IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150005098
CJ 2015/34

UNDER	Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Mangakahia 2B2 No 2A1A and orders made on 5 February 1998 (85 WH 205) and 27 November 2009 (143 WH 271-280)
BETWEEN	KEVIN TITO Applicant

Judgment: 23 May 2016

RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX

Introduction

[1] This application was filed by Kevin John Tito (the applicant) pursuant to s 45 of Te Ture Whenua Māori Act 1993 (the Act) and processed on 4 September 2015. The applicant challenges the following orders made by the Māori Land Court:

(a) On 5 February 1998, constituting an ahu whenua trust over Mangakahia 2B2 No 2A1A – CT 55A/1194 and appointing Winifred Tito, Ngaroma Tito, Dorothy Tito, Edward Mulligan and Te Anga Whanga trustees;[1] and

(b) On 27 November 2009, replacing existing trustees with the Māori Trustee and appointing Kevin Tito, Aroha Tito and John Andrew as Advisory Trustees.[2]

Grounds for challenge to orders made on 5 February 1998

[2] The applicant supported his s 45 application with submissions contending an omission in the presentation of the facts to the Court in relation to the 1998 order constituting the ahu whenua trust over the Mangakahia block. The applicant claims that, when giving her consent to the establishment of the ahu whenua trust, his mother Winifred Tito did not advise the Court that she only held a life interest in her shares of the block (to which the applicant is entitled in remainder) and that the applicant was not given a chance to consent to, or oppose the constitution of the trust over his interests in remainder. The applicant claims he has been adversely affected by the order, which he says has effectively "alienated" him from his family farm and their land.

[3] A review of the minutes of the Court hearing reveals only limited information. The Court stated that:[3]

> After canvassing issues widely, everyone present has had notice of the proposal. All owners are represented. The proposed amendment to the draft orders however that sums of less than $50 due to any one shareholder be held in a putea to be decided by an AGM is deleted. The majority owners may then otherwise decide the destination of the minority's funds which is prima facie oppressive and a breach of s.17(2)(d)/93.

[1] 85 Whāngarei MB 205 (85 WH 205).
[2] 143 Whāngarei MB 271-280 (143 WH 271-280).
[3] 85 Whāngarei MB 205 (85 WH 205) at 205.

> Orders accordingly vesting the land in the 5 persons named as proposed trustees upon the trusts in the draft trust order filed.

[4] The people present included WP Tito of Wellsford and NA Brown of Glenfield, Auckland. These people are the applicant's mother and sister.

[5] The applicant alleges that s 150D of the Act was breached. This section provides that a person with a life interest is not capable of alienating Māori freehold land in which a life interest is held without the consent of all persons entitled in remainder, and that those who hold a life interest do so as a kaitiaki in accordance with tikanga Māori. The applicant contended that his mother did not comply with this provision. In support of these submissions the applicant provided the following evidence:[4]

> Background:
>
> [5] This application is in relation to the whenua being all that parcel containing 41.1843 hectares more or less and being Mangakahia 2B2 No: 2A1A, (see Section 1: Evidence: Item 1).
>
> [6] In accordance to tikanga Māori, ownership of my interests are predetermined by whakapapa (see Section 1: Evidence: Item 2, Page 3).
>
> This whakapapa outlines how our family holds the mana of Kowhai Hotorene Tito (our tipuna), as "kaitiakitanga" or caretaker/guardian of this whenua.
>
> And thirty-six years ago this predetermination of kaitiakitanga is affirmed through bloodline descent to my son, and full name bearer, Kowhai Hotorene Tito.
>
> [7] The whakapapa explains that the Paramount Chief of Te Parawhau, Kukupa had a son, Te Tirarau (who was a signatory to Te Tiriti o Waitangi).
>
> Kukupa's daughter, Ipuwhakatara had an only child, a son named (Pa) Tito.
>
> Of (Pa) Tito's eight children, Kowhai Hotorene Tito had sole ownership of this whenua.
>
> [8] In the "Schedule of Ownership Orders" (see Section 1: Evidence: Item 3, Page 4), it shows of Kowhai's eight children, my grandmother Te Awhi Kowhai Tito received approx. 75% majority ownership of the whenua directly from her father, and her younger brother Waata Kowhai Tito received the balance of approx. 25% ownership.
>
> [9] Awhi's older brother Eruera Makaore Tito, and younger sister Hoani Ani Tito, later received an equal share along with Awhi and her younger sister Rosy Letitia Tito, from their brother, Waata Kowhai Tito when he passed away.
>
> Rosy later transferred her share to her nephews, Pomare Kingi Tito and Te Anga Whanga equally.
>
> [10] The current owners descend from Awhi Kowhai Tito, Eruera Makaore Tito, and Hoani Ani Tito. (see Section 1: Evidence: Item 4, Page 9)

[4] Submission filed with Application dated 3 September 2015

The "Current list of Owners" (see Section 1: Evidence: Item 5, Page 10), shows current owner/shareholder interests.

"Te Waka o Kowhai Hotorene Tito" shows how the current owner/shareholder interests are apportioned in relation to the whenua, and reveals general consensus of owners in support of my application. (see Section 1: Evidence: Item 6, Page 12)

[11] My grandmother Awhi farmed the land with her husband Kepa Whanga from 1953, under a 21 year lease with ROR. Awhi acquired the adjoining block as sole owner, namely Mangakahia 2B2 No: 2G to increase land size to qualify for a development loan from Māori Development Board for improvements.

When the loan was discharged, Awhi changed Mangakahia 2B2 No: 2G to general land namely Mangakahia 2B2X, for future finance if needed.

For this reason the whenua was never to be sold. (see Section 1: Evidence: Item 1, Page 1)

[12] When Awhi passed away, the lease transferred by succession to her two sons, my father Pomare Kingi Tito and Te Anga Whanga. My father had his own farm, so Te Anga continued the lease. They received an equal share from Awhi on the farm, and equal shares of Mangakahia 2B2X.

In 1965 Te Anga leased the farm before retiring to live with our family, and sub-leasing to cousin Joseph Cassidy for two 5-year terms, and then to Richard Booth (Snr) for a further two-5-year terms to 1995. (see Section 1: Evidence: Item 9, Page 16)

[13] Before my father passed away in November 1995, he, myself and uncle Te Anga discussed whether I would go back on the farm, or continue subleasing to the Booth family for a further 5 year term from August 1995.

My career at the time did not avail the time to manage the farm, so I agreed with them both to formally lease the farm. So Richard (Jnr) and Sharron Booth would lease the farm to March 2000, renewal pending such time as I may return to the farm.

[14] When my father passed away in November 1995, my sister Ngaroma Anne Tito and I received equal shares. Our mother, Winifred Pandora Tito held a life interest over our shares.

[15] On 22 August 1997, Winifred encouraged Te Anga to sign a sale agreement of Mangakahia 2B2X (Awhi's general land), and included the family homestead on the Māori land farm boundary in the sale to the lessees Richard and Sharron Booth. (see Section 1 Evidence: Item 10, Pages 19-22)

[16] The homestead was on-sold by the Booth family and removed from the whenua. A stand of manuka was also removed from the whenua during the term of lease. One week after sale, Winifred and Iain Duffy were appointed joint EPOA's for Te Anga's property. Then two months later, Winifred and Iain structure the meeting to constitute the trust.

Grounds:

In relation to first order in Clause [1](a) above:

[17] First and foremost, Winifred Tito, in her capacity as life tenant, has adversely affected my current kaitiakitanga, by wilfully disposing of an instrument belonging to the whenua; the homestead that was to be retained for our whānau from generation to generation, disposing of a parcel of land adjoined to the whenua that belonged to my grandmother, which was to benefit the whānau and farm with financial support, again without consulting me.

[18] And with only Ngaroma's support, Iain Duffy structures a meeting enlisting the support of certain members of Eruera's descendants to constitute the Ahu Whenua Trust with the sole objective to alienate my interests, take over the lease, and eventually sell the rest of the

> whenua to the lessees through another structured meeting. [130 WH MB 136 – clause [7] of Reserved decision] (see Section 4: Court Decisions: Item 4, Page 43)
>
> It was only because of my intervention with Te Anga's support that stopped the sale to Richard and Sharron Booth from proceeding any further.
>
> This was not in accordance with the tikanga of my father's or grandmother's lineage.
>
> [19] A clear and concise fact in law was breached by Winifred Tito which was been omitted in the presentation of facts to the Court, and the Court was misled into making the mistake of granting the constitution of trust.
>
> (see Section 1: Evidence: Item 7, Page 13)
>
> [20] A copy of the presentation of facts to the Court, ie: the minute of the "Meeting of Owners" held on 15 October 1997 to establish the trust.
>
> At this meeting it shows that the life tenant Winifred Tito, is presented as an owner with no mention of life interest, and is not in attendance. She is represented by Iain Duffy.
>
> Ngaroma Tito, also not in attendance is represented by her daughter Aroha Tito.
>
> (see Section 1: Evidence: item 8, Page 14)
>
> [21] Together they ushered Te Anga into that meeting with other whanaunga (Eruera's descendants) whom Te Anga had not seen for years, to be influenced by those who had little or no interest in the whenua, for the sole purpose of contributing his vote to the agenda.
>
> [22] At this meeting, there were no owners representing Ani's descendants, and no apology, enquiry, or mention about me or my expressed view on the issue. Therefore, in the absence of opposition, a meritorious objection was not able to be heard.

Grounds for challenge to orders made on 27 November 2009

[6] The submissions accompanying the s 45 application also raised issues that have occurred since the trust was established. Those issues relating to the operation of the trust since it was established were fully traversed by the Māori Land Court, which made orders on 27 November 2009 for the appointment of the Māori Trustee and advisory trustees.[5] Judge Ambler dismissed the application for termination of trust.

[7] Mr Kevin Tito appealed Judge Ambler's decision successfully to the Māori Appellate Court in 2011.[6] The Māori Appellate Court appears to have declined to terminate the Trust but that is not clear from the decision. It did quash all orders of the Lower Court but it only substituted one new order. It appointed Kevin Tito, the applicant, Aroha Tito and John Andrew as responsible trustees on an interim basis, until the holding of the next general meeting of owners. The Court directed that the trustees were to call a general meeting of

[5] 143 Whāngarei MB 271-280 (143 WH 271-280).
[6] *Tito – Mangakahia 2B2 – No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86) at [61]-[67].

owners within 12 months (that is, by 23 February 2012) to consider the future administration of the trust and the appointment of permanent trustees.

Findings in the Court of Appeal and Supreme Court

[8] Mr Kevin Tito unsuccessfully appealed the decision of the Māori Appellate Court to the Court of Appeal and the Supreme Court.

[9] In the Court of Appeal, Randerson J noted the facts as follows:[7]

> The Trust was established in 1998 with five trustees pursuant to a Court Order made under s 215 of Te Ture Whenua Maori Act 1993 (the Act) over land comprising 41.1843 hectares.
>
> There are now 20 owners holding 1,020 shares. After his uncle's death in late 2009/early 2010, Mr Tito's shareholding increased to 660.375 shares, which represents a 65 per cent shareholding. His sister, Ms Ngaroma Tito, holds 220.125 shares.
>
> The land is leased to a neighbouring dairy farmer at an annual rental of $16,500. The rental is the Trust's sole source of income.
>
> Unfortunately the Trust has had a somewhat troubled history, characterised by intra-familial conflict and mismanagement.
>
> Concerns about the administration of the Trust prompted Mr Tito to apply in May 2008 to the Māori Land Court under s 19 of the Act for an injunction to restrain the Trust manager from "altering the books to clear his name and retiring as trust manager". He also applied for an order under s 238(1) to enforce the obligations of the Trust. Subsequently, in October 2008, Mr Tito filed an application for termination of the Trust.
>
> Following several hearings, all three applications were considered by Judge Ambler in a reserved decision dated 23 January 2009.
>
> Judge Ambler found that the trustees had acted in breach of the Trust Order by failing to convene any annual general meetings during the life of the Trust and in failing to undertake reviews of the Trust required under the Order to be held every three years. The Judge also found that the trustees had abdicated their responsibilities as trustees by leaving the Trust's affairs solely in the control of a trust manager. As a consequence, the current accounts of beneficial owners had been overdrawn, payments had been made without the requisite authority and the financial statements contained inaccuracies. The Judge was not however prepared to terminate the Trust, which he considered was necessary for the land given that it was being leased and given the significant disparity in shareholding. In Judge Ambler's view, the real issue was not whether there should be a trust but who should be the trustees.

[7] *Tito v Tito* [2012] NZCA 493 [5]-[23].

Of the five original trustees, one was deceased, another was incapacitated, while the remaining three had not only breached their duties but two of them held less than one per cent of the interest in the land, and the third suffered from ill health.

The Judge identified two options regarding trusteeship. The first was to reduce the trustees to three, comprising Mr Tito, his sister Ms Ngaroma Tito (or their respective nominees) and an independent professional trustee, possibly the Māori Trustee, to represent the balance of the owners. The second option was to appoint the Māori Trustee as sole responsible trustee with advisory trustees.

Judge Ambler directed the trustees to engage an auditor to undertake an audit of the accounts and following receipt of that audit to convene a general meeting of beneficial owners to elicit their views on trusteeship. The Judge then adjourned the proceeding to the August 2009 sitting to enable both those matters to be actioned before he made a final decision on trusteeship.

In August there was a further adjournment, there having been delays in obtaining audited accounts and the general meeting never having been convened.

The general meeting was eventually held on 12 November 2009. Those present either in person or by proxy represented over 95 per cent of the owners in the block. Everyone present opposed the appointment of the Māori Trustee as sole responsible trustee. Instead, it was agreed there should be five trustees, Mr Tito and Ms Ngaroma Tito's daughter, Ms Aroha Tito, representing the majority shareholders and three representing the minority owners. Because there were more than three nominations, a vote was taken following which Mr John Andrew, Mr Brett Cassidy and Ms Dorothy Tito were appointed.

When the matter came back before Judge Ambler on 27 November 2009, the Judge noted the meeting's objection to the appointment of the Māori Trustee. However, the Judge considered that in circumstances where the Trust had not operated properly, where financial statements were still doubtful and where action might need to be taken against former trustees or other persons, it was appropriate he appoint the Māori Trustee notwithstanding the opposition.

He accordingly made an order appointing the Māori Trustee as responsible trustee for a period of two years together with Mr Tito, Ms Aroha Tito and Mr Andrew as advisory trustees. In the Judge's view, three trustees was the best number (as opposed to five) because three better reflected the ownership makeup.

The orders were expressed to be conditional on the Māori Trustee accepting his appointment and finalising the terms of the order by 20 December 2009.

On 16 December 2009 the Māori Trustee accepted his appointment but sought to change the terms. Mr Tito learnt of this development and accordingly wrote to the Court on 22 January 2010 requesting that the matter be recalled. That did not happen. Instead, Judge Ambler convened a conference call on 4 February 2010 with the Māori Trustee, the upshot of which was that the Judge varied his previous order by changing the term of the Māori Trustee's appointment from two years to three years. None of the beneficial owners were given notice of the conference call and did not participate in it. There was no further hearing.

Mr Tito confirmed to us that he did not appeal Judge Ambler's decision declining his application to terminate the Trust.

[10] The Court of Appeal dismissed Mr Tito's appeal, but extended the time for holding the general meeting of owners until 29 January 2013.

[11] On appeal by Mr Kevin Tito to the Supreme Court,[8] the application for leave to appeal was dismissed on 14 March 2013. As that Court noted, Mr Kevin Tito sought to bring a wide-ranging appeal to that Court. He sought to raise matters beyond what was in issue in the Court of Appeal and accordingly beyond what could be in issue before the Supreme Court. The Supreme Court did note that the interim trustees should have held a general meeting of owners. The Court opined that if it had happened, it will or should have rendered otiose the only matter which could properly be in issue before it, namely the validity of the interim trustee appointments made by the Maori Appellate Court. If, contrary to the Court of Appeal's order, that meeting had still not been held, the Supreme Court directed that it must happen as soon as possible. That Court also dismissed the appeal on the grounds that the proposed appeal did not raise any matter of general or public importance. Nor would a substantial miscarriage of justice occur if leave to appeal was declined.

[12] Clearly, the issues concerning the orders made by Judge Ambler have been dealt with by the superior Courts. Nothing further is required to address any mistake or omission made by him in 2009. Thus I decline to exercise the ss 45-44 jurisdiction in terms of reviewing that decision. The following sections of my decision deal only with the challenge to the orders made on 5 February 1998.

[13] However, I do note that since the Supreme Court decision, an AGM was held on 6 April 2013. The District Registrar for the Māori Land Court in Taitokerau, Mr Don Cameron, appears to have been present. The applicant distributed minutes to the owners, which record that John Andrew resigned as a trustee as he was going to Australia. The following people were nominated for appointment as trustees: Denise Katene, Lynette Katene, Brett Cassidy, Kevin Tito, Tui Phillips, Lorna Lunyevich and Aroha Tito. This matter needs to be finalised to give effect to the decision of the Māori Appellate Court affirmed by the Court of Appeal and the Supreme Court.

[14] The applicant produced evidence demonstrating that a Meeting of Owners was held on 16 May 2015 where there were only 5 owners present. However they held collectively 72.6%

[8] Tito v Tito & Anor SC 92/2012 [14 March 2013]

of the shares in the land. The meeting was called to address the fact that the District Registrar had done nothing further to address the outcomes of the April 2013 AGM. A second meeting was held on 20 June 2015 where it was resolved by 9 owners represented, holding 74.4% of the shares, to cancel the ahu whenua trust. It appears that from this meeting, the decision was made to pursue the s 45 application.

The Chief Registrar's report on the s 45 application

[15] A Deputy Registrar has completed the review of the Court record for the s 45 application and they have produced the following Report and Recommendation (the Report).

APPLICATION UNDER SECTION 45 OF TE TURE WHENUA MĀORI ACT 1993
REPORT AND RECOMMENDATION

Introduction

1. This application filed by Kevin John Tito (the applicant) seeks to cancel orders relating to Mangakahia 2B2 No 2A1A (the block) as follows:
   a) 85 Whangarei MB 205 dated 5 February 1998 to constitute an Ahu Whenua Trust
   b) 143 Whangarei MB 271-280 dated 27 November 2009 to replace existing trustees
2. The applicant claims the said orders are incorrect due to a mistake, error or omission as follows:
   a) 85 Whangarei MB 205 (5 February 1998)

      A fact in law was omitted when Winifred Pandora Tito breached section 150D of Te Ture Whenua Māori Act 1993, when presenting her case to Court to constitute a trust without consent of all remaindermen.

   b) 143 Whangarei MB 271-280 (27 November 2009)

      A fact was omitted in the presentation of the case to the Court by Judge David Ambler, where the Trust did not have a quorum to arrange an AGM, directed by Judge Ambler to replace trustees. Omission of this fact was in breach of the Ahu Whenua Trust order, clause 26: Majority decisions
3. The applicant claims that he has been adversely affected by the orders complained of because Winifred Tito did not obtain his consent to establish a trust order over his interests in the family farm, and he has not been able to carry out kaitiakitanga bestowed upon him by his predecessor to uphold retain and manage the farm in the same manner as they did. Instead he has had to accept trusteeship, when he did not agree to the constitution of the trust. The trust ought to have been cancelled by the Court when it was dormant and dysfunctional.

Concise history of Orders sought to be amended 85 Whangarei MB 205 (5 February 1998)

4. The minute is reproduced as follows:

> s.215/93 Mangakahia 2B2 No 2A1A
> Ian Dick on behalf of Te Puni Kokiri
> Attendance list circulated
> I refer to CT 55A/1194. The land is under Part XXIV/53. The land will be released following its being vested in an Ahu Whenua Trust.
>
> I refer to the minutes of a meeting held on 15/10/97. Compensation has been paid about 2 years ago to the previous lessee. It created a debt of approx.. $50000. It was proposed by the owners to repay the debt and take over the land's administration. The meeting was to discuss this proposal.
>
> I refer to the draft trust order filed
>
> Court – after canvassing issues widely, everyone present has had notice of the proposal. All owners are represented. The proposed amendment to the draft orders however that ?? of less than $50 due to any one shareholder be held in a putea to be decided by an AGM is deleted. The majority owner may then otherwise decide the destination of the minority's funds which is prima facie oppressive and a breach of s.17(2)(d)/93
>
> Orders accordingly vesting the land in the 5 persons named as proposed trustees upon the trusts in the draft trust order filed…

5. The Court constituted the Mangakahia 2B2 No 2A1A Ahu Whenua Trust and appointed Winifred Pandora Tito, Ngaroma Anne Tito, Dorothy Tito, Edward Mulligan and Te Anga Whanga as the trustees of the block.

143 Whangarei MB 271-280 (27 November 2009)

6. The Court orders made pursuant to s 236 and 237 of the Act and s 51 of the Trustee Act 1956 appointing the Māori Trustee as responsible trustee in place of the existing trustees. Kevin Tito, Aroha Tito and John Andrew were appointed as advisory trustees.

Identification of evidence that may be of assistance in remedying the mistake or omission

7. The applicant has provided the following in support of the application:

   a) Minutes of meeting of owners held 15 October 1997

   b) A copy of the minutes complained of

   c) A copy of the court orders complained of

   d) Compiled list of owners as at 1 September 1958 with schedule of ownership up to 24 September 1997.

   e) Copy of the Māori Appellate Court minute at 2011 Māori Appellate Court MB 86-101 (23 February 2011).

Court Research

85 Whangarei MB 205 (5 February 1998)

8. The applicant states the orders made at 85 Whangarei MB 205 are incorrect because he was a remaindermen at the time of the trust being constituted and the life tenant, Winifred Pandora Tito, breached section 150D of Te Ture Whenua Māori Act 1993.(the Act)

9. Section 150D of the Act is set out in full as follows:

> Life Interests
>
> A person with a life interest or a determinable life interest in Māori freehold land-
> (a) is not capable of alienating the Māori freehold land in which the life interest is held without the consent of all persons entitled in remainder; and
> (b) holds that interest as a kaitiaki in accordance with tikanga Māori.

10. There was no requirement for the Court to consider s150D of the Act when constituting the Mangakahia 2B2 No 2A1A Ahu Whenua Trust as s150D was inserted into the Act in 2002, approximately four years after the order at 85 Whangarei MB 205 was made.

11. A copy of the minutes of the owners meeting held on 15 October 1997 shows that 11 of the 17 owners attended that meeting representing 929.787 out of 1020.000 shares, which equates to 91.16% of the total shareholding. The minutes of the owners meeting is reproduced as follows:

> Ian R Dick representing Te Puni Kokiri chaired the meeting which was opened at 2.40pm.
>
> A roll call was then held and addresses amended. An apology was received from Winifred Pandora Tito and four proxies were presented.
>
> 11 of the 17 owners were present, or represented by proxies, with those represented and their shares being

Ngaroma Anne Tito (Mrs Brown) (proxy)	Remainderman
Winifred Pandora Tito (by Mr I D Duffy)	440.250
Te Anga Whanga	440.250
Caroline Andrews	9.965
Eva Waipoua Little	9.965
Rebecca Te Pania (proxy)	9.965
Murray Marepa Tito (proxy)	9.963
Edward Muligan	8.896
Dorothy Tito	0.178
Grace Dunning (Proxy)	0.178
Lorna Lunevich	0.177
Total Shares represented	929.787
Total shares in block	1020.000
Percent represented	91.16%

> It should be noted that Mrs Tito and Anga Whanga own 86.32 % of the shares between them.
>
> The purpose of the meeting was then explained by Mr Dick. This was that Mrs Tito and Anga Whanga have offered to pay the debt on the land and were seeking a trust to be set up to administer the block.
>
> The history of the block was then discussed. In summary this was that the land had been bought under development in 1953 with the major owner, Mrs Whanga, being the occupier and being granted a lease for 42 years which expired in 1995. The lease was transferred to Anga Whanga in 1965

> and he was paid compensation for improvements amounting to $60,000 following expiry.
>
> Since then the land had been leased to Richard and Sharron Booth with the net rental ($11,500 per annum less Māori Trustee commission and Resident Withholding Tax) being used for debt reduction. By the end of September 1997 this debt had been reduced to $48,000. Anga Whanga and Mrs Tito were prepared to repay this debt.
>
> Mr Duffy then spoke on the proposal which was based on investment opportunities which showed that the best investment his clients could make was to repay the debt and take the net rental directly. 86% of $11,500 being $9,890 and this was a return of 20% gross on an investment of $48,000. His clients were not requiring any contribution from the other owners other than that they agree to the setting up of an Ahu Whenua Trust which distributed all the income other that small amounts.
>
> By retaining any distribution less than say $50 in a trust for the benefit of all owners …

12. When making an order to constitute an Ahu Whenua Trust, the Court is required to consider s 215(4) which is set out as follows:

> 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 notice of the application and 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.

13. In summary there was an overwhelming support of the owners to constitute an Ahu Whenua Trust in 1997.

143 Whangarei MB 271-280 (27 November 2009)

14. In 2010 Kevin Tito lodged an appeal against the Court order at 143 Whangarei MB 271-280.

15. At 2011 Māori Appellate Court MB 86-101 (23 February 2011) the Appellate Court quashed the lower Court order and made a new order appointing Kevin Tito, Aroha Tito and John Andrews as responsible trustees on an interim basis.

16. The Appellate Court directed that the interim trustees were to call a general meeting of owners within 12 months to consider the future administration of the trust and the appointment of permanent trustees.

17. The applicant, Aroha Tito and John Andrews are still the current trustees of Mangakahia 2B2 No 2A1A Ahu Whenua Trust.

Details of subsequent Orders affecting lands to which this application relates

18. At 141 Whangarei MB 117 dated 27 August 2009 pursuant to s37(3), 239 and 240 of the Act removing Winifred Tito and Te Anga Whanga as trustees.

Details of payments made as a result of the Order

19. Nil

Reference to areas of difficulty

20. Kevin Tito, Aroha Tito and John Andrews are still the current trustees Mangakahia 2B2 No 2A1A Ahu Whenua Trust. Kevin Tito advises that John Andrews has retired as a trustee and moved to Australia.

21. Permanent trustees have not been appointed as directed by the Māori Appellate Court in 2011. Minutes provided by Kevin Tito show that an annual general meeting of owners was held on 6 April 2013 where seven trustees were appointed, however, there is no evidence that their appointment was confirmed by an order of the Māori Land Court.

22. It would seem that the interim trustees would need some support in facilitating a meeting to appoint permanent trustees and lodging an application to the Court so that an order can be made confirming their appointment.

23. The Appellate Court order has not been registered with Land Information New Zealand and the old trustees are still shown as the legal proprietors of the block.

Consideration of whether matter needs to go to full hearing

24. A Court hearing is not necessary and the matter can be dealt with on the papers before the Court.

25. There was no requirement for the Court to consider s150D of the Act when constituting the Mangakahia 2B2 No 2A1A Ahu Whenua Trust as s150D was inserted into the Act in 2002, approximately four years after the order at 85 Whangarei MB 205 was made

26. Minutes of the owners meeting held on 15 October 1997 show that 11 of the 17 owners attended that meeting representing 929.787 out of 1020.000 shares, which equates to 91.16% of the total shareholding.

27. The order at 143 Whangarei MB 271-280 was quashed by the Appellate Court at 2011 Māori Appellate Court MB 86-101. Interim trustees were appointed, namely Kevin Tito, Aroha Tito and John Andrews.

28. Given that the evidence provided by the applicant does not support the claim that an error was made by the Court at 85 Whangarei MB 205 and the order at 143 Whangarei MB 271-280 was quashed by the Māori Appellate Court, I recommend that this application be dismissed.

29. However, the trustees of Mangakahia 2B2 No 2A1A Ahu Whenua Trust may need some support in facilitating a meeting of owners to appoint permanent trustees and lodging an application to the Court to confirm the appointment of those trustees.

Recommendation - course of action to be taken

30. If the Deputy Chief Judge is of a mind to exercise her jurisdiction, then it would be my recommendation that:

31. A copy of this report be sent to Kevin Tito (the applicant), and the trustees of Mangakahia 2B2 No 2A1A Ahu Whenua Trust, to distribute to beneficiaries of the

block. Parties are given an opportunity to comment or respond in writing, within two months of the date of this report.

32. If no objections are received then the matter should be dismissed.

33. That the Registrar of the Whangarei Māori Land Court be directed to hold a meeting of owners to appoint permanent trustees to the Mangakahia 2B2 No 2A1A Ahu Whenua Trust and lodge an application to have these appointments confirmed by the Court.

34. That the Registrar of the Whangarei Māori Land Court be directed to register the order at 2011 Māori Appellate Court MB 86-101 (23 February 2011) against the certificate of title.

35. If objections are received then the matter should be referred to the Court for directions.

Procedure

[16] On 23 September 2015, the Chief Judge delegated this matter to me pursuant to s 48A of the Act.[9]

[17] On 7 October 2015 a request for urgency was filed by Mr Tito primarily because the tenants continue to use the land without a formal agreement. They pay rent to their own solicitors and an injunction prevents the funds being used by the owners. The issue is that tax has accrued penalties and interest. The situation demanded some urgency. Unfortunately, that request for urgency was never referred to me.

[18] Unfortunately also, and for this process to work under s 45, it takes 3 months before a report is completed. On 23 December 2015, the Report was finally sent to the trustees of the Mangakahia 2B2 No 2A1A Ahu Whenua Trust (the Trust). Those people include the applicant, who is a trustee. So he, along with Aroha Tito and John Andrews, received the report.

[19] Receiving the Report so close to the Christmas Holidays contributed to the delay in addressing the issues. Thus objections to the Report were not received from Kevin Tito, Allen Leahy or Hone Cassidy until 19 February 2016. Following their receipt, the case manager sought directions. I directed that the matter be set down for hearing on 4 March 2016. After notice and advertising were addressed, the matter was heard in Whāngarei on 22 April 2016.

[9] [2015] Chief Judge's MB 634 (2015 CJ 634).

[20] Only Mr Kevin Tito appeared for the trustees. He was supported by his de facto partner, Ms Tui Phillips. Mr Gordon Little spoke on behalf of Ms Aroha Tito and other shareholders. Mr Gordon Little did not support the position taken by Mr Kevin Tito and his partner. There were seven other people present, including Ngaroma Brown (nee Tito), sister to the applicant. Her daughter Aroha is a trustee. She did not express an opinion either in support or opposition to the position taken by the applicant.

[21] I reserved my decision, noting that the issues raised by the applicant concerning the lease, the accounts, taxation and activities of trustees (both past and present) should be dealt with by new applications for termination of trust and or review of trust if there is further information available not known to the Māori Land Court in 2009. If the information is new, I direct the Registrar to waive the fee. However, I should point out that if the applicant is attempting to use the same information to mount the same case before the Māori Land Court, he is likely to be told that the principle of res judicata applies.

[22] I turn now to the law concerning s 44 of the Act, the provision that permits the Chief Judge to correct a mistake or omission made by the Māori Land Court.

The Law

[23] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in section 44(1) of the Act:

> On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[24] As I always repeat in these s 44 decisions, for the benefit of the parties, in *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)*[10] the Chief Judge summarised certain principles relating to s 45 applications as follows:

- When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence provided by the Applicants (and any evidence in opposition);

- Section 45 applications are not to be treated as a rehearing of the original applications;

- The principle of *Omnia Praesumuntur Rite Esse Acta (*everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;

- Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;

- The burden of proof is on the applicant to rebut the two presumptions above; and

- As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in section 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[25] Section 45 explicitly refers to situations where the Court has not made a correct decision due to a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct this. For this reason, s 45 applications must be

[10] *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209) at [15].

accompanied by proof of the flaw identified, through the production of evidence not available or not known of at the time the order was made.

[26] As stated in *Tau v Nga Whanau o Morven & Glenavy – Waihao 903 Section IX Block,*[11] the Chief Judge must exercise his jurisdiction by applying the civil standard of proof on the balance of probabilities having regard to that standard's inherent flexibility that takes into account the nature and gravity of the matters at issue.

Issues

[27] In the context of this case, and in exercising the jurisdiction of the Chief Judge under s 44, I must consider:

- Whether the orders made by the Court on 5 February 1998 constituting the ahu whenua trust over Mangakahia 2B2 No 2A1A were erroneous in fact or in law and, if so, whether they were made as a result of any mistake or omission on the part of the Court.

- If the orders were erroneous, whether it is necessary in the interests of justice to remedy the mistake or omission by cancelling or amending the order.

Were the orders erroneous in fact or in law and if so were they made as a result of any mistake or omission on the part of the Court?

[28] A key aspect of this case is whether the applicant has demonstrated a mistake of law or fact on the part of the Court. This turns on whether the Court erred by accepting Winifred Tito's consent to the establishment of the Mangakahia 2B2 No 2A1A ahu whenua trust, without the consent of the applicant (a remainderman), as she only held a life interest in the relevant shares.

[29] In making his case the applicant's argument concerning s 150D cannot be sustained. That is because that provision was only inserted into the Act in 2002, four years after the making of the orders complained of. Rather, I must consider what the law said at the time

[11] *Tau v Nga Whanau o Morven & Glenavy – Waihao 903 Section IX Block* [2010] Maori Appellate Court MB 167 (2010 APPEAL 167) at [61].

those orders constituting the trust were made regarding the ability of a holder of a life interest in Māori land to alienate that land with or without the consent of all remaindermen.

[30] The Act, prior to 2002, was silent on the scope of the rights of those with a life estate in Māori land interests. Given the absence of any emphatic restrictions such as appear in s 150D, and given the subsequent decision to insert this section, it is at least arguable that prior to 2002 the rights of a life tenant were more expansive than they are now.

[31] While the issue arose very infrequently, the pre-2002 approach followed by the Māori Appellate Court in *Tamatea v Tinworth* for determining a life tenant's rights and powers to lease land was to apply s 88 of the Trustee Act 1956. This provision confers on individuals with a life interest (where no trustee exists) all the powers of a trustee under that Act (including the power to sell land under certain circumstances).[12] However, these powers are not unbridled because the life tenant would need to comply with trustee obligations in the legislation governing Maori land interests in force at the time.

[32] The Appellate Court held that *"where there is no trustee and the powers are exercised by a life tenant, that life tenant must in leasing a property have due regard not only to the interests of the life tenant but also to those of the remainderman. To decide otherwise would be to confer on the life tenant greater powers than would be conferred on a trustee if there were one for that property…".*[13] The Court did not go so far as to require a remainderman's consent to a proposed transfer, but stated that remaindermen should be consulted about the proposal to lease, notified of the application to the Court for confirmation, and given the opportunity to be heard in Court in relation to the confirmation.[14]

[33] The 1998 decisions of the Māori Land Court and the Māori Appellate Court in *Greening v Sidney,*[15] approved of the Court's decision in *Tamatea v Tinworth*, although neither referred to the Trustee Act 1956. The Appellate Court offered the following principles:

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[12] *Tamatea v Tinworth – Herehеretau B7G1A* (1963) 28 Gisborne ACMB 256 (28 GIS 256).
[13] At 258.
[14] At 258.
[15] *Greening v Sidney – Whangawehi 1B3H* (1998) 99 Wairoa MB 168 (99 WR 168); *Greening v Sidney – Whangawehi 1B3H* (1998) 33 Tairawhiti Appellate MB 232 (33 APGS 232).

(a) Generally, a life tenant's right to alienate is restricted to the particular interest they hold, i.e. an estate in possession. They cannot alienate an estate greater than that which they are entitled to themselves.[16]

(b) While the estate of a life tenant is "normally" alienable without consent of the remainderman, where the estate is over Māori land the ability to alienate is subject to the provisions of the Te Ture Whenua Māori Act 1993 (such as its restrictions on alienation).[17]

(c) The intention behind introducing life tenancies into Maori land legislation was to allow a surviving spouse to enjoy the benefits of the land in his or her lifetime and to "preserve those interests intact for the benefit of the remaindermen", i.e. those otherwise entitled to succeed in accordance with Māori custom. The Preamble and kaupapa of the 1993 Act reinforce that intent. A proposal to alienate a life tenant's interests should be consistent with the nature and intent of the legislation.[18]

[34] In relation to the matter of remainderman consent, the Lower Court in *Greening v Sidney* was emphatic in stating that *"[t]he life interest… is not a tradable commodity and cannot be alienated without the prior consent of the remaindermen."*[19] The Appellate Court did not expressly approve or disapprove of this formulation, but supported the notion that altering the rights that flow from different types of estates in Māori land (in that case, through a partition order) is essentially an alienation and must be achieved through negotiation and agreement between the holder of a life interest and the remaindermen.[20]

[35] Applying these principles to the present case, Winifred Tito was in the position analogous to a trustee under the Trustee Act 1956, when dealing with the shares in question. She should not have been able to alienate her life interest to an ahu whenua trust without consulting the remainderman – in this case the applicant.

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[16] At 236.
[17] At 236.
[18] At 237.
[19] At 175.
[20] At 236.

[36] That is because her power was restricted by the terms of the Act. Section 215, under which the ahu whenua trust was constituted, clearly stated that the court should not grant an application for such a trust unless satisfied that the owners of the land to which the application related had received sufficient notice of the application and opportunity to discuss and consider it, and that no meritorious objection to the application existed among the owners.[21] The Court has held that a remainderman is an "owner" for the purposes of the Act, and has a stronger claim to ownership than the holders of life interests.[22]

[37] The applicant was not present at the court hearing for the constitution of the trust. He subsequently confirmed that he did not receive notification of the hearing, and there is no record of his receiving notice on the Court record. The minutes of the meeting before the Court do state that Winifred Tito held a life interest. It is unclear whether the Court made the order believing that Ngaroma was the only remainderman, and had consented, or whether the Court overlooked the significance of Winifred Tito's interest being a mere life interest. In any case, a material fact was not before the Court and so the correct procedure was not followed. Even if it were the case that making the order did not require the applicant's consent, the Act at least required that he was consulted. Thus the Court erred at law.

Is it necessary in the interests of justice to remedy the mistake or omission?

[38] In this case the applicant says he did not know of the application or the hearing, so his right to natural justice was breached. However, even if his views were known it is not necessarily the case that his opinion would have prevailed. There is evidence that the trust was clearly supported by the majority of owners.

[39] In addition, the constitution of an ahu whenua trust does not affect any person's entitlement to succeed to any beneficial interest in any land vested in the trust (s 215(8)). Thus the applicant has not lost his right to succeed. I also note that the applicant has been a trustee of the trust and has been active in trust matters. The applicant's primary complaints relate to the management of the trust and that has already been dealt with by the superior Courts. If there is any further material not known to the Māori Land Court in 2009, then a fresh

[21] Section 215(4).
[22] *Official Assignee – Potakakuratawhiti 1B1 and 1C* (1973) 9 Ikaroa ACMB 154 (9 APT 154).

application for review of trust and termination of trust can be filed. That is for the applicant to decide.

[40] Accordingly, I do not consider that it is in the interests of justice to remedy the mistake or omission of the Court by cancelling the order.

Order

[41] The application is dismissed and I decline to exercise to use s 44 jurisdiction in the manner sought.

[42] A copy of this decision is to be distributed to all parties.

Dated at Gisborne this 23th day of May 2016.

C L Fox
DEPUTY CHIEF JUDGE