IN THE MAORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20090015245
A20090015244

UNDER	Sections 19 and 269(4), Te Ture Whenua Māori Act 1993
BETWEEN	THE COMMITTEE OF MANAGEMENT OF THE MANGATAWA PAPAMOA BLOCKS INCORPORATED Applicant
AND	WHITIORA RANGIMARIE MCLEOD Respondent

Hearing: 6 November 2009
(Heard at Tauranga)

Appearances: Mr A Tate, Counsel for the applicant
Mr W McLeod in person

Judgment: 13 November 2009

RESERVED JUDGMENT OF JUDGE S R CLARK

Introduction

[1] On 28 August 2009 Mr Whitiora McLeod was elected to the Committee of Management of the Mangatawa Papamoa Blocks Incorporated ("the Incorporation"). In late August and September there were incidents involving him which prompted a majority (four out of seven) of the Committee of Management members to file and support an application to the Māori Land Court on 17 September 2009 seeking his removal as a Committee of Management member. Mr McLeod opposes the application.

[2] On the same day the Incorporation sought an injunction restraining the activities of Mr McLeod. I heard and granted that injunction on an ex parte basis on 21 September 2009 prohibiting Mr McLeod from entering onto any Māori freehold land owned by the Incorporation and from entering into the office and administration centre for the Incorporation. That injunction was to endure until the first substantive hearing of the removal application or until further order of the Court.

The Hearing

[3] This application was heard at Tauranga on 6 November 2009. Various witnesses gave evidence for the Incorporation including two Committee of Management members, the current CEO and a shareholder. I also received an affidavit from Mr George Skudder, the current Chairperson in support of the application.

[4] Mr Whitiora McLeod gave evidence, he also called two current Committee of Management members in support of his case and two other shareholders.

[5] The hearing of the matter did not conclude until late Friday evening, 6 November 2009. I indicated to all present at that time that the injunction would continue until such time that I had released a reserved decision.

The Allegations

[6] The allegations against Mr McLeod can be summarised as follows:

a) That he has interrupted management meetings with third parties;

b) That he has been abusive and intimidatory towards employees of the Incorporation;

c) That he has a reputation for aggressive and intimidating behaviour;

d) That Mr McLeod's ongoing presence on the Committee of Management is a threat to the well being of the organisation;

e) That he does not understand his governance role, he lacks business skills and will promote his own agenda.

Legal Principles

[7] The application is brought pursuant to section 269(4) of Te Ture Whenua Māori Act 1993. It reads as follows:

> ***269 Committee of management***
>
> *(1) Upon the making of an order incorporating the owners of any land under this Part of this Act, the Court shall, having regard to but not being bound by any nominations of members that may be made by or on behalf of the owners who have applied for incorporation, appoint an interim committee of management consisting of not less than 3 nor more than 7 persons; and the persons so appointed shall hold office as members of the committee of management until the first annual general meeting of the incorporation.*
>
> *(2) At the first annual general meeting of shareholders of a Maori incorporation, the shareholders shall elect a committee of management in accordance with the constitution of the incorporation; and thereafter the members of the committee shall hold office in accordance with the constitution.*
>
> *(3) Every member of the committee of management of a Maori incorporation shall be responsible for the proper administration and management of the affairs of the incorporation.*
>
> *(4) Any shareholder may at any time apply to the Court for the removal from office of any member of the committee of management on the ground that—*
>
> *(a) The member has failed to carry out his or her duties satisfactorily; or*
>
> *(b) The member has contravened any of the provisions of this Part of this Act or of the constitution of the incorporation, or has otherwise acted in a manner that is incompatible with membership of the committee; or*
>
> *(c) It is otherwise in the best interests of the incorporation that the member be removed from office,—*
>
> *and the Court, on being satisfied that sufficient cause has been shown, may remove that member from office accordingly.*
>
> *(5) The Court may appoint any qualified person to be a member of the committee of management of a Maori incorporation, notwithstanding that that person has not been elected as a member pursuant to subsection (2) of*

> *this section, in any case where the shareholders have failed to fill a vacancy in the committee.*
>
> *(6) The Court may, on the application of any shareholder or officer of the incorporation, investigate the conduct of any election of a member or members to the committee of management, and may either—*
>
> *(a) Confirm the appointment of the person or persons elected; or*
>
> *(b) Declare the election invalid and order a new election to be held.*
>
> *(7) Except as may be provided by the incorporation's constitution, and subject to any conditions that may be imposed on the committee by resolution passed at a general meeting of shareholders, the committee may regulate its procedures as it thinks fit.*

[8] Counsel for the Incorporation made a submission that there did not appear to be any readily available decisions of the Court on the specific provisions of section 269(4). That submission is incorrect and I draw these principles from previous decisions of the Māori Land Court and Māori Appellate Court:

a) Section 269(4) requires only one of the grounds from subsections (4)(a)-(c) to be met in order for the Court to exercise its discretion under that section[1];

b) Even if the Court is satisfied that one or more of the grounds set out in section 269(4)(a)-(c) has been made out, the Court retains a discretion as to whether or not it will make removal orders[2];

c) The Court before removing from office any member of a Committee of Management must be satisfied that there is sufficient cause to do so[3];

d) Unsatisfactory performance must be measured against the principles of the Act. They are contained in the Preamble and section 2[4];

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[1] Refer *Erlbeck & Anor – Tikitiki D9* (2007) 171 Gisborne 55 (171 GIS MB 55) at para 18
[2] Refer *Erlbeck* at para 27
[3] Refer *Erlbeck* para 18 and *Opawa Rangitoto 2C Incorporation v Toto* (2004) 142 Aotea MB 69 (141 AOT MB 69) at para 3.2
[4] Refer *Bramley v Hiruharama Ponui Incorporation – Committee of Management* (2006) 11 Waiariki Appellate MB 144 (11 AP 144) at para 7

e) It is not every unsatisfactory act or omission which would lead to removal but those that go to the principles of the Act. To adopt any other approach, would lead to removal being the primary remedy available for any technical breach of the Act[5];

f) Each Committee Member must make his or her own decisions and cannot hide behind the dominant personality of one member when the decision goes wrong. To do so is not carrying out the duties of a Committee member satisfactorily in terms of section 269(4)(a)[6];

g) Wholesale removal of Māori governance members is not consistent with the principles of the Act or the intentions of the legislature[7];

h) Whether governance performance has been satisfactory or not must depend on whether there was a clear and present apprehension of risk to an Incorporation asset or to the wider interests of the Incorporation shareholders as a result of action or inaction of the Committee[8];

i) The Court has special powers and functions in protecting the owners of the land by ensuring as far as possible that the Committees of Management comprise persons who will administer the land to the best advantage of the owners as a whole.[9]

Interrupted Management Meetings with Third Parties

[9] The Chairperson of the Committee of Management, Mr Skudder, swore an affidavit dated 17 September 2009. That affidavit was filed to support the injunction application. Mr Skudder did not attend the hearing on 6 November 2009. I was asked on behalf of the Incorporation to treat Mr Skudder's affidavit as part and parcel of the totality of the evidence in support of the application.

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[5] Refer *Bramley* at para 9
[6] Refer *Erlbeck* at para 24
[7] Refer *Bramley*, para 9
[8] Refer *Bramley*, para 9

[10] Whilst Rule 44 of the Māori Land Court Rules 1994 permits the Māori Land Court in its discretion to accept evidence by affidavit, I was concerned that an important witness for the applicant was not available to be cross-examined by Mr McLeod or if necessary to be asked questions by the Court.

[11] Mr Skudder deposed that on 31 August 2009 Mr McLeod interrupted a meeting the CEO was having with an archaeologist and surveyor, that the conversation became heated and that Mr McLeod was extremely intimidating to those present. There is no information before me that Mr Skudder personally attended that meeting. Indeed the impression I got from his affidavit evidence is that he was not in attendance at that meeting.

[12] The CEO of the Incorporation, Mr Rishworth, gave oral evidence. He did not give any evidence on this point nor were any other persons who attended the meeting called to give evidence.

[13] I did not receive any direct evidence from those who attended this meeting. I only received the hearsay evidence of Mr Skudder to which I give little weight. Based on this evidence I am not prepared to find as a fact that Mr McLeod's conduct was intimidating to those present.

[14] Kathryn Bluett-Atvars a Committee of Management member gave evidence that on 7 September 2009 Mr McLeod, uninvited, interrupted a meeting that she had arranged between herself as the Director of Mangatawa Tourism Limited and third parties to explore a tourism proposal. She said that Mr McLeod's attendance "caused confusion, and tenseness in the air".

[15] Mr McLeod accepts that he attended that meeting. After a brief period of time Mrs Bluett-Atvars spoke to Mr McLeod privately. Mr McLeod then returned to the meeting after speaking to the Chairperson of the Committee of Management by telephone. He stayed briefly then left.

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[9] Refer *Te Ua v Halbert – Waihirere No 2 Incorporation* (1960) 29 Gisborne Appellate MB 269 (29 APGS 269) at page 5 upheld in *Opawa Rangitoto* at para 3.4

[16] There was also some indirect evidence about this meeting put before me. A letter from a Mr Andrew Te Whaiti was attached as exhibit "A" to the affidavit evidence of Mr Rishworth. Mr Rishworth read this affidavit as his evidence in chief.

[17] In that letter Mr Te Whaiti referred to the fact that the meeting was "interrupted by the arrival of your newest board member. This resulted in a somewhat confusing and for a small while tense situation." Mr Rishworth himself did not attend the meeting and I expressed concern during the hearing as to why I was receiving this evidence in a hearsay fashion.

[18] I find that Mr McLeod attended this meeting on an uninvited basis and initially this caused some confusion in the minds of those attending. Having said that it is obvious he attended for a short period only and then left. There is nothing in that conduct that warrants a finding that any of the grounds set out in section 269(4) are made out.

Abuse of Staff and Committee of Management Members

[19] During her meeting on 7 September 2009 with Mr Te Whaiti, Mrs Bluett-Atvars was joined by two other persons. She gave evidence that those two persons relayed that there "appeared to be some problem outside the office". Mrs Bluett-Atvars was not personally outside whilst this incident was taking place therefore she is not able to give any evidence as to who was involved in that incident.

[20] In his letter attached to the affidavit of Mr Rishworth, Mr Te Whaiti outlined something similar, but did not identify who the persons were outside yelling.

[21] The two persons the subject to this incident, were not called to give evidence. I find that there was minimal evidence that any incident took place, more importantly there is absolutely no evidence to indicate that Mr McLeod was involved.

[22] Mrs Bluett-Atvars then went on to give evidence that she in the company of a number of people proceeded to walk around the Mangatawa property. During the course of that walk she heard her name being called out in a threatening manner and intonation.

[23] As the hearing transpired it became self-evident that the persons yelling at Mrs Bluett-Atvars and her group were Mr Pine McLeod and Donna McLeod, not Whitiora McLeod. Mrs Bluett-Atvars accepted that in answer to a question from Mr Whitiora McLeod. Some attempt was made during his cross-examination to place Mr Whitiora McLeod amongst the group that were yelling and abusing Mrs Bluett-Atvars. It is unclear to me whether Mr Whitiora McLeod was even part of that group. More to the point there is no evidence that he was abusing Mrs Bluett-Atvars.

[24] There were a number of generalised allegations that Mr McLeod has been abusive and acted in an intimidatory nature towards staff. None of those staff members gave evidence. Counsel for the Incorporation submitted that the reason they would not give evidence is that they felt intimidated by Mr McLeod. Putting aside the fact that was evidence from the Bar, no attempt was made at all to put the evidence of the staff members before me for example by way of affidavit.

[25] Hearsay evidence of allegations involving staff members was put before me by Mr Hohepa Maxwell, Mr Jonathan Rishworth and Mr George Skudder.

[26] An example of this appears in the affidavit of Mr Skudder. In order to illustrate the point I set out in full his paragraph 7(c) as follows:

> *"After the incident described in the affidavit of Kathryn Bluett-Atvars, Priscilla Nepia ("Cilla") advised me that she had gone to the house from which the yelling had come from to see what was going on (the house is next door to our office and on Mangatawa land). She reported that she had been verbally attacked by Pine McLeod and his sister Donna McLeod and throughout the verbal abuse, Whiti was present and sat smiling and did nothing to try and stop the verbal abuse. Cilla has now resigned from her position with the MPBI and she has said that she is not willing to work in the environment that has been created by Whiti McLeod."*

[27] Problems with that evidence are:

a) Mr Skudder was not personally present at the incident. He is giving evidence as to what he has been told by Cilla Nepia;

b) Donna McLeod gave evidence and accepted that she had yelled abuse at Kathryn Bluett-Atvars. Pine McLeod provided a letter to the Court in which he too accepted that he had yelled abuse and apologised for that. The actions of Pine McLeod and Donna McLeod however cannot be attributed to Whitiora McLeod;

c) Mr Skudder gave evidence that Mr McLeod was present throughout this incident and sat smiling and did nothing to try and stop the verbal abuse. Putting aside for the moment that that evidence is hearsay, his mere inaction, if proved is not sufficient to make out the grounds under section 269(4)(a);

d) Mr Skudder has given evidence that Cilla Nepia was "not willing to work in the environment that has been created by Whiti McLeod". Again that evidence is hearsay.

[28] Whilst I heard a great deal of hearsay evidence as to the alleged abuse of staff members, I am not prepared to give it any weight when the best evidence could have been given to the Court from those staff members.

The Reputation Point

[29] An attempt was made by the applicants to put "general reputation evidence" as to Mr McLeod's propensity for aggressive and intimidating behaviour. Mrs Poihaere Walker gave evidence to that effect for the Incorporation. She referred to incidents experienced whilst she was a marae committee member of the Tamapahore Marae. She also attached to her affidavit a letter marked as exhibit "A" dated 21 September 2009 in which similar allegations were made. She went on to allege that

Mr McLeod had previous criminal convictions and protection orders against him. No proof of those convictions or orders was put before the Court.

[30] Counsel for the Incorporation made an oral submission as to Mr McLeod's "general reputation". In his written submissions, counsel referred to only one case, a copy of which was placed before the Court, that being *Joseph McLeod & Ors v Whitiora McLeod & Pine McLeod – Mangatawa 2B2A Block* (2007) 88 Tauranga MB 292 (88 TGA MB 292). In that reserved decision Judge Milroy removed Whitiora McLeod and Pine McLeod as trustees of Mangatawa 2B2A otherwise known as Tamapahore Marae.

[31] I queried Mr Tate as to why he referred to that case only. The concern I had was that counsel was effectively using a decision of this Court, albeit involving a different section, as a type of "reputation evidence".

[32] I indicated to all concerned during the course of the hearing that I was aware that Mr McLeod had been removed pursuant to section 240 from being a trustee of the Tamapahore Marae. All participants before me know that a section 238 review application in relation to that marae involving Mr McLeod has yet to be concluded.

[33] I accept that pursuant to section 40(2) of the Evidence Act 2006 a person in civil proceedings can call propensity evidence including "reputation evidence". There is no specific test for admissibility of propensity evidence however it will be subject to the requirement that the evidence is relevant (section 7 of the Evidence Act 2006) and that its probative value is outweighed by the risk that the evidence will either have an unfairly prejudicial effect on or needlessly prolong the proceeding (section 8 of the Evidence Act 2006).

[34] I indicated to the parties that the extent to which I would take this evidence into account was that I was aware that Mr McLeod had on a previous occasion been removed as a trustee pursuant to section 240. Thus I have taken judicial notice of that fact.

[35] However I also indicated that this case was not an opportunity to re-run the Tamapahore Marae case and I have taken the view that in order for this application to succeed, the applicant needed to first make out the grounds of section 269(4) based on evidence of the actions of Mr McLeod since he has been a Committee of Management member.

[36] In summary although I have taken into account that Mr McLeod was in 2007 removed from being a trustee of a marae reservation pursuant to section 240, I do not consider that to be of much relevance, particularly as the allegations made concerning Mr McLeod's conduct towards the staff and other Committee of Management members have not been made out based on the evidence before me.

Threats to the Well Being of the Organisation

[37] Mr Skudder gave evidence in his affidavit that the Incorporation is involved in a joint venture with Retirement Assets Limited to construct a retirement village. Stage one of the project is worth $120 million and is at the stage of having earthworks completed. At paragraph 8 of his affidavit he said:

> *"The Directors of Retirement Assets Limited are aware of the issues being created by Whiti and have expressed extreme concern about the impact on the marketing of the Village should that dispute become public knowledge. I am also very concerned that Whiti and his associates could disrupt the construction process by interfering with the contractors or occupying the land."*

[38] The evidence of Mr Skudder is hearsay as to the concerns of the Directors of Retirement Assets Limited. Mr Skudder's evidence as to any future actions of Mr Whitiora McLeod and his associates is speculative.

[39] The CEO Mr Rishworth gave evidence that the people from the Department of Discovery Limited who witnessed certain behaviour on 7 September 2009 were concerned to the extent that they did not want to proceed with the business relationships with the Incorporation until things were resolved. To that end Mr Rishworth attached a letter from Mr Andrew Te Whaiti dated 3 November 2009. Putting aside the hearsay nature of the evidence, as I have discussed earlier the

persons involved in the yelling incident on 7 September 2009 did not involve Mr McLeod, therefore this evidence is irrelevant.

[40] Mr Te Whaiti goes on to discuss lost revenue as a result of delay. He arrives at a figure of some $189,000.00. In hearing from Kathryn Bluett-Atvars I formed the impression that this was very much an embryonic project and there was no evidence put before me that this project was ready to be marketed in a commercial sense. Therefore any evidence as to lost revenue is highly dubious. More to the point even if revenue has been lost, the blame for that cannot be sheeted home to Mr McLeod.

Lack of Understanding of Governance Role and Lack of Skills

[41] A number of allegations have been made against Mr McLeod under this heading. They revolve around suggestions that he does not understand the difference between governance and management roles, he lacks the necessary skills to be a Committee of Management member, he wishes to push his own agenda as a Committee of Management member, he insists on attending the Incorporation almost on a daily basis to read papers and he has been secretive as to his home address.

[42] Mr McLeod is a new member of the Committee of Management. He has since being elected attempted to come up to speed with the business of the Incorporation and has requested many historical documents to read. There is nothing in that which is of concern to the Court, in fact that should be encouraged.

[43] Mr McLeod denies that he has kept his address secretive and indeed has provided it in a letter he wrote to the Court and in his evidence in chief before the Court.

[44] The impression the Court has is that Mr McLeod probably does not fully appreciate the differences between a governance role and a management role. He is raw and inexperienced in this role. As an example it is not correct for Mr McLeod to simply say that he can attend any meeting involving the affairs of Mangatawa Papamoa Incorporation. Having said that there has been no evidence put before me

as to what is the policy at the Incorporation for Committee of Management members to attend meetings which are purely management or meetings at which Committee of Management members and management are in attendance.

[45] I would have thought it is in the best interests of the Committee of Management to have a regular diary of forthcoming meetings. At Committee of Management meetings what should be discussed is whether forthcoming meetings are purely Committee of Management meetings, meetings which require the attendance of Committee of Management members and management or purely management meetings. What should also be discussed and if necessary a decision made on, is whether Committee of Management members should be tasked to attend those meetings, including Mr McLeod. If that was done then there should be no confusion arising as to which meetings Mr McLeod can be in attendance at.

[46] Mr Hohepa Maxwell, who has a background as a commercial lawyer gave evidence as follows:

> *"Within a short time of his appointment he has caused turmoil amongst the staff, interfered with negotiations with contract partners, shown that he has no understanding of business principals* [sic] *or processes or his role as only one member of a Committee of Management comprising seven people or the documented and approved strategy of MPBI.*
>
> *In my view he represents a real and immediate danger to the ability of the Committee of Management to implement the strategies approved by shareholders by his apparent unwillingness to work within recognised business processes and practices.*
>
> *I am aware that he has a history of attempting to enforce his own agenda by unconventional means. I refer to the issue that arose at Tamapahore Marae."*

[47] It became apparent during questioning of him by Mr McLeod that Mr Maxwell had very little personal contact with Mr McLeod. His evidence as to turmoil amongst the staff, interfering with contract partners and Tamapahore Marae is hearsay.

[48] Mr Maxwell was asked by me to expand upon his evidence as to Mr McLeod's lack of business skills. He did in an extremely cursory fashion, so much so that I find the allegation was not made out.

[49] No evidence was put before the Court as to a minimal level of skill required to be a Committee of Management member on this Incorporation. If Mr McLeod lacks business skills, then surely it is in the interests of the Incorporation to assist in bringing him up to speed in the acquisition of those skills. Alternatively Mr McLeod could do so himself. There are any number of courses available at tertiary institutions and via organisations such as the Institute of Directors to which Mr McLeod could attend if this is a real issue.

[50] One area which has caused the Court to pause and consider is the suggestion that Mr McLeod will push his own agenda as a Committee of Management member. Mr McLeod himself gave evidence before me that he sought election on a platform to:

a) Seek the removal of the CEO;

b) Not enter any future joint venture partnerships;

c) Ensure decision making should reflect the views of shareholders.

[51] In his evidence in chief, under cross-examination and under questioning from the Bench, Mr McLeod stressed that he was fully aware that any contractual arrangements in place at the moment he could not interfere with. He accepted that if the Committee of Management adopted certain contractual arrangements with third parties he would be bound to respect those arrangements.

[52] It was put to him in cross-examination that the Incorporation had developed a strategic plan and philosophy which was at odds with his own personal philosophy. Mr McLeod's response was to the effect that he hadn't even seen the strategic plan as it had not been made available to him.

[53] There is no requirement that Directors, Partners, Trustees or Committee of Management members must all think alike and be unanimous at all times in their decision making process. Indeed one of the witnesses Mrs Paula Werohia-Lloyd gave evidence that there had never been complete agreement amongst the Committee

of Management members. Committee of Management members are entitled to make their own independent decisions.

[54] The challenge for Mr McLeod will be if a majority decision of the Committee of Management is not in line with his own personal philosophy, whether he then is able to step back and not interfere in the implementation of that decision making process by the Committee of Management or management. As examples, if Mr McLeod deliberately attempts to interfere in third party contractual relationships, brings about proven internal turmoil amongst the staff or actively campaigns to have the CEO removed thereby bringing about an employment dispute, then he is likely to face another application for his removal.

Summary

[55] I am conscious that the Māori Land Court on a regular basis in our ordinary work receives evidence which would be otherwise inadmissible.[10] However in a case such as this involving a contested application to remove a Committee of Management member, I would have expected to have received direct evidence on the allegations made against Mr McLeod. Much of the evidence fell well short of that being hearsay, assertion, expressions of belief and speculation.

[56] The onus is of course on the applicant to make out its case. The evidence brought before the Court was not sufficient to enable the Court to make factual findings that any of the grounds set out in section 269(4)(a)-(c) had been made out let alone whether the Court should exercise its discretion to remove Mr McLeod.

[57] Thus the application is dismissed.

Injunction

[58] Given that the substantive application has now been dismissed there are no grounds warranting the continuation of the injunction. The injunction (100 Tauranga

[10] Refer section 69(1), Te Ture Whenua Māori Act 1993

MB 179-182) was always made on the basis that it shall endure until the first substantive hearing of the removal application or until further order of the Court. That application is now dismissed and the injunction discharged.

Pronounced in open Court at 3.30 ~~am~~/pm in Hamilton on this 13th day of November 2009.

S R Clark
JUDGE