

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

A20120007030

UNDER Sections 231, 238 & 237, Te Ture Whenua
Māori Act 1993

IN THE MATTER OF Poukawa 9G and others

BETWEEN MEAFOU CLARKE
Applicant

AND WAHIAO RAYMOND JAMES GRAY
- TRUSTEE OF POUKAWA 9G AND
OTHERS TRUST
First Respondent

AND FAYE WALKER, MARIA KAHUKIWA,
MARION RUKUPO, MOSS TAWHAI
AND THOMAS CLARKE – PREVIOUS
TRUSTEES OF POUKAWA 9G AND
OTHERS TRUST
Second Respondent

On the papers

Appearance: Ms C Bennett, Counsel for the Applicant
Mr C Bidois, Counsel for Respondent, Faye Walker
Mr P Harman, Counsel for Respondent, Thomas Clarke

Judgment: 22 April 2013

RESERVED JUDGMENT OF JUDGE C T COXHEAD

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Introduction

[1] On 25 February 2013 I convened a telephone conference where the issue was raised as to whether Mr Meafou Clarke, the applicant in three of the applications before the Court, had standing to bring these proceedings. The agreed proposed approach is to deal with the issue of standing before moving to hearing the substantive issues, if required.

[2] The parties were given time to file memorandum specific to the question of whether Mr Meafou Clarke had standing in these proceedings.

Current Applications

[3] There are currently eight applications before the Court relating to the Poukawa 9G and Others Trust (“the Trust”). Mr Meafou Clarke is the applicant in three of these applications. These are:

- (a) An application pursuant to s 231 of Te Ture Whenua Māori Act 1993 (“the Act”), that the responsible trustee be required to recover the losses caused by the former trustees and as confirmed in the responsible trustees’ report dated 26 August 2011;
- (b) An application pursuant to s 238 of the Act, that the responsible trustee be required to reconcile dividends alleged to have been paid with dividends actually paid by the former trustees and in particular, from 2005 to date; and
- (c) An application to the Court for directions, that as a consequence of the closing of the Court file, the decision of the Court of 14 February 2011 remains unfulfilled. The applicant wishes to finalise these proceedings and to ensure that Trust is restored as closely as possible, to the state in which it was in were it not for the maladministration of the estate by the culpable former trustees.

[4] These applications, it is submitted, are a consequence of prior orders of the Court which have not been finalised.

[5] The other five relevant applications have all been filed by the responsible trustee of the trust, Mr Wahiao Raymond James Gray (Jim Gray). These are:

- (a) An application pursuant to s 244 of the Act for variation of the Trust Order;
- (b) An application pursuant to s 18(1)(d) of the Act for orders for payment of money, as monies belonging to the Trust have been applied to the purchase of a hall, sited on the Tauhara Middle 4A1N1B Reservation, Waitahanui, and its repairs and maintenance;
- (c) An application pursuant to s 236 of the Act and s 66 of the Trustee Act 1956 – seeking directions as to a full investigation with regards to the purchase of a hall sited on the Tauhara Middle 4A1N1B Reservation, Waitahanui;
- (d) An application pursuant to s 18(1)(i) of the Act for an order for payment of money from the previous trustees of the Trust, in regards to funds used ultra vires; and
- (e) An application pursuant to s 230 of the Act for aggregation of the three blocks that constitute the Trust, being Poukawa 9G block and the Patangata 3D Sec 1 and 3D Sec 3 blocks.

Previous Applications

[6] The previous applications that can be considered the genesis of the current applications were dealt with in my decision of 14 February 2011.¹

[7] The three applications I had before the Court at that time were all concluded.²

[8] The application for a review of Trust was completed by the provision of an independent report to the Court. The application for removal of trustee was successful.

¹ *Clarke v Walker – Poukawa 9G and Others Trust* (2011) 6 Takitimu MB 285 (6 TKT 285).

² *Ibid* at 6 Takitimu MB 287 (6 TKT 287), [3]-[4].

The enforcement of obligations of trustee application was rendered unnecessary given my decision to remove trustees.³

[9] In my decision of 14 February 2011 I noted at paragraph [74] that whoever was appointed as a trustee would be appointed on an interim basis. I indicated that they would need to undertake an investigation as to what losses (if any) had been caused to the Trust by the actions of the trustees I removed.

[10] I then appointed Mr Jim Gray as responsible trustee. Along with all other responsibilities associated with a responsible trustee, Mr Gray was also;⁴

(i) To undertake an investigation as to what losses if any had been caused to the trust by the actions of the trustees removed. The findings of the investigation may lead to further Court actions in terms of seeking recovery of losses from those removed trustees, that may also require a further hearing in terms of the issues relating to indemnity of the trustees or whether there is [relief] specific to section 73 of the Trustee Act 1956;

[11] It is clear to me that the previous applications have now been concluded and are at an end.

Applicant's submissions

[12] Ms Bennett on behalf of her client notes that in removing the trustees the Court directed that the yet to be appointed responsible trustee was to conduct an investigation into losses that may have been caused to the Trust by the administration of the former trustees. This is correct.

[13] She also, in my view, incorrectly submits that that report undertaken was then to come back to the Court so the Court could determine what (if any) repayment should be ordered or whether the former trustees should be entitled to an indemnity.

[14] I did not read my appointment of Mr Jim Gray to be on that basis.

³ Ibid.

⁴ 9 Takitimu MB 256 (9 TKT 256).

[15] The Court did indicate depending on the findings of the report it may lead to further Court actions and it may also require further hearing in terms of issues relating to indemnity of the trustees.⁵

[16] However, it was always for the responsible trustee to determine whether Court or any other type of action would be appropriate. There was no compulsion on the responsible trustee to bring proceedings before the Court to determine what, if any, repayment could be ordered or whether former trustees could be entitled to an indemnity.

[17] Without an application the Court's hands are tied and would not on its own motion consider the report and make orders.

Applicant's submissions in terms of standing

[18] The applicant submits that the applications are effectively against the responsible trustee; Mr Jim Gray and the applicant ask the Court to enforce its directions through the responsible trustee.

[19] The applicant also submits that:

- (a) It is clear law that a beneficiary is entitled to institute proceedings to compel trustees to perform trustees duties; and
- (b) If a trustee refuses to take action against a debtor or to recover trust property, then a beneficiary may sue in his own name if circumstances are exceptional.

[20] While applications by a beneficiary in their own name may not be popular, they are permissible and confer that a beneficiary is not absolutely prohibited from bringing such applications.

[21] In terms of special circumstances the applicant's submission is that special circumstances exist to give the applicant standing and these are as follows:

⁵ 9 Takitimu MB 256 (9 TKT 256).

- (a) The applicant made the originating application the subject of *Clarke v Walker – Poukawa 9G and Others Trust*⁶ decision;
- (b) It was expected as a result of the *Clarke v Walker – Poukawa 9G and Others Trust* decision that the file would not be closed but that the proceedings would come back before the Court once the report was available;
- (c) The report, recovery of losses and any indemnity would then be treated as part of the original proceedings and not as a new application. In that instance the applicant remains an applicant;
- (d) The application has been accepted by the Court and has commenced. Having not challenged standing upon becoming aware of the application, the trustees and the respondents should now be prohibited from denying standing;
- (e) As a beneficiary in the Trust the applicant has a clear interest in the outcome of the proceedings;
- (f) An applicant as beneficiary is not a discretionary beneficiary, but has a proprietary interest in the Trust assets;
- (g) The Court was cognisant that the misadministration of the Trust by the former trustees may have given rise to losses and specifically ordered the report with a view to determining what recovery might be appropriate;
- (h) The applicant has been involved in these proceedings and has much information in his possession to be of assistance;
- (i) The reserved decision of 14 February remains unchallenged, so the question for that Court becomes what sums if any, should be ordered to be repaid and what indemnity if any should be available to the former trustees; and

⁶ (2011) 6 Takitimu MB 285 (6 TKT 285).

- (j) The role of the applicant is to ensure that the matter is before the Court.

Respondent's submissions

[22] Mr Bidois made submissions for the respondent, Ms Faye Walker. Mr Harman on behalf of Mr Thomas Clarke has indicated to the Court that he adopts those submissions.

[23] In summary, Mr Bidois states that Meafou Clarke does not have standing to appear on three grounds being:

- (a) This is a wholly new proceeding. The original proceedings had been concluded on a final basis;
- (b) The authority to inquire into and recover trust losses (if any) has been vested in Mr Jim Gray solely as responsible trustee; and
- (c) The orderly identification and disposal of issues will be promoted by the responsible trustee bringing the claim on behalf of all the owners.

[24] Counsel for the respondent Faye Walker further submitted:

- (a) These proceedings are not a continuation of the original proceedings brought by Meafou Clarke and others. These are wholly new proceedings directed at establishing the extent of any losses to the trust and the liability of the respondents for such losses;
- (b) A reserved decision was issued in the original proceedings and the Court is now functus officio in respect of those proceedings;
- (c) Meafou Clarke has no interests that are substantially different or greater than the interest of other beneficial owners;
- (d) The interests of all owners are competently represented by Mr Gray as responsible trustee;

- (e) There is no evidence that the community of owners want Meafou Clarke to appear on their behalf in place of the Court appointed responsible trustee;
- (f) There is a real risk of injustice to the respondents if the Court allows individual owners to raise and pursue their own separate claims.

Responsible Trustee

[25] Mr Gray has also advised the Māori Land Court that:

- (a) He needs to reopen his applications for directions; and
- (b) If it is determined that he is to continue with full duties as responsible trustee and to recover all monies owing to the trust, and if it is determined that Meafou Clarke has no standing, all it means is that he will engage Ms Bennett as counsel for the trust and brief her accordingly.

Decision

[26] The Court is currently dealing with application A20120007030. This is an application for a review of trust, enforcement of obligations of the trust and an application for directions. It is unclear to me as to why, from an administrative point of view there are not three separate applications.

[27] I agree with Mr Bidois that this is a wholly new proceeding. The original proceedings have been concluded with the decision *Clarke v Walker – Poukawa 9G and Others Trust*.⁷

[28] As I read the current applications filed by Mr Clarke, they are very clearly applications against the responsible trustee. Ms Bennett confirms such at paragraph 13 of her submissions of 11 March 2013 where she ask that the Court enforce its directions through the responsible trustee.

⁷ (2011) 6 Takitimu MB 285 (6 TKT 285).

[29] Mr Clarke's applications have purposely been framed against the responsible trustee.

[30] These proceedings are indirectly aimed at the previous trustees by seeking that the responsible trustee be required to recover the losses caused by the former trustees, as confirmed in the responsible trustees report dated 26 August 2011.

[31] As I read the applications, the parties in the first instance are the applicant, Meafou Clarke, and the responsible trustee, Mr Jim Gray, as first respondent.

[32] The previous trustees would be second respondents to the extent that the proceedings may result in the responsible trustee taking proceedings against them.

[33] At this stage the relief sought in Mr Clarke's applications are very much focused on the responsible trustee.

[34] However, new trustees are not liable for actions and breaches of trust by earlier trustees. If a new trustee knows there has been a breach of trust, then they should take action to remedy this if necessary.⁸ It is when new trustees fail to take any necessary actions to protect a beneficiary's interests, that a beneficiary is entitled to bring a claim to the Court seeking enforcement of the trustee's obligations.

[35] Mr Clarke as a beneficiary is certainly entitled to seek enforcement of trustees' obligations and directions, as he has applied for, and to seek the review of trust, as he has also applied for.

[36] I therefore find that Mr Meafou Clarke does have standing in terms of the applications he has filed.

[37] With regard to whether Mr Clarke has standing to bring proceedings as a beneficiary on his own account against the previous trustees, there must be exceptional

⁸ Andrew Butler "Trustees and Beneficiaries" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 105 at 148.

circumstances to warrant such an action. There must also be a failure by the trustee to perform a duty owed to the beneficiary to protect the interests of the beneficiary.⁹

[38] However, it cannot be said there has been any such failure by Mr Gray. He has filed applications with this Court seeking full payment of funds by the previous trustees.

Responsible Trustees applications

[39] On the face of them, one of the responsible trustee's applications seeks a similar outcome as Mr Clarke's applications. Just through a different road.

[40] Mr Gray's applications for payment of funds will certainly see the previous trustees as respondents. The applications may necessitate the previous trustees seeking to participate in the proceedings; given a potential consequence of Mr Gray's applications could be orders against the previous trustees.

[41] All applications should be dealt with together given they relate to the same parties, block of land, and trust, and will no doubt rely on similar facts.

[42] The case manager is to organise a teleconference for the purposes of timetabling towards hearing.

Pronounced in open Court at am/pm in Rotorua on the 22nd day of April 2013

C T Coxhead
JUDGE

⁹ *Manukau City Council v Lawson* HC Auckland CP 210/SW99, 20 December 1999, at [31].