IN THE MĀORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT

A20170004105

	UNDER	Section 238, Te Ture Whenua Māori Act 1993
	IN THE MATTER OF	Pukemakoiti 2 and 4 Block
	BETWEEN	BARBARA TANIORA AS TRUSTEE OF THE TANIORA MARU WHĀNAU TRUST Applicant
	AND	MARY CROWN, MOERA HUGHES, GRAEME KILGOUR, WEO MAAG, MORGAN RATA, THOMAS TUWHANGAI AND RAYMOND WI AS TRUSTEES OF THE PUKEMAKOITI TRUST Respondent
Hearings:	18 June 2018, 387 Aotea MB 126-136 7 December 2017, 155 Waikato Maniapoto MB 33-40	
Judgment:	28 September 2018	

INTERIM JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Barbara Taniora seeks the enforcement of obligations of the Pukemakoiti Trust. She claims that the trustees have breached their trust order and their duties by loaning or granting funds to Te Maru o Rereahu Trust, an entity created to advance the Treaty claims of Ngāti Rereahu. Ms Taniora argues that all trustees should be removed because of this breach.

[2] The trustees oppose the application. While they acknowledge that the trust order does not explicitly allow the trust funds to be used in this way, they consider it was for the owners to determine whether to support a grant or loan of funds to TMOR. Resolutions to use the funds were subsequently passed by those owners present at several annual general meetings. The trustees argue against their removal and say their trusteeship has been successful and that the trust is in a strong position. They contend the application is frivolous and vexatious and accordingly seek an award of costs against the applicant.

Issues

[3] The issues for determination are whether the trustees have breached their duties, and, if so, whether those breaches are sufficient to warrant their removal.

Background

[4] The Pukemakoiti Trust was constituted on 1 March 1973 pursuant to s 438 of the Māori Affairs Act 1953, over what was at that time Pukemakoiti block.[1] The trust is now constituted in respect of Pukemakoiti 2 and 4, following an amalgamation of titles.[2] The land is Māori freehold land, 1,748.527 hectares in area. There are currently 2,330 owners with a total ownership of 100.8283 shares.

[5] The original trustees were Pei Te Hurinui Jones, Hikaia Amohia, Pakira Tutaki, Weo Wetere and Koro Wetere. The current trustees are Graeme Kilgour, Weo Maag, Raymond Wi, Thomas Tuwhangai, Moera Hughes, Mary Crown and Morgan Rata.[3]

Procedural history

[6] Ms Taniora filed the application for enforcement of obligations of the trust on 20 June 2017, on behalf of the Taniora Maru Whānau Trust. The applicant requested the hearing be held in Hamilton as she resides there, which was opposed by the trustees. I issued directions on 29 August 2017 allowing for the case to be heard in Hamilton for the purpose of taking the applicant's evidence, and for the matter to be subsequently returned to Taumarunui for the trustees to respond.[4]

[7] The first hearing in Hamilton was held before Judge Milroy on 7 December 2017.[5] Evidence was recorded from Ms Taniora and others present who appeared in support. The application was then adjourned for a further hearing to be held in Taumarunui.

[8] The case was then heard on 18 June 2018 before Judge Savage at Taumarunui.[6] A majority of the current trustees attended and gave evidence. At the end of the hearing the case was adjourned to chambers.

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1 52 Tokaanu MB 112-113 (52 ATK 112-113)
2 264 Aotea MB 192-193 (264 AOT 192-193)
3 274 Aotea MB 101-110 (274 AOT 101-110)
4 375 Aotea MB 121 (375 AOT 121)
5 155 Waikato Maniapoto MB 33-40 (155 WMN 33-40)

Applicant's submissions

[9] Ms Taniora submitted that the trustees have failed to act prudently by giving trust funds in the amount of $40,000.00 to Te Maru o Rereahu Trust, henceforth TMOR, in breach of their trust order and ss 13B, 13C and 13D of the Trustee Act 1956.

[10] She contended that in 2013, TMOR requested the sum of $20,000.00 from the trust as funding to support their efforts to achieve a settlement of Ngāti Rereahu's claims. The trust's 2013 annual general meeting minutes record that the owners approved the funding request "in the hope" that they would be repaid. In 2015, TMOR made a further request for $20,000.00 and suggested that the funding be recorded as a grant but be repayable should a settlement with the Crown be achieved. The minutes confirm that owners agreed to this request on that basis in 2015. The applicant asserts, however, that her objections at both meetings were not properly recorded, which gave the wrong impression that all owners had agreed. In addition, she suggested that there was no prior notice of the request from TMOR and it was only raised during the hui.

[11] Ms Taniora argued that the trust order does not allow for such loans to be made and it is not the objective of this trust to look after another trust. In addition, the provisions of the Trustee Act 1956 require trustees to exercise the care, diligence and skill of a prudent person of business when exercising any power of investment. She says that, although the transactions were approved by the owners, a business-like approach has not been employed by the trustees and it is not prudent to make such advances without any security or certainty of repayment. Ms Taniora pointed out that TMOR has no assets and, should anything happen with that trust, the beneficiaries will "miss out".

[12] At the hearing in Hamilton, it was argued that the mandate strategy adopted by Ngāti Maniapoto makes it clear that there will only be one Post-Settlement Governance Entity ("PSGE") who will hold any settlement money for the claims, including those of Ngāti Rereahu. Therefore, TMOR will not receive settlement monies to repay the trust. Given that some of the trustees are also members of the Ngāti Maniapoto Trust Board, it was contended they would have had advanced knowledge of this mandate strategy.

[13] Ms Taniora submitted that the actions of the trustees warrant their removal.

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[6] 387 Aotea MB 126-136 (387 AOT 126-136)

Respondent's submission

[14] The trustees reject the allegations. They submitted they understood the trust order does not explicitly provide for trust funds to be used in the manner requested by TMOR. They considered the request and decided it was the owners' right to determine whether to grant the funding or not, thereby allowing them to exercise their democratic vote. The owners voted in favour of the funding and the trustees argue therefore that it was the owners, not them, who decided what to do with their money.

[15] In terms of the allegation regarding notice, the trustees pointed out that owners were sent copies of the request letters from TMOR with the notices of both the 2013 and 2015 meetings. Correspondence filed by the trustees from Ms Taniora, confirmed that she did receive notice of the TMOR requests prior to both hui. At the meetings, the funding requests were discussed and in 2015 a representative from TMOR also gave a presentation. The trustees did not take part in the discussion of the matter and all but one did not participate in the vote. The trustees say it is well known that the applicant was strenuously opposed to the formation of TMOR and its aims and has continued to publicly criticise it on all possible occasions. However, the other owners were in support of TMOR and the trust funds were advanced following consideration by the owners in a democratic manner. The applicant simply refuses to accept this.

[16] The trustees also argued that much of the information given by the applicant at the hearing in Hamilton is incorrect, and others who appeared at the hearing are not owners in the land and did not attend the general meetings. In addition, the provisions of the Trustee Act 1956 referred to by the applicant do not apply, as the payments to TMOR were not investments and were made specifically in accordance with resolutions of the owners. In any case, the trustees say the trust is in a strong financial position and, given the presentation of the financial reports, the owners would have been able to consider for themselves if the trust could afford the funding for TMOR. While the trustees acknowledged that TMOR has no assets, they also contended the owners were aware of that fact when they made the decision to provide the funding.

[17] The trustees submitted that the application is frivolous, vexatious and a waste of both time and money for the trust and the Court. They argue that the trust has incurred extra costs in responding to the application and that the allegations of the applicant have demeaned the integrity of the trustees and are bordering on defamation. Given the financial loss to the trust, the trustees request the Court make an award of costs against the applicant.

The Law

[18] Sections 238 and 240 of Te Ture Whenua Māori Act 1993 provide:

> **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).
>
> **240 Removal of trustee**
>
> The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—
>
> (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
>
> (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[19] The general duties of trustees are set out in s 223:

> **223 General functions of responsible trustees**
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> Every person who is appointed as a responsible trustee of a trust constituted under this Part shall be responsible for—
>
> (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 of the income of the trust.

[20] In *Rameka v Hall*, the Court of Appeal noted that these general duties are not exhaustive and general trustee law principles are also relevant, as is the applicable trust order.[7] In other words, trustees are subject to traditional trustee duties with the statutory overlay of obligations arising from the context of ahu whenua trusts.[8] The relevant obligations are described as:[9]

(a) A duty to acquaint themselves with the terms of trust;

(b) A duty to adhere rigidly to the terms of trust;

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7 *Rameka v Hall* [2013] NZCA 203
8 *Rameka v Hall* [2013] NZCA 203, at [19]
9 Ibid, at [29]

(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

[21] Regarding the removal of trustees, the prerequisite is not a simple failure or neglect of duties, but a failure to perform them satisfactorily. An assessment of the trustees' performance is necessary, and the Court will also need to consider the impact of the trustees' actions on the beneficiaries and any apprehension of risk to the assets of the trust.[10]

Discussion

Did the trustees breach their duties by advancing trust funds to Te Maru o Rereahu?

[22] The most fundamental duty of a trustee is to adhere rigidly to the terms of trust. The current trust order records the following objects:[11]

> **OBJECT**
>
> i) The object of the Trust shall be to provide for the use management and alienation of the land and any other property or assets of the Trust to the best advantage of the beneficial owners or the better habitation or use of land by beneficial owners and to carry on any one or more businesses, undertakings, or enterprises either upon the land or parts thereof, or in connection with some user of the land, which will directly assist in the better utilisation of the resource of the land or any other trust property or the commercial realisation thereof for the beneficial owners.
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> ii) To ensure the retention of the land for the present Maori beneficial owners their successors and assigns.
>
> iii) To represent the beneficial owners on all matters relating to the land and for the use and enjoyment of the facilities associated therewith.

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[10] Ibid. See also *Apatu v Puna – Owhaoko C1 and C2* [2010] Maori Appellate Court MB 34 (2010 APPEAL 34); *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7); *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233); *Marino – Repongaere 4G (Part)* (2004) 34 Gisborne Appellate MB 98 (34 APGS 98) and *Bramley v Hiruharama Ponui Incorporation* (2006) 11 Waiariki Appellate MB 144 (11 AP 144)

[11] 298 Aotea MB 12-16 (298 AOT 12-16)

[23] The only power given to the trustees to lend or invest is contained in cl 7:

> **TO LEND OR INVEST**
>
> To lend all or any of the money coming into their hands upon any securities in which Trust funds may be invested by trustees in accordance with the Trustee Act 1956 or in accordance with any other statutory authority.

[24] According to the documentation filed, the initial funds requested by TMOR in 2013 were sought to enable the engagement of a legal adviser and to cover the costs of hui-a-iwi and other administration in relation to their Treaty of Waitangi claims for Ngāti Rereahu. The funds sought in 2015 were also as support for their Treaty claim work for the benefit Ngāti Rereahu. The Chairman, Weo Maag, advised that several beneficial owners in the land whakapapa to Ngāti Rereahu.

[25] Under s 218, where any income of a trust is to be applied for Māori community purposes, the trust may provide money for the benefit or advancement of any specified beneficiary, class or classes of beneficiaries, or the interests of any hapū associated with any land belonging to the trust, and its members. Section 218(3) also specifically provides that the trustees can apply money for the general benefit of a group of class of persons, notwithstanding that the group or class includes persons other than beneficiaries. Therefore, it is not inconceivable that money could be provided to a group such as TMOR if the circumstances came within the scope of these provisions. However, in the present case, there is no provision in the trust order which allows income to be applied for Māori community purposes.

[26] The payment of funds to TMOR does not come within the objects of the trust as set out in the trust order. The advance does not relate to the existing land, property or other assets of the trust. Although, depending on the settlement, arguably, it could. I accept that ss 13B, 13C and 13D of the Trustee Act 1956 are not applicable here as the funds were not investments but were rather in the nature of grants. However, as noted, the trust order also does not allow for grants for Māori community purposes. While I have some sympathy for the trustees' position and their attempts to seek a decision from the owners, the short point is that the trustees are ultimately responsible for decision making in relation to the trust and must comply with their duties and trust order. The fact they knew there was no provision in the trust order for the advancement of trust funds to TMOR, the proper course of action was to seek the directions of the Court.

[27] On the face of the evidence the trustees did in fact breach their duties by making a grant that was, strictly speaking, outside of the terms of trust. It is no answer that the owners

gave their consent given that rarely do more than fifty per cent of owners attend. That said, the trust order provides for a quorum of twenty and, provided there had been compliance with s244 of the Act, a quorate meeting satisfying the sufficiency of notice, opportunity for discussion and support tests would have facilitated a change of trust order that might have included s218. In other words, while only a small number of owners will ever attend general meetings, twenty is sufficient to constitute a quorum and make decisions that are then considered but are not binding on the trustees and the Court.

[28] In this case, as foreshadowed, the proper course would have been to seek directions which would have included a direction to vary the trust order following a general meeting of owners. If, as the trustees contend, they do have the support of their owners, and the evidence would suggest that that is correct, then a formal variation to the trust order will not only deal with the present point but also any future conduct of the trustees in this context, taking into account their duty of prudency. I therefore direct that, at the next general meeting, the trustees promote a variation to their current trust order to include provision for community purposes and, if they are so minded, to add a clause dealing with grants in support of negotiations.

Should the trustees be required to repay the funds?

[29] It is well-settled that where there is a breach of trust, liability extends to all loss caused directly or indirectly to the trust. In *Rātima v Sullivan – Tataraakina C*, the Court put it this way:[12]

> [11] It is also trite law that the basic right of a beneficiary is to have the trust duly administered in accordance with the trust instrument and the general law of trusts. Where there is a breach of trust, liability extends to all loss caused directly or indirectly to the trust estate, although there may be instances where there is a breach of trust but no demonstrable loss and therefore no resulting liability. A trustee is generally also fully liable for loss suffered by the trust property by the wrongful act of a fellow trustee, as liability is joint and several, even if there are varying degrees of blameworthiness.
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> [12] The Courts have imposed liability in three ways:
> (a) A duty to account to the beneficiaries for the assets administered by the trustee;
> (b) An obligation to put the trust estate in the same position as if the breach of trust had not been committed; and
> (c) A requirement to make good the loss of trust property caused by the wrongful act or omission.

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12 *Rātima v Sullivan – Tataraakina C* (2017) 64 Tākitimu MB 121 (64 TKT 121)

[30] Trustees may also be granted relief from liability. Section 73 of the Trustee Act 1956 provides that a trustee may be excused from personal liability for a breach of trust where the trustee has acted honestly and reasonably.

> **73 Power to relieve trustee from personal liability**
> If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the same.

[31] To claim the shelter of s 73, trustees must show they acted honestly and reasonably and ought fairly to be excused for both breaching the trust and omitting to obtain directions from the Court. If both criteria are met, then there is a discretion whether to grant relief and to what extent, however, that remedy is not given lightly.[13]

[32] Given the earlier intimation that the next general meeting needs to consider a variation to the trust order, the issue of relief from liability can be deferred until the outcome of the next owners' hui is known.

Should the trustees be removed?

[33] Although Ms Taniora did make submissions regarding adequacy of notice and minute taking of trust meetings, it appears that the sole basis of her request for removal of all trustees, is their actions in advancing trust funds to TMOR. The trustees however, argued against their removal, given the consent of the owners to the use of the trust funds and the strong financial position of the trust.

[34] The trustees acknowledged the lack of provision in the trust order for the payment of funds to TMOR and on that basis, albeit incorrect, determined that the case should be put to the owners to decide. The evidence confirms that they sent notices to all owners for whom they held addresses and attached the letter from TMOR requesting the funds. The minutes accordingly record discussion of the issue and resolutions passed in favour of the advance. It is evident from this that the trustees sought to adopt a transparent process for consideration of the request for trust funds on what they thought was an appropriate basis. This is a relevant consideration.

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[13] *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166); *Tauhara Middle 4A2B2C Block - Opepe Farm Trust* (1996) 68 Taupō MB 27 (68 TPO 27).

[35] As with the issue of relief from liability, I consider that any question of the removal of trustees should properly be deferred until the results of the next general meeting in the context of a proposed variation to the trust order are considered. To put the point plainly, had the trustees secured a variation *prior* to the payment of the grants or advances then the present application would have been rejected.

Decision

[36] The application is adjourned.

[37] The trustees are directed to promote a variation to the trust order to provide for community purposes and related grants at the next general meeting of the owners and to put the issue of the grants made to date formally to the meeting for the owners' approval.

[38] Should such a variation be approved then the proceedings will be set down for hearing on any such variation. If such a variation is not approved, then the application will be set down for further hearing.

[39] Costs are reserved.

[40] Any party may seek further directions at any time.

Pronounced at 3.45pm in Rotorua on Friday this 28th day of September 2018.

L R Harvey
JUDGE