

**IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT**

**A20130002370
A20130002091**

UNDER Sections 231, 241 of Te Ture Whenua Māori Act
1993

IN THE MATTER OF Tahae Kunikuni Pekapeka Roberts and Te Tahī
Francis Te Tapua Te Amo Roberts Whānau Trust

BETWEEN EREATARA KOKIRI
Applicant

AND CECILIA ANNE HORI, JIMMY TE HIRA
ROBERTS, MANUKURA ROBERTS,
NGARONGOKAHAU ROBERTS AND PEKA
ROBERTS AS TRUSTEES OF THE TAHAE
KUNIKUNI PEKAPEKA ROBERTS AND TE
TAHI FRANCIS TE TAPUA TE AMO
ROBERTS WHĀNAU TRUST
Respondent

Hearing: 18 Te Waipounamu MB 223 dated 7 May 2013
67 Waikato Maniapoto MB 149 dated 23 September 2013
24 Te Waipounamu MB 144 dated 5 May 2014
86 Waikato Maniapoto MB 78 dated 9 September 2014
91 Waikato Maniapoto MB 102 dated 1 December 2014
30 Te Waipounamu MB 276 dated 18 May 2015
(Heard at Blenheim)

Judgment: 20 April 2016

RESERVED JUDGMENT OF JUDGE S F REEVES

Introduction

[1] The applicant, Ereatarā Kokiri (also known as Tahae Gavin Roberts)¹ has applied under s 241 of Te Ture Whenua Māori Act 1993 (“the Act”) for a partial termination of the Tahae Kunikuni Pekapeka Roberts (Snr) and Te Tahī Francis Te Tapua Te Amo Roberts Whānau Trust (“the Trust”). Mr Kokiri has also sought a review of the Trust under s 231 of the Act.

[2] The applicant is a natural grandson of Tahae Kunikuni Pekapeka Roberts (Snr) (“Tahae (Snr)”) and Te Tahī Francis Te Tapua Te Amo Roberts (“Te Tahī”), being a son of Hariata Roberts (Toko). He and his twin brother Te Tapua Richard Roberts were recognised as whāngai of Te Tahī in 1995 and succeeded equally to her interests along with the other 13 children.²

[3] The Trust was constituted on 2 February 2001. The minutes of the hearing state the Trust is for the benefit of the uri of Tahae (Snr) and Te Tahī down through the generations and for the benefit of Tahae (Snr) during his lifetime.³

[4] The applicant says the Trust has failed to provide him with any information about the Trust and its finances for 8 years. He also says he has not received any benefit from the Trust, and the trustees have advised him that his own whāngai children and grandchildren do not qualify as beneficiaries of the Trust as they are not descendants of Tahae (Snr) and Te Tahī. As the applications progressed and the Court heard evidence from several of the trustees, the applicant also expressed concerns about the way the trustees are administering the Trust.

[5] Mr Kokiri seeks to partially terminate the Trust so he can take “his share” and establish his own trust for the benefit of his children and grandchildren.

[6] The trustees oppose the partial termination of the Trust because their father Tahae (Snr) expressly wanted all the Māori freehold land interests to be held collectively and used for the benefit of the whānau. The trustees acknowledge that there has been little to

¹ The name ‘Tahae’ is shared with Tahae Roberts (Snr) and Tahae Roberts (Jnr), the eldest son of Tahae (Snr)

² 237 Rotorua MB 210

³ 257 Rotorua MB 10 (257 Rot 10)

no communication with the applicant however; they say this is due in part to a whānau disagreement in 2004 after which Mr Kokiri expressed a desire to no longer be part of the Trust.

[7] The issues for determination are:

- (a) Should the Court allow a partial termination of the Trust with respect to Mr Kokiri's interests; and
- (b) Should the trustees be required to take any further steps regarding the review application?

Background

[8] The Trust was originally vested in Tahae (Snr) and his children Ngarongokahau Tai, Cecilia Anne Hinemoa Hori, Jimmy Te Hira Roberts, Peka Roberts, Manukura Roberts as trustees.

[9] At the time the Trust was constituted Tahae (Snr) held substantial Māori freehold land interests absolutely. He also held a number of interests pursuant to a life tenancy derived from his wife, Te Tahī.⁴ He surrendered his life interest prior to those interests being vested in the Trust. Consents were obtained from each of the children (remainderman), for those interests to be vested in the Trust.⁵

[10] Tahae (Snr) died on 19 August 2001. On 28 August 2002 an order was made vesting further interests held by him in the Trust.⁶ A number of subsequent orders have also been made over the years vesting further interests held by Te Tahī and Tahae (Snr) in the Trust.⁷

⁴ 252 Rotorua MB 126B (252 ROT 126B), 237 Rotorua MB 209 (237 Rot 209)

⁵ A20000057042

⁶ 267 Rotorua MB 199 (267 ROT 199)

⁷ See 267 Rotorua MB 201 (267 ROT 201); 276 Rotorua MB 289 (276 ROT 289); 280 Rotorua MB 180 (280 Rot 180); 334 Rotorua MB 176 (334 ROT 176); 32 Waiariki MB 8 (32 WAR 8) and [2012] Chief Judges MB 194 (2012 CJ 194)

Procedural History

[11] After the initial application for partial termination was filed, I directed Mr Kokiri to also file an application for review under s 231 of the Act. He was directed to call a meeting of beneficiaries and trustees to discuss the partial termination application. The trustees were also directed to file a report on the activities, administration, and finances of the Trust.

[12] The applications were first heard before me on 7 May 2013, in Blenheim.⁸ While the review application had been filed neither the directions concerning the meeting, nor the filing of a trustee report had been actioned. After hearing from Mr Kokiri I adjourned the applications to Tauranga for the trustees to be summonsed to appear and respond to the evidence.

[13] The matter was then heard before Judge Clark, in Tauranga, on 23 September 2013.⁹ Four trustees attended the hearing. They confirmed that no whānau hui had been held since 2004, but that various of the trustees would meet from time to time to make decisions about payments. The Court was provided with copies of bank statements for the Trust's bank account from December 2007 to July 2013. Judge Clark adjourned the application and directed the trustees to call a meeting of beneficiaries; to report on the Trust's finances, to explain the various distributions and payments, and how the decisions had been made. The trustees were also directed to discuss with beneficiaries how to improve communication issues, and the future direction of the trust, including whether there should be a partial termination.

[14] A meeting of the Trust was held in March 2014 attended by 7 whānau members including 2 trustees. The applicant gave his apologies. The minutes show questions were raised during the meeting about why the financial records of the Trust were incomplete, and about a number of payments that had been made from the Trust's bank account. The treasurer's report was not accepted by the meeting. However those present confirmed they wanted the Trust to continue.

⁸ 18 Te Waipounamu MB 223 (18 TWP 223)

⁹ 67 Waikato Maniapoto MB 149 (67 WMN 149)

[15] The applications came before me again in Blenheim on 5 May 2014.¹⁰ The trustees had not made timely arrangements to phone into the hearing in Blenheim and I gave further directions that a trustee representative was to be available at the next hearing to explain payments, and what controls there were on the Trust's bank account. The applications were adjourned to Tauranga for the trustees and the treasurer to be summonsed to appear and give evidence about the financial issues

[16] On 9 September 2014, Judge Clark heard the applications again in Tauranga.¹¹ The summons directions had not been completed but Judge Clark heard from trustee Manukura Roberts. At the conclusion of the hearing Judge Clark directed that the previous summons directions be carried out. He also, of his own motion, issued an injunction order prohibiting the trustees from making any further withdrawals from the Trust's bank account. Judge Clark additionally directed that the trustees file bank statements for the period 1 August 2013 through to the end of August 2014.

[17] A further hearing was held before Judge Clark on 1 December 2014.¹² Judge Clark heard from the trustees and the treasurer. At the conclusion of the hearing he noted that there now appeared sufficient evidence before the Court to enable me to make a determination.

[18] As foreshadowed the final hearing was held before me, in Blenheim, on 18 May 2015.¹³ Mr Kokiri responded to the evidence from the previous hearings. He maintained his desire for the Trust to be at least partially terminated.

Mr Kokiri's submissions

[19] Mr Kokiri submits that the trustees have not provided him with any information regarding the Trust for at least the last 8 years. He says that the trustees lack transparency, and he has not received any dividends or other benefits from the Trust despite other whānau members receiving payments.

¹⁰ 24 Te Waipounamu MB 144 (24 TWP 144)

¹¹ 86 Waikato Maniapoto MB 78 (86 WMN 78)

¹² 91 Waikato Maniapoto MB 102 (91 WMN 102)

¹³ 30 Te Waipounamu MB 276 (30 TWP 276)

[20] Mr Kokiri further submits that the trustees have informed him that his children cannot be beneficiaries of the whānau trust as they are whangai and not blood descendants of Tahae (Snr) and Te Tahi.

[21] Mr Kokiri maintains that he does not wish to completely terminate the Trust however he does wish to receive his fair share. He believes that because he does not presently have a good relationship with his siblings who are trustees, that they are not treating him fairly, and are therefore not acting in the best interests of all the beneficiaries.

[22] Mr Kokiri further adds that the problems surrounding the Trust stem from incidents arising following his father's tangi in 2001 which he says led to him not wanting to be part of the Trust. He says that his statements about not wanting to be part of the Trust were made in heat of moment and taken out of context by trustees who have excluded him from the Trust ever since. Mr Kokiri says his father included him in the Trust to ensure that things were done right however he says he has now lost faith in the trustees and wishes to extract his Māori land interests from the Trust.

[23] Mr Kokiri reiterates that he is being bullied and excluded and as such argues that it will be to his detriment if the partial termination is declined. In response to statements by the trustees that he received payments from the Trust for airfares, he firmly denies ever receiving any such payments.

[24] Mr Kokiri also submits that the evidence of the trustees failing to properly control the finances of the Trust is sufficient reason to partially terminate the Trust.

Respondents' submissions

[25] Te Hira Roberts submits that the trustees oppose the termination of the Trust as it was their fathers wish that the shares be held together in the hopes of keeping the whānau together. Te Hira says that the trustees have an annual get together and discuss the finances. Te Hira says that four or five years ago the trustees decided to make distributions to the 15 families and retain the balance for general purposes.

[26] Te Hira confirmed that Mr Kokiri has not received any dividends and puts this down to a lack of communication. As regards the lack of information from the trustees, Te

Hira says that in 2004, Mr Kokiri was working with whānau to establish a learning centre, that project fell through and there was some disagreement regarding Mr Kokiri not being a beneficiary of the trust. According to Te Hira, Mr Kokiri subsequently relocated to the South Island and information has not flowed between Mr Kokiri and the trustees since then.

[27] Te Hira further submits that the trustees have no issue with Mr Kokiri being part of the Trust in spite of the fact that he was bought up by another whānau as a whangai. He is their full brother and they do not dispute that he is a beneficiary of the Trust. However Te Hira does acknowledge that there is an issue with whether Mr Kokiri's children/grandchildren are beneficiaries given that they are whāngai with no blood relationship to their parents.

[28] Cecilia Hori submits that she has discussed the issue of Mr Kokiri's children/grandchildren with him in general terms in the context of a Chief Judge's application she had been involved in where shares were not given out to a whangai family who were not of the bloodline. Ms Hori said she was only explaining things to Mr Kokiri when he said he wanted his grandchildren included. At which point she said that was not right as they are not direct descendants.

[29] Ngarongokahau Roberts expressed disappointment at the applicant not discussing issues with the trustees first. He confirmed that following the disagreement in 2004 they have not heard from Mr Kokiri. Manukura Roberts added that in 2004 the Trust gave Mr Kokiri funds to assist with his travel expenses. Manukura thought that one payment was for \$360 and another for \$200 - \$300.

[30] The trustees are in broad agreement that Mr Kokiri should be paid a sum of money however they are not sure how much. They considered that in the past other families have received in the vicinity of approximately \$3,000 – 4,000.

[31] The trustees have acknowledged that their management of the Trust has been poor and that they lack proper decision making processes when deciding how Trust funds will be spent or distributed to beneficiaries.

Law

Partial termination

[32] Section 241 of the Act provides:

241 Termination of trust

(1) The Court may at any time, in respect of any trust to which this [Part] applies, terminate the trust in respect of—

- (a) The whole or any part of the land; or
- (b) The whole or any part of any interest in land subject to the trust,—

by making an order vesting that land or that part of that interest in land in the persons entitled to it in their respective shares, whether at law or in equity, or in such other persons as the beneficial owners may direct.

(2) Where a trust terminated under subsection (1) of this section is a whanau trust, the Court shall, notwithstanding anything in subsection (1) of this section, make an order vesting the land or the part of the land or the interest in the land in the persons entitled to it in their respective shares, whether at law or in equity, which persons are—

- (a) The persons who were, at the creation of the trust and are at the date of the order, the beneficial owners of the land or the part of the land or the interest in the land; and
- (b) Any persons who, at the date of the order, are successors of any of the persons who were, at the creation of the trust, the beneficial owners of the land or the part of the land or the interest in the land.

[33] The wording of s 241 grants the Court a general discretion to allow partial termination but this must always be exercised with caution. There is no automatic right of termination, and an applicant must show that the discretion to refuse termination should not be exercised.¹⁴

[34] The principles and objectives set out in the Act's Preamble, and ss 2 and 17 are the necessary starting point, with the Act emphasising retention and utilisation of Māori land as a taonga tuku iho by owners, their whānau and hapū¹⁵, and leaning away from alienation, facilitation of individual holdings, and further fragmentation of land.¹⁶

¹⁴ *Chambers v Keepa – Te Hinau a Pura Whānau Trust* (2016) 350 Aotea MB 74 at [45]

¹⁵ *Larkins v Kaitaia – Waihou Hutoia D2A* at (2013) Taitokerau MAC 159 MB at [18]

¹⁶ *Chambers*, above n14 at [46]

[35] In *Larkins* the Māori Appellate Court set out several important considerations to assist the Court in weighing competing views and interests, including: that termination should be refused where it is likely to result in detriment or create unreasonable disadvantage to affected parties, and evidence of core dysfunction by trustees may be sufficient grounds for termination.¹⁷

[36] The recent decision of *Chambers v Keepa – Te Hinau a Pura Whānau Trust* includes a useful review of other relevant case-law relating to termination in similar circumstances, and I adopt that discussion here.¹⁸

Discussion

Should the Court allow a partial termination?

[37] I do not consider that the partial termination of the Trust would achieve the better retention and use of the interests which are in the Trust. The applicant's wish to extract "his fair share" to establish another whānau trust will instead facilitate alienation and fragmentation of the interests contrary to the purposes the Trust was established for. In this regard, the objections of Mr Kokiri's siblings are relevant.

[38] While the current wording of the Trust order indicates that only blood descendants of Tahae (Snr) and Te Tahi are included as beneficiaries, it is wrong to state that the applicant's children cannot be added as beneficiaries. Such a step would not result in further fragmentation or alienation in the way a partial termination would, and nor would further succession be required as all interests are already in the Trust. Including the applicant's children requires sufficient support (unanimous agreement is not necessary) of beneficiaries and trustees and could be on agreed terms, such as inclusion for their lifetimes. This could provide a solution to the present impasse and a way for the applicant and his siblings to move on. Such a step would need to be discussed by beneficiaries and trustees at a Trust meeting, and any agreed variation could be dealt with in the s 231 application.

¹⁷ *Larkins*, above n15 at

¹⁸ *Chambers*, above n14 at [47] – [49]

[39] Cecilia Hori referred to the decision of the Chief Judge in *Temo v McGarvey – Re Hohapata Heremia*¹⁹ as authority for the proposition that shares cannot be “given out” to a whangai family who were not of the bloodline. This statement is potentially misleading because the decision in fact upheld the vesting of Māori land interests in a whāngai daughter under the terms of a will, and is not relevant to the present situation.

[40] Turning to the purpose of the Trust. The objects clause provides that the Trust is to “provide for the management of the Trust property to the best advantage of the beneficiaries of the Trust, to make provision for any special needs of the beneficiaries of the Trust and to represent the beneficiaries of the trust on all matters relating to the shares and to the use and enjoyment associated therewith.” To further these objects the trustees’ powers include “promoting the health, social, cultural and economic welfare, education and vocational training and general advancement in life for the descendants of Tahae Kunikuni Peka Roberts and Te Tahī Francis Te Tapua Te Amo Roberts.” These objects and powers are similar to most whānau trusts. The evidence is Tahae (Snr) established the Trust with the agreement of all his children to keep his and his late wife’s Māori land interests together for the benefit of the whole whānau. Further interests were also vested after his death by agreement. In my view, partial termination of the Trust would be contrary to those purposes.

[41] There is no evidence of support for Mr Kokiri’s application amongst the trustees and beneficiaries. The Trust hui on 9 March 2014, acknowledged the problems with the way the Trust had been run, but the wish of those present was that the Trust continue without partial termination.

[42] Next I take into account the impact of termination on the remaining beneficiaries and the Trust. A consequence of partial termination would be that all interests previously belonging to Tahae (Snr) would be re-vested under s 241(2), and succession would be required to determine who is entitled and in what proportions. Currently the trustees hold all the Māori land interests for the beneficiaries for the purposes set out above. In my view termination and removal of interests with all that entails is contrary to the purposes of the Trust and would be detrimental to the Trust and beneficiaries, particularly if succession to Tahae (Snr’s) interests was to be contested.

¹⁹ *Temo v McGarvey – Re Hohapata Heremia* (2012) Chief Judge’s MB 194

[43] Lastly, there is the issue of dysfunction within the Trust. As the hearings progressed and more evidence was given, it became clear that the trustees have not functioned properly in several respects; failure to call meetings and keep beneficiaries informed, lack of accounts and proper financial records, no proper processes for authorising payments from the Trust's bank account, and failure to act fairly towards all beneficiaries. There are a number of payments to individuals and groups recorded in the bank statements which are not adequately explained. At the hearing on 9 September 2014 Judge Clark took the precautionary step of issuing an injunction to freeze further withdrawals from the Trust's bank account.²⁰

[44] Evidence of failure to comply with core trustee accountabilities can be sufficient grounds for termination. However in my view termination will not resolve any issues of dysfunction for this Trust, and would end the original kaupapa under which the Trust was established. Further, the issues concerning trustee accountability and expenditure of Trust funds can be better addressed through the current s 231 application and a further application under s 238. It is not appropriate to terminate the Trust while those issues are under review.

[45] For these reasons, I conclude that that the Trust should not be terminated in whole or in part at this time.

Law

Review of trust

[46] Section 231 of the Act provides:

231 Review of trusts

- (1) The trustees or a beneficiary of a trust (other than a kai tiaki trust) constituted under this Part may apply to the Court to review the terms, operation, or other aspect of the trust.
- (2) There can be no more than 1 review of a trust within a period of 24 consecutive months.
- (3) The Court may, on any review,—
 - (a) confirm the trust order for the trust without variation; or

²⁰ 86 Waikato Maniapoto MB 78-85

- (b) exercise its powers under section 244; or
- (c) terminate the trust if the Court is satisfied that there is a sufficient degree of support for termination among the beneficiaries.

[47] The Court of Appeal has noted the extensive powers this Court has in relation to trusts.²¹ In a review of trust, the Court generally focuses on higher level policy issues rather than day to day operational matters although particular circumstances may make it necessary to consider issues of operational management.²²

[48] A review of operational matters should only be carried out as a last resort, where the Court considers there is a reasonable apprehension of risk to assets of the trust, or where some serious allegation has been made that requires the intervention of the Court, particularly through the application of s 238 for the enforcement of the obligations of the trust.²³

Discussion

Should the trustees be required to take any further steps regarding the review application?

[49] Initial concerns about the operation of the Trust's bank account were addressed through the injunction, which froze the operation of the account. The limited financial information provided to date demonstrates that the trustees have failed to follow a robust process in dealing with Trust funds. They have paid dividends to only some beneficiaries and have acted on a reactionary basis in assisting whānau and others where necessary. The Trust has not held regular general meetings and there has been a clear lack of communication between the trustees and the beneficiaries. Whilst the sums involved in these proceedings are not huge the trustees must be held accountable for their spending.

[50] In terms of payments from the Trust's bank account, the trustees must be able to show that these have been for proper purposes, and I now put the trustees on notice that I will be considering whether orders should be made for repayment of any improper payments or loans. I now invoke the Court's supervisory jurisdiction pursuant to s 238 of the Act.

²¹ *Proprietors of Mangakino Township v Māori Land Court* CA65/99, 16 June 1999.

²² *Mangakino*, above n 14, at [21] – [22].

²³ *Eriha v Trustees of Kairakau Lands Trust* (2014) 32 Takitimu MB 84 (32 TKT 84) at [13]

[51] In order to have the information to make those determinations, I have directed the Registrar to make inquiries about preparation of a full set of accounts for the Trust pursuant to a grant of special aid.

[52] I also want accurate information about what dividend payments have been made to Trust beneficiaries, to better inform the trustees about the appropriate level of a dividend payment to the applicant.

[53] The trustees will also have to meet and agree some basic policies and processes for making dividend and other payments from the Trust's account, keeping proper financial records, and keeping their beneficiaries better informed.

Decision

[54] The application pursuant to s 241 for partial termination is dismissed.

[55] The applications for review of trust and enforcement of obligations are adjourned. This matter down for a judicial conference pursuant to s 67 of the Act to discuss with the parties the preparation of accounts, and the conditions for lifting the injunction.

Dated at Wellington at 3.00 pm this 20th day of April 2016.

S F Reeves
JUDGE