

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

**A20120008779**

UNDER Sections 239 and 338(7) of Te Ture Whenua  
Māori Act 1993

IN THE MATTER OF Horowhenua 11B 36 2L 4A Block (Kawiu  
Marae)

BETWEEN DEAN TUKAPUA  
Applicant

Hearing: 20 September 2012, 290 Aotea MB 157  
(Heard at Levin)

Judgment: 2 September 2013

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**RESERVED JUDGMENT OF JUDGE S F REEVES**

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## Introduction

[1] This is an application pursuant to ss 239 and 338(7) of Te Ture Whenua Māori Act 1993 (“the Act”) to appoint and replace trustees to the Māori reservation Horowhenua 11B 36 2L 4A (Kawiu Marae) (“the Marae”).

[2] The application was filed by Dean Tukapua following the Marae’s annual general meeting (“AGM”) held on 10 June 2012. Submissions were filed in opposition and a hearing took place in Levin on 20 September 2012 following which I reserved my decision.

[3] Mr Phil Taueki, a trustee who was not re-elected at the AGM, opposed the application. In particular he says the election was fatally flawed because it was not carried out according to the processes set out in the Marae charter adopted by the trustees and beneficiaries of the Marae.

[4] Mr Tukapua and others who spoke in support of the application said the trustees had been uncertain whether the Marae charter applied. They say the election process at the AGM was fair and robust and the owners and beneficiaries had the opportunity to express their views about who they wanted as trustees of the Marae. They submit the Court should appoint those who were elected.

[5] The issue is whether the trustees’ failure to follow the election process in the Marae charter invalidates the outcome of the election.

## Background

[6] Horowhenua 11B 36 2 L 4A, was set aside as a Māori Reservation for the common use of the Muaupoko iwi as a site for a meeting house in 1949,<sup>1</sup> and the original trustees were appointed in 1963.<sup>2</sup>

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<sup>1</sup> (10 March 1949) 15 *New Zealand Gazette* at 702.

<sup>2</sup> 70 Ōtaki MB 172 (70 OTI 172).

[7] There are twelve trustees who were appointed by the Court on 18 November 2009 at 243 Aotea MB 162 – 173 (243 AOT 162). At the 2012 AGM four new trustees were elected, three trustees were re-elected, and six trustees are to be replaced as they were either not re-elected or have resigned. In addition there are three trustees it is sought to replace because of their non-attendance at trustees meetings.

[8] In recent years the administration of this reservation has been contentious. The Marae trustees have regularly appeared before the Court in relation to the appointment of trustees, administration of the Marae, and completion of a charter. The Court has given numerous directions, but relevantly in relation to the Marae charter the Court has directed;

- a) On 20 January 2009 at 223 Aotea MB 231 – 239 (223 AOT 231) Judge Isaac directed that there be a meeting of owners and beneficiaries of the Marae to consider the position of the trustees, their roles and obligations, and completion of the Marae charter;
- b) On 18 November 2009 at 243 Aotea MB 162 (243 AOT 162) the trustees advised the Court that a meeting of owners and beneficiaries was held at the Marae on 7 August 2009 where a draft charter was discussed and approved in principle, including the process for trustee elections. Judge Harvey appointed the current trustees and directed the trustees to hold further hui and wānanga to discuss the charter and report back to the March 2010 Court as to their progress;
- c) On 20 May 2010 at 250 Aotea MB 260 (250 AOT 260) Judge Harvey received an oral report from the trustees that the charter would be put to the owners and beneficiaries for endorsement at the 2010 AGM, and the application was adjourned further for that to occur;
- d) On 15 July 2010 at 253 Aotea MB 83 (253 AOT 83) the Marae trustees advised the Court that the charter had been endorsed by the beneficiaries at the AGM on 20 June 2010. Judge Harvey advised the trustees that if the

charter had been endorsed by the beneficiaries at a properly constituted meeting, then it is effective from that time and does not need to be further sanctioned by the Court.

[9] Following its adoption in 2010 a copy of the Marae charter was filed with the Court. I also note that the trustees filed a copy of the charter with the current application.

[10] The 2012 AGM was scheduled for Sunday 10 June at the Marae. The AGM and agenda including election of trustees was advertised in the local newspaper, with a statement that nominations for trustees would need to be received in writing to the Secretary no later than 3 days before the AGM, with a resumé to be provided setting out requisite skills and experience.

*The trustees meeting*

[11] There were eight of the Marae trustees who were present for the AGM. They held an impromptu meeting at 1pm, immediately prior to the meeting and copy of the minutes of that trustees meeting has been filed. There was evidence that a number of trustee nominations had been received via the nominations process in the Notice of AGM.

[12] For reasons which are unclear to me the trustees say they were uncertain whether the Marae charter applied and the election process as set out in the charter should be followed. The trustees say they wanted to make a decision before the AGM about how the election would be run.

[13] As recorded in the minutes the trustees' meeting made three decisions by majority, about the election process for the AGM:

1. Election criteria
  - All nominations to be accepted
  - The current trustees to be included in the election process except for Frances Kerei who is resigning
2. Voting process

- By show of hands
  - Each beneficiary to vote only once per candidate
  - Each beneficiary may vote for more than one candidate of their choice
  - The seven highest polling candidates names to be forwarded to the Māori Land Court for ratification
3. Police presence
- Tim, Frances, Dean, Trevor and Kevin agreed to have the Police Iwi Liaison Officer and Māori Wardens present at the AGM. Maria, Eugene and Philip did not agree

### *The AGM*

[14] The AGM started at 1.25pm immediately after the trustees meeting had finished. Trevor Hill chaired the meeting. There were approximately 74 people present at the AGM, one of the biggest turn outs in recent times for a meeting at the Marae. Mr Hill says he outlined to the meeting the voting process decided by the trustees prior to the meeting. He says the only person who objected to this process being adopted was Vivienne Taueki.

[15] Nominations were opened up and approximately 18 or 19 nominations for seven trustee positions were received, including the notified nominations and those from the floor. Each candidate had the opportunity to speak to the meeting. Voting was by show of hands. The seven successful trustee candidates were Debbie Broughton, Maria Lomax, Rakapa MacGregor, Tim Tukapua, Dean Tukapua, Bruce Murray and Brenton Tukapua. Current trustees Gina Lomax and Frances Kerei, the outgoing secretary, did not stand for election following their earlier resignations.

### **Submissions in support**

[16] Mr Dean Tukapua who was elected as a trustee at the AGM, said there was a good representation from the iwi on the day of the AGM, and it was a fair election because all the trustees put their names in the hat and not just the three that were supposed to, and it was a very democratic election.

[17] Mr Trevor Hill said that he was a current trustee but had not been re-elected at the AGM. He supported the results of the election. He said it was democratically

done, and the whole process was fair and everyone had an opportunity to say what they wanted to say about the election process.

[18] Mr Tim Tukapua who was re-elected as a trustee said that on the day of the AGM the whānau spoke and that was the key thing. Even though there was a process of resumés, the iwi spoke. The trustees allowed the opportunity to include everyone who wanted to put their name forward, and they didn't want to shut anybody out.

### **Submissions in Opposition**

[19] On 18 September 2012 written submissions were received from Phillip Taueki and Maria Lomax, current trustees, opposing the appointment of the trustees elected at the AGM and alleging numerous failures to adhere to the election process in the Marae charter. The major complaints were:

- a) Nomination process – the charter sets out a process for 3 days notice of nominations, and provision of resumes setting out relevant skills and experience. At the AGM nominations were accepted on the day from the floor, and resumes were not provided for those candidates;
- b) Term of office – the charter sets out a rotation process to ensure no more than one-third of trustees are replaced each year. At the AGM all trustee positions were put up for election. Mr Taueki says that a trustees' hui should have been held prior to the AGM to decide which three trustees would be put forward for re-election;
- c) Voting – the charter states that elections are to be by secret ballot where nominations exceed vacancies, and only beneficiaries over 18 years are entitled to vote. Mr Taueki submitted that as the nominations exceeded the total number of vacancies, voting should have been by secret ballot. He described the show of hands voting at the AGM as being shambolic, with children and people who were not of Muaupoko descent voting.

[20] Mr Peter Heremaia, a beneficiary of the Marae, said he attended the AGM believing the election process would follow the notice of AGM. He was surprised and concerned when nominations were taken from the floor. He said he was prevented by the chair of the hui from putting questions to the candidates.

[21] Maria Lomax, a current trustee who was re-elected at the AGM spoke in opposition to the application. She said that in the show of hands voting there were children voting, as well as other persons who were clearly not owners and beneficiaries of the Marae.

[22] Vivienne Taueki, an owner and beneficiary of the Marae also opposed the application. She was a nominee for trustee and had followed the process in the notice of AGM. She objected at the AGM to nominations being opened up and to the show of hands voting.

## Law

[23] Section 338(7) and (8) of the Act deals with the appointment of trustees to Māori reservations:

### *338 Māori reservations for communal purposes*

...

(7) The Court may, by order, vest any Māori reservation in any body corporate or in any 2 or more persons in trust to hold and administer it for the benefit of the persons or class of persons for whose benefit the reservation is made, and may from time to time, as and when it thinks fit, appoint a new trustee or new trustees or additional trustees.

(8) The Court may, on the appointment of trustees under subsection (7) of this section, or on application at any time thereafter, set out the terms of trust, and subject to any such terms, the Māori reservation shall be administered in accordance with, and subject to, any regulations made under subsection (15) of this section.

[24] Section 222(2) applies to appointment of trustees under the Act generally:

### *222 Appointment of trustees*

...

(2) The Court in deciding whether to appoint any individual or body to be a trustee of a Trust constituted under this part of the Act,-

(a) Shall have regard to the ability, experience, and knowledge of the individual or body; and

(b) Shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

[25] Sections 236(10)(b) and 237 provide this Court with the same trust jurisdiction as the High Court including those trusts constituted under Part 12 of the Act and “*every other trust constituted in respect of Māori land.*”

[26] The Māori Reservations Regulations 1994 (the “Regulations”) are also relevant and regulation 3 states:

**3 Trustees**

Any trustee for the time being appointed, by order of the court, in relation to any reservation,—

(a) Shall, subject to paragraphs (d) to (f), hold office, pursuant to, and in accordance with, the relevant order of the court, from the date of the order or from such other date as is specified in the order

...

(e) May retire from the office of trustee upon giving notice to that effect to the court or to the other trustees

(f) May be removed from office by order of the court made at any time and shall cease to hold office from such time as the order shall specify

[27] In relation to marae charters, regulation 7 relevantly states:

**7 Charter in respect of marae**

(1) ... where a reservation is a marae, the trustees of that reservation shall draw up, in agreement with the beneficiaries of the marae, a charter for the reservation, which charter may include provision for the following matters

...

(d) The process for nominating and selecting marae trustees

(e) Principles to which the trustees will have regard in relation to the marae

(f) The manner in which the trustees are to be accountable to the beneficiaries

...

(j) The procedure for altering the charter

[28] Once a charter is endorsed by the trustees and beneficiaries then the process complies with the Regulations and there is no requirement for approval by the Court. The Registrar should simply note the charter in the records of the Court and by this means the charter will comprise part of the permanent record of the Court pursuant to rule 7.19(e) Māori Land Court Rules 2011.

*Case-law*

[29] The Māori Appellate Court and this Court have regularly canvassed the issues of appointments and the role of trustees to Māori reservations. Leading decisions are *Perenara v Pryor – Matatā 930*,<sup>3</sup> and *Marino – Repongaere 4G (Part) – Rongopai Marae*,<sup>4</sup> and I adopt the reasoning set out in those decisions.

[30] The Court of Appeal decision in *Clarke v Karaitiana*<sup>5</sup> sets out the law in relation to how this Court should approach the issue of determining whether nominees are broadly acceptable to beneficiaries:

[51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by s 222(2) (b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.

[52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint the leading candidates as elected by the owners, it must still be satisfied the requirements of s 222(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

## Discussion

*Did the Marae charter apply to trustee election process?*

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<sup>3</sup> (2004) 10 Waiariki Appellate MB 233 (10 AP 233).

<sup>4</sup> (2004) 34 Gisborne Appellate MB 98 (34 APGS 98).

<sup>5</sup> [2011] NZCA 154 at [51] – [52].

[31] The Court's record shows that the Marae trustees advised Judge Harvey in July 2010 that the charter had been endorsed at the 2010 AGM<sup>6</sup> and Judge Harvey confirmed that the charter was in effect. The record further shows that several of the current or proposed trustees who stated at this hearing that they were uncertain whether the charter applied, were also present at that 2010 hearing.

[32] The evidence suggests that at least some of the trustees were aware of the content of the charter in the run-up to the 2012 AGM. The Notice of the AGM contains reference to the nomination process, and trustees giving evidence referred variously to the requirement for resumés, the maximum number of trustees, and the requirement for rotation of three trustees.

[33] I do not accept that the trustees had any credible reason to doubt that the charter was in place, or indeed for failing to follow its election processes. I conclude that the election of trustees at the 2012 AGM should have been conducted according to the procedure set out in the Marae charter.

*Is failure to comply with the Marae charter fatal to the election result?*

[34] A charter is the agreement between trustees and beneficiaries about how a marae reservation is to be administered. Trustees' have a duty and are bound to administer the marae according to the terms of the charter. They do not have discretion to follow some processes and ignore others. Any changes to a charter must be endorsed by beneficiaries at a properly notified annual general meeting or special meeting.

[35] Beneficiaries have a legitimate expectation that elections will be run according to the processes they have agreed to. There was no agreement by the beneficiaries to substitute the charter process with the election process used on the day, and in any event the trustees did not give the beneficiaries that choice.

[36] The Court of Appeal observed in *Clarke v Karaitiana* that the Court is not bound to appoint the leading candidates elected by beneficial owners, but will

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<sup>6</sup> At 253 Aotea MB 83 (253 AOT 83).

ordinarily give substantial weight to the views of owners as demonstrated by the outcome of an election. If the Court is not going to appoint the leading candidates then it must be satisfied that either or both requirements in s 222(2)(b) are absent.

[37] In this case, the entire election was flawed because the trustees unilaterally jettisoned the election process in the Marae charter. Therefore appointment of the successful candidates cannot be said to be broadly acceptable to the beneficiaries.

[38] The Marae has a history of contention, and so it is particularly important that the trustees' follow due process to ensure their decisions are robust and will stand scrutiny, and to give beneficiaries certainty. The Marae charter has been in place since 2010 following a long period of consultation between trustees and beneficiaries and it is the duty of the trustees to be familiar with it and to administer the Marae according to its terms.

### **Decision**

[39] Given my finding about that the nature of the flaws in the election process at the 2012 AGM, I decline to appoint any of the trustees who were elected at the AGM.

[40] I direct the Registrar to convene and chair a further meeting of the Marae beneficiaries to elect trustees. The meeting and election is to be conducted according to the procedures in the Marae charter. The current trustees are directed to stay in place until new trustees have been appointed by the Court.

Pronounced at am/pm in Wellington on this day of September 2013

S F Reeves  
**JUDGE**