

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT**

A20060025818

UNDER Section 238, Te Ture Whenua Māori Act
1993

IN THE MATTER OF Mangatawa 2B2A - an application to
enforce the obligations of a Trust

A N D WHITIORA RANGIMARIE McLEOD
and PINE McLEOD
Applicants

A N D WAIMIHI BROTT, PAREWAITAI
McLEOD, TE RUPE RIRINUI, HENARE
RIRINUI, JOSEPH McLEOD, ATHLONE
WALKER, AROHA KAKAU, TE WAI
WALKER trustees of Mangatawa 2B2A
Block
Respondents

Hearing: 31 January 2007, 88 Tauranga MB 84-107
29 November 2007, 91 Tauranga MB 116-119
29 September 2008, 95 Tauranga MB 153-162
3 February 2009, 97 Tauranga MB 208-213
9 April 2009, 98 Tauranga MB 104-114
(Heard at Tauranga)


Appearances: Mr M Sharp, Counsel for the applicants at the 31 January 2007 and
29 November 2007 hearings
Mr A Tate, Counsel for the Trustees of the Mangatawa 2B2A Block

Judgment: 16 December 2009

RESERVED JUDGMENT OF JUDGE S R CLARK

Introduction

[1] The applicants Pine McLeod and Whitiora McLeod are cousins and members of Tamapahore Marae. Tamapahore Marae is situated on the Mangatawa 2B2A



Block (“the block”), at Tauranga. The block was set apart as a Māori Reservation by Gazette Notice on 7 March 1963.

[2] The block has, for some time, been administered by trustees appointed by the Māori Land Court. On or about 19 September 2006 the applicants filed an application with the Māori Land Court seeking to enforce the obligations of a trust pursuant to s 238 of Te Ture Whenua Māori Act 1993 (“TTWMA”). At that time the applicants were, along with eight others, responsible trustees of the block.

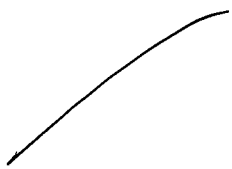
[3] The application was made upon the following grounds:

- a) That the trust had not held an annual general meeting in over four years;
- b) That the trust had not held a properly convened meeting of trustees for over two years;
- c) That financial and other records of the trust were not being disclosed to all of the trustees.

[4] Shortly thereafter on 15 November 2006, a majority of the then trustees (“the previous trustees”) filed an application with the Māori Land Court seeking an order removing the applicants as trustees of the block pursuant to s 240 of TTWMA.

[5] Both applications were initially heard by Judge Milroy on 31 January 2007. On that day she removed both applicants as trustees. She initially indicated her decision orally and then later gave full reasons in a reserved decision dated 11 May 2007 – *McLeod & Ors v McLeod & Anor – Mangatawa 2B2A* (2007) 88 Tauranga MB 292 (88 T 292).

[6] Since 31 January 2007 there have been a number of further hearings and other events have occurred impacting upon the outstanding s 238 application. However, the remaining issue for the Court is whether there are any outstanding issues concerning the administration of this trust, which would warrant any further steps being taken by the Court.



Background – Procedural History

[7] On 31 January 2007 Judge Milroy made directions in relation to this application. She directed the Registrar pursuant to s 40 to “prepare a report and, if necessary, to employ an accountant to investigate the administration, finances and management of the operations of the marae and report on the same with a view to holding an annual general meeting as soon as possible, at which a report would be presented and an election of trustees would take place” – ref 88 Tauranga MB 106 (88 T 106).

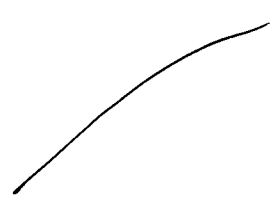
[8] Later that year on 29 November 2007 the matter was again before the Court. Prior to then Mr Sharp, counsel for the applicants had, on 17 August 2007, filed a memorandum of counsel concerning the lack of progress in preparing the s 40 report.

[9] By the time the second hearing took place on 29 November 2007 an accountant had yet to be engaged by the Court. The matter was further adjourned to enable the s 40 report to be completed, for an AGM to be held and for there to be an election or re-election of trustees.

[10] On 12 March 2008 the Case Manager forwarded a memorandum to Judge Milroy. The Case Manager advised that the Court staff had selected a suitable tenderer for the s 40 report and asked the Court for an order of engagement to appoint accountants.

[11] On 17 March 2008 the secretary of the trust wrote to the Court advising that as the process to appoint an accountant to carry out the s 40 report was taking too long the trustees had appointed their own chartered accountant, Bennett Gibson to carry out preparation of financial statements and an audit.

[12] On 8 April 2008 the Court received audited financial statements for the financial years ending 31 March 2006, 31 March 2007 and for a seven month period from 1 April 2007 – 31 October 2007.



[13] On 2 May 2008, I directed the Case Manager to contact Mr Sharp, then counsel for the applicants. My inclination was to accept the financial reports prepared by Bennett Gibson in lieu of any s 40 report which the Court had over a 14 month period failed to organise. Mr Sharp subsequently confirmed his clients' acceptance to that course of action.

[14] An annual general meeting was eventually held at Tamapahore Marae on 20 July 2008. It was chaired by Erana Brewerton from the Māori Land Court, following a request from the Trust secretary for assistance from the Court.

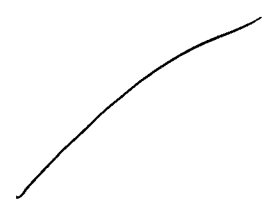
[15] The matter first came before me on 29 September 2008. This application was adjourned as further financial statements for the year ending 31 March 2008 were being finalised and needed to be presented to a hui-a-hapū. On the same day, as a result of resolutions put at the AGM, a number of incumbent trustees resigned and were replaced by new trustees ("the current trustees").

[16] The matter was next called before the Court on 3 February 2009. The application had to be adjourned as the accounts for the year ending 31 March 2008 had yet to be prepared and had not yet been presented to a hui-a-hapū.

[17] Those accounts were prepared and eventually presented to a hui-a-hapū on Sunday 5 April 2009.

[18] The matter was next before the Court on 9 April 2009. At that hearing a copy of the chairperson's report for the hui-a-hapū of 5 April 2009, the financial statements for the year ending 31 March 2008 and minutes of the hui-a-hapū of 5 April 2009 were made available to the Court.

[19] During the course of the hearing on 9 April 2009 Mr Whitiōra McLeod drew to my attention that neither he nor Pine McLeod had attended the hui-a-hapū. Prior to then both men had been charged with unlawful intimidation against one of the new trustees Victoria Kingi. Bail conditions imposed upon both of the applicants meant that they could not attend the hui-a-hapū on 5 April 2009.



[20] After learning of that I gave the applicants an opportunity to provide written submissions as they had not received the written material presented to the hui-a-hapū on 5 April 2009.

[21] On 1 May 2009 the applicants filed a voluminous submission with the Māori Land Court.

[22] The chairperson of the current trustees in turn filed written submissions with the Court on 21 May 2009.

The Allegations by the Applicants

[23] The allegations emerged in a somewhat piecemeal fashion during the hearings. Having said that, the previous trustees in a report made available to the Court on 31 January 2007, admitted the following:

- a) That from 2001 until the conclusion of 2006, very few trustee meetings took place;
- b) That at some stage the trust minute folder for the years 1996 – 2004 went missing;
- c) That annual general meetings did not take place between 2001 – 2006;
- d) That there had been a misappropriation of trust funds by a former non-trustee treasurer;
- e) That trust business was not being properly administered;
- f) That the safety of trustees, kaumātua and members of the marae was a concern.

[24] In submissions and evidence put to the Court on 31 January 2007, the previous trustees indicated that meetings had not been held due to aggressive and

intimidatory behaviour exhibited by the applicants. For those reasons they said, the trustee meetings that did occur, were held off the marae.

[25] On the same day a number of previous trustees spoke about the deteriorating condition of marae buildings and facilities. This was also confirmed in the then chairperson's report put to the AGM on 20 July 2008.


[26] A letter from the accountants dated 22 May 2008 noted that audit reports prepared for the financial years ending 31 March 2006 and 2007 and for the seven month period ending 31 October 2007 were qualified for the following reasons:

- a) A lack of control over income before being recorded;
- b) The misappropriation of funds by the treasurer;
- c) An inability to obtain sufficient supporting documentation for marae payment transactions.

[27] Unfortunately as this matter progressed allegations and counter allegations of assault were made. As referred to earlier, criminal charges were laid against both applicants alleging unlawful intimidation of Ms Victoria Kingi who had been appointed a trustee on 29 September 2008. At the 3 February 2009 hearing Mr Whitiora McLeod alleged that he had been assaulted while waiting for this matter to be called.

[28] At the final hearing on 9 April 2009 Mr Whitiora McLeod talked about the criminal charges he was facing and bail conditions which meant he could not return to the marae.

[29] In his written submissions Mr Whitiora McLeod reiterated an allegation that he had been assaulted by Jerry Carroll, the brother of Victoria Kingi prior to Court on 3 February 2009. Mr Whitiora McLeod also alleged that his cousin Pine McLeod had been assaulted by Ms Kingi's husband Patrick Kingi.



[30] In his written submissions of 29 April 2009 Mr Whitiora McLeod made wide sweeping allegations against Ms Kingi. In essence he was suggesting a conspiracy on the part of Ms Kingi to gain control of the marae, Treaty settlement claims and the Mangatawa Papamoa Incorporation.

The Law

[31] Section 238 reads as follows:

“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 obligations of his or her trust (whether by way of injunction or otherwise).”*

[32] There are numerous cases from this jurisdiction which canvass the obligations of trustees and the steps Courts can take when a breach of trust has been established. For example see *Proprietors of Mangakino Township v Māori Land Court & Anor* CA 65/99 16 June 1999, *Paki v Māori Land Court* [1999] 3 NZLR 700, *Karena & Ors v Nelson & Ors – Owhaoko C1, C2, C4, C5 & C7* (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4) and *De Loree v Mokomoko & Ors – Hiwarau C* (2006) 11 Waiariki Appellate MB 101 (11 AP 101).

[33] As the Court noted in the *De Loree* decision, the burden borne by trusteeship is no light one. The standard of performance required of trustees is high. It is the basic right of every beneficiary to have the land, its income, and other assets associated with the trust, duly and prudently administered in accordance with the trust order.

Discussion

[34] There is no doubt, in light of the admissions on 31 January 2007 by the chairperson of the previous trustees, that this trust had become dysfunctional.



Breaches of trust had occurred. Regular trustee meetings had not been held as required by the marae charter, AGMs had not been held as required by regulation, records of trust meetings had been lost, records documenting financial expenditure was poor, marae buildings and facilities had deteriorated. In addition during the tenure of the previous trustees a defalcation had occurred which resulted in a financial loss to the trust.

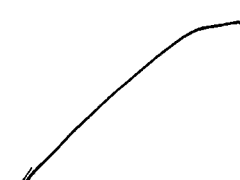
[35] The extent to which the applicants are to blame for this state of affairs is something which I have to consider. I say that because much of the evidence which I have read and heard from previous trustees was to the effect that the reason trust meetings could not be held is due to the aggressive, overbearing and intimidatory conduct exhibited by both applicants. It was conduct of this type which led Judge Milroy, rightly, to remove both applicants as trustees.

[36] However that does not mean all the previous trustees were exonerated. There were eight other trustees and they too were responsible in part for the dysfunction which occurred during their trusteeship. Whilst I accept that it was difficult to hold regular trust meetings due to the overbearing and aggressive conduct by the applicants, there were other aspects of their trusteeship for which they are just as responsible, for example: poor record keeping; loss of trust records; failure to keep proper financial records; deterioration of marae facilities are all matters for which those trustees must share some responsibility. The issue is whether given what subsequently happened, the Court needs to take any further action against the previous trustees now.

Steps taken by trustees since the application was filed

[37] Since this application was filed a number of steps have been taken by the previous and current trustees to remedy the situation.

[38] Rather than wait for the Court to arrange a s 40 report, the previous trustees arranged for audited sets of financial statements for the years ending 31 March 2006, 2007 and 2008 to be prepared. The most recent statements show a significant increase in income.



[39] The previous trustees then organised and held an AGM on 20 July 2008. The minutes record that the following matters were discussed: financial reports; boundary adjustment with Mangatawa Papamoa Incorporation; resolution for the nomination of new trustees were passed; hapū and iwi business.

[40] The previous trustees also took the prudent step of entering into a deed of acknowledgement of debt with two persons responsible for the defalcation. A debt of \$10,287.23 is recorded in the deed dated 1 November 2007. I received evidence, which I accept, that the debt was being repaid by regular instalment payments. As at 27 January 2009 the debt had reduced to \$3,898.23.

[41] On 3 February 2009 the Court received evidence of regular monthly trustee meetings which had taken place throughout the second half of 2008 and through until the early part of 2009. Copies of minutes of those meetings were made available to the Court.

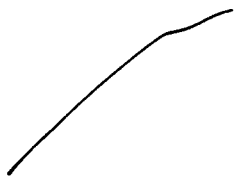
[42] Evidence was put before the Court in the form of minutes of the hui-a-hapū held on 5 April 2009 confirming that extensive renovations had been carried out to marae facilities in particular the wharekai, wharenuī and kōhanga.

[43] Importantly all of the trustees in place at the time the application was first filed subsequently resigned and were replaced at either the 29 September 2008 or 9 April 2009 Court hearings.

Outcome – Previous Trustees

[44] Many of the grounds upon which this application was brought before the Court were made out or admitted by the previous trustees. To that extent all the previous trustees, including the applicants must share responsibility for the breaches of trust which occurred.

[45] There is no doubt, as Judge Milroy found in her reserved decision, that the applicants' behaviour was such that it warranted their removal as trustees pursuant to s 240 of TTWMA.



[46] What then to do in relation to the previous trustees? Ultimately I conclude that no further action is warranted. I say that for the following reasons:

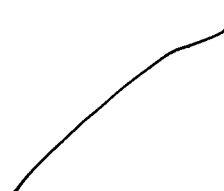
- a) Those trustees in a report to the Court on 31 January 2007 admitted that dysfunction had occurred within the trust;
- b) Those trustees then took a number of steps in direct response to the application. In particular regular meetings started to occur, three sets of financial statements were prepared and audited, an AGM was held in 2008, considerable marae renovations were carried out;
- c) The loss occurred by the defalcation was documented and is being recovered;
- d) All of the previous trustees have now resigned.

[47] Thus it is clear to me that the previous trustees identified and admitted that dysfunction had occurred within the trust. More importantly the previous trustees embarked upon a programme to restore the trust to the position it should have been in. The previous trustees have also taken steps to ensure that the loss of trust money is being recovered.

[48] Thus I am satisfied that the previous trustees accounted to the beneficiaries. They took steps to restore the position of the trust and have sought to recover trust monies. Given those circumstances I consider no further steps are necessary.

Outcome – Current Trustee Ms Victoria Kingi

[49] Before me on 9 April 2009, and in his written submissions, Mr Whitiara McLeod makes a number of allegations against a current trustee, Victoria Kingi. These allegations are new in the sense that they did not form part of the original application.



[50] On 9 April 2009 Mr McLeod discussed the criminal charges brought against himself and his cousin Pine McLeod. The complainant in that matter was Ms Kingi. I indicated to Mr Whitiora McLeod that the fact that Ms Kingi had laid a complaint with the Police and the related bail conditions were matters not within the jurisdiction of the Māori Land Court. Mr McLeod also raised those matters in his written submissions. Surprisingly he attached to his submissions material disclosed to him by the Police. Such material hinders not helps the applicants' case. It was also irrelevant to the application before me and did not disclose any conduct on the part of Ms Kingi which the Court is concerned about.


[51] Mr McLeod also makes allegations that Ms Kingi's brother assaulted him prior to Court on 3 February 2009. In his written submission he made an allegation that Ms Kingi's husband also assaulted him prior to the last hearing. Whilst those allegations, if true reflect badly on all concerned, there is no evidence before me suggesting that such actions were carried out at the behest of Ms Kingi.

[52] Mr Whitiora McLeod in his written submissions spends a great deal of time and energy making unsubstantiated allegations against Ms Kingi to the effect that she is attempting to usurp a Treaty claim both applicants are involved in and to totally control the operations of Tamapahore Marae and the Mangatawa Papamoa Incorporation. I find that those allegations are without foundation and indeed in the manner in which they are put, quite scandalous.

[53] For my part I have no doubt that the steps the previous and trustees took following the filing of the application to remedy what had been a dysfunctional trust and the ongoing steps by the current trustees to administer this trust in a proper fashion have been to a large extent assisted with the intervention of Ms Kingi. Following her involvement the trustees' performance has markedly improved. There is no substance in the allegations by Mr Whitiora McLeod against Ms Kingi.

Result

[54] The application is dismissed.



Costs

[55] Ordinarily the trustees would be entitled to an award of costs given that the application has been dismissed.

[56] Having said that my tentative thoughts are at this stage that costs should lie where they fall, the reason being that in my opinion all previous trustees in place at the time the application was filed were to some extent responsible for the dysfunction which arose.

[57] The trustees may file a memorandum seeking costs if they so wish. However it will be considered in light of the above comments. Any such memorandum should be filed with the Court within 14 working days upon release of this judgment.

Special Aid Fund – s 98

[58] At 95 Tauranga MB 162 (95 T 162) I mentioned the possibility that costs incurred by the trustees in arranging the audited financial statements by Bennett Gibson might be reimbursed from the Special Aid Fund. I was minded to do so, given the failure on the part of the Court to arrange a s 40 report as directed. I am still minded to do so, but as indicated I will only do so upon receipt of the Bennett Gibson invoices for their work in preparing the financial statements for 31 March 2006, 2007, 2008 and to 31 October 2007. If the trustees wish the Court to consider that possibility then those invoices should also be sent to the Court within 14 working days following the release of this judgment.

Pronounced in open Court at Hamilton at 1.45 pm on 16 December 2009.



S R Clark
JUDGE