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

**A20150006419**
**APPEAL 2015/18**

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| UNDER | Section 58, Te Ture Whenua Māori Act 1993 |
| IN THE MATTER OF | Horowhenua 11 (Lake) Block |
| BETWEEN | PHILIP TAUEKI<br>Appellant |
| AND | HOROWHENUA 11 PART RESERVATION TRUST<br>Respondent |

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| Hearing: | 16 February 2016<br>(Heard at Wellington) |
| Court: | Judge S Te A Milroy (Presiding)<br>Judge D J Ambler<br>Judge M P Armstrong |
| Appearances: | Shannon Johnston, for the respondent<br>Philip Taueki, in person |
| Judgment: | 12 April 2016 |

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT**

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Copies to:
S Johnston, Fitzherbert Rowe Lawyers, DX PP82017, Palmerston North, s.johnston@fitzrowe.co.nz

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## Introduction

[1] On 4 November 2015, Judge Doogan granted the following orders:[1]

(a) A permanent injunction requiring the removal of Philip Taueki from continuing in possession, or from taking up further possession, of the Horowhenua 11 (Lake) block ("the block"), including the buildings known as the nursery ("the nursery"), per s 19(1)(a) of Te Ture Whenua Māori Act 1993 ("the Act"); and

(b) An order for recovery of vacant possession of the block, including the nursery, per s 20(d) of the Act.

[2] Mr Taueki appeals against that decision.

[3] The appeal was heard in Wellington on 16 February 2016.[2] Mr Taueki sought an adjournment which was declined with reasons to follow. The substantive appeal was then heard (in Mr Taueki's absence) and the Court reserved its decision.

[4] This decision sets out the reasons for declining the adjournment, and determines the appeal.

## Background

[5] The block is 400.9234 hectares of Māori freehold land. It consists of the bed of Lake Horowhenua, together what is now known as the de-watered area (a further one chain strip of land around the original margin of the Lake and the bed of the Hokio stream and certain adjoining lands).

[6] The block has long been a source of contention. For over 100 years a series of competing claims relating to the block (and the surrounding land) have been before the

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1 *Horowhenua 11 (Lake) Part Reservation Trust v Taueki – Horowhenua 11 (Lake) Block* (2015) 343 Aotea MB 254 (343 AOT 254).

2 2016 Māori Appellate Court MB 57-77 (2016 APPEAL 57-77).

Māori Land Court (and its predecessor the Native Land Court), this Court, and other Courts of general jurisdiction.

[7] The block is currently vested in Brenton Tukapua, Charles Rudd, Eugene Henare, Jonathan Procter, Kelly Tahiwi, Keri Hori Te Pa, Marakopa Wiremu Matakatea, Mathew Sword, Robert Warrington, Vivienne Taueki and Wayne Hurunui, as trustees of the Horowhenua 11 Part Reservation Trust ("the trust").[3] Those trustees hold the block on behalf of the members of the Muaupoko tribe.

[8] The trust is somewhat unique in that it is not an ahu whenua trust,[4] or a Māori reservation trust,[5] which are commonly constituted to administer Māori land. Rather, this trust was established by the Native Land Court on 19 October 1898 per s 7 of the Native Trusts and Claims Definition and Registration Act 1893.[6]

[9] For more than 10 years, Mr Taueki has lived in a converted skyline garage located on the block. This building is known informally as the nursery. On or around 13 May 2013, the trustees served notice on Mr Taueki to vacate the block by 12 August 2013.

[10] Following service of that notice, Judge Doogan issued a reserved decision on 9 August 2013 concluding that, at best, Mr Taueki had a bare licence to occupy the nursery, revocable at will on notice.[7] Judge Doogan also upheld the notice to vacate served on 13 May 2013. Despite that, for practical reasons, Judge Doogan extended an interim injunction already in place for a further period of six weeks to give Mr Taueki a reasonable opportunity to vacate the block. Judge Doogan's decision of 9 August 2013 was not challenged. Despite that, Mr Taueki did not vacate the block and remained in occupation.

[11] On or around 19 November 2013, a trespass notice was served on Mr Taueki, by an agent, on behalf of the trustees. Subsequently on 10 February 2015, the trustees filed an amended application seeking a permanent injunction per s 19(1)(a) of the Act removing Mr

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3 293 Aotea MB 165-174 (293 AOT 165-174).
4 Per s 215 of the Act.
5 Per s 338(7) of the Act.
6 *Horowhenua 11* (1898) 37 Otaki MB 10.
7 *Taueki v Trustees of Horowhenua 11 (Lake) Part Reservation Trust* (2013) 306 Aotea MB 175 (306 AOT 175).

Taueki from the block, and an order for recovery of vacant possession per s 20(d) of the Act. As noted, Judge Doogan granted those orders which are the subject of this appeal.

**Reasons for declining the adjournment**

*The application for an adjournment*

[12] On 5 November 2015, Mr Taueki filed the notice of appeal in this proceeding.

[13] Mr Taueki then filed a memorandum on 26 November 2015 arguing that, pursuant to the terms of the trust order, the trustees' term of office expired on 26 November 2015. Mr Taueki further alleged that the trustees had failed to call a meeting of beneficiaries to conduct an election. On 2 December 2015, Mr Taueki filed a further memorandum alleging that as the trustees' term of office had expired, they no longer had authority to instruct counsel, and to expend trust funds, in relation to the appeal.

[14] On 17 December 2015, we issued a minute advising that both parties should address this issue at the hearing of the appeal.[8]

[15] Subsequently, on 18 December 2015, Mr Taueki filed a memorandum giving notice that any appearance by the trustees at the appeal would constitute contempt, that any judgment accepting the appearance of the trustees would be challenged, and that a complaint would be laid with the New Zealand Law Society.

[16] On 5 February 2016, Mr Taueki filed a copy of an interim judgment of Judge Harvey dated 2 February 2016.[9] Mr Taueki argued that as the interim judgment states that the current trustees are in a "holding pattern" the appeal should be adjourned '*sine die'*. Mr Taueki also referred to a decision of Palmer J on 9 December 2015, where the High Court granted Mr Taueki bail in relation to charges of trespass and assault, on the condition that he reside at the nursery.[10]

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8 2015 Māori Appellate Court MB 681-682 (2015 APPEAL 681-682).

9 *Taueki v Horowhenua 11 Part Reservation Trust - Horowhenua 11 (Lake) Block* (2016) 347 Aotea MB 269 (347 AOT 269).

10 *Taueki v Police* [2015] NZHC 3140.

[17] Ms Johnston, on behalf of the trustees, then filed a memorandum on 10 February 2016 opposing the application for an adjournment.

[18] On 11 February 2016, we issued a further minute directing that:[11]

(a) The application for an adjournment would be heard at the hearing set down for 16 February 2016;

(b) The Court would first consider whether to grant the adjournment;

(c) If the adjournment was not granted, the Court would continue to hear the substantive matters raised on appeal; and

(d) Both parties must be prepared to address the application for an adjournment and the substantive issues on appeal, at the hearing on 16 February 2016.

[19] The hearing proceeded on 16 February 2016. After hearing submissions from Mr Taueki and Ms Johnston, we issued an oral decision declining the adjournment with reasons to follow. Upon issuing this decision, Mr Taueki and his supporters advised that they would leave the Courtroom and that they would not remain for the substantive appeal. Prior to Mr Taueki's departure, we made it clear that we would continue to hear the appeal in Mr Taueki's absence. Despite that warning, Mr Taueki and his supporters left the hearing and did not participate further.[12]

*The law*

[20] Rule 6.9 of the Māori Land Court Rules 2011 states:

> **6.9 Court may adjourn hearing**
>
> (1) The Court may, on the application of a party or on its own initiative, either before or during a hearing, adjourn an application—
>
> (a) to another ordinary sitting of the Court; or
>
> (b) to a special sitting; or

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11 2016 Māori Appellate Court MB 5-6 (2016 APPEAL 5-6).
12 2016 Māori Appellate Court MB 57-77 (2016 APPEAL 57-77) at 70.

> (c) if the circumstances require, to a date and place to be fixed.
>
> (2) A party seeking an adjournment must, if possible, notify the other parties of the intention to seek an adjournment and must attempt to obtain the consent of the other parties to the adjournment.
>
> (3) An application that has been adjourned to a date and place to be fixed may be brought on for hearing on the application of any party or on the direction of the Court, and may be heard at the time and place and on the notice that the Court may direct.

[21] The question of an adjournment is a matter for the Court to decide. It is not granted as of right.[13] In *Attorney General of New Zealand – Tuaropaki E* this Court had to consider the approach when determining whether to grant an adjournment. It held that:[14]

> The power to adjourn is discretionary…
>
> In exercising the jurisdiction to adjourn regard must always be had to the considerations of fairness and balance between the parties.
>
> > "However the essential question which the Court always has to consider when asked for an adjournment is whether or not it is necessary in order to do justice between the parties. One must not overlook that not only is it necessary to do justice to the party who is seeking the adjournment but also justice to the party who wishes to retain the benefit of the fixture. It is essentially a balancing exercise." *O'Malley v Southern Lakes Helicopters* 4\12\90, HC Christchurch CP513\89 per Tipping J.

[22] As such, the issue in this case is whether an adjournment is necessary in order to do justice between these parties.

*The grounds for seeking an adjournment*

[23] In his memorandum dated 5 February 2016, Mr Taueki sought an adjournment as the trustees were in a "holding pattern" due to the expiration of their term of office. Mr Taueki also asserted that it was a condition of his bail to reside at the nursery.

[24] At the hearing on 16 February 2016, Mr Taueki raised a new ground that he was seeking an adjournment in order to obtain legal representation for the appeal.

[25] These grounds are addressed in turn.

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13 *Poihipi – Estate of Hinewhati Takiari* (1999) 1 Waiariki Appellate Court MB 125 (1 AP 125) at 129.
14 *Attorney General of New Zealand – Tuaropaki E* (1994) 1 Waiariki Appellate Court MB 24 (1 AP 24).

*The election of trustees*

[26] Clause 3.1 of the First Schedule to the Trust Order states:

> **3.1 Term of office**
>
> The Trustees from time to time shall hold office until such time as their position comes up for re-election in accordance with this rule provided that no Trustee shall hold office for longer than three years without facing re-election.

[27] Mr Taueki argued that the trustees' term of office expired on 26 November 2015. An election of trustees is to be held on 19 March 2016. Mr Taueki submitted that the appeal should be adjourned pending the outcome of the election, as this may result in the appointment of new trustees.

[28] In his interim judgment of 2 February 2016, Judge Harvey found that pursuant to the trust order, the trustees' term of office came to an end on 26 November 2015. Judge Harvey further found that although the trustees were appointed for a three-year term, they did not automatically cease to be trustees once that time passed. Rather, the trustees will continue to act in office pending the outcome of an election and any appointment of new trustees by the Court. Judge Harvey considered that in such circumstances, the trustees should maintain the trust in a "holding pattern" until the election. Judge Harvey found that:[15]

> [61]… the trustees should maintain the status quo as to their management of the activities and business of the trust until after the election. This is because any new trustees who may be elected might take a different view to those of the present incumbents on specific policies and issues that can arise. The trustees should make no major policy decisions during this period given that their term of office has expired. Where a particular issue requiring a decision that might travel beyond the status quo arises then the trustees should seek directions.

[29] Ms Johnston, on behalf of the trustees, argued that this is a longstanding issue which has been before the trustees and the courts for some time. Ms Johnston contends that the decision made, and the steps taken, by the trustees to remove Mr Taueki from the block, were made prior to the expiration of their term in office. As such, she argues that the current trustees are entitled to appear on the appeal, as this is maintaining the status quo of the trust's earlier position.

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15 *Taueki v Horowhenua 11 Part Reservation Trust* (2016) 347 Aotea MB 269 (347 AOT 269).

[30] To avoid doubt, Ms Johnston sought further directions on this issue. On 11 February 2016, Judge Harvey issued those directions which state:

> …The trustees are entitled to defend the trust where it is involved in litigation or where it is required to comply with the orders of any Court….

[31] We agree with Judge Harvey's decision as set out in his interim judgment of 2 February 2016, and as confirmed in his further directions of 11 February 2016. Although the trustees' term of office had come to an end, they are to continue in office until removed or replaced by the Court. While an election is due to take place, the current trustees are entitled to maintain the status quo.

[32] In the present case, the notice to vacate and the trespass notice were served on Mr Taueki prior to the expiration of the trustees' term. The amended application was filed, and Judge Doogan also issued his decision, prior to their term expiring. As such, we accept that the trustees are entitled to appear on this appeal notwithstanding the forthcoming election, as they are simply maintaining a well established position on behalf of the trust.

[33] In response to questions from the Court, Mr Taueki accepted that the election is not relevant to Judge Doogan's decision which is under appeal. Rather, Mr Taueki argued that as a result of the election, new trustees may be appointed which could affect whether the trustees proceed with the current position of removing him from the block.[16]

[34] We do not consider that this is a proper basis to adjourn the appeal. Mr Taueki has not shown that he will suffer an injustice if the appeal is not adjourned. Even if the current appeal was dismissed, if Mr Taueki still refuses to comply with Judge Doogan's orders, a copy of the injunction will have to be transmitted to the High Court for enforcement per s 85 of the Act. If Mr Taueki's argument on this issue has any merit (and we are not convinced that it does), it would arguably be relevant to whether the injunction should be enforced. It is certainly not relevant to whether Judge Doogan's decision to grant the injunction should be overturned and we reject this as a ground for seeking an adjournment.

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16 2016 Māori Appellate Court MB 57-77 (2016 APPEAL 57-77) at 62.

*The bail condition*

[35] Mr Taueki is currently facing several criminal charges of trespass and assault. He is presently on bail with respect to those charges.

[36] On 1 December 2015, Judge Ross varied the conditions of Mr Taueki's bail.[17] Mr Taueki appealed against that decision. That appeal was heard by Palmer J on 9 December 2015. Palmer J upheld the appeal and further varied Mr Taueki's bail conditions as follows:[18]

> …I bail Mr Taueki to his home at Lake Horowhenua, on the condition that he is not to go within 30 metres of the Levin Rowing Club, unless he is driving to and from his home.

[37] Mr Taueki argued that as a result of that decision he must reside at the nursery. Mr Taueki submitted that the appeal should be adjourned pending his next appearance on those charges, otherwise if he is required to vacate the nursery, he will breach his bail conditions.

[38] Mr Taueki accepted that at the time of the bail hearing, Palmer J was not made aware that Judge Doogan had already granted a permanent injunction requiring Mr Taueki to vacate the nursery.[19] In his oral decision, Palmer J notes that the Crown did not present submissions, in writing or in person, in relation to the bail appeal. Not surprisingly, Palmer J considered that this was completely unsatisfactory and referred the Crown Solicitor's conduct in that case to the Solicitor-General.

[39] It is apparent that Palmer J proceeded on the assumption that the nursery was Mr Taueki's home and that he had a right to reside there. Had the injunction been brought to Palmer J's attention, his decision may well have been different. In any event, the variation to Mr Taueki's bail condition does not create a right of occupation in favour of Mr Taueki with respect to the block. Palmer J simply ordered that it was a condition of Mr Taueki's bail to reside there. That decision does not create a property right in the block. Nor can it restrain this Court or the lower Court in dealing with property rights that are properly before it.

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17 *Police v Taueki* [2015] NZDC 23741.
18 *Taueki v Police* [2015] NZHC 3140.
19 2016 Māori Appellate Court MB 57-77 (2016 APPEAL 57-77) at 60.

[40] We also note that at the time of the hearing before Judge Doogan, Mr Taueki had already been bailed to the nursery. Judge Doogan considered that the grant of bail to that address did not affect his jurisdiction to grant the injunction. We agree.

[41] Mr Taueki is entitled to seek a variation to the conditions of his bail per ss 33 or 34 of the Bail Act 2000. As such, we do not consider that Mr Taueki will suffer an injustice if an adjournment is refused as he is entitled to seek a variation to his bail address.

[42] Mr Taueki argued that the Crown is opposed to any variations to his bail, however, no evidence was filed to support this. We also consider it unlikely that the Crown would oppose a variation to a bail address, or that any court would uphold such an objection, where the bailee is subject to a court order requiring him to vacate the existing bail address.

[43] Given that the grant of the injunction by Judge Doogan was not brought to the attention of the Court when considering bail, we direct the Registrar to provide a copy of this decision to the New Zealand Police, who are prosecuting the criminal charges against Mr Taueki, and to the District Court where Mr Taueki's bail application was first heard.

*Lack of legal representation*

[44] Finally, Mr Taueki argued that the appeal should be adjourned so that he can obtain legal representation. Mr Taueki submitted that the appeal involves complex issues and that he required assistance to properly present his case. Mr Taueki further argued that he has been heavily involved in opposing the criminal charges against him, and in appearing before the Waitangi Tribunal. As such, Mr Taueki submitted that he has not had sufficient time to prepare for the appeal. Mr Taueki contends that an adjournment should be granted to allow him to instruct counsel and properly prepare his case.

[45] At the outset we note that this was a new issue raised by Mr Taueki. At no time prior to the hearing did Mr Taueki indicate that he required legal representation or that an adjournment would be sought on that basis. In fact, it was only when presenting oral submissions in reply, that Mr Taueki raised this argument.

[46] We do not agree that the appeal had to be adjourned to enable Mr Taueki to instruct counsel. Mr Taueki had sufficient time and opportunity to instruct counsel prior to the hearing.

[47] On 25 November 2015, Chief Judge Isaac issued a minute setting this appeal down for hearing on 16 February 2016 in Wellington.[20] A copy of that minute was sent to Mr Taueki by email on 26 November 2015. Accordingly, Mr Taueki had been aware for over two months of the date of the appeal. Had he required legal representation he could have taken steps to instruct counsel.

[48] If Mr Taueki had attempted to instruct counsel, but had difficulties in doing so, we would have expected him to raise this prior to the hearing. Mr Taueki was able to file numerous memoranda with the Court leading up to the appeal. That included his memorandum dated 5 February 2016 where he sought an adjournment. At no time prior to the hearing did Mr Taueki advise that he intended to instruct counsel or that he was having difficulty in doing so.

[49] While Mr Taueki was not represented at the hearing before us, he is an experienced lay advocate. He was not represented during the hearing in the lower Court and we consider that Mr Taueki has a good understanding of the matters in issue in this appeal. Those issues were also argued before Judge Doogan and there are no new matters that Mr Taueki must come to terms with.

[50] The direction from the Court dated 11 February 2016 made it clear that if the adjournment was not granted, we would then proceed to hear the substantive appeal.[21] The direction expressly advised that both parties would need to be prepared to address the adjournment, and the substantive appeal, at the hearing on 16 February 2016. As such, Mr Taueki could not have expected that if the adjournment was not granted that the appeal would not proceed.

[51] Mr Taueki is the appellant in this case. This is his appeal. He had sufficient notice of the date of the appeal and he was aware that he had to be ready to argue his case. The

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20 2015 Chief Judge's MB 808 (2015 CJ 808).
21 2016 Māori Appellate Court MB 5-6 (2016 APPEAL 5-6).

argument raised by Mr Taueki at the eleventh hour that an adjournment was required so that he can instruct legal representation is simply untenable.

[52] For the reasons set out above, we considered that an adjournment was not necessary in order to do justice between the parties in this case. Accordingly, the application seeking an adjournment was dismissed.

[53] We now turn to consider the substantive appeal.

**The decision of the lower Court**

[54] In his reserved judgment of 4 November 2015, Judge Doogan set out detailed reasons for his decision.[22]

[55] Mr Taueki challenged the legal capacity of the trustees to make the application before the lower Court, and the jurisdiction of the lower Court to hear it. Judge Doogan considered the decision in *Paki v Māori Land Court*,[23] where Clifford J found that the Māori Land Court had the power to issue terms of trust for this trust, as it did in 2012.[24] Judge Doogan found that the trustees had the capacity to bring the application, and that there was sufficient evidence to show that the trustees had resolved (by majority) that Mr Taueki had to vacate the block.

[56] Judge Doogan rejected Mr Taueki's challenge to the Court's jurisdiction. He agreed with Clifford J in *Paki,* that the Reserves and Other Lands Disposal Act 1956 ("the ROLD Act") did not remove or supplant the jurisdiction of the Court in relation to the trust.

[57] Judge Doogan also rejected Mr Taueki's argument that the Supreme Court recognised that Mr Taueki was in peaceable possession of the block. He found that the decision in *Taueki v R*, is not authority for the proposition that Mr Taueki has an established right to occupy or possess the nursery or any other part of the block. [25]

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22 *Horowhenua 11(Lake) Part Reservation Trust v Taueki – Horowhenua 11 (Lake) Block* (2015) 343 Aotea MB 254 (343 AOT 254).
23 *Paki v Māori Land Court* [2015] NZHC 2535.
24 See *Procter – Horowhenua 11* (2012) 293 Aotea MB 165 (293 AOT 165).
25 *Taueki v R* [2013] NZSC 146.

[58] In considering the law concerning 'trespass by relation', Judge Doogan found that the trust was entitled to immediate possession of the block on or about 20 September 2013, when the six week extension to the interim injunction expired. He concluded that the trustees are the legal owners of the block on which the nursery is located, and that the presumption that a building is a fixture, and that ownership runs with the land, had not been displaced in this case.

[59] Judge Doogan noted the turbulent history concerning this block, and the lengthy disputes that Mr Taueki had encountered with the trustees. He found that, despite this history, there was no legal impediment to the granting of relief.

[60] Judge Doogan went on to consider whether there were any equitable issues that arose that may affect his discretion on whether to grant relief. Judge Doogan took into account the length of Mr Taueki's occupation, and that it commenced with the sanction of the then trust chairperson. He also had regard to the fact that the nursery is located in a proximate area to lands of particular significance to the Taueki whānau (and to Muaupoko more generally). Judge Doogan considered that, in these circumstances, it was no small matter to grant an order requiring Mr Taueki's removal from the nursery, and to prevent him from taking up any further occupation or possession.

[61] Ultimately however, Judge Doogan found that the relief sought was appropriate in order to ensure fairness between all beneficial owners of the block. He considered that Mr Taueki's rights as a beneficial owner are, at law, no different from those he shares with all beneficial owners. Judge Doogan further considered that the rights recognised under the ROLD Act do not confer on the beneficial owners any control over, or amount to possession of, the block.

[62] Judge Doogan commented that this is not customary land in the hands of Mr Taueki or his whānau, and it is for the trustees to decide who may occupy and on what terms. He considered that there is a need to protect the interests of the majority of the owners against the unilateral and unauthorised actions of one owner. Judge Doogan also relied on the decision of this Court in *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust – Waitara SD s6 and 91 Land Trust*.[26]

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[26] *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust – Waitara SD Sections 6 & 91 Land Trust*

[63] Judge Doogan considered that damages was not an adequate remedy for the trustees, and that there was nothing in the evidence which suggests that the trust had disentitled itself to injunctive relief. Judge Doogan found that Mr Taueki had remained in occupation without right, title or licence, despite demands that he vacate the block.

[64] For those reasons, Judge Doogan concluded that the trustees were entitled to injunctive relief, and an order for recovery of the block.

[65] It is noted that when granting those orders, Judge Doogan expressed that the orders do not operate so as to inhibit or restrain Mr Taueki's right of access to the land, which he shares in common with the other beneficial owners and the public.

**The grounds of appeal**

[66] In his notice of appeal dated 5 November 2015, Mr Taueki raised the following grounds of appeal:

(a) The trust is not an ahu whenua trust;

(b) The principle of "*specialia generalibus derogant*" applies; and

(c) The Crown law concessions that governance arrangements are at fault.

[67] Although Mr Taueki chose not to present submissions on the substantive appeal, these arguments were raised before the lower Court. Mr Taueki also addressed these issues when presenting submissions in support of his application for an adjournment. As such, while Mr Taueki left the Courtroom once we declined his request for an adjournment, we nevertheless have a broad understanding of his argument on appeal.[27]

[68] These grounds of appeal are addressed in turn.

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(2005) 15 Aotea Appellate MB 192 (15 WGAP 192).

[27] As noted, Mr Taueki was advised before leaving the Courtroom that we would proceed with the substantive appeal in his absence. Mr Taueki acknowledged this but left anyway.

*The trust is not an ahu whenua trust*

[69] In coming to his decision, Judge Doogan relied on the finding of this Court in *Eriwata* where it found:[28]

> [5] When trustees are appointed to an Ahu Whenua Trust, they take legal ownership. The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Māori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

[70] Mr Taueki challenges the applicability of the decision in *Eriwata* given that this trust is not an ahu whenua trust.

[71] On 2 October 2012, Judge Harvey granted an order declaring terms of trust for this trust.[29] The title to that order states:

**AHU WHENUA ORDER DECLARING TERMS OF TRUST**

Te Ture Whenua Māori Act 1993 – Section 219

[72] On 29 September 2014, Judge Harvey granted a further order per s 86 of the Act amending the trust order removing the reference to an ahu whenua trust and s 219 of the Act.[30] As such, the order declaring terms of trust now read:

**ORDER DECLARING TERMS OF TRUST**

The Trustee Act 1953 – Section 64

[73] It is clear that this trust is not an ahu whenua trust. Despite that, we reject the argument that the principles set out in *Eriwata* only apply to an ahu whenua trust.

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28 *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust – Waitara SD Sections 6 & 91 Land Trust* (2005) 15 Aotea Appellate MB 192 (15 WGAP 192).

29 293 Aotea MB 165-174 (293 AOT 165-174).

30 327 Aotea MB 192-193 (327 AOT 192-193).

[74] The proposition that it is the trustees, and not the beneficiaries, who decide how to administer trust property, is a general principle applicable to all trusts, subject to the terms of trust. In the present case, the legal title to this block is vested in the trustees. As such, this general principle applies, and it is for the trustees to administer the block. This is further supported by the terms of the trust order.

[75] In *Paki* Clifford J found:[31]

> [83] Against that background I conclude that the power to declare terms of trust to provide a trust over Māori land with effective management and administrative rules is a reasonable and necessary incident of the role of the Māori Land Court. More particularly, I am also satisfied that there is in s 64A of the Trustee Act specific statutory provision of such a power.
>
> [84] I am, therefore, satisfied that the Māori Land Court had the power to issue terms of trust for the Lake Horowhenua Trust as it did in the 2012 Decision. Not only did it have that power, but the issue was properly before it.

[76] We agree with that finding and the order declaring the terms of trust was properly made. Clause 4.1 of the trust order states:

> **4.1 General**
>
> Subject always to the objects of the Trust and in accordance with the powers conferred by this trust order, the Trustees are empowered to do all or any of the things that the Trustees would be entitled to do if they were the absolute owners of and beneficially entitled to the Trust Property **PROVIDED HOWEVER** that the Trustees shall not alienate by way of sale or gift the whole or any part of the Land.

[77] This provision is clear that the trustees have all powers in relation to the block as if they were the absolute owners of, and were beneficially entitled to, the block, provided that they shall not alienate the land by sale or gift.[32] This must include the power to determine who can occupy any part of the block, including the nursery, and the principles set out in *Eriwata* apply in this case.

*Specialia generalibus derogant*

[78] In the lower Court, Mr Taueki asserted the maxim "*specialia generalibus derogant*" which is a Latin phrase denoting that special provisions override general provisions. Mr

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31 *Paki v Māori Land Court* [2015] NZHC 2535.

32 See *Karena – Owhaoko C1, C2, C4, C5 & C7* (2004) 14 Takitimu Appellate MB 4 (14 ACTK 4) at 13-14.

Taueki argued that in this context the Māori Land Court cannot override the rights of the beneficial owners as set out in the "special legislation" of the ROLD Act.[33] We reject Mr Taueki's argument on this point.

[79] As determined in *Paki,* this trust is not beyond the jurisdiction of the Māori Land Court. It was the Native Land Court that first established the trust relationship over the block. The Court can and has been involved in setting and overseeing terms of trust to provide the trust with effective management and administration.[34]

[80] We also consider that the ROLD Act has not been overridden by the orders granted by the Court. The ROLD Act reserves free and unrestricted access to the block in favour of all beneficiaries, of which Mr Taueki is one. Free and unrestricted access does not equate to the right to occupy or possess the land. We accept Judge Doogan's finding that Mr Taueki's interest is no different to that of all other beneficial owners.

[81] This was confirmed by the decision of the Supreme Court in *Taueki v R*:[35]

> While the Reserves and Other Lands Disposal Act reserve to the Māori owners, of whom Mr Taueki was one, the "free and unrestricted use" of the lake and domain, this right of access to the lake and land does not confer any control over, or amount to possession of, the same especially given the nature of the land as a public domain.

[82] Neither the ROLD Act, nor the decision of the Supreme Court in *Taueki v R,* confer upon Mr Taueki a right to possession of the block. Mr Taueki does enjoy a right of access along with all beneficial owners. That right has not been interfered with in the orders granted by Judge Doogan and this ground cannot succeed.

*The Crown Law concessions*

[83] This ground of appeal is not particularised in the notice of appeal. Neither did Mr Taueki take the opportunity afforded to him to present submissions on the merits of the appeal. As such, the substance of Mr Taueki's argument on this issue is not entirely clear.

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33 *Horowhenua 11 (Lake) Part Reservation Trust v Taueki – Horowhenua 11 (Lake) Block* (2015) 343 Aotea MB 254 (343 AOT 254) at 265.

34 *Paki v Māori Land Court* [2015] NZHC 2535, at [64] – [69] and [83] – [84].

35 *Taueki v R* [2013] NZSC 146 at [67].

In the absence of detailed particulars or submissions, we must assess this ground based on the material before us.

[84] In the lower Court, Mr Taueki referred to an application he filed per s 29 of the Act, which is currently before the Minister of Māori Development, to review governance arrangements for the trust. Mr Taueki saw that as an application to the "ultimate Court" as he argued that only Parliament can amend statute. Mr Taueki argued that as the s 29 application was before the Minister, the application by the trustees to remove him from the block should not be advanced. Mr Taueki also referred to the position taken by the Crown in recent Waitangi Tribunal hearings concerning Lake Horowhenua.[36]

[85] Section 29 of the Act states:

> **29 Reference to court for inquiry**
>
> (1) The Minister, the chief executive, or the Chief Judge may at any time refer to the court for inquiry and report any matter as to which, in the opinion of the Minister, the chief executive, or the Chief Judge, it may be necessary or expedient that any such inquiry should be made.
>
> (2) A reference under this section shall be deemed to be an application within the ordinary jurisdiction of the Māori Land Court, and the Māori Land Court shall have full power and authority accordingly to hear the matter and to make such report and recommendations on the matter to the Minister, the chief executive, or the Chief Judge as the Māori Land Court thinks proper.

[86] On 20 July 2015, the Minister wrote to Mr Taueki in response to his s 29 application. In that letter the Minister states:

> …I believe that I now have a broad understanding of the very complex ownership, governance, access, use arrangements, and rights that apply to Lake Horowhenua. There are certainly a number of interests in the picture and I can understand how these arrangements have generated conflicts, going right back to the early 1900s and earlier.
>
> I can also understand the view point of those that question the appropriateness of the historical and the current arrangements. They appear to me to be arrangements that we would not put in place today. At the same time, I need to acknowledge the reality that the history has created certain rights both within the Muaupoko iwi and also between Muaupoko and others.

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[36] *Horowhenua 11 (Lake) Part Reservation Trust v Taueki – Horowhenua 11 (Lake) Block* (2015) 343 Aotea MB 254 (343 AOT 254) at 271.

> I believe that a section 29 referral is one of a number of options worth considering, but there are other options as well.
>
> …
>
> I hope this gives you some confidence that I am willing to assist as best I can, but for various reasons it will take time….

[87] This letter is clear that the Minister has not determined whether he should refer this issue to the Court for inquiry. Even if such a referral is made, the outcome of the inquiry cannot be known until it is completed.

[88] Such a ground of appeal cannot succeed. Judge Doogan could not take into account the potential outcome of an inquiry and report per s 29 of the Act when a referral has not yet been made, and the inquiry itself has not been completed. Judge Doogan had to proceed on the basis of the existing governance arrangements in place. As noted above, the land is currently vested in trustees who have the authority to determine who, if anyone, should occupy the block.

[89] We also note that Mr Taueki did not apply to stay the proceeding before Judge Doogan pending determination of the s 29 application. In the absence of an application seeking a stay, Judge Doogan had to determine the application before him.

[90] We are not aware of the position taken by the Crown in recent Waitangi Tribunal hearings concerning Lake Horowhenua. In any event, the Crown's position in that forum cannot be relevant to the present appeal. In such proceedings, the Crown is responding to claims filed with the Waitangi Tribunal pursuant to the Treaty of Waitangi Act 1975. If the Tribunal finds that any claim is well-founded, it may make a recommendation to the Crown that action be taken to compensate for, or remove, the prejudice suffered, or to prevent other persons from being similarly affected in the future.[37] The Tribunal Inquiry which concerns Lake Horowhenua is ongoing and no such recommendations have been made.

[91] Even where recommendations are made by the Tribunal, those recommendations form the basis of a settlement to be negotiated between the Crown and the relevant group

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[37] Treaty of Waitangi Act 1975, s 6(3).

of Māori.[38] Judge Doogan could not have taken into account any position put forward by the Crown during the course of a hearing before the Waitangi Tribunal, and particularly not in the face of the existing trust order, and the authority of the trustees to determine who should occupy this land.

[92] This ground of appeal must also fail.

**Decision**

[93] The appeal is dismissed.

[94] The respondents have been successful on appeal and would ordinarily be entitled to an award of costs. However, we note that the respondents are in receipt of special aid and accordingly we decline to make an award of costs.

Dated at Hamilton this 12th day of April 2016.

| | | |
|---|---|---|
| Judge S Te A Milroy | Judge D J Ambler | Judge M P Armstrong |

[38] Unless binding recommendations are made in relation to Crown Licensed Forest Land which would not apply here.