

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

**A20150001019  
APPEAL 2015/2**

UNDER Section 58 of Te Ture Whenua Māori Act 1993

IN THE MATTER OF RUATOKI B92

BETWEEN PETER PIIPII KEEPA and CHRISTIAN  
KOHAI  
Appellants

AND FRANK VERCOE and NGAWAIATA  
TURNBULL  
Respondents

Hearing: 19 May 2015  
(Heard at Rotorua)

Coram: Judge S R Clark (Presiding)  
Judge S F Reeves  
Judge M P Armstrong

Appearances: Mr Keepa and Mr Kohai, in person  
Mr Vercoe and Ms Turnbull, in person

Judgment: 20 May 2015

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Introduction

[1] On 7 July 2014 Judge Savage made an order removing Peter Keepa as a trustee of Ruatoki B92<sup>1</sup>. Mr Keepa appeals against that decision.

[2] The issue in this case is whether the appeal should be upheld.

## Background

[3] Ruatoki B92 block is 15.1699 hectares. As at the date of this appeal there are 251 beneficial owners of the block. The block is administered by the Ruatoki B92 Ahu Whenua Trust. The trustees of the trust are Donald Turnbull, Frank Vercoe, Larry Hawkins and Peter Keepa.<sup>2</sup>

## The application before Judge Savage

[4] On 10 April 2014 Frank Vercoe and Ngawaiata Turnbull filed an application pursuant to s 67 of Te Ture Whenua Māori Act 1993 (“the Act”) seeking a judicial conference on the grounds that Mr Keepa had been taking unilateral action with respect to the Ruatoki B92 block. The application noted that “We want to seek an outcome moving forward from now.”

[5] The application was heard by Judge Savage on 7 July 2014 in Whakatāne by way of a Judicial Conference. At the outset of the conference Judge Savage noted as follows:<sup>3</sup>

... Now Mr Keepa you will understand that this is not a hearing at which the Court will be making orders. It is simply a conference that has been sought by the two applicants Frank and Ngawaiata. They are concerned about a number of matters that are set out in the application. You’ve received the application?

[6] Judge Savage then proceeded to discuss the issues raised in the application with Mr Keepa, Ms Turnbull and Mr Vercoe. During the course of the conference Judge Savage grew concerned that Mr Keepa had not been discharging his duties as a trustee. As such, Judge Savage advised of the following<sup>4</sup>:

Listen to what I have to say. I have it in my mind that you are so far out of line with what is required of a trustee that I should remove you as a trustee now notwithstanding that this

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<sup>1</sup> 101 Waiariki MB 12-22, (101 WAR 12-22)

<sup>2</sup> 85 Whakatane MB 156-157 (85 WHK 156-157)

<sup>3</sup> 101 Waiariki MB 12-22, (101 WAR 12-22) at MB 13

<sup>4</sup> 101 Waiariki MB 12-22, (101 WAR 12-22) at MB 20

is a conference because I have the power to do so under Te Ture Whenua Māori Act 1993 section 240.

[7] Judge Savage went on to add that<sup>5</sup>:

I have a preliminary view you have failed to carry out your duties as a trustee anywhere near satisfactorily that you have used this land for your own benefit and ignored the rights of the other owners and that you have failed to keep accounts, and that you do not recognised (sic) that you have duties to the other owners as a trustee.

Now that is my view on a preliminary basis and I'm inviting you to address me to the contrary if you wish to.

[8] Mr Keepa then presented further submissions to Judge Savage focussing on the Preamble to the Act. Judge Savage then made the following orders<sup>6</sup>:

There is no point – I've listened to what you have said, there is no point in proceeding with this conference further. The differences are irreconcilable. I will be failing in my duty though if I let matters remain as they are.

I invited Mr Keepa to address me on the proposition that as a trustee he has failed to carry out his duties as a trustee satisfactorily. He has addressed me on something quite different.

**I now remove Peter Keepa as a trustee of Ruatoki B92. He of course remains an owner.**

**I direct that Mr Vercoe forthwith call a meeting of owners for the purpose of electing new trustees because I have found by a clear margin that Mr Keepa has not and will not carry out his duties as a trustee and the land needs new trustees. That meeting is to be held within the next 6 months and if Mr Vercoe and Ms Turnbull require assistance in the setting up of that meeting they can deal with the staff at the Māori Land Court at Rotorua.**

### Submissions for the Appellant

[9] Mr Keepa submitted that the order of Judge Savage is inconsistent with his right to exercise rangātiratanga with respect to this block. Mr Keepa further argued that his rangātiratanga is recognised and provided for in the Preamble to the Act.

[10] Mr Keepa also submitted that he was surprised that Judge Savage made an order removing him as a trustee. Mr Keepa considered that he was attending the Court in order to look for a way forward in relation to the block and in particular that he would be discussing the calling of a

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<sup>5</sup> 101 Waiariki MB 12-22, (101 WAR 12-22) at MB 20

<sup>6</sup> 101 Waiariki MB 12-22, (101 WAR 12-22) at MB 21

meeting of owners of the block. As such, Mr Keepa said that it came as a surprise that Judge Savage made an order removing him as a trustee as that was not the purpose of the conference.

### **Submissions for the Respondents**

[11] Ms Turnbull advised that the respondents were also surprised that Judge Savage made an order removing Mr Keepa as a trustee. She confirmed that they were not seeking an order to remove Mr Keepa as a trustee but were seeking a way forward in relation to the administration of the block. Despite that, Ms Turnbull agreed with the position reached by Judge Savage, that there was sufficient grounds to remove Mr Keepa as a trustee.

### **The Law**

[12] Section 67 of the Act states:

#### **67 Powers of Judge to call conference and give directions**

- (1) For the purpose of ensuring that any application or intended application may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without any such application, and on such terms as the Judge thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.
- (2) At any such conference, the Judge presiding may do all or any of the following things:
  - (a) with the consent of the applicant, amend the application to give better effect to the applicant's intention:
  - (b) settle the issues to be determined:
  - (c) give directions as to service, and as to the public notification of the application and any hearing:
  - (d) direct by whom and by what time any notice of intention to appear, or any statement in reply, shall be filed:
  - (e) direct the filing of further particulars by any party:
  - (f) direct further research by any party, or by the Registrar from the court records:
  - (g) direct the filing by any party of any valuation, land use, or other report that may assist the court in determining any matter in issue:
  - (h) fix a time by which affidavits or other documents shall be filed:
  - (i) exercise any powers of direction or appointment vested in the court or a Judge by the rules of court in respect of applications of the class with which the Judge is dealing:
  - (j) give such consequential directions as may be necessary:
  - (k) fix a time and place for the hearing of the application.
- (3) Notwithstanding any of the foregoing provisions of this section, a Judge may, at any time before the hearing of an application has been commenced, exercise any of the powers specified in subsection (2) without holding a conference under subsection (1).

[13] In the decision of *Karena v George – Karaka Huarua A and B* the Māori Appellate Court found as follows<sup>7</sup>:

28. Under section 67(1)/93 a conference is part of a preliminary process aimed at ensuring that an application is managed and eventually determined in a convenient and expeditious manner. To enhance that purpose, the Court is given various powers of direction as are set out in section 67(2)/93; none of those matters list the making of final orders or dismissal as jurisdictional options that may be pursued during such conferences.

29. While we tend to the view that the powers set out in section 67/93 are not exclusive, a Judge is limited to making directions in keeping with the tenor and intent of the section. There is no mention of a power to make an order. This is consistent with section 41/93, which requires every order to be pronounced orally in open Court.

A conference is not a hearing in open Court. The parties are not required to be ready to proceed or to put forward their cases. Admittedly, it serves to bring the parties together and there is always the possibility that discussion may bring about agreement. In such case, the Court has no power to make an order but it may be appropriate for the Judge, with the consent of the parties, to convene a hearing and deal with the matter under Rule 11 of the Maori Land Court Rules 1994. Even then, the notice requirements are still reasonably onerous. In other cases, where orders are proposed during a conference, the requirements as to notice may render it necessary for a hearing to be set down and formally notified.

30. There is no authority for the Court to dismiss an application during the course of a judicial conference. Accordingly the order dismissing the applications has been made in excess of jurisdiction. We, therefore, uphold the appeal on this ground and order a rehearing.

[14] In *Tito – Mangakahia 2B2 No 2A1A* the Māori Appellate Court found:<sup>8</sup>

[48] In *Maxwell v Parata – Maruata 2B2* the Māori Appellate Court found that where there is no application before the Court under section 240 to remove trustees, and the Court wishes to remove trustees of its own motion, it must exercise the jurisdiction under section 37(3) of the Act. Section 37(3) allows the Court in the course of any proceedings to exercise any other part of its jurisdiction as it sees fit. However, as set out in both of these decisions, persons affected by the exercise of this jurisdiction must be given notice so that they can appear and be heard in respect of their removal.

## Discussion

[15] It is clear from the Court minute that during the course of the judicial conference, Judge Savage grew concerned that Mr Keepa had failed to carry out his duties as a trustee of the Ruatoki B92 block. It is also clear that Judge Savage sought to exercise the supervisory function of the Court with respect to trusts, in removing Mr Keepa.

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<sup>7</sup> *Karena v George – Karaka Huarua A and B* (2002) 6 Taitokerau Appellate Court MB 32-45

<sup>8</sup> *Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 86-101 (2011 APPEAL 86-101)

[16] Such concerns appear to be well founded. Mr Keepa's response to Judge Savage indicated that he not only failed to understand the nature of the obligations he owes as a trustee, he also refused to recognise that the other owners have an interest in the block. It also appears that Mr Keepa has been using the block for his own benefit without accounting to the Trust or the other owners. Such concerns may well give rise to an order for removal as per s240 of the Act.

[17] Despite that Judge Savage did not follow the proper process in removing Mr Keepa. The decision of the Māori Appellate Court in *Karena*, makes it clear that final orders cannot be made at a judicial conference.<sup>9</sup> Judge Savage said as much at the outset of the conference. Despite that, Judge Savage then proceeded to make orders removing Mr Keepa when he had no jurisdiction to do so.

[18] It is also clear in the decision of *Tito* that where there is no application before the Court under s 240 to remove a trustee, the Court must exercise its jurisdiction as per s37(3) of the Act.<sup>10</sup> While Judge Savage referred to the jurisdiction of the Court for removal of a trustee as per s 240, he did not exercise jurisdiction under s 37(3) of the Act in order to engage s 240 of his own motion. We accept that Judge Savage warned Mr Keepa of the possibility of removal and allowed Mr Keepa the opportunity to make submissions in response. However, we do not consider that this cures the remaining procedural deficiencies as set out above.

[19] For these reasons the appeal must be upheld.

[20] While we have upheld the appeal on procedural grounds, we note the concerns raised by Judge Savage that Mr Keepa may have failed to discharge the duties that he owes as a trustee of the Ruatoki B92 block. Those issues may well give rise to grounds for removal of Mr Keepa as a trustee. It is also possible that Mr Keepa may be liable to account to the Trust, given that he may have benefited personally from the use of the land, in breach of his duties as a trustee. Ultimately these issues need to be determined and it is appropriate for the Court to exercise its supervisory functions to do so.

[21] As such we consider that it is appropriate to amend the current application pursuant to s 37(3) of the Act to include an application for removal of Mr Keepa as a trustee pursuant to s 240 of the Act, and an application to enforce Mr Keepa's obligations as a trustee as per ss 236, 237 and 238 of the Act. We also direct that a rehearing by the Māori Land Court be held to determine these

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<sup>9</sup> *Karena v George – Karaka Huarua A and B* (2002) 6 Taitokerau Appellate Court MB 32-45 (6 APWH 32-45)

<sup>10</sup> *Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 86-101 (2011 APPEAL 86-101)

issues. This will ensure that Mr Keepa has a proper and full opportunity to prepare for and be heard in relation to these matters at a formal hearing before any final orders are made.

**Decision**

[22] We make the following orders and directions:

- (a) Pursuant to s56(1)(b) of the Act the order by Judge Savage dated 7 July 2014 at 101 Waiariki MB 12 – 22 removing Mr Keepa as a trustee of Ruatoki B92 is annulled;
- (b) Pursuant to s 37(3) of the Act the application is amended to include an application for removal of Mr Keepa pursuant to s 240 and an application for enforcement of Mr Keepa’s obligations as trustee pursuant to ss 236, 237 and 238 of the Act; and
- (c) Pursuant to s 56(1)(e) of the Act we direct a rehearing by the Māori Land Court to properly consider whether Mr Keepa should be removed as a trustee and whether any further order should be made enforcing any obligations that he may owe as a trustee of the Ruatoki B92 block.

Pronounced in open Court at 4.00 pm in Rotorua on this 20<sup>th</sup> day of May 2015

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S R Clark  
**PRESIDING JUDGE**

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S F Reeves  
**JUDGE**

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M P Armstrong  
**JUDGE**