

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

A20190005334

UNDER Section 215, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Wairau Block XII Part Sections B and C

AMIRIA FINLAY, MOIRA ANNE HEBBERD,
ERINA TANGIWAI MACDONALD, ROBIN
BRYAN MACDONALD, GEMMA NGA
ROIMATA MCKINNEY and MERE ARRE
GREY-SCHUMACHER
Applicants

Hearing: 27 September 2019, 59 Te Waipounamu MB 198-216
(Heard at Blenheim)

Judgment: 17 December 2019

JUDGMENT OF JUDGE S F REEVES

Introduction

[1] On 4 June 2019, Amiria Finlay, Moira Hebbard, Erina MacDonald, Robin MacDonald, Gemma McKinney and Mere Grey-Schumacher jointly filed an application under s 215 of Te Ture Whenua Māori Act 1993 to constitute an ahu whenua trust over Wairau Block XII Part Sections B and C (the block).

[2] Several owners and descendants of owners oppose the application and filed their opposition with the Court or appeared at the hearing to speak to it.

[3] The issue in this case is whether an ahu whenua trust should be constituted over the block.

Background

[4] Wairau Block XII Part Sections B and C (the land) is a Māori freehold land block of just over three ha located near the Wairau Bar in Blenheim. There are 562 owners according to Court records at the time of the hearing, many of whom are deceased. The entire block is planted in grape vines, and there is currently no lease or other arrangement in place.

[5] The above listed applicants (the interim trustees) wish to establish a trust over the block and have themselves appointed as trustees. They also seek court endorsement for the proposed trust deed.

The application

[6] A meeting of owners was held on 14 November 2018 to consider the establishment of an ahu whenua trust. A follow-up meeting was held on 13 April 2019 to further consider the draft trust order.

[7] The applicants state that their desire to set up an ahu whenua trust arises from events occurring some four years ago. An owner in the block, Philip MacDonald, planted the entire block in grape vines without notifying other owners or seeking their support prior to undertaking this work. The applicants consider that a management structure and representation for all owners are needed to prevent unilateral decision making by individual owners.

[8] This application was heard before me on 27 September 2019 in Blenheim.¹ Further submissions were received in writing, and I then reserved my decision.

Law

[9] The establishment of an ahu whenua trust is governed by s 215 of Te Ture Whenua Māori Act 1993:

215 Ahu whenua trusts

- (1) The Court may, in accordance with this section, constitute an ahu whenua trust in respect of any Maori land or General land owned by Maori.
- (2) An ahu whenua trust may be constituted where the Court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land.
- (3) An application for the constitution of an ahu whenua trust under this section —
 - (a) shall be made in the respect of all the beneficial interests in 1 block or in 2 or more blocks of land; and
 - (b) may be made by or on behalf of any of the owners or the Registrar of the court.
- (4) The court shall not grant an application made under this section unless it is satisfied —
 - (a) that the owners of the land to which the application relates have had sufficient opportunity to discuss and consider it; and
 - (b) that there is no meritorious objection to the application among the owners, having regard to the nature and importance of the matter.
- (5) The land, money, and other assets of an ahu whenua trust shall be held in trust for the persons beneficially entitled to the land in proportion to their several interests in the land.
- (6) Notwithstanding anything in subsection (5), the court may, either on the constitution of an ahu whenua trust or on application at any time thereafter, empower the trustees to apply the whole or any part of any specified portion of the trust income for Maori community purposes or for such Maori community purposes as the court may specify, and, in such case, the trustees may apply any part of such specified portion of the trust income in accordance with section 218.

¹ 59 Te Waipounamu MB 198-216 (59 TWP 198-216).

- (7) In any case to which subsection (6) applies, the beneficiaries shall be the beneficial owners of the block or blocks of land vested or to be vested in the trustees for the purposes of the trust.
- (8) The constitution of an ahu whenua trust shall not affect any person's entitlement to succeed to any beneficial interest in any land vested in the trustees for the purposes of the trust.

[10] The guiding principles concerning s 215 and the constitution of an ahu whenua trust were reviewed in *Far North District Council – Okahu 3B2B2*.² The principles set out by Judge Ambler have been adopted in several decisions concerning the constitution of ahu whenua trusts as I do so in this decision.³

[11] In *Napia - Waihou A No 2A No 1*, Judge Armstrong set out the threshold questions for the Court in determining whether an ahu whenua trust should be constituted:⁴

- (a) Have the owners had sufficient notice?
- (b) Have the owners had sufficient opportunity to discuss and consider the application?
- (c) Are there any meritorious objections to the application among the owners having regard to the nature and importance of the matter?
- (d) Would an ahu whenua trust promote and facilitate the use and administration of the block in the interests of the owners?

[12] If I determine that the trust should be established, the following questions arise:⁵

- (a) Who should be appointed as trustees?
- (b) Should the draft trust order be approved?

² *Far North District Council – Okahu 3B2B2* (2014) 91 Taitokerau MB 284 (91 TTK 284).

³ *Napia – Waihou A No 2A No 1* (2015) 97 Taitokerau MB 212 (97 TTK 212) at [24]-[25] and *Russell – Waitoto Māori Reserve 755 Blk 3 Arawata SD* (2016) 37 Te Waipounamu MB 139 (37 TWP 139) at [15]-[17].

⁴ *Napia*, above n 3.

⁵ *Napia*, above n 3.

Have the owners had sufficient notice?

[13] The application included details of the steps taken to give notice of, and to hold the initial meeting of owners on 14 November 2018. This included advertising in the local newspaper, social media including Facebook whānau pages and Twitter, and email or phone calls to owners for whom contact details were held.

[14] Advice was sought from the Māori Land Court concerning advertising which took place on two occasions in the local Marlborough Express newspaper with the second notice nine days prior to the meeting. The notice clearly stated the agenda and the time, date and venue for the meeting.

[15] Notice of the further meeting on 13 April 2019 was by email to owners for whom contact details were held including those owners and descendants who had attended the earlier meeting and given their contact details.

[16] At the hearing several owners and descendants of owners raised concerns about the advertising for the initial meeting, saying that it was not advertised widely enough.

[17] Phillip MacDonald does not oppose the ahu whenua trust however he did not believe the meetings, in particular the second meeting, was properly notified and run. He stated that the meeting did not meet quorum and a hostile environment meant the issues could not properly be discussed.

[18] Linda Love stated that she is not opposed to a trust on the land, but the meeting of owners was not properly advertised and there has been a lack of notice. As she lives outside of Blenheim, she did not see the newspaper advertising and only learnt of the application because she receives the Māori Land Court pānui. She also objected to the use of social media to advertise meetings as a number of the owners do not regularly use computers.

[19] After the hearing, written opposition to the application was received from Richard Taylor, Diane Taylor and Corran Taylor. The Taylors believe the meeting of owners ought to have been advertised nationally, as owners outside of Marlborough were disadvantaged.

[20] Liz McElhinney helped with notifying the meeting of owners. She said those people involved in the application had each been given a section of the list of owners and were charged with contacting them about the meeting. Some emails had been sent but it had been difficult to notify whānau members who had moved away from Blenheim without leaving contact details. The intention behind using social media was that younger owners would see the notices and be able to talk to older owners who do not use social media.

[21] Lorraine Eade worked with Liz to notify the meeting of owners. She stated that while they had looked at advertising in other newspapers around the country, the cost was too high given the whānau were funding it from their own pockets.

[22] I have considered the objections raised concerning notice, and there is no evidence to suggest that advertising nationally would have resulted in substantially more owners in attendance. In my view the steps taken to notify the meeting of owners including advertising locally were reasonable in the circumstances. I am satisfied that the owners have had sufficient notice of the application.

Have the owners had sufficient opportunity to discuss and consider the application?

[23] A core group of owners, including some or all of the applicants met several times prior to the meeting of owners to discuss the possibility of an ahu whenua trust for the block. It was this group that did the preparation for the proposal and made the arrangements for the meeting of owners.

[24] The meeting of owners was held at Ūkaipō, Grovetown on 14 November 2018. The meeting commenced at 5.30pm and concluded at 8.45pm. An attendance record was circulated listing 28 beneficial owners present in person or by proxy and a further 12 interested persons who were descendants or whānau members of owners.

[25] Riki Palatchie opened the meeting with karakia, and then outlined the purpose of the meeting and the agenda. He took the meeting through a power-point presentation which included information about the land, its history and utilisation. There was an overview of ahu whenua trusts, and the Māori Land Court requirements. All attendees at the meeting participated in the discussions, but it was clarified that only current owners would be able to vote in person or by proxy. Discussion continued about whether a trust was in the best

interests of the owners. A resolution was then proposed to establish an ahu whenua trust over the block, and the owners voted.

[26] No serious issues were raised concerning the meeting which appears to have been well conducted, with relevant information provided to those present. There was the usual robust discussion but the minutes show that those present had the opportunity to give their views, to raise issues and ask questions.

[27] Following the vote, there was discussion on the draft ahu whenua trust order, including a clause by clause review. There was then a call for nominations for the election of trustees. I discuss these aspects further below.

[28] I conclude that the owners had sufficient opportunity to discuss and consider the application in this case.

Are there any meritorious objections to the application having regard to the nature and importance of the matter?

[29] There is no particular quorum required for the meeting of owners or required threshold for owner support, but an ahu whenua trust cannot be constituted without some owner support.

[30] No issues have been raised concerning the voting at the meeting and the minutes record that 22 owners present in person or by proxy voted in favour of the trust and four were opposed. By shareholding, this equates to at least 0.23 shares out of the total 7.8125 shares in favour and 0.072 shares opposed. On this basis it is clear there is support for the formation of the trust.

[31] The primary inquiry though is whether there is any meritorious objection, and I now turn to the objections raised in this case.

[32] Several objections at the hearing, and in subsequent submissions focused on lack of notice and insufficient consultation, as well as wanting more time to consider the application. Of the owners raising these issues, Phillip MacDonald and Linda Love both stated that they were not opposed to a trust on the land, but felt more time was needed to consider the matter.

[33] Richard Taylor, Diane Taylor and Corran Taylor are opposed. They stated that more effort could have been made by the applicants to contact owners, provide them with information and consult on the proposed trust. Richard Taylor is concerned that the trust deed was voted in with the support of less than five per cent of the beneficial ownership and was not sent to all owners for consultation.

[34] I accept that only 22 owners in person or by proxy of the current 562 owners participated, representing 0.302 of the share-holding. That is a small number in relation to the total number of owners, but that is not uncommon for meetings of Māori land-owners. I also note that many of the owners are deceased and the ownership in the land cannot be updated until those successions are dealt with.

[35] It would be preferable to have more owners engaged in this process, but I note that both hui held had approximately the same number attending. I have already found there was sufficient notice given for the meeting and there is no evidence to suggest a further meeting would result in significantly more owners attending than have already done so.

[36] Several owners raised concerns about how a trust structure could incorporate or address issues of tikanga in relation to the land.

[37] Carol Allen noted that the MacDonald family had seen a lot of benefit from the land to the exclusion of the other families. She stated that in earlier times, the MacDonald family had used the land for their business but that this had also provided some benefit to the owners. Carol noted for example that Phillip MacDonald's father had cows on the land which would help manage the grass.

[38] Wanda Heberd recalled that while Phillip's father would use the land for farming, in return he would provide free potatoes to other owners. She supports the establishment of the trust to ensure profits made from the land are shared among all the owners. Wanda was also concerned that delay in setting up the trust would cause further problems in the future and the number of shareholders will only grow with each generation.

[39] Phillip MacDonald said that this land was used by his grandfather and father before him. In the past, rent was paid to shareholders in the form of produce for tangi, weddings

and gatherings. He carried on this tradition once his father passed away. His whānau had covered the rates for the land for the several generations and he continues to pay these and the costs of maintaining the vineyard on the land. While different from the potatoes of the previous generation, he said this is a continuation of that same tikanga on the land, where any whānau member can use the land provided they use the products or profits to support others of the whānau.

[40] Phillip stated that he had established the vineyard on the land for the benefit of the owners who would be receiving rental monies from the business. Prior to the planting, the land was in poor state. The soil had a high salt content and he did not believe the land was being used for any other purpose. He stated that his family has greatly improved the quality of the soil and made the land much more productive.

[41] Phillip stated that apart from the rent he sets aside, the profits from the grapes are donated to the local hospice. Evidence was presented of payment of rates, and donations of products and labour from local businesses to support the hospice venture. There was no evidence provided of the monies set aside for a rent payment on this block, other than his statement he has done so.

[42] John Allen, a descendant but not an owner did not indicate whether he supported or opposed a trust, but he wished to give some background to the land. He submitted on the traditional use of the land as a means of accessing the river to gather kai. His major concern was that consultation was insufficient and without proper consultation, there is significant risk to traditional uses of the land.

[43] These issues of tikanga in relation to the land are not objections as such to the establishment of an ahu whenua trust, but rather matters that should be taken into consideration by trustees in their decisions concerning use and management of the land. Such history requires trustees to exercise care and caution in their dealings with the occupier of the land to ensure an outcome for the benefit of all owners.

[44] Most of the owners and interested parties involved in this application acknowledge that the block should be managed for the benefit of all the owners. I do not consider that any of the issues or objections raised are meritorious.

Would an ahu whenua trust promote and facilitate the use and administration of the block in the interests of the owners?

[45] Liz McElhinney believes the trust will allow the whānau to work together to ensure the land is properly managed and the benefits can be shared by everyone.

[46] Lorraine Eade completely supports the proposal and the trustees but states that the current application has another important function. Many of the Māori land blocks near the Wairau Bar have no formal governance and she believes this application will stand as a good example for the process and benefits of establishing a trust.

[47] Terina MacDonald appeared in Court on behalf of her whānau trust. Despite living in Wellington, she was satisfied with the advertising of the hui and with the consultation undertaken. Terina stated her concern about Phillip's lack of communication before planting the land in grapes but, overall, she is supportive of the work undertaken by the applicants.

[48] There is clearly merit in the proposal for an ahu whenua trust over this block. In particular I note that the block has not previously had a governance structure, the land is multiply-owned, and is currently being used by an individual owner with no benefit to other owners. All these factors point to the need for a simple but effective structure, in this case an ahu whenua trust, so the block can be administered by trustees for the benefit of all owners.

[49] I am satisfied that a trust would promote the purposes and objectives of the Act as set out in the Preamble, s 2, and s 17. In particular, ascertaining and giving effect to the wishes of the owners, protecting majority interests against an unreasonable minority, and promoting practical solutions to problems arising in the use or management of the land. Importantly, the trustees can develop a plan in relation to use and management of the land and engage with Phillip MacDonald to enter into a lease or other arrangements for the current use of the land, including continued payment of rates.

[50] On consideration of the above, I find that a trust should be constituted over the block.

Who should be appointed as trustees?

[51] The following trustees have been elected by the owners: Robin MacDonald, Erina MacDonald, Mere Grey-Schumacher, Moira Hebbard, Amiria Finlay, and Gemma

McKinney. I am satisfied that they are all broadly acceptable to the owners as evidenced by their election.

[52] There is opposition to Robin MacDonald's appointment from Moira Heberd, Mere Grey-Schumacher, Michael Fryer, Peter Grey, and Phillip MacDonald. I note that these persons also voted against the election of trustees at the meeting on 14 November 2018, so this is not new or additional opposition, but it is now clearly specific to Robin MacDonald.

[53] The concerns raised are that he has not been sharing information with those others elected as trustees, that he unilaterally cancelled a further owners meeting in June 2019 to discuss the trust order, and that he has made inappropriate comments on Facebook. These are all matters that have arisen subsequent to the election of trustees.

[54] The issue is therefore whether Robin MacDonald has the background, skills, experience and knowledge to be appointed. Given the issues have been raised by other trustee nominees, the question is whether the trustee group as a whole can work co-operatively such that they are a cohesive and effective trustee group.

[55] Trustees must make decisions together, if necessary by majority, and there is no place for individual trustees to act unilaterally. Mr MacDonald has taken much of the responsibility for getting the application to this point and has been elected interim chair. Clearly his actions have caused tensions within the trustee group, but once the trust is up and running the whole trustee group will need to make decisions collectively. They must be able to work together to ensure they retain the confidence of their owners.

[56] I consider Robin MacDonald has the background and experience to be appointed as a trustee and so I am prepared to give him the benefit of the doubt on this occasion. He will need to work collectively with his fellow trustees to retain their confidence.

[57] There is no opposition to the other nominees, and they all have the necessary background, skills, experience and knowledge to be appointed.

[58] I will appoint all the trustees as interim trustees for an initial period of three years. If the trustees do not have the support of owners at the end of three years, then they will not be re-elected.

[59] Lastly, in her submissions Linda Love noted that most of the proposed trustees come from a single family-line and do not properly represent all the owners in the land. This issue was also raised by Carol Allen at the hearing. The initial three-year appointment will give time for trustees to engage with the owners about whether the trustees should be representative of the various whānau within the ownership.

Should the draft trust order be approved?

[60] Following the vote to establish an ahu whenua trust on 14 November 2018, the meeting then turned to discuss the draft trust order. The minutes record that the trust order was reviewed clause by clause. Amendments as listed in the minutes were agreed at the meeting and a resolution was passed approving the draft trust deed subject to owner feed-back to be given by 30 January 2019. Another resolution was passed that the next hui of owners be held on 8 February 2019 to incorporate owner feed-back and finalise the trust deed.

[61] The meeting of 8 February did not proceed, and a further meeting of owners was not held until 13 April 2019. Email notice of the meeting and the proposed agenda was sent to the beneficiaries, and the minutes of that meeting show some 26 people in attendance, with 16 of those recorded as beneficial owners. Although the agenda showed that details of the trust deed were to be discussed, no motions were passed in relation to the trust deed and the meeting was shut-down after the discussion grew heated.

[62] The evidence was that it was agreed that a further meeting to discuss the trust order would be held on 22 June 2019, but that meeting was called off. The application for ahu whenua trust was then filed on 4 June 2019.

[63] Richard Taylor attended the meeting on 13 April 2019 to further discuss the trust deed but believes no motions should have been carried as there were too few people in attendance. The attendance issue was worsened when three people left the meeting because they were unhappy with how it was being run. Expecting a further meeting to be held in June

2019, the Taylors were surprised when that was called off and unhappy when the trustees did not tell them of the Court sitting in September. Corran Taylor also raised concerns about the election of the proposed trustees given what he considered their inadequate consultation.

[64] Peter Grey noted that he supports the creation of the ahu whenua trust but that he wants more consultation to occur on the trust deed before the Court issues any orders. He is unhappy that the scheduled June 2019 meeting to further discuss the trust deed was cancelled with little notice.

[65] Although she is one of the named applicants, Moira Hebbard wrote to the Court after the hearing to express some concerns about the process surrounding the establishment of the trust. Moira stated that she supports the establishment of the trust but believes the proposed trust deed should be sent back to the owners for further consultation.

[66] The draft trust order was approved at the meeting of 14 November 2018, but this was clearly contingent on further engagement and consultation with the owners on at least one more occasion. That meeting took place in April 2019 and no further changes were made to the trust order. The question is whether the concerns over consultation justify further delay so that the trust order can be reviewed again.

[67] No issues have been raised concerning the specific terms of the trust order. The proposed trust order is based on the standard trust order for ahu whenua trusts in the Te Waipounamu district. Even if I approve the current trust order, that does not prevent the trustees or the beneficiaries from reviewing the terms at future meetings of owners. Provided there is sufficient support from owners for any amendments, an application can be made to the Court to vary the trust order per s 244 of the Te Ture Whenua Māori Act 1993.

[68] I remind all parties that the block in question is small in area, with currently a single use and there should be no need for a complex trust order. I suggest that the trustees and owners use the next three years to find out if the trust order does the job they want it to. If changes are necessary, an application should be brought to the Court to coincide with the appointment of trustees in three years' time.

[69] I now approve the trust order subject to the amendments that have been approved.

Decision

[70] I make the following orders:

- (a) Pursuant to sections 215 and 219 of Te Ture Whenua Māori Act 1993 constituting the Wairau Block XII Part Sections B & C Ahu Whenua Trust on the terms of trust set out in the draft trust order now approved above. **This order is conditional upon the trustees providing a final copy of the trust order with amendments incorporated within 3 months of this decision being issued.**
- (b) Pursuant to sections 220 and 222 of Te Ture Whenua Māori Act 1993 appointing Amiria Finlay, Moira Heberd, Erina MacDonald, Robin MacDonald, Gemma McKinney and Mere Grey-Schumacher as interim responsible trustees for a period of three years and vesting the Wairau Block XII Part Sections B & C block in them in their capacity as responsible trustees, jointly, no survivorship.

[71] There is also a direction that the new trustees are to undertake Māori Land Court trustee training, if possible as a group, within six months of this decision.

Pronounced in Wellington at 12.30pm on Tuesday this 17th day of December 2019.

S F Reeves
JUDGE