IN THE MAORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20040007319

UNDER	Section 58, Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Hiwarau C Block
BETWEEN	PETER DE LOREE Appellant
AND	TUIRINGI MOKOMOKO, PHILLIP WILSON AND JOSEPHINE MORTENSON Respondents

Hearing: 10 May 2005
(Heard at Rotorua)

Court: Chief Judge J V Williams (Presiding)
Deputy Chief Judge W W Isaac
Judge L R Harvey

Appearances: Peter De Loree (Appellant - in person)
S R Clark (for the respondents)

Judgment: 26 October 2006

DECISION OF THE COURT

The Land

[1] The Hiwarau C block comprises some 375 hectares in the Eastern Bay of Plenty near Kutarere. There are nearly 800 owners in the land holding nearly 20,000 shares between them. The land is administered as an ahu whenua trust called the Hiwarau Lands Trust.

[2] The Māori Trustee was responsible trustee until 1992 when he handed control to this newly created Hiwarau Lands Trust. The original trust order recorded at 67 Opotiki MB 271-272 was replaced in 1995 with the current more comprehensive wide powers trust order, 70 Opotiki MB 189-204. The three current responsible trustees are Tuiringa Mokomoko, Phillip Wilson and Josephine Mortenson.

The Appeal

[3] Peter De Loree applied, along with Harold Henry Ruff, for an order from the lower court enforcing the obligations of trust against the trustees on seven separate grounds. They amounted to allegations of incompetence, breach of fiduciary obligations and misuse of the office of trustee for personal gain. Her Honour Judge C L Fox (nee Wickliffe) dismissed the application but issued various directions relating to the governance of the block requiring the trustees to:

(a) prepare a plan for occupation of the block for report to the Court within one year of the decision;

(b) obtain a market valuation for the block to ensure that the lessee (himself a trustee) was paying a fair market rental; and

(c) commission a farm inspection report by an independent farming consultant.

[4] The appellant Mr De Loree now appeals that decision under section 58 of Te Ture Whenua Māori Act 1993. The appeal document contained very generalised allegations some of which were raised in the application and some of which were not. This is not a criticism of the appellant. He is not a lawyer and is unfamiliar with legal constraints on an Appellate Court. After extensive discussions with the appellant at the appeal hearing, we deduced that the appeal was based on the ground that the judge at first instance had failed to take proper account of the following matters:

(a) that there was insufficient evidence before the Court to conclude that the trustees were not responsible for the money lost by the trust over a logging contract from 1993-1994;

(b) the need to inquire into the ownership of the house located on the Hiwarau C Block;

(c) the failure of the trustees to provide audited accounts from 1992-1999;

(d) the evidence that the trustees have administered the lands negligently and failed in their fiduciary obligations to the beneficiaries; and

(e) the trustees had converted power company shares owned personally by the appellant.

[5] Mr Clark appeared as counsel for the respondent trust. He vigorously defended the appeal. We turn now to address each issue.

Logging contracts

[6] In the early 1990s the trustees entered into a joint venture with the trustees of adjoining block known as Hiwarau A9. The joint venture entered into an oral contract with David Edwards of East Coast Logging for one year to remove wild pine trees on the block owned by the joint venture partners. Some extraction occurred but there is no evidence of any income in the records of the trust.

[7] The appellant alleged either that the trustees had pocketed any income or that they had so negligently administered the joint venture that they should be responsible for any money that was lost. There were five trustees at the time including the current three respondents.

[8] For the trustees, Mr Clark admitted that trees had been removed from the Hiwarau C Block under the joint venture by Mr Edwards. However he submitted that the trust had received no payment at all from Mr Edwards. Indeed, the trustees argued when they pursued Mr Edwards it was discovered that he had been adjudged bankrupt and there was no prospect of recovering monies under the contract from him.

[9] Our conclusion is that there is no evidence that any trustees misappropriated monies that may have been received by the trust under the contract. The only evidence available is that no money was received at all. If there is a liability in the trustees it can arise only if their administration of the contract was so negligent as to be a breach of their duty of care to the beneficiaries of the trust. While it is a matter of concern that there appears to be no paperwork in respect of the contract and that the agreement was very

informal, we are not prepared to find that the trustees have breached their duties in respect of the logging joint venture.

[10] The trustees' evidence is that they did the best they could within the limits of the time, resources and skill available to them. The fact they sought to pursue Mr Edwards is evidence that they had not completely abdicated their responsibilities. The trustees made a business decision not to pursue Mr Edwards because doing so would have been a waste of time and money. We are not prepared to infer from the facts, as we have them, a breach of the trustees' duty of care. This aspect of the appeal is therefore dismissed. We do however express concern about the informality of arrangements in relation to such a potentially valuable contractual relationship.

Ownership of the house on the block

[11] The appellant did not seek a declaration as to ownership of the house on the land. He sought only that the Court order an inquiry into the question.

[12] The matter of the house situated on the Hiwarau C block has some history. It appears that it was built by the appellant himself while he held a lease from the Māori Trustee in the block prior to 1992. He did not obtain the permission of the Māori Trustee before doing so. Perhaps in light of this the appellant applied to the Māori Land Court in 1994 to determine ownership of the house. The Court refused to decide the application. Instead the judge adjourned the application sine die for the reason that there was a judgment in the District Court against the appellant and in favour of the Māori Trustee for the sum of $54,037.36 being the appellant's rental arrears in respect of the whole block.

[13] We agree with Mr Clark that there is no point in an inquiry into this matter since the appellant is fully appraised of the background and his role in it. Given the existence of the judgment debt, we cannot see how this appellant can seek to enforce any rights or interests against the trustees in respect of this matter, let alone seek an inquiry into the issue. This aspect of the appeal is plainly misconceived and is consequently dismissed.

Failure to file accounts

[14] It is common ground that from 1992 (when the Māori Trustee relinquished responsibility for the trust) to 1999 the trustees did not provide annual audited accounts. For the first three years of the trust there are no accounts at all.

[15] For the period 31 December 1996 to 12 March 1999 there is an unaudited reconstruction of receipts and expenditure and a bank reconciliation. This document is dated 12 April 1999. From the year 2000 on annual audited accounts have been prepared.

[16] The appellant argues that the state of the accounts for 1992-1999 is unacceptable on two grounds. Either it is evidence of trustee incompetence, or it may hide more serious wrongdoing.

[17] The trustees in response say that the original trust order was brief and extremely restrictive. It contained no obligation on the trustees to prepare accounts audited or otherwise. By 1996 the trust order had been reviewed and a comprehensive trust order had been substituted. Clause 7(c) of the 1996 order required the trustees (among other things) to discharge two functions:

(a) to prepare annual audited accounts and file those in the Māori Land Court within six months of balance date; and

(b) to produce annual reports and accounts to any general meeting.

[18] Counsel for the trustees accepted that this had not been done. He argued that the only income of the trust was a lease with Mr Phillip Wilson, a trustee. That income was minimal. Expenditure was also minimal with the trustees not being paid for their efforts. Any administrative expenditure of the trust was met by them personally.

[19] Counsel argued that there was no evidence of dishonesty on the part of the trustees nor of any loss as a result of the failure to provide accounts. He argued that the evidence did not suggest mismanagement of trust income, funds or property. He argued that should the Court take the significant step of removing the trustees for their failure, this would

affect the trust's ongoing institutional knowledge. He argued that the prompt filing of audited accounts for the years 2000-2003 showed the trustees were able to be accountable once they had learnt their lesson.

[20] As this Court has emphasised on previous occasions, the burden borne by trusteeship is no light one. The standard of performance required of trustees is high – see for example *Marino v Horsfall,* in *re: Repongaere 4G (Part) Rongopai Marae* (2004) 34 Gisborne Appellate MB 98 (34 APGS) and in *re: Owhaoko C1 & Ors* (2004) 14 Takitimu Appellate MB 4 (14 APTK 4). It is the basic right of every beneficiary to have the land, its income, and the other assets associated with the trust, duly and prudently administered in accordance with the trust order.

[21] Clause 8 of the Hiwarau Lands Trust order makes it clear that the Court may remove any trustee who has failed to prepare and provide accounts to the Court (Clause 8(b)(i)) or has otherwise failed to carry out the duties of office satisfactorily (Clause 8(b)(ii)). These requirements state with more particularity the general common law requirement of fidelity to the trust instrument and prudence in the administration of trust affairs. See for example Butler et al *Equity and Trusts in New Zealand* (2003) Thomson Brookers, Wellington, at 220-221 Audited accounts are the best way of demonstrating that this standard has been met.

[22] We understand that there has been limited income from the trust. It may be that in the early years, the cost of audit outweighed the benefit of it to the beneficiaries. But there can be no justifications for providing no accounts whatsoever. That is simply inexcusable. It may be that there was no loss occasioned by the trustees' failure but in the absence of evidence we, like the owners, have no way of knowing any more.

[23] Viewing this issue more generally across a 14 year period now, were it not for the fact that audited accounts have been provided since 2000, we would have unhesitatingly removed the trustees for incompetence and breach of the trust order. However it appears that they have learned the importance of maintaining good standards of transparency and accountability to their beneficiaries. We do not think that anything would be gained now from removal on that count. Indeed, we agree with counsel for the trustees that to remove

them would cause greater injury to the trust and thus the beneficial owners by removing 14 years of institutional knowledge.

Future directions

[24] It appears to us that some of the problems confronting this trust have been caused by the appellant himself. He owes the trust a large judgment debt from the pre-1992 era. Those funds if paid would significantly improve the financial position of the trust and make development initiatives a real possibility. He has embroiled the trust in repetitive litigation in which they have felt the need to seek the advice and representation of counsel. Instructing competent senior counsel is costly. Then there is the time and effort of the trustees themselves in responding to the appellant's claims. This has made the role of trustee in respect of Hiwarau Lands Trust a difficult and conflictual one.

[25] On the other hand the asset the trustees administer is a valuable one and it is returning far less in benefits to the beneficiaries than it would if it were properly managed. We do not just mean by this, a return in terms of profit necessarily. Equally valuable benefits could be derived by a properly administered settlement or occupation plan for the owners of the land. From our perusal of the previous minutes and evidence, it appears that the future of the land is in a mix of pastoral lease and occupation sites. On the evidence before us, there is little to give the beneficiaries confidence that either option is being imaginatively explored, planned and implemented at this stage. On the contrary, the land is reverting, not because of any positive decisions by the trustees, but, it appears, because no real decisions about the future of this land have been taken at all. This may be because of – in part at least – the trustees' attention being regularly diverted by the appellant and those supporting his actions.

[26] The short point is that the owners and the trustees obviously need some assistance to find their way forward. Assistance is necessary both in terms of strategic planning and management and to that end we direct that the trustees identify to the lower Court an experienced business manager or consultant with whom they are prepared to work. We would then direct the lower Court to commission that person to prepare a report on future directions for the trust including draft strategic and management plans and appropriate business procedures for the trust. As soon as this person is identified an appointment can

be made under s40(1)(b) of the Act and the costs of such report can be met from the Special Aid Fund under s98(9)(a).

Power Shares

[27] As to the claims of the appellant in respect of shares in the local power company, we are not satisfied on the evidence that there is any reason to depart from the views of Judge Fox as expressed in her judgment. This aspect of the appeal must also fail.

Consequential orders

[28] In addition to the foregoing direction, the remaining directions of Her Honour Judge Fox are affirmed and remain to be fulfilled. The appeal is otherwise dismissed.

[29] Costs are reserved. Mr Clark is to file a memorandum in that respect in due course. It would be convenient for the Court if such memorandum also contained a proposed appointee to assist trustees as indicated and an update on what steps have already been taken to comply with Judge Fox's directions.

Dated at ROTORUA this 26TH day of OCTOBER 2006

J V Williams
CHIEF JUDGE
(presiding)

W W Isaac
DEPUTY CHIEF JUDGE

L R Harvey
JUDGE