

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

A20180001436

UNDER Section 240, Te Ture Whenua Māori Act 1993
IN THE MATTER OF Tahorakuri A No 1 Sec 33A 2 Block
BETWEEN AARON BRUCE ANDERSON BAMBER
Applicant
AND SHANE MONSCHAU AND HARRY TE
NGARU AS MAJORITY TRUSTEES OF
TAHORAKURI A NO 1 SEC 33A2 TRUST
Respondent

A20180006521

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IN THE MATTER OF Tahorakuri A No 1 Sec 33A 2 Block
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Applicant
AND AARON BRUCE ANDERSON BAMBER
Respondent

Hearing: 8 May 2019, 212 Waiariki MB 88-100
(Heard at Rotorua)

Appearances: H Te Nahu for A Bamber
J Temm for S Monschau and H Te Nagru as Majority Trustees

Judgment: 3 September 2019

JUDGMENT OF JUDGE C T COXHEAD

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He hōnore, he kororia ki te Atua, he maungārongo ki te whenua, he whakaaro pai ki ngā tāngata katoa tētahi ki tētahi

E tangi tikapa ana te kanohi ora mō rātou kua hoki ki te marinotanga, ki te urunga tē taka, tāoki mai rā koutou. Heoi, me pēnei noa te whakataua, ko rātou ngā mate ki a rātou, ko tātou te kanohi ora ki a tātou.

Hei tīmatanga kōrero - Introduction

[1] This decision concerns the ongoing battle between the trustees of Tahorakuri A No 1 Sec 33A 2 Trust. There are two applications in relation to Tahorakuri A No 1 Sec 33A 2 Trust seeking removal of trustees per s 240 of Te Ture Whenua Māori Act 1993. Shane Monschau and Harry Te Ngaru seek to remove Aaron Bamber as trustees, while Aaron Bamber seeks to remove Shane Monschau and Harry Te Ngaru as trustees.

[2] Both applications are opposed and are separately sought to be struck out. The issues for determination are therefore whether either or both of the proceedings should be struck out and whether any of the trustees should be removed.

Kōrero whānui - Background

[3] Tahorakuri A No 1 Sec 33A2 is Māori freehold land with an area of 38.56 hectares. It was created by partition order dated 27 March 1991.¹ There are currently 25 owners in the land holding a total of 100 shares.

[4] The Tahorakuri A No 1 Sec 33A2 Ahu Whenua Trust was constituted on 2 November 2011, following an application to appoint an agent to deal with easement and leasing issues on the land.² The current trustees are Aaron Bamber, Shane Monschau and Harry Te Ngaru.³

[5] Since its constitution, the trust has been embroiled in ongoing litigation. In 2013, the trust brought proceedings against Kathleen and Bruce Bamber to recover the rental proceeds of a lease arrangement, which they had retained for themselves rather than accounting to all the owners. As a result of proceedings in this Court and the Māori Appellate Court, the Bammers have been ordered to pay a total of \$168,986.00 to the trust and a further \$6,865.25

¹ 65 Taupo MB 114 (65 TPO 114).

² 43 Waiariki MB 290-300 (43 WAR 290-300).

³ 55 Waiariki MB 85-86 (55 WAR 85-86).

for costs, totalling \$175,851.25.⁴ Those funds remain outstanding and a transmittal of the orders to the District Court for enforcement has been granted.⁵ Kathleen and Bruce Bamber have now filed a further appeal to the Māori Appellate Court out of time, which is I understand extant before that Court.⁶

[6] Earlier applications were also filed seeking the removal of Aaron Bamber as a trustee, along with a review of trust, variation of the trust order and appointment of trustees. Aaron Bamber is a son of Kathleen and Bruce Bamber. On 13 June 2018, I issued a decision which dismissed the application for removal of Aaron Bamber and directed the other matters be set down to be heard together.⁷ In that decision, I also directed further matters be attended to by both the trust and Aaron Bamber.

Ko te hātepe ture o te tono nei - Procedural history

[7] The application to remove Shane Monschau and Harry Te Ngaru (“the majority trustees”) was filed by Aaron Bamber on 31 January 2018. I issued directions on 12 March 2018, for Aaron Bamber to ensure the application was served on the majority trustees and I set the matter down for a judicial conference for the purpose of timetabling.

[8] A judicial conference was then held on 6 April 2018.⁸ As no supporting documentation or evidence had been filed with the application, I allowed Aaron Bamber a month to file a more particularised statement of claim together with briefs of evidence. The majority trustees were then to have a month to file their reply and briefs of evidence, following which the matter would be set down for hearing. At the conclusion of the judicial conference, the application was adjourned.

[9] Aaron Bamber filed a further statement of claim and affidavit dated 4 May 2018, and I directed service of those documents on the majority trustees. On 20 June 2018, the majority

⁴ *Monschau v Bamber – Tahorakuri A No 1 Section 33A2* (2015) 125 Waiariki MB 260 (125 WAR 260); 133 Waiariki MB 245-270 (133 WAR 245-270); *Monschau v Bamber – Tahorakuri A No 1 Section 33A2* [2016] Māori Appellate Court MB 286 (2016 APPEAL 286); *Bamber v Monschau* [2016] Māori Appellate Court MB 363 (2016 APPEAL 363); *Monschau v Bamber – Tahorakuri A No 1 Sec 33A2* [2016] Māori Appellate Court MB 383 (2016 APPEAL 383); *Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Block* (2017) 157 Waiariki MB 173 (157 WAR 173).

⁵ 189 Waiariki MB 199-207 (189 WAR 199-207).

⁶ Application A20190002966.

⁷ *Monschau – Tahorakuri A No. 1 Section 33A2* (2018) 189 Waiariki MB 117 (189 WAR 117).

⁸ 184 Waiariki MB 278-282 (184 WAR 278-282).

trustees filed a statement of defence and application to strike out Aaron Bamber's proceedings, together with an affidavit in support. A reply memorandum and affidavit were then filed by Aaron Bamber on 25 July 2018 and the matter subsequently set down for hearing on 20 September 2018.

[10] On 31 August 2018, a further application was filed by the majority trustees seeking removal of Aaron Bamber as a trustee. They sought to have both applications heard together and, following further correspondence between the parties and the Court, the hearing scheduled for September 2018 was adjourned to allow Aaron Bamber time to file a response.

[11] On 15 October 2018, Aaron Bamber filed a statement of defence and an application to strike out the majority trustees' application, together with an affidavit in support. Several letters had also been filed by Kathleen Bamber. I directed that a teleconference be set down to address further timetabling matters.

[12] The teleconference was then held on 18 December 2018.⁹ The issue of how to proceed was discussed, given that five applications in relation to the trust were extant before the Court, including applications to replace trustees and for a review and variation of the trust order.¹⁰ It was agreed that the applications for removal of trustees and accompanying strike out applications would be dealt with first prior to consideration of the other matters. At the conclusion of the teleconference, the majority trustees were given until 23 January 2019 to file their response to the strike out application of Aaron Bamber.

[13] The response to Aaron Bamber's strike out application was filed by the majority trustees on 23 January 2019. Following further directions, the issue of how to proceed with matters was the subject of much correspondence from both parties' counsel, who could not agree. As a result, I directed that the strike out and removal applications be set down for hearing.

[14] The hearing was then held on 8 May 2019.¹¹ At the conclusion of the hearing, I adjourned the applications for a written decision to issue.

⁹ 204 Waiariki MB 34-39 (204 WAR 34-39).

¹⁰ Applications A20170006964, A20170006962 and A20140005362

¹¹ 212 Waiariki MB 88-100 (212 WAR 88-100).

Ko te tono mo te panatanga a Shane Monschau rāua ko Harry Te Nahu - Application for removal of Shane Monschau and Harry Te Nahu

Ngā kōrero a Aaron Bamber - Submissions of Aaron Bamber

[15] Aaron Bamber's application for the removal of Shane Monschau and Harry Te Ngaru states the following grounds:

- (a) Fraud;
- (b) Failing to follow Court directions;
- (c) Failing to keep financial records;
- (d) Lack of transparency;
- (e) Failing to carry out trust duties or incompetency; and
- (f) Dishonesty.

[16] Counsel, Mr Te Nahu, submitted that the majority trustees have committed fraud by taking \$70,000 from trust funds. He argued that the trust funds were frozen by the Court in 2013, pending the determinations of the Court, and no orders have issued determining that distributions should be made. At hearing, Mr Te Nahu confirmed that the \$70,000 sum he refers to is the amount of legal and accounting costs expended in relation to the recovery of rental litigation against Aaron Bamber's parents.

[17] Mr Te Nahu also submitted that the majority trustees have failed to adhere to Court directions issued in 2013 that the trust's accountants prepare a full reconciliation of all financial information and accounts relating to the land from 2004.¹² He argued that no such accounts have been obtained in the five years since the directions was issued. On this basis, counsel also argued that the majority trustees have failed to keep financial records.

¹² 86 Waiariki MB 35-46 (85 WAR 35-46) at 46.

[18] In terms of the lack of transparency, Mr Te Nahu submitted that the majority trustees continue to keep Aaron Bamber out of all communications in relation to trust matters and activities, including the engagement of lawyers and other service providers. Aaron Bamber has not been involved in any financial decision making, nor has he been communicated with by the trust solicitor, who has advised that he does not represent Aaron Bamber, despite him being a trustee. Aaron Bamber has therefore been forced to obtain legal advice at his own cost while the majority trustees have the trust solicitor at their disposal.

[19] Counsel also says that the majority trustees have failed to carry out their trust duties as they have engaged agencies for duties which the trustees should be undertaking. He referred to the fact that Perpetual Guardian Trust has been engaged at a cost that the trust cannot afford and for which the Court has not released funds to pay for such services. Mr Te Nahu further noted that Aaron Bamber performs the secretarial functions for the trust but is not communicated with in relation to trust meetings and the like.

[20] Mr Te Nahu submitted that the majority trustees should be removed as they have enacted processes which have shown their complete disdain for Aaron Bamber and have created “conflicting situations” that illustrates they cannot act in an unprejudicial manner towards Aaron Bamber. They have failed in their own duties as they have prevented Aaron Bamber from carrying out his duties as a trustee. Counsel contended that the majority trustees have bullied Aaron Bamber to resign as a trustee, have subjected him to three applications seeking his removal, and are tarring him as the son of Bruce and Kathleen Bamber in relation to trust’s litigation for recovery of rental proceeds, despite removing himself from such matters. Mr Te Nahu argued that as such, the majority trustees are subjecting Aaron Bamber to “prejudicial and conflicting behaviour subjecting him to personal stress and unwarranted legal costs”.

Ngā kōrero a ngā taratī - Submissions of the majority trustees

[21] The majority trustees opposed the application for their removal and sought to strike out the proceedings. They submitted that the application has been made in bad faith, with its real purpose being to delay the existing debt recovery proceedings against Aaron Bamber’s parents in the High Court.

[22] In his affidavit, Mr Monschau noted that the Court directed the rental monies to be held in trust “pending the determinations of the Court”. He says that the relevant determinations have clearly been made, referring to the orders of this and the Māori Appellate Court, which decided the claims and ordered the payment of all claimed amounts and costs by Kathleen and Bruce Bamber to the trust. Consequently, all monies in the lawyer’s trust account belong to the trust and the payments made from the fund have been properly authorised by the majority trustees. Mr Temm noted that the trust order allows the trustees to make payments in the proper administration of the trust and the trustees are not required to return to Court every time they wish to make such payments.

[23] In terms of the financial records, Mr Temm advised that a full reconciliation of the rental proceeds from 2004 was compiled by accountants BDO Spicers in 2015, as directed. A summary update of the trust’s accounts was then presented to the meeting of beneficial owners held in 2017 and accepted. Mr Temm noted that the majority trustees are in the process of preparing full, updated financial information and accounts for the trust through BDO Spicers. It was submitted that, Aaron Bamber’s claims regarding the financial records are completely without foundation.

[24] Mr Temm submitted that since the trust’s litigation against Aaron Bamber’s parents began, Aaron Bamber has, by his actions, sought to derail, delay and defeat the trust’s claims and has refused to co-operate with the majority trustees, sometimes aggressively. In addition, much, if not most, of the trustee discussions have for many years concerned the Bamber litigation, for which Aaron Bamber is conflicted and cannot participate. It is for these reasons that Aaron Bamber has not been included in ongoing trustee discussion. Mr Temm further noted that the lawyer acts for the majority trustees and not Aaron Bamber. Notwithstanding, on their instructions the lawyer has communicated with Aaron Bamber through his own lawyer and replied to Aaron Bamber’s update requests.

[25] Mr Temm argued that as a direct result of Aaron Bamber’s conduct and intransigence in performing his trustee duties, the majority trustees have engaged the services of Perpetual Guardian Trust to perform secretary functions for the trust. Perpetual Guardian Trust has communicated with Aaron Bamber as necessary. However, given the application now filed for his removal, it is difficult for Perpetual Guardian Trust or the majority trustees to

communicate with Aaron Bamber on any matter. As noted earlier, the trustees do not require an order of the Court to authorise payment to Perpetual Guardian Trust for its services.

[26] Regarding the application to strike out the proceedings, counsel argued that the evidential threshold for claims of fraud is high and Aaron Bamber has provided no evidence which comes close to satisfying such threshold. The other causes of action are also not supported by probative evidence justifying the removal of the majority trustees.

[27] Mr Temm noted that Aaron Bamber's application was referred to by Kathleen and Bruce Bamber in bankruptcy proceedings before the High Court, as one of the grounds for seeking to set aside the bankruptcy notice issued against them. He says this is clear evidence that Aaron Bamber and his parents are colluding to try and defeat the bankruptcy proceedings. Therefore, in filing this application, Aaron Bamber is using the Court process for an improper purpose. He argued that the Court should strike out the proceedings and award costs to the majority trustees on an indemnity basis.

Ko te whakautu a Aaron Bamber - Reply submissions of Aaron Bamber

[28] In reply, Aaron Bamber opposed the application to strike out his proceedings and reiterated much of his earlier submissions.

[29] He argued that the issues relating to recovery of the rental monies from his parents have nothing to do with him, and he has purposely kept himself out of those issues, as he has a conflict. He says such arguments demonstrate that the majority trustees cannot distinguish between issues related to him and those related to his parents, and therefore cannot fulfil their duties as a trustee.

[30] Aaron Bamber denied claims that he refuses to co-operate with the trustees and that he has been aggressive, making matters as difficult as possible. He also denied the allegation that he is generally supporting his parents' litigation. Aaron Bamber argued that he has been left out of trust matters due to the trustees' biased attitude towards him, even in relation to issues for which he is not conflicted. He says he has a right to question matters, such as the actions of the trust solicitor, the engagement of Perpetual Guardian Trust and the easement.

[31] Aaron Bamber continued to dispute that the majority trustees have properly complied with the Court's directions regarding the financial accounts and argued that the minutes of the AGM presented by Perpetual Guardian Trust are not accurate, in relation to both the presentation of the financial accounts and the beneficial owner support for his removal.

[32] Aaron Bamber submitted that his application for removal of the majority trustees should not be struck out.

Ko te tono mo te panatanga a Aaron Bamber - Application to remove Aaron Bamber

Ngā kōrero a ngā taratī - Submissions of the majority trustees

[33] The majority trustees' application for removal of Aaron Bamber referred to many of the same matters raised in response to the application for their removal. The application states the following grounds:

- (a) Breach of trustee's duties, including failure to follow Court directions;
- (b) The use of Court processes for an improper purpose;
- (c) The beneficial owners' wishes to remove and replace Aaron Bamber as a trustee of this trust;
- (d) Aaron Bamber's untenable conflict of interest; and
- (e) Failure to act in the best interests of the trust.

[34] Counsel noted that this is the third application brought seeking the Court's assistance in relation to Aaron Bamber. The first application in 2014 was withdrawn by agreement between the parties at the hearing, while the second application was determined by this Court on 13 June 2018, with the result that Aaron Bamber was not removed. Counsel noted however, that not all relevant matters were before the Court in the second application filed by Perpetual Guardian Trust. He says the present application now places all such matters before the Court together with additional matters that have arisen subsequent to the earlier applications.

[35] It was submitted that Aaron Bamber's overriding obligation as a trustee is to act in the best interest of the trust beneficiaries and the trust. Concurrently however, Aaron Bamber also seeks to act in the best interest of his parents, who at all relevant times have been involved in legal proceedings for the recovery of misappropriated rental proceeds brought by the majority trustees. There is a significant judgment debt owed to the trust, however, rather than paying it, the Bamber family has filed numerous actions with the Court to challenge the actions of the majority trustees and the judgment debt, causing serious financial and other disadvantage to the trust beneficiaries. Counsel further noted that Aaron Bamber is also a trustee of the Bamber Whānau Trust, to which his parents have now transferred their only known asset. The majority trustees' view is that such transfer was made in order to defeat creditors. Mr Temm argued that this creates an untenable conflict of interest between Aaron Bamber's duties as a trustee of both trusts, given that one trust is holding the asset which the other trust is seeking in order to recover its debt. In other words, Aaron Bamber has divided loyalties.

[36] Mr Temm further submitted that Aaron Bamber has failed to follow Court orders. He noted that Aaron Bamber agreed to sign the easement with Mighty River Power in consideration for the trustees withdrawing their first application seeking his removal in 2014. Aaron Bamber reneged on that agreement and did not sign the easement, which resulted in the loss of a \$50,000 cash payment to the trust. Although Aaron Bamber argued that the Court did not direct him to sign the easement, the Court did direct Aaron Bamber to attend to the easement issue in its decision dated 13 June 2018¹³.

[37] Further, Aaron Bamber has failed to attend to the opening of a bank account for the trust, as directed by the Court. Instead, he advised he would not follow the Court order until his allegations of fraud had been heard. Mr Temm submitted that allegations of fraud are serious and Aaron Bamber's claim, that the \$70,000 of trust funds spent on legal fees, accounting and expert witness fees without the Court's endorsement is fraud, is unsupported by evidence. The trustees have the power under their trust deed to employ lawyers and accountants and approve trust expenditure by majority. It was also noted the commercial reality that these trust funds are being used in pursuit of the judgment debt of \$175,851.25 owed by Aaron Bamber's parents. Mr Temm argued that without a trading bank account the

¹³ *Monschau – Tahorakuri A No. 1 Section 33A2* (2018) 189 Waiariki MB 117 (189 WAR 117).

trust cannot run efficiently. It is forced to conduct all accounting transactions through the lawyer's trust account. In the majority trustees' view, this is not only an unnecessary cost to the trust but also impedes the majority trustees' ability to carry out their trustee duties.

[38] Counsel submitted that the need to remove Aaron Bamber as a trustee is now clear and is supported by the beneficiaries. The longer he remains a trustee the more detrimental his involvement will become for the trust and its beneficiaries. The recovery of debt from Aaron Bamber's parents has reached a critical point and the trust cannot continue to fund and fight the baseless and vexatious allegations. Aaron Bamber has failed to follow Court directions and his current conflict of interest is so severe that it renders him "impotent" when it comes to attending to his trustee duties.

Ngā kōrero a Aaron Bamber - Submissions of Aaron Bamber

[39] Aaron Bamber denied the allegations made by the majority trustees. He sought to strike out their application and argued for an award of indemnity costs in his favour.

[40] Counsel submitted that the matters contained in the application have already been determined by the Court on two previous occasions, most recently in the decision dated 13 June 2018. He argued that the majority trustees have ignored the Court and are rehashing historical grievances, clearly indicating they will not work with Aaron Bamber due to matters relating to his parents and the easement issue. The majority trustees are therefore abusing the Court process.

[41] Aaron Bamber reiterated his position on both the conflict of interest and easement issues. He argued that the trust's issues with his parents have nothing to do with him. He has removed himself from those matters and has not been obstructive in the trustees' pursuit of the issue in either these proceedings or the bankruptcy proceedings in the civil courts. In terms of the easement, he says there was no verbal agreement for him to sign the easement and the Court did not direct him to do so.

[42] Regarding the bank account, Aaron Bamber submitted that he was hesitant to open a bank account until his fraud allegations had been heard, and he advised the Court of this hesitancy. As there were no further directions issued on the matter, Aaron Bamber presumed

the Court was happy with his position. He says that if the Court had subsequently directed him to continue with opening the bank account, he would have done so. He argued that his filing of an application to remove the trustees due to their fraud, is no basis for seeking his removal.

[43] Aaron Bamber submitted that the application is vexatious, is an abuse of Court process and has failed to introduce new matters in order for the Court to determine whether his conduct justifies removal. It should therefore be struck out.

Ko te whakautu a ngā taratī - Reply submissions of the majority trustees

[44] The majority trustees opposed the strike out of their application. They say that Aaron Bamber's argument that the application fails to introduce any new evidence is clearly incorrect, as their application specifically details further actions and allegations occurring since the last application.

[45] The majority trustees submitted that Aaron Bamber has failed to properly advance the application in accordance with relevant legal thresholds and his strike out application should therefore be dismissed and indemnity costs awarded against him.

Kia panaia tētahi o ngā tono? - Should either of the applications be struck out?

[46] In accordance with r 6.28 of the Māori Land Court Rules 2011, the Court has the power to dismiss an application if the applicant fails to properly advance the application or fails to comply with an order or direction. The Court also has an inherent power to strike out proceedings.¹⁴

[47] In *Taueki v Horowhenua Sailing Club – Horowhenua 11 (Lake) Māori Reservation* the Court considered the approach to applications for strike out, noting there are no specific provisions in the Act or the Māori Land Court Rules 2011 which address the factors to be

¹⁴ Te Ture Whenua Māori Act 1993, s 6(2). *The Proprietors of Maraeroa C Block v NZ Forest Products Ltd* (2007) 121 Waikato MB 258 (121 W 258) at [12].

taken into account.¹⁵ The Court referred to the High Court Rules for guidance, which provide:¹⁶

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court’s inherent jurisdiction.

[48] The Court noted the established criteria that, before the Court may strike out proceedings, the causes of action must be so clearly untenable that they cannot possibly succeed.¹⁷ The jurisdiction is one to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material.

[49] The Court also referred to the decision of the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, which commented:¹⁸

[89] The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court’s processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court’s processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a “frivolous” pleading is one which trifles with the court’s processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – “otherwise an abuse of process of the court” – extends beyond the other grounds and captures all other instances of misuse of the court’s processes,

¹⁵ *Taueki v Horowhenua Sailing Club Ltd – Horowhenua 11 (Lake) Māori Reservation* (2015) 337 Aotea MB 68 (337 AOT 68) at [22]-[26].

¹⁶ High Court Rules 2016, r 15.1.

¹⁷ At [24], citing *Attorney General v Prince* [1998] 1 NZLR 262 (CA) at 264.

¹⁸ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53.

such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[50] Both the majority trustees and Aaron Bamber seek to strike out each other's proceedings. The majority trustees argue that Aaron Bamber's application does not meet the evidential threshold for fraud and is not supported by probative evidence justifying the removal of the majority trustees. Further, the application is being used for an improper purpose. Aaron Bamber argues that the majority trustees' application refers to matters already determined by the Court and is vexatious and an abuse of the Court process.

[51] Matters proceeded where I heard the strike out applications as well as the substantive matters at the same time. The strike out applications are dismissed, and I deal with the substantive applications below.

Kia panaia tētahi o ngā taratī? - Should any of the trustees be removed?

[52] Section 240 of the Act provides jurisdiction for the Court to remove trustees. It states:

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.

[53] It is well settled that the prerequisite for removal is not a simple failure or neglect of duties, but a failure to perform them satisfactorily. An assessment of the trustees' performance will therefore be necessary, having regard to standard trustee duties together with the special nature of Māori land trusts and the provisions of the Act. If the Court finds that there has been unsatisfactory conduct, the Court must then exercise its discretion as to whether or not to remove the trustees. In doing so, the Court will take a cautious approach.¹⁹

¹⁹ *Rameka v Hall* [2013] NZCA 203

Kōrerorero - Discussion

*Ko te tono mo te panatanga a Shane Monschau rāua ko Harry Te Nahu - Application
Application to remove Shane Monschau and Harry Te Ngaru as trustees*

[54] Grounds for the removal of the majority trustees include fraud; failing to follow Court directions; failing to keep financial records; lack of transparency, failing to carry out trustee duties or incompetency; and dishonesty.

[55] Aaron Bamber's claim of fraud against the two trustees is baseless. Aaron Bamber has provided no evidence which comes close to satisfying anything amounting to fraud. As noted by counsel, the commercial reality is that these trust funds are being used in pursuit of the judgment debt of \$175,851.25 owed by Aaron Bamber's parents. The trustees have the power under their trust deed to employ lawyers and accountants and approve trust expenditure by majority. The claim that the trustees are committing fraud by paying fees to collect the debt owed to the trust by Aaron Bamber's parents is nonsensical.

[56] In terms of the claim regarding failing to follow Court directions and failing to complete financial records, the majority trustees have, as best as they have been able to, completed financial accounts. They have followed the directions of the Court. Not only have they attended to accounts from 2011 but a summary update of the trust's accounts was presented to the meeting of beneficial owners held in 2017 and accepted. Aaron Bamber was present at the meeting and appears to have made no comment with regard to the accounts and did not challenge the accounts. Further, I have noted that the trustees have attended to accounts as best as they can and that is because there has clearly been a delay in finalising accounts. The hold up in getting accounts completed appears to be due to Aaron Bamber refusing to sign off on the accounts. I agree with the majority trustees that Aaron Bamber's claims regarding the financial records are completely without foundation.

[57] This trust is in a difficult administrative position due to Aaron Bamber not completing the required forms, so a bank account could be opened. The trust funds are administered via a lawyers account. Consequently, all monies of the trust are held in a lawyer's trust account. From my review payments made from the fund have been properly authorised by the majority trustees. Further, as Mr Temm correctly noted the trust order allows the trustees to make payments in the proper administration of the trust and the trustees are not required to

return to Court every time they wish to make such payments. Aaron Bamber's claims of unauthorised payments are without foundation.

[58] As Mr Temm submitted, much, if not most, of the trustee discussions have for many years concerned the Bamber litigation, for which Aaron Bamber is conflicted and cannot participate. In my decision of 13 June 2018, I noted that Aaron Bamber had taken the right approach in refraining from being involved in any of the matters relating to his parents in that, whether by design or luck, he had managed the conflict of interest that he had²⁰. It now seems a bit odd that Aaron Bamber complains that the trustees have not been including him in discussions and there has been a lack of transparency, when his non-inclusion previously saved him from being removed.

[59] I see nothing wrong with the Trustees engaging the services of Perpetual Guardian Trust to perform secretary functions for the trust. The clear reason for engaging Perpetual Guardian Trust is as a direct result of Aaron Bamber's conduct. Further, the trustees do not require an order of the Court to authorise payment to Perpetual Guardian Trust for its services.

[60] In assessing the trustees' performance, in what is a difficult situation given Aaron Bamber's relationship to the trust debtor, I find that the trustees have performed their duties satisfactorily. Having considered the claims against the trustees Shane Monschau and Harry Te Ngaru I see nothing to justify their removal.

Ko te tono mo te panatanga a Aaron Bamber - Application to remove Arron Bamber as trustees

[61] It has been recognised that Aaron Bamber is in a difficult position as a trustee given that his parents owe the trust in excess of \$160,000.00. However, by luck or design he had managed the conflict as it then existed.

[62] It is trite law that a fiduciary must not place him or herself in a position where personal interest conflicts with the duty owed to the trust.²¹ Section 227A of the Act

²⁰ *Monschau – Tahorakuri A No. 1 Section 33A2* (2018) 189 Waiariki MB 117 (189 WAR 117).

²¹ *Bray v Ford* [1986] AC 44 (HL) at 51.

reinforces this position and sets out the approach for dealing with a situation where a trustee may have a personal interest in dealings with the trust.

[63] The Supreme Court in *Fenwick v Naera* made the following comments regarding conflicts of interest and s 227A:²²

[61] ... We agree with the Court of Appeal that all trustees participating in decision making must “bring to bear a mind unclouded by any contrary interest”. Nor is it an answer that their fellow trustees all supported the transaction. Section 227A provides that a conflicted trustee must not “participate in the discussion” on a matter affecting his or her interests. The reason a conflicted trustee must not participate in discussions is to remove the risk that the other decision makers may be influenced (either consciously or subconsciously) by a person with divided loyalties.

[62] Equally, it is irrelevant that Mrs Fenwick (and Mr Eru) were not driven by personal financial considerations. That may have been so, at least at a conscious level. But it may not have been so subconsciously. Further, the beneficiaries were entitled to be assured that every trustee considering and voting in favour of the transaction did so without a conflict of interest and the risk of being influenced by that conflict (whether or not the person was in fact influenced).

[63] We agree with the Court of Appeal that the rules against conflicts and s 227A are designed with prophylactic effect – to avoid the appearance, and risk, of conflict. This applies both in terms of a conflicted trustee being influenced by the conflict (consciously or subconsciously) and of influencing fellow decision makers (again consciously or subconsciously).

[64] In the recent decision of the Māori Appellate Court in *Pook v Matchitt – Matangareka 3B Block*, that Court considered whether a conflict of interest arises if trustees participate in decisions that benefit close relatives, in that case whether a sibling relationship was caught by s 227A.²³ The Court found that the conflicts inherent in a sibling relationship fall squarely within the parameters identified by the Court of Appeal and Supreme Court in the *Naera v Fenwick* line of cases, and the conflicts should have been properly managed in accordance with s 227A and the terms of trust.²⁴

[65] In *Rudd – Horowhenua 11 Part Reservation Trust*, Judge Doogan considered the issue of divided loyalties in a case where trustees held roles in other entities. He noted:²⁵

[74] There is an obvious risk of conflict if and when a trustee is financially interested either directly or indirectly in the matter under consideration.

²² *Fenwick v Naera* [2015] NZSC 68.

²³ *Pook v Matchitt – Matangareka 3B Block* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167).

²⁴ At [60] – [62].

²⁵ *Rudd – Horowhenua 11 Part Reservation Trust* (2017) 368 Aotea 201 (368 AOT 201).

[75] The situation is more complex when there is no direct or indirect financial interest but there is an interest by reason of duties a particular trustee may owe to another entity by reason of a position they hold in that entity. Such a situation could potentially give rise to a conflict between duties owed to more than one principal. In such a situation the Court will look to ensure that the trustee properly fulfils his or her duties to each principal and that conflicts between duties are avoided. The situation to avoid would be one in which a trustee prefers the interests of one principal over another, even if there is no direct or indirect financial incentive to do so.

[66] Judge Doogan noted that it is the particular nature of the relationship and its connection to the matter under consideration by the trust that is key to understanding the circumstances in which a conflict may arise. There must be sufficient evidence provided to establish a relationship or connection that would or might constitute a conflict of interest.

[67] The situation with Aaron Bamber has changed since my June 2018 decision. Aaron Bamber is now a trustee of the Bamber Whānau Trust. Aaron Bamber's parents have transferred their only known asset into the Bamber Whānau Trust. This is significant given the judgment debt owed by Aaron Bamber's parents to the trust.

[68] I agree with counsel for the majority trustees that this creates an untenable conflict of interest between Aaron Bamber's duties as a trustee of both trusts. When there was distance between Aaron Bamber acting as a trustee and his parent's interest - the conflict was manageable. Now Aaron Bamber is a trustee of two trust where one trust is holding the asset which the other trust is seeking in order to recover its debt. In other words, Aaron Bamber has divided loyalties.

[69] Given the context in which this trust has been operating, having Aaron Bamber as a trustee has clearly been difficult. That situation has over time become more difficult – for the other trustees and for Aaron Bamber. Importantly, the recovery of debt from Aaron Bamber's parents has reached a critical point and the conflict of interest situation has changed given Aaron Bamber is a trustee of the Bamber Whānau Trust. The conflict of interest now is at a point where it is unmanageable and renders him incapable when it comes to attending to his trustee duties.

[70] In *Faulkner – Poripori Farm A Block* the Court considered the removal of a trustee where there had been friction between the trustees over a number of years.²⁶ The Court found:²⁷

This Court accepts that part of the duties of trustees is to consider fully matters that are put to the trustees and affect the operations and administration of the Trust, that they will have diverging views and that they are entitled to put their various views forward and have them considered. Healthy discussion and argument are part of any commercial forum. However, the Trust order indicates, as does section 227 of Te Ture Whenua Māori Act, that once a decision is made it is the majority that rules. Trustees who dissent are entitled to apply to the Court for directions, although as I have commented, their performance may be judged as the result of such action. They may also under section 227(6) have their dissent recorded.

Other than that, all trustees must be prepared to work with the majority to implement the decision which has been made. Where a trustee still takes a different view or regards himself as being separate from the majority of trustees then dangers arise. If there are to be negotiations of a commercial nature then such attitude will be seen to be a sign of weakness. This is an element that Mr Faulkner brings to the Trust and his assertion that he is entitled to represent himself as a trustee separately from representation which the trustees have by majority agreed to, as evidenced in the Pihema case, clearly shows his lack of ability to work as a ‘team man’ and as part of the Trust. This is not the first time that Mr Faulkner has been on his own and while one can perhaps overlook a failing at a first occasion the fact that this has continued shows a propensity for it to happen again. This Court therefore finds that Mr Faulkner’s inability to team and work with the trustees is enough to be considered as a failure to carry out his duties satisfactorily and for this reason the Court agrees that he should be removed as a trustee.

[71] Aaron Bamber has not worked with the other trustees. This in part is due to the obvious conflict of interest situation that he had to manage which has meant he has not been able to be involved in certain trust matters. However, there are other times where Aaron Bamber has simply refused to work and co-operate with the majority trustees.

[72] A clear example has been with regard to the opening of a bank account for the trust, as directed by the Court. Without a trading bank account the trust cannot run efficiently. It is forced to conduct all accounting transactions through a lawyer’s trust account. Aaron Bamber has for a long time now frustrated the administration of the trust by providing excuse upon excuse as to why he has not attended to the simple task of completing a form so the trust can have a bank account.

²⁶ *Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7).

²⁷ At 9.

[73] In my previous decision of 13 June 2018 I noted that with regards to the easement issue, the bank account matter and working with the other trustees there is a need for Mr Bamber to attend to these matters promptly. I directed that Aaron Bamber was to within two weeks attend the bank of the trust so that a bank account could be opened for the trust. He has failed to follow that direction.

[74] This Court finds that Aaron Bamber's inability to team and work with the trustees is enough to be considered as a failure to carry out his duties satisfactorily.

Kupu whakatau - Decision

[75] Both applications for strike out are dismissed.

[76] I find that Shane Monschau and Harry Te Ngaru have performed their duties satisfactorily. Having considered the claims against these two trustees I see nothing to justify their removal. The application for their removal is dismissed.

[77] Aaron Bamber is a trustee of two trust where one trust is holding the asset which the other trust is seeking in order to recover its debt. He has divided loyalties. Aaron Bamber is now in a position where there is an untenable conflict of interest between his duties as a trustee of two trusts. I find that he can no longer carry out his duties as a trustee of Tahorakuri A No 1 Sec 33A 2 Trust satisfactorily. Further, Aaron Bamber's inability to team and work with the trustees is enough to be considered as a failure to carry out his duties satisfactorily. Aaron Bamber will be removed as a trustee of Tahorakuri A No 1 Sec 33A 2 Trust.

[78] With regards to costs, Counsel have three weeks to file memorandum.

I whakapuaki i te 1:00pm i Rotorua te 3rd o ngā rā o Hepetema te tau 2019

C T Coxhead
JUDGE