

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

**A20140008517
A20130005100**

UNDER Section 238 of Te Ture Whenua Māori Act
1993

IN THE MATTER OF Okahukura 8M2C2C2B Trust

BETWEEN DEPUTY REGISTRAR
Applicant

TRUSTEES OF OKAHUKURA
8M2C2C2B TRUST
Respondent

Hearing: 331 Aotea MB 252-269 dated 18 December 2014
(Heard at Taumarunui)

Date: 22 May 2015

RESERVED JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] In 2013 applications were filed seeking the replacement of trustees and a review of the Okahukura 8M2C2C2B Trust. Following the appointment of new trustees, on 28 April 2014, I dismissed the applications and directed that a new application be filed per s 238 to deal with the remaining concerns about the administration of the trust.¹

[2] The new application was duly filed and a hearing was subsequently held on 16 December 2014.² The remaining issues were identified as being the trustee's costs and legal expenses incurred by the trust for the three years prior to 2012. At the conclusion of the hearing, I dismissed the application and indicated written reasons for the dismissal would issue in due course.

[3] The issue for determination is were the trustees' and legal expenses reasonably incurred?

¹ 319 Aotea MB 272 (319 AOT 272)

² 331 Aotea MB 252 (331 AOT 252)

The Land

[4] Okahukura 8M2C2C2B is Māori freehold land approximately 425.9118 ha in area that was created by partition order on 28 September 1949 and vested in 50 beneficial owners.³ There are currently 469 owners in the block holding 7.3173 shares.

[5] The land is administered by an ahu whenua trust that was constituted on 16 November 1970 per s 438 of the Māori Affairs Act 1953.⁴ The original trustees were Fearon Grace, John Hura, Rawiri Hemopo, William Paraku, Rato Konui, Haimoana Te Murau, Hohipera Ferris and Te Hiroto Ngahoro.

[6] At the time the 2013 applications were heard the trustees were Kathleen Te Urutakari Potae, Dianne Miriama Edwards, Kepa Patena and Erica Lorraine Hinemanu Clark. As foreshadowed, on 28 April 2014 I replaced Kathleen Edwards, Dianne Edwards and Kepa Patena (who had all resigned) with Paul Edwards, Benjamin Severne, Iris Kerehoma and Huria Chambers.⁵ Ms Clark remained in her position as a trustee.

Historical background

[7] The trust has had to deal with a series of disputes concerning the use of this block over many years.⁶ In 1981 the trustees entered into a lease of the block with Mr and Mrs Thompson for a period of 21 years with a right of renewal for a further 21 years and conditions as to improvements. Part of the land was planted in pine trees and the remainder was to be farmed. The lease came up for renewal in 2002. The trustees did not wish to grant the renewal. Litigation ensued but the proceedings were settled. That agreement provided for the Thompsons to forgo their right of renewal. They were also granted a right to harvest the trees.

[8] During the period in which the Thompsons were leasing the block they effectively granted two subleases. The first to Kevin O'Brien (to farm the block) and the second to the Christensen family (to occupy part of the block). Upon termination of the lease with the Thompsons in 2005 the trust entered into arrangements with Mr O'Brien to farm the block and the Christensen's to occupy a house on the block and a small portion of the block.

³ 29 Tokaanu MB 232,324 (29 ATK 232,324)

⁴ 50 Tokaanu MB 73 (50 ATK 73)

⁵ 319 Aotea MB 272 (319 AOT 272)

⁶ The information is based on the report filed by Ms Clark, evidence given at the hearing and information from the Māori Land Court records.

[9] In 2006 the trustees filed proceedings seeking the removal of the Christensen family from the block. Judge Savage issued a decision granting the order for possession and for the removal of the Christensens from the block within 6 weeks from the date of judgment.⁷ According to Ms Clark the Christensens vacated the land and moved to a house on the edge of the property. Shortly thereafter Terence Whakatihi and others moved into the house.

[10] In 2007 the trustees filed a further application for the removal of Mr Whakatihi and others. Those orders were granted on 4 July 2007.⁸ It appears that not longer after this Mr Howell began to occupy the house previously occupied by the Christensens.

[11] Kevin Kakahi and Mr O'Brien looked to work the farm jointly in 2008. The trustees were to draw up a lease agreement to provide for this. The trustees also had to deal with issues concerning whether the Christensens were encroaching on the land and the removal of Mr Howell from the cottage situated on the block.

[12] The trustees filed an application with the Tenancy Tribunal in 2009 regarding the removal of Mr Howell and the issue of outstanding rental payments. During 2009 hostilities between Mr Howell and Mr O'Brien came to a head with the trustees deciding to employ someone to undertake periodic security checks of the block.

[13] In 2011 issues arose with the logging of the pine trees on the block. The trustees were then alerted to the fact that there may be ETS liabilities arising from the pine trees, namely that they be required to replant. The trustees appointed John Hura to assist in dealing with the ETS issues. Added to this was the fact that Mr Howell had moved a house onto the block. The lease with Mr O'Brien was also sought to be terminated.

[14] The issue regarding the termination of the lease with Mr O'Brien continued into 2012 the trustees entered into an agreement with Mr O'Brien to surrender the lease. Following the surrender they offered to lease the block to Mr Kakahi. The issues relating to Mr Howell and ETS liabilities also remained outstanding during this year.

[15] In 2013 Kathleen Edwards, Dianne Edwards and Kepa Patena resigned their positions as trustees. Ms Clark continued to deal with the issues with Mr Howell. Several owners meetings

⁷ *Trustees of Okahukura 8M2C2C2B v Christensen* (2006) 176 Aotea MB 42 (176 AOT 42)

⁸ *Trustees of Okahukura 8M2C2C2B v Whakatihi* (2007) 188 Aotea MB 96 (188 AOT 96)

were held for appointing trustees. During this year, the replacement of trustee and review of trust applications were filed with the Court.

Procedural history

[16] The current application arises from issues outstanding under the previous applications made to the Court concerning the administration of the trust. At the hearing held on 28 April 2014 I raised with Ms Clark the issue of trustee expenses.⁹ I was concerned that, notwithstanding the fact that there had been no approval from the Court for trustee meeting fees and expenses, given the size and income level of the trust, the expenses appeared to be excessive.

[17] At the conclusion of that hearing I directed the trustees to provide a detailed breakdown of trustee costs and expenses for the three years prior to 2012, a summary of the trusts activities and an explanation as to legal expenses. I also directed the trustees to convene a meeting of owners to discuss the outstanding issues, particular the expenses incurred by the trust between 2008 and 2013.¹⁰ I also made reference to the need for the trustees to obtain expert advice as to the options available to the trust regarding Emission Trading Scheme (“ETS”) issues.

[18] A meeting of owners was subsequently held on 23 November 2013 where those in attendance approved various expenses incurred by the trust. A total of \$18,235.00 for trustee meeting expenses for the period between 2012 and 2013 were approved as well as legal costs totalling \$14,305.00, incurred in 2013 and the costs of a hui held on 25 May 2013 at Papakai Marae amounting to \$914.60.

[19] Ms Clark subsequently filed with the Court a list of trustee expenses from 2008 to 2013, a letter from the trust’s lawyer regarding legal expenses and a summary of the trust’s activities between 2008 and 2013. In relation to trustee fees and meeting expenses it appears that a total of \$53,591 has been incurred between 2008 and 2013 for trustee expenses (including owners meetings, trust work and security).

[20] The substantive hearing was held on 16 December 2014.¹¹ Ms Clark gave an account of trust activities noting that the expenses incurred are related to the large number of issues that the

⁹ 308 Aotea MB 82 (308 AOT 82)

¹⁰ 308 Aotea MB 248 (308 AOT 248)

¹¹ 331 Aotea MB 252 (331 AOT 252)

trustees have had to deal with over the years. At the conclusion of the hearing I dismissed the application with written reasons to follow.

The Law

[21] Section 238 of Te Ture Whenua Māori Act 1993 provides:

238 Enforcement of obligations of trust

(1) The Court may at any time require any trustee of a trust to file in the Court a written report, and to appear before the Court for questioning on the report, or on any matter relating to the administration of the trust or the performance of his or her duties as a trustee.

(2) The Court may at any time, in respect of any trustee of a trust to which this section applies, enforce the obligation of his or her trust (whether by way of injunction or otherwise.)

[22] It is trite law that trustees must adhere to their duties and any suggestion as to a lack of knowledge of such responsibilities is no defence against a claim of breach of duty. The Court of Appeal judgment *Rameka v Hall* underscored the relevant duties including the principal obligation of being familiar with the terms of the trust.¹² I adopt the principles set out in that decision.

Discussion

Were the legal costs reasonably incurred?

[23] East Brewster provided a letter on the nature of the legal expenses incurred by the trust between 2012 and 2014. They advised that no legal fees were incurred for the year ending March 2012. For the year ending March 2013 the trust incurred costs of \$13,289.60 in relation to the ETS and lease issues. The trust also incurred, in that year, legal expenses relating to a variation of Forestry right of \$1,015.00. For the year ended March 2014 the trust incurred legal expenses of \$525.75 in relation to a third supplementary deed of variation of forestry right.

[24] On reflection, given the numbers of disputes that the trust found itself in, largely through no fault of the trustees, it is surprising that the legal costs were not higher. I accept that these costs were incurred in good faith by trustees who considered that they were acting prudently and within their duties as trustees. I find that the legal costs incurred by the trust concerning the various proceedings that took place were both reasonable and prudently incurred.

¹² *Rameka v Hall* [2013] NZCA 203

[25] Regarding the ETS issues, given the circumstances surrounding the lease with Mr Thompson and the fact the trustees engaged an expert to assist them in resolving this, I consider that the legal expenses incurred were reasonable.

Were the trustees' expenses reasonably incurred?

[26] It is accepted that the trustees were paid for expenses without the prior approval of the Court and without the power to do so under their trust order:¹³

To pay own costs

From the revenues derived from the operation of the trust to pay all costs expenses and disbursements incurred by them including the costs of any person employed by them in the administration of the trust and for any Advisory Trustees or in the furtherance of any of the objects of the trust and, if approved by the Court, including also the reasonable fees costs and travelling expenses of the Trustees in attending the meetings of the trust or in respect of any trust business.

[27] It is settled law that a trustee cannot profit from that office: *Robinson v Pett*.¹⁴ Whether the profit is made directly or indirectly, honestly or dishonestly, it will still amount to a breach: *Rochefoucauld v Boustead*.¹⁵ It will also be a breach even where the profit is made by a third party, including children of the trustee: *Willis v Barron*.¹⁶ As a fiduciary a trustee cannot permit any conflict between personal interests and the trustee's duties to the beneficiaries: *Boardman v Phipps*.¹⁷ Where trustees profit from that role they must then account to the trust for the unauthorised retention of trust capital: in *re Macadam*.¹⁸ That said, trustees can also seek relief from liability per s 73 of the Trustee Act 1956 if they can prove that they have acted both honestly and reasonably.

[28] As foreshadowed Ms Clark attended the hearing held on 16 December 2014. She advised that:¹⁹

...the meeting expenses charged for each trustee is \$80.00. The mileage is \$1.00, except in my case it is \$0.75. And the hourly rate for hours put into the trust is \$10.00.

[29] Ms Clark considered that the complaints over the number of meetings held were unreasonable given that the need to hold so many meetings was brought about by the action of

¹³ 61 Aotea MB 246 (61 AOT 246)

¹⁴ *Robinson v Pett* (1734) 3P Wms 249. See also A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 497 to 502

¹⁵ *Rochefoucauld v Boustead* [1898] 1 Ch 550 (CA)

¹⁶ *Willis v Barron* [1902] AC 271 (HL)

¹⁷ *Boardman v Phipps* [1967] 2 AC 46; [1966] 3 All ER 721

¹⁸ *re Macadam* [1945] 2 All ER 664; [1946] Ch 73

¹⁹ 331 Aotea MB 253 (331 AOT 253)

the people who had complained. Ms Clark spoke at length about the trust activities and ongoing issues surrounding the use of the block.

[30] In relation to the expenses claimed by Ms Clark, she stated that from 2005 the trustees were having up to five meetings a year to deal with the activities taking place on the land. Ms Clark said that at one stage she did advise her fellow trustees of the expense involved in her attending meetings (from Auckland) and was told by then trustee Arthur Smallman that she should continue on as trustee to give the new trustees time to become familiar with their role. Initially, Ms Clark says that she advised the trustees that she was not going to attend all the meetings given the expense involved. However this did not last long as the trustees were subsequently changing their minds about things and as such Ms Clark says she ended up going to all trustee meetings. Ms Clark also said that the expenses she has claimed for work undertaken in drafting the lease and dealing with the ETS issues were reasonable.

[31] The trustees have paid themselves without the prior approval of the Court and without the power to do so under the trust order. That said, it is evident from the trust documents filed by Ms Clark and in light of the issues surrounding the use of the block that the trustees have been required to meet on a number of occasions. The trustees have remained vigilant in seeking to address the issues and worked regularly towards resolving the issues as and when they arose. I accept that the fees incurred are high and the expenses report filed by Ms Clark goes some way to explaining the fees. In the absence of any further breakdown it is difficult to determine whether the fees are unreasonable.

[32] By way of example I note that a trustee meeting was held on 23 September 2012 with total expenses being \$1,171. Deducting the fee for attending the meeting (\$80.00) reduces the total to \$851 from that figure further deductions must be made for travel. However without further evidence of the travel claimed for each trustees no final determination can be made.

[33] In summary, taken as a whole, it seems evident that the trustees had many onerous tasks to perform in their efforts to adhere to their duties and to act prudently. When the background history to the various sets of proceedings and issues is taken into account, this does provide some explanation as to the level of costs that were incurred. Much of the burden fell on Ms Clark and it appears from the evidence that she had tried her best as a lay person to manage the various proceedings and issues that engulfed the trust.

[34] Even so, the trustees acted in breach of their trust order and so it is essential that they understand that such action is impermissible. The solution would have been for the trustees to

have sought directions. By a narrow margin I am prepared to grant relief per s73 of the Trustee Act 1956 regarding the fees incurred. I accept that, overall, the trustees acted both reasonably and honestly.

Decision

[35] The trustees are relieved from liability to repay any fees received in breach of the trust order per s73 of the Trustee Act 1956.

[36] To avoid doubt, the ss231, 238 and 240 proceedings are concluded and dismissed.

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

Pronounced at 2.20 pm in Rotorua on Friday this 22nd day of May 2015

L R Harvey
JUDGE