremy Finn, Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 2.4.1

¹⁴ *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC) at 5 per Henry J

¹⁵ *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC at 648 per Lord Jauncey

¹⁶ 339 Aotea MB 254-264 (339 AOT 254-264)

¹⁷ *Roberts v McKenzie – Tokaanu Māori Township 2nd Residue Trust* (2016) 371 Aotea MB 133 (371 AOT 133)

little use in the appointment of a receiver. The trust owned property that had the potential to create income, but it was operating at a loss. The appointment of a receiver would have been detrimental to the trust's ability to restore its financial position and would not have resulted in counsel recovering the costs he was owed. More importantly, in the context of this case, before seeking remedies in this Court, the applicant in the Tokaanu Māori township proceedings obtained summary judgment from the District Court. That decision confirmed that the trustees were in breach of trust and a debt of more than \$130,000 was owed to that applicant.

[38] Although I do not rule out a potential remedy under ss 83 and 238(2) it seems appropriate, in consideration of the authorities, that Mr Williams seek judgment in his favour from the District Court defining what he is owed under the contract. He could then seek to enforce those orders in this Court if required. If Mr Williams disagrees and would prefer to pursue his case before me, he must file a fresh application.

Decision

[39] The application for review of trust is dismissed.

[40] There will be no order as to costs.

Pronounced at 10.15 am in Whanganui on Thursday this 18th day of July 2019

L R Harvey
JUDGE