

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

A20150006858

UNDER Section 231 of Te Ture Whenua Māori Act
1993

IN THE MATTER OF Kaipakopako 2C2 block

BETWEEN THE MĀORI TRUSTEE
Applicant

AND RIPEKA BRIGHTWELL
Respondent

Hearings: 348 Aotea MB 293-296 dated 12 February 2016
(Heard at New Plymouth)

Judgment: 16 June 2016

RESERVED JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] The Māori Trustee seeks an order confirming the review of the Kaipakopako 2C2 trust. A meeting of owners was held on 20 May 2015 and those present also supported his retention as responsible trustee.

[2] Ripeka Brightwell objects to the application. She says that at the meeting of owners concerns were raised about the status of the land, its administration by the Māori Trustee and the future utilisation of the block.

Issues

[3] The issue for determination is whether the review of trust should be granted. In determining that issue it is necessary to consider:

- (a) Has the Māori Trustee administered Kaipakopako 2C2 satisfactorily?
- (b) What is the status of Kaipakopako 2C2 block?
- (c) What regard should be had to the future utilisation of Kaipakopako 2C2 block?

Muru Raupatu Pā

[4] The registry received further correspondence from Ms Brightwell on 30 May 2016. The information appears to relate to the minutes of a meeting held in respect to Muru Raupatu Pā. She appears to have concerns about its administration. With respect, those matters are not the subject of these proceedings. Accordingly, Ms Brightwell will need to file a separate application in due course should she wish to pursue those issues further. They are not considered further in this decision.

Background

[5] Kaipakopako 2C2 was created by partition order on 9 August 1943.¹ Kaipakopako 2C2 comprises 2.463 hectares and there are currently 26 beneficial owners. An ahu whenua trust was constituted on 14 October 1997 to administer Kaipakopako 2C2.² The original trustees were Christine Tamihana, Clemetine Houghton and Edward Tamati.

[6] On 28 September 1998 the owners agreed to have the Māori Trustee appointed as replacement trustee and the trust order varied to allow the Māori Trustee to arrange a lease of the land.³ The Court appointed the Māori Trustee as responsible trustee and appointed Mary Gardner, Clementine Houghton and Esther Brown as advisory trustees.

The Law

[7] 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
 - (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.

¹ 54 Taranaki MB 160-161 (54 TAR 160-161)

² 78 Aotea MB 31 (78 AOT 31)

³ 87 Aotea MB 58-59 (87 AOT 58-59)

[8] In the *Proprietors of Mangakino Township v The Māori Land Court* the Court of Appeal discussed in the Court's extensive powers on a review of a trust:⁴

[19] We entirely agree with McGechan J that a review of the trust cannot sensibly be conducted unless the Court pays some regard to its performance — how well or how badly have its affairs been running? That necessarily requires the Court to look at the competence of the trustee(s). What Parliament has called for in ss 231 and 351 is a general review of the trust's governance and management of its assets on behalf of the beneficial owners. Are those assets being administered in the best interests of the beneficiaries? Is the trust fulfilling its purpose as an *ahu whenua* (care of the land) trust, as that purpose appears from the statute (s 215, read in the light of the preamble to the Act and s 2) and from the objects stated in the trust order? ...

[21] In carrying out a general review of this kind the Court ought to concentrate on the broader picture and not become drawn into matters of detail, but it is in our view impossible to see any bright line between matters of governance and policy, on the one hand, and questions of operational management, on the other. As McGechan J appreciated and as is reflected as well in comments of Judge Savage during one of the hearings, it comes down to a question of common-sense how far into the affairs of a trust the Maori Land Court should burrow. Certainly its primary focus ought to be on the policies that the trust is pursuing and on how in a general way those policies are being implemented, but in order to see whether a policy is working at ground level in the best interest of the beneficiaries the Court can hardly avoid some consideration of particular operational matters.

...

[24] There is an armoury of powers given to the Court in relation to trusts under Part XII so that it can carry out its guardianship role and there is good reason to read ss 231 and 351, which apply to the particular situation of a general review, in a manner consistent with those powers.

Has the Māori Trustee administered Kaipakopako 2C2 satisfactorily?

Respondent's submissions

[9] Ms Brightwell's concerns are set out in her letter to the Māori Trustee and the Court dated 5 February 2016 and, broadly speaking, are based on the administration of the land by the Māori Trustee, its status and future utilisation.

[10] Ms Brightwell also submits that the minutes of the meeting of owners held on 20 May 2015 contain discrepancies and adds that the Māori Trustee has not provided information requested regarding the distributable income for the trust. Ms Brightwell claims that the Māori Trustee has not provided audited accounts for the year ended 31 March 2015 and that the trust is not GST registered.

⁴ *Proprietors of Mangakino Township v The Māori Land Court* CA 65/99, 16 June 1999 at [19]-[21],[24]

[11] She also refers to cl 3(v)(iii) where trustees are required to pay their own costs. She also submits that the Wiremu Kingi Te Toa Rangatira Whānau Trust has requested all documentation regarding the distributable income for 2008 to 2014.

Applicant's submissions

[12] The Māori Trustee did not respond directly to the concerns raised by Ms Brightwell. He does however maintain that the review should be granted and has provided information of the current state of Kaipakopako 2C2, the trust account and the minutes from the most recent meeting of owners where those present resolved that the Māori Trustee should continue to administer the trust.

Discussion

[13] As foreshadowed, the Māori Trustee was appointed responsible trustee for Kaipakopako 2C2 on 28 September 1998. The minutes record that a meeting of owners was held on 20 March 1998 where they agreed to have the Māori Trustee appointed as replacement trustee. The trust order was also varied to allow the Māori Trustee to arrange a lease of the block.

[14] On 18 December 2006 a review of the trust was held.⁵ The Māori Trustee updated the Court on the current position of the trust and utilisation of the land. The Court confirmed the review and indicated that the next review take place in 2011. No variations were made to the trust order as alleged by Ms Brightwell. The next review of trust was held on 20 October 2011.⁶ No variations were made to the trust order as part of that review.

[15] Ms Brightwell says further issues were raised at the meeting concerning options to utilise the land and the status of the land which are not recorded in the minutes. Having regard to the overall circumstances of the case, I consider that whilst there may have been discussion around those issues, the accuracy of the minutes is something to be dealt with by the trustees and the owners at the *next* meeting where the minutes will either be confirmed or not. They are, after all, only draft minutes until then.

[16] The financial statements supplied by the Māori Trustees notes the distributable income and why the accounts are unaudited and the trust is not GST registered. The trust has a small income of just under \$2,500 per annum. Clause 6(b) of the trust order provides

⁵ 180 Aotea MB 126-127 (180 AOT 126-127)

⁶ 273 Aotea MB 248 (273 AOT 248)

that the trustees shall keep proper and separate accounts of the land and present the accounts to the equitable owners thereof at a general meeting. The Māori Trustee has done this. Given the size of the trust it is not unusual that the accounts are unaudited.

[17] The Inland Revenue Department only requires businesses to register for GST if a taxable activity is undertaken and revenue for the previous 12 months exceeds \$60,000 or will be \$60,000 or more in the next 12 months. The trust does not fall within this category.

[18] In summary, having regard to the overall operation of the trust, I conclude that the Māori Trustee is administering the trust satisfactorily.

What is the status of Kaipakopako 2C2 block?

Respondent's submissions

[19] Ms Brightwell submits that there were questions raised at the meeting about the status of the block as a Māori reservation. She argued that Kaipakopako 2C2 is “Crown Grant land” and has not been subject to any partition orders. Ms Brightwell questions the ability of the Māori Trustee to “change the status” of the land without the owners’ consent.

[20] In addition, Ms Brightwell says that Kaipakopako 2C2 is inalienable by sale or gift and does not pass by will but will go to next of kin. She queries how Edward Tamati became an owner. She further questioned how his interests have apparently been subject to succession, given the “inalienability” of the land.

[21] Ms Brightwell also raised concerns about the status of the land. She says that it has “reserve status” and argues that it is consequently inalienable. She also contends that in 2006 the Māori Trustee changed the “status” of Kaipakopako 2C2 without prior notification or consent from the beneficial owners.

[22] Further, Ms Brightwell argues that the Māori Trustee does not hold title to the block and therefore the variation of the trust order was undertaken without authority. She says that in 2006 the Court granted a variation of the trust without notice to owners and the Māori Trustee did not subsequently notify them of the variation at the hui of owners held in 2006.

Māori Trustee's submissions

[23] Again, the Māori Trustee did not respond directly to the concerns raised by Ms Brightwell and maintains that the review should be confirmed.

Discussion

[24] Kaipakopako 2C2 block is derived from s 133 Waitara West District which was the subject of Crown Grant 3871. The land was initially subject to the West Coast Settlement Reserves Act 1892 and 1908. CT TN10/222 issued for s 133 Waitara West District. That block was then subsequently vested in the Public Trustee under the West Coast Settlement Reserves Act 1892 and 1908.

[25] Then on 17 November 1915 Kaipakopako was partitioned per the West Coast Settlement Reserves Amendment Act 1913 and 1914. Kaipakopako 2C was constituted and a certificate of title TN144/219 was subsequently issued. Following that, on 9 August 1943 Kaipakopako 2C and Kaipakopako 5B1A and 8A1 were the subject of partition orders issued per s 146 of the Native Land Act 1931 and Kaipakopako 2C2 was created. CFR 283098 issued for the block followed by CFR 283099 which is the current title for Kaipakopako 2C2.

[26] On the issue of inalienability, s 15 of the West Coast Settlement Reserves Amendment Act 1913 is relevant and it provides:

15. (1.) The Public Trustee shall forthwith, upon the coming into operation of this Act, forward to the Chief Judge of the Native Land Court a list and description of all lands subject to the provisions of this Act, and a list of the Native owners so far as the same are known to the Public Trustee; and the Native Land Court shall thereupon, without further application or direction, according as far as practicable to its usual practice, subject, however, to any regulations that may be made under this Act, proceed to partition the same amongst the Native owners thereof; and the Chief Judge of the said Court shall take all the necessary steps for the holding of a sitting of the Court for that purpose; and the said Court shall have jurisdiction from time to time to make any necessary partitions of the said lands and to appoint successors to any deceased Native owners; but no partition shall take effect, nor shall the land comprised in any partition order vest in the Native owner thereof, until the expiration of the new lease to be granted in pursuance of the provisions of this Act in respect of such land, but upon the expiration of such new lease the land comprised therein shall vest at law in the Native owners thereof in accordance with the partition orders to be made by the Native Land Court; and the District Land Registrar of the district in which such land is situate shall thereupon issue certificates of title to the Native owners' entitled thereto, **freed and discharged from all restrictions whatsoever against alienation:**

Provided, however, that the Native owner of the land comprised in any partition order may, if he so desire, direct the District Land Registrar in writing to issue a certificate of title to the Public Trustee instead of to himself, and in such case the District Land Registrar shall issue a certificate of title to the Public Trustee accordingly, and the Public Trustee shall thereafter manage and administer the land comprised in such certificate of title for and on behalf of the Native owners thereof, and shall have power to grant leases of such land for such periods and on such terms and conditions as he may think best in the interests of the said Native owners, but subject to regulations to be made in that behalf:

Provided further that if at the period of vesting as aforesaid any of the Native owners shall be minors, or be under any disability, the Public Trustee shall manage and

administer the interests of such Native owners during their minority, or so long as such disability shall exist.

(2.) Until the 'said partition orders take effect "it shall not be lawful for any beneficial Native owner to alienate any part of the said land, or any estate, share, or interest therein, excepting under the provisions of section one hundred and nine of the Native Land Amendment Act, 1913, in the event of the same being made applicable as hereinafter provided.

(3.) No partition of any land as aforesaid shall affect the rights of the lessee thereof, or any rights which may be acquired by the Crown.

(Emphasis added)

[27] The jurisdiction to partition was extended under the West Coast Settlement Reserves Amendment Act 1914:

3. On any partition of such lands the Native Land Court may exercise all the powers of exchange, consolidation of interests, laying off road-lines and private ways, appointing successors, or otherwise howsoever which the Native Land Court might exercise in its ordinary jurisdiction.

[28] The effect of the partition orders and issue of certificates of title was to make the land Māori Freehold land. It was no longer a Māori reserve as ownership was vested in beneficial owners. The owners then passed a resolution to constitute an ahu whenua trust over the block in 1997 to lease Kaipakopako 2C2.⁷

[29] The Māori Trustee's subsequent appointment as responsible trustee in 1998 was a result of the owners expressing a desire for the Māori Trustee to administer the block rather than being appointed to administer Māori reserved land.⁸

[30] Ms Brightwell is also concerned about the order determining the status of the land issue in 2006.⁹ That order was granted as part of the Māori Freehold Land Registration Project.¹⁰ The Māori Trustee did not bring the application as Ms Brightwell appears to suggest rather the application was made by the Deputy Registrar. As noted above the land is no longer Māori Reserve land however even if it were this would not change its status as Māori freehold land.¹¹

⁷ 78 Aotea MB 31 (78 AOT 31)

⁸ 180 Aotea MB 126-127 (180 AOT 126-127)

⁹ 164 Aotea MB 71 (164 AOT 71)

¹⁰ Māori Freehold Land Registration Project was run by the Special Jurisdictions Project Unit on behalf of the Māori Land Court in partnership with Land Information New Zealand ("LINZ"). The intent of the project was to identify and ensure the registration of all Māori freehold land under the Land Transfer Act 1952.

¹¹ Maori Reserved Land Act 1955 s 7

[31] As foreshadowed, the land is no longer subject to restrictions as to alienations. Wiki Tamati succeeded to her father's estate on 21 August 2008.¹² Edward Tamati received his interests in the land from Rutu Ruru and Uruwhetu Toi who were original owners. That order was made on 16 March 1972 per s 213 of the Māori Affairs Act 1953.¹³ Prima facie there does not appear to be any error in the orders made. If Ms Brightwell wishes to challenge those orders an application can be made to the Chief Judge per s 45 of the Act.

What regard should be had to the future utilisation of Kaipakopako 2C2 block?

Respondent's submissions

[32] Ms Brightwell submits that there are families who wish to return to Kaipakopako 2C2 and reside on the block as such the block should be utilised for papakainga. Ms Brightwell refers to clause 4(xi) and (xii) of the trust order to support the ability of the trustees to utilise the land for the benefit of the owners.

Māori Trustee's submissions

[33] As foreshadowed, the Māori Trustee did not respond directly to the concerns raised by Ms Brightwell. He again confirmed that he has provided information on Kaipakopako 2C2 to assist the Court in confirming the review.

Discussion

[34] Kaipakopako 2C2 was leased to Chiselhurst Farms Ltd for a term of 9 years from 1 September 2006. The lease expired on 31 August 2015. The lessees remain in occupation while the lease is being negotiated.

[35] Clause 4(xi) and (xii) provide the trustee with the following powers:

To permit occupation and enjoyment by the owners

At their discretion to reserve in any lease or licence or otherwise provide for any one or more of the beneficial owners to personally occupy use or otherwise enjoy such defined part or parts of the land as the Trustees shall determine having regard to the comparative shareholdings and if any such right is reserved licensed or otherwise provided for but to one or some only of the beneficial owners then the Trustees will determine the extent to which participation in rentals and profits are to abate for the purposes of receiving the benefit of such reservations licences or provisions or otherwise be adjusted.

¹² 214 Aotea MB 108 (214 Aot 108)

¹³ 7 Taranaki Alienation MB 182 (7ALTR 182)

To make other special provisions for beneficiaries

At their discretion to alienate by way of lease or licence to any beneficial owner or to any blood relative of a beneficial owner at a reduced rent or otherwise upon terms more favourable to the lessee than those obtainable on the open market for so long as that person or his executor or administrator remains in possession of the land PROVIDED THAT such proposal has first been approved by the resolution of a meeting of beneficial owners called by the Trustees.

[36] The power granted to the trustees under these clauses is discretionary. It is trite law that trustees appointed to an ahu whenua trust take legal ownership. The owners have beneficial or equitable ownership but do not have legal ownership and do not have the right to manage the land or occupy the land. Decisions to be taken for the land are to be decisions of the trustees.¹⁴

[37] If Ms Brightwell would like the Māori Trustee to consider different options for the future utilisation for the land she will need to take that up with him in the first instance. Doubtless he would appreciate the opportunity for dialogue with her.

Decision

[38] The review of trust is now confirmed. The next review will take place in 2021.

[39] The application for review is therefore concluded and dismissed.

[40] There will be no order as to costs.

Pronounced at 2.45 pm in Wellington on Thursday this 16th day of June 2016

L R Harvey
JUDGE

¹⁴ *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) 15 Whanganui Appellate Court MB 192 (15 WGAP 192)