

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

**A20130001240**

UNDER Section 242, of Te Ture Whenua Māori Act 1993

IN THE MATTER OF Omaio 39

BETWEEN NICHOLAS MOTU ALBERT  
Applicant

AND TE TUNU PAEROA  
Respondent

Hearing: 1 April 2014  
(Heard at Te Kaha)

Judgment: 19 December 2014

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**RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE CL FOX**

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## **Introduction**

[1] Omaio 39 is a block of Māori freehold land situated near the township of Te Kaha in the Eastern Bay of Plenty. It is approximately 8.635 hectares in size with 83 owners. It is administered as an ahu whenua trust by the Māori Trustee, now known as Te Tumu Paeroa. There are 6 advisory trustees. It is prime cropping and horticultural land. According to Te Tumu Paeroa it is well suited for cultivated crops, pasture and forestry.

## **Application**

[2] This application was filed by Nicholas Motu Albert for the payment of money held in trust by the Māori Trustee to the beneficial owners, in accordance with the Omaio 39 ahu whenua trust order.<sup>1</sup> It was filed in January 2013. The application was filed upon the grounds alleging, inter alia, that the land had been subject to a lease which expired on 31 March 2012, and that there was 23 years of rent money held in an interest bearing account which the applicant contended should be distributed to the owners.

## **Māori Land Court Procedure**

[3] The application was referred to the Court for directions for the first time in February 2013 and it was subsequently set down for hearing.

[4] On 18 April 2013, Te Tumu Paeroa requested an adjournment to allow that office time to call and hold a meeting of owners. After the Court considered the request, the matter was adjourned for 4 months. A meeting of owners was subsequently held on 27 July 2013 and a resolution was passed by the 9 owners present that of the \$121,584 held, \$100,000 should be distributed to the owners.

[5] The application came before the Court for hearing on 4 September 2013. On that date the matter was called early by mistake. The applicant arrived during the proceedings. During the hearing Mr Ngāneko opined that paying the distribution would set the block back for the next 10-20 years and that it would not be in the best interests of the owners or the block. The applicant objected to the notion that the money held should be used for further development and continued to press for distribution.

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<sup>1</sup> (1996) 70 Ōpōtiki MB 364 clause 3(b)

He believed that any further capital investment to rectify previous breaches of covenant on the lease that expired in 2012 should be pursued against the then lessee and that any future capital investment should be a cost borne by a future lessee.

[6] I determined that I should not grant an order for distribution of trust funds to the beneficial owners, but rather I gave Te Tumu Paeroa six months to come to an agreement with the owners as to future utilisation.

[7] The matter came before the Court for the final time on 1 April 2014. No agreement had been reached between the parties. Prior to the hearing, Te Tumu Paeroa submitted a report dated 25 March 2014. That report noted that prior to the expiry of the lease, inspections undertaken highlighted that the avocado orchard on the block was in a general state of neglect with the majority of trees suffering from severe phytophthora infection. Many of the trees were dead and beyond recovery. Furthermore, vacant possession had not been secured as a previous lessee was still in occupation and Te Tumu Paeroa had filed a Notice of Claim against the three lessees for \$105,584.16. It was further noted that the owners and advisory trustees still needed time to consider development options.

[8] Te Tumu Paeroa have resolved to distribute \$20,000 to the owners rather than \$100,000. That is because it considered that a distribution would limit the future options for the block for the next 10-20 years and that it was not in the best interests of all the owners and successors. Cash reserves of \$52,500 were needed to cover the cost of the initial distribution, closure of the orchard, legal costs and advertising to secure a three year maize cropping arrangement which will leave \$71,937.00 in reserve for re-investment back into the property, potential business development options and or a further distribution in 2015. The applicant and the other owners continued to press for distribution of \$100,000 on that basis that there had not been any significant return to the owners for 32 years.

[9] I reserved my judgment.

### **The Law**

[10] The Court of Appeal in *Rameka v Hall* (2013) summarised the duties of a responsible trustee.<sup>2</sup> The general responsibilities of responsible trustees are set out in s 223 of the Act. Those are (a) carrying out the terms of the trust, (b) the proper administration and management of the business of the trust, (c) the preservation of the assets of the trust, (d) the collection and distribution

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<sup>2</sup> [2013] NZCA 203

of the income of the trust. The Court of Appeal noted that these statutory duties are not exhaustive and general trustee law principles are also relevant. Further, the trust order applicable to the trust may add other responsibilities.

[11] The Court of Appeal also considered that:<sup>3</sup>

The trustees have obligations to the beneficiaries to administer the trust property in accordance with general trust law, the requirements of the Trustee Act 1956 and the provisions of the Act. In other words, trustees are subject to traditional trustee duties with the statutory overlay of particular obligations arising from the context of ahu whenua trusts.

[12] The Court of Appeal adopted the Māori Appellate Court's elaboration of trustees' duties, namely that trustees have:<sup>4</sup>

- a) A duty to acquaint themselves with the terms of trust;
- b) A duty to adhere rigidly to the terms of trust;
- c) A duty to transfer property only to beneficiaries or to the objects of a power of appointment or to persons authorised under a trust instrument or the general law to receive property such as a custodian trustee;
- d) A duty to act fairly by all beneficiaries;
- e) A duty of trustees to invest the trust funds in accordance with the trust instrument or as the law provides;
- f) A duty to keep and render accounts and provide information;
- g) A duty of diligence and prudence as an ordinary prudent person of business would exercise and conduct in that business if it were his or her own;
- h) A duty not to delegate his or her powers not even to co-trustees;
- i) A duty not to make a profit for themselves out of the trust property or out of the office of trust: Garrow and Kelly Law of Trusts and Trustees (sixth edition, pp 523–582 inclusive).

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<sup>3</sup> [2013] NZCA 203 at [19]

<sup>4</sup> [2013] NZCA 203

[13] I note further that the Māori Appellate Court held in *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) that where a trust is adhering to its trust order and acting prudently, the Court cannot interfere.<sup>5</sup> This is because it is the trustees who have the principal responsibility for the management of the trust and its assets. Only where there is evidence of an actual or potential breach of duties and risk to the trust will the Court invoke its powers as set out in Part 12 of the Act to endeavour to protect the interests of the beneficiaries of the trust.

### **Discussion**

[14] In this case the terms of this trust are set out in the Omaio 39 Ahu Whenua Trust Order.<sup>6</sup> Clause 3(b)(ii) empowers the responsible trustee to set aside reserves for capital expenditure and to retain such profits as it thinks prudent. Clause 3(b)(v) of the Trust Order empowers Te Tumu Paeroa as the responsible trustee to distribute to equitable owners in accordance with their shares the whole or part of the net proceeds as it determines.

[15] In this case there is nothing that suggests that Te Tumu Paeroa is not adhering to its trust order. Neither has there been any sufficient evidence demonstrating that it has or is acting imprudently, or that it has been in breach of its trustee duties. Certainly, its position on distribution indicates that it is not putting at risk trust property.

[16] I cannot, as a result, interfere with what I consider to be a prudent decision made for the benefit of all the owners not just those who have been active on this issue.

[17] The application is dismissed

Pronounced in open Court at 11.45 am in Gisborne on Friday this 19<sup>th</sup> day of December 2014

C L Fox  
**DEPUTY CHIEF JUDGE**

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<sup>5</sup> (2005) 15 Aotea Appellate MB 192 (15 WGAP 192)

<sup>6</sup> (1996) 70 Ōpōtiki MB 364