

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

CIV 2009-463-381

UNDER the Declaratory Judgments Act 1908
AND UNDER the Trustee Act 1956

IN THE MATTER OF Te Uruoteao Rika Estate Trust

BETWEEN RICHARD THOMAS CHARTERS
Plaintiff

AND JOHN TEURUOTEAO RIKA
First Defendant

AND WARWICK RIKA
Second Defendant

Hearing: 1 December 2009

Appearances: Martin Taylor for Plaintiff
Alan Knowsley for First Defendant

Judgment: 1 December 2009

JUDGMENT OF HARRISON J

SOLICITORS

Paul Cheng & Co (Wellington) for Plaintiff
Raine Collins (Wellington) for First Defendant

COUNSEL

Martin Taylor

Introduction

[1] The parties to this proceeding, Messrs Richard Charters, John Rika and Warwick Rika, are the trustees of Te Uruoteao Rika Estate Trust (the estate) created by a will dated 23 January 1968. Each of the three trustees is a grandchild of the testator, the late Te Uruoteao Rika. One trustee, with the consent of another, seeks important directions relating to the future administration of the trust.

Background

[2] By way of background, the testator provided by way of his will as follows:

7. I GIVE DEVISE AND BEQUEATH the residue to my trustees UPON TRUST for a period of eighty years from the date of my death (hereinafter referred to as "the said period") and then to such of my descendants who shall be living at the end of the said period equally provided that the right of any person to qualify as a descendant shall not be affected by the fact that that person or any person through whom his or her claim was derived is or was illegitimate or adopted.
8. I EMPOWER my trustees in their absolute discretion to apply during the said period the whole or any part of the income or capital towards the maintenance education acquiring of a home promotion in business or a profession advancement marriage or otherwise for the benefit of any child or grandchild or descendant of mine whether born or adopted either before or after my death and whether legitimate or illegitimate.

[3] The testator died in July 1968. His eight children then living were the nominated beneficiaries. His estate then comprised shares in various Maori land blocks including land at Kawaha Point. In 1975 the then trustees converted the proceeds of sale of \$240,000 of that land to investment capital.

[4] Since then the trustees for the time being have pursued an active policy of investment in commercial property. The success of this policy is a testament to the skills and acumen of the trustees. Not only has it provided significant capital growth, it has also provided a steady flow of income for further retention or distribution to some of the living beneficiaries.

[5] As a result of this policy the capital of the trust represented by cash is \$2.354m, realised upon sale of a commercial property at Mt Maunganui. In addition the trustees own Maori land. The trustees have not, for obvious reasons, sought to value the land because they intend to hold it indefinitely for the benefit of the wider whanau. However, Mr Charters' very rough estimate is that it should be worth in excess of \$1m.

[6] Over the years, in accordance with their powers, the trustees have made various distributions to the nominated beneficiaries and their whanau. Payments were initially made equally to the named beneficiaries. Subsequently, upon the death of those children, payments have been made to individuals or whanau trusts representing the descendants. The trustees' current practice is to make equal payments to whanau trusts established for each of the whanau lines of the testator's children. Alternatively where trusts are not operating successfully, payments have been made to the children of primary descendants.

[7] An illustration of the level and intensity of the distributions is shown by a reconstruction of records dating back to 1976. An unadjusted total of almost \$1.74m has been distributed in the intervening 35 years. Regrettably, however, tensions have arisen about distributions both of the corpus and income, leading to an increasing degree of discord and this application for declarations. That is perhaps an inevitable product of the growth both of the estate's assets and the number of potential living beneficiaries.

[8] Just over 41 years of the 80 year term of the trust have elapsed. On the trustees' estimate there are between 1000 and 2000 current living beneficiaries including children. If that growth continues, the number of potential beneficiaries at the final date of distribution could be in excess of 4000-5000. The potential problems, both legal and practical, for the trustees are obvious.

Application

[9] In order to reduce discord and also to meet current economic needs, Mr Charters has applied for this Court's approval to exercise the trustees' powers of

distribution more liberally. As a result he has sought declarations and directions, in summary as follows:

- (a) A declaration as the trustees' ability to make distributions, either under clause 8 or otherwise under the will, to whanau trusts representing the whanau lines of the eight first generation beneficiaries noted in the will, or to whanau trusts representing the whanau lines of each of the second generation or similar;
- (b) A declaration whether any distribution permissible under (a) above must or may be made equally across each whanau trust;
- (c) A declaration as to whether the trustees may distribute whole or substantially the whole of the trust fund, either under clause 8 or otherwise under the will;
- (d) If the answer to the above question is in the affirmative, declaration or directions as to the basis upon which such distribution would be permissible;
- (e) Subject to the answers to the above questions, directions as to whether the circumstances of the beneficiaries make it appropriate for the trustees to apply to the Court to vary the trust or authorise dealing with trust property to allow either the payment of interim distributions to whanau trusts or to allow the distribution of the whole of the trust fund;
- (f) The costs of this proceeding.

[10] Additionally Mr Charters seeks declarations relating to the rights of one descendant of the deceased and an order for removal and replacement of Mr Warwick Rika.

[11] In anticipation of today's hearing, Mr Martin Taylor, counsel for Mr Charters, has filed a comprehensive synopsis of submissions. I wish to record my appreciation for the quality of his work and his analysis of the relevant legal principles. Mr Alan Knowsley, for Mr John Rika, has filed a memorandum recording his agreement with Mr Taylor's analysis and the declarations sought by Mr Charters. Mr Warwick Rika has taken no formal steps but like the other two trustees is present in Court this morning.

Decision

[12] I have heard from both counsel this morning and from all three trustees. I have also had the benefit of the presence of other senior whanau members who have taken a close interest in the administration of the trust. As a result I am satisfied that the relief sought by Mr Charters should be granted.

[13] In particular, in my judgment, the trustees should be entitled to use their powers of appointment to distribute some or all of the trust capital at this stage. The trustees' current proposal in broad outline is to distribute most of the cash corpus but to retain some for wider whanau purposes and benefit all the testator's descendants. As earlier noted, the trustees intend to keep ownership of the Maori land. I am satisfied also that substantial distributions now will ease the burden on subsequent trustees who will inevitably have to be appointed for part of the balance of the term of the trust.

[14] Accordingly I make the following directions by consent:

- (1) The trustees are entitled to distribute under the power of appointment contained in clause 8 for the widest possible range of purposes which they consider to be of benefit to the recipient or recipients;
- (2) The trustees are entitled to distribute any part of the trust fund up to and including the whole of its capital under the power of appointment;
- (3) The trustees are entitled to distribute such benefit on the basis of family or whanau lines on current information available to them (for the avoidance of doubt they are not obliged to distribute on the basis of individual need or interest);
- (4) The trustees are entitled to distribute to whanau trusts in accordance with the intention to distribute along whanau lines;

- (5) The trustees are entitled to apportion such benefit equally across whanau lines either to the level of the testator's children, grandchildren or some other level at their discretion.

[15] The application seeks an order removing Mr Warwick Rika as a trustee. I have spoken with Mr Rika. It is unnecessary to traverse some of the issues raised by him and other whanau members about his appointment. It is sufficient to record my satisfaction that, given these directions by consent, no more than two trustees will be required at any one time. I am allowing Mr Warwick Rika the opportunity to consider his position and formally resign on or before 15 December 2009. In the event that he does not take that step, I will hear further submissions on an order for his removal. I trust that course will not be necessary.

[16] Also I am satisfied that Mrs Frances Nicoll is entitled to be considered as a discretionary beneficiary, and that her descendants and whanau are not disqualified from receiving a benefit under the terms of the trust. As a result they are to share equally with other whanau lines from the testator.

[17] Counsel are entitled to costs to be paid on a solicitor/client basis from the estate. Both are to submit itemised bills of costs on or before 7 December 2009 and I will make an order immediately. The trust is directed to make payment within 14 days of an order.

[18] In this respect, I wish to repeat my appreciation for the assistance given by Messrs Taylor and Knowsley. Also I wish to compliment the trustees in reaching agreement enabling orders to be made by consent. My expectation is that the relief granted today will enable the trustees to work co-operatively and unite the wider whanau in the future administration of the trust. I am grateful to those who have paid me the courtesy of attending today.

Rhys Harrison J