

I TE KOOTI WHENUA MĀORI O AOTEAROA

I TE ROHE O WAIKATO MANIAPOTO

In the Māori Land Court of New Zealand

Waikato Maniapoto District

A20210005133

WĀHANGA

Under

Section 18, Te Ture Whenua Māori Act 1993

MŌ TE TAKE

In the matter of

Allotment 20 Parish of Waiheke (Waiheke Station)

I WAENGA I A

Between

HARRY PAORA WILLIAMS, PERCY AWAROA
THOMPSON, PAULINE OGDEN, DANELLA
ROEBECK, MIRIATA TAKAREI, MIKAERA
PARAONE, HAUAURU RAWIRI, CHARLES
TAKA PETERS, MICHAEL PAKI AND
BERNADETTE MOHI AS TRUSTEES OF THE
NGĀTI PAOA TRUST BOARD

Te Kaitono

Applicant

ME

And

THE ATTORNEY-GENERAL

Te Kaiurupare Tuatahi

First Respondent

ME

And

GLEN ANDREW TUPUHI, TANIA AROHA
ROCHELLE TARAWA, HEREAROHA
FRANCIS SKIPPER, MIHINGARANGI
FORBES, ANAHERA SADLER, LORRAINE
RANGITAHU POMPEY, JAMES RATAHI AS
TRUSTEES OF THE NGĀTI PAOA IWI TRUST

Te Kaiurupare Tuarua

Second Respondent

Nohoanga:

On the papers

Hearings

Whakataunga:

30 May 2022

Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ D H STONE

Judgment of Judge D H Stone

Hei tīmatanga kōrero

Introduction

[1] The Ngāti Paoa Trust Board, the Ngāti Paoa Iwi Trust and the Attorney-General agreed to seek a declaration by consent which identifies the legal owner of Waiheke Station and records the terms of the Waiheke Station Trust.

[2] This judgment confirms the declaration jointly sought. The respective positions of the parties are recorded but no determination or declaration on these respective positions is made.

Kōrero whānui

Background

[3] The land central to this matter is Allotment 20 Parish of Waiheke, referred to as Waiheke Station and Waiheke Station Farm (“the farm”). Located on Waiheke Island, the farm is a block of Māori freehold land comprising approximately 3.2375 hectares. It is vested in the Waiheke Station Trust, an ahu whenua trust of which the Ngāti Paoa Trust Board is the sole trustee.

[4] The parties to these proceedings are the Ngāti Paoa Trust Board (“the applicant”), the Ngāti Paoa Iwi Trust and the Attorney-General (“the respondents”).

[5] The Ngāti Paoa Trust Board was established in 2004. It is described as “a charitable trust incorporated as a board under the Charitable Trusts Act 1957, established to represent the cultural, economic and educational needs of all people who whakapapa to Paoa.”¹

[6] The Ngāti Paoa Iwi Trust was established in 2013 as the post-settlement governance entity for Ngāti Paoa.

Ko te hātepe ture o te tono nei

Procedural History

[7] The applicant filed an initial application on 15 March 2021. A judicial conference was held on 16 June 2021, during which the applicant consented to filing an amended application. Counsel indicated that they would liaise with each other in the preparation of the amended statement. The applicant filed a revised application dated 2 August 2021 (“the application”).

¹ Ngāti Paoa Trust Board, Revised application, 2 August 2021, at [2].

The application was filed pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993 (“the Act”), seeking confirmation:

- (a) that the farm is vested in the applicants, on the terms of the original Waiheke Station Trust;
- (b) of the terms of the Waiheke Station Trust; and
- (c) of the history of Waiheke Station Farm following its return by the Crown to Ngāti Paoa.

[8] A second judicial conference was held on 7 September 2021. Following this conference, the Court confirmed that it was willing to consider granting orders for consent should the parties reach agreement on the terms.

[9] On 22 September 2021, the Attorney-General and the Ngāti Paoa Iwi Trust each filed a statement of response to the application. Following that, on 28 September 2021, the respondents filed a joint memorandum submitting that the application and the statements of response demonstrate that there is no pleaded dispute between the parties.

[10] The applicant filed a statement of reply and a statement of issues on 7 October 2021. The applicant acknowledged that substantially, the parties agreed, but made submissions concerning the history of the farm, and the terms of the Waiheke Station Trust.

[11] Following the third judicial conference, held on 19 October 2021, the parties were directed to confirm whether there is agreement for the Court to grant orders by consent to dispose of this proceeding.

[12] On 5 November 2021 the parties filed a joint memorandum seeking a declaration by consent in order to dispose of these proceedings. The parties also indicated that they intended to file separate memoranda recording their respective positions.

[13] On 18 November 2021, the applicant filed its position regarding the declaration jointly sought. The respondents filed their position on 22 December 2021.

Te whakapuakitanga i rapua e ngā kiritake*The declaration jointly sought*

[14] The declaration jointly sought was filed by the parties on 5 November 2021. It states:²

The Trust Board as sole trustee of the Waiheke Station Trust is the legal owner of the blocks of Māori freehold land together known as Waiheke Station Farm (and any other assets of the Waiheke Station Trust).

The terms of the Waiheke Station Trust are that:

- (a) all trust property is held and administered for the benefit of those who whakapapa to the eponymous ancestor Paoa; and
- (b) the trustee shall establish and maintain an up-to-date list of beneficiaries and their addresses.

Ngā kiritake me ō rātou ake whakaponono*The parties and their positions*

[15] To ensure the parties' positions are comprehensively and accurately recorded, they are set out in full as follows.

[16] The applicant filed its position on 18 November 2021, stating:³

The Trust Board's position

As the Trust Board understands matters, even though the text of the declaration has now been agreed by the parties, it is incumbent on the Court to satisfy itself that it has a sufficient basis to make the declaration sought (even if the declaration is now sought by agreement).

This is because, declaratory relief is an important judicial remedy. It provides an efficient and effective means by which parties can clarify and establish their legal rights and obligations, without the need for further remedies.⁴ The value of a declaration should not be diminished because the wording of it has, in the end, been agreed. The Supreme Court has emphasised that the courts may make a declaration under the Declaratory Judgments Act 1908 even where there is no existing dispute, or where there is no *lis*.⁵ There is no reason why these findings should not apply to declarations made under different jurisdictional pathways, including under s18(a) of the Te Ture Whenua Maori Act 1993, which provides the jurisdictional basis in these proceedings.

² At [2].

³ At [4]-[13].

⁴ Refer for example, as reflected by the Law Commission in its identification of the issues for the first principles review of declaratory judgments in New Zealand law that it commenced in 2016 (but which appears to have been discontinued before making much progress): <https://www.lawcom.govt.nz/our-projects/declaratory-judgments>.

⁵ *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [5]-[9] per Elias CJ and [82] per Blanchard, Tipping, McGrath and William Young JJ.

Accordingly, there can be no doubt that the Court has the jurisdiction to make the declaration sought.

As for whether this Court should make any declaration, the respondents' opposition to the making of the declaration has evaporated – although it is anticipated that they will say that this was for pragmatic reasons and that they still do not think that a declaration should be granted. Any attempt to diminish the value of the declaration should be resisted by the Court.

Once [sic] case referred to by counsel for the trustees of the Iwi Trust, in support of their position, was *Birkenfeld v Yachting New Zealand Inc* [2009] 1 NZLR 499. That case also confirmed that it was not necessary for an applicant for declaratory relief to have a subsisting cause of action or right to some other relief.⁶ However, the circumstances in *Birkenfeld* which led to the Court declining to make a declaration were very particular (and different to the present proceedings) – there was a limitation regime in play. Unsurprisingly the Court found at [55]:

Here we are satisfied that, Parliament having established both the limitation regime and a system for the investigation of mishaps, including means for experts to establish findings which may increase transport safety, it is neither necessary nor desirable for the judiciary by exercise of discretion under the Declaratory Judgments Act to impose a parallel system of investigation by lay judges which is not required for the purpose of compensation for injury. Nor does the claim of injury to reputation justify that course.

As for whether any declaration will have utility, it is submitted that the very machinations of the parties in arriving at the text of the declaration (despite the respondents at an early stage saying they did not disagree with the then formulation of the declaration) demonstrates the utility in the making of the declaration.

In any event, quite independently of the respondents, it is of significant utility for the Trust Board itself to have confirmation that it is the legal owner of the Waiheke Station Farm, and a clear understanding of the terms of the trust on which it holds that land. There would have otherwise been room for significant debate going forward, as there has been in the past. For example, the Crown had only last year, before the Waitangi Tribunal, submitted that the Trust Board held the Farm on an “interim trust”.⁷ This position has now necessarily been abandoned, as the Crown has not sought for any term of the trust reflecting an “interim” nature to be included in the terms of the trust to be declared.

As for relevance in any other proceedings, rather than being (or approaching) an abuse of process as Counsel for the trustees of the Iwi Trust suggests, the Trust Board considers the making of the declaration to be in the interests of justice. It is very appropriate that the High Court has confirmation, by way of a declaration from the Māori Land Court (the specialist tribunal with primary jurisdiction over trusts relating to Māori land), as to who owns the land and on what terms. The parties to those proceedings can also go into the High Court proceedings with that certainty in mind.

Forward progress

The Trust Board looks forward to the Court's declaration.

⁶ At [35]-[38].

⁷ Wai 2982, 2.5.

In addition to however the Court wishes to capture the position of each of the parties in the recitals to its declaration, the Trust Board invites the Court to also:

- (a) record the legal basis for it to issue the declaration, and any principles it is relying on; and
- (b) address the background or history to the ownership and management of the Waiheke Station Farm, since its gifting from the Crown to Ngāti Paoa in 1989. The Agreed Common Bundle contains all the relevant decisions of the Māori Land Court in this regard, if that would assist the Court in its task. This would avoid any criticism of the declaration being made in some sort of a vacuum, and without context.

[17] The respondents filed their position on 22 December 2021, stating:⁸

Respondent's position

The respondents seek their position on the following two key points to be recorded alongside the declaration:

- 3.1 the appropriateness of making a declaration; and
- 3.2 declining to plead under s 18(1)(ba) of Te Ture Whenua Māori Act 1993 (TTWMA) to resolve a live question.

Appropriateness of making a declaration

As indicated earlier in these proceedings, the respondents submitted there was no reasonably arguable cause of action within the Court's jurisdiction and within scope of the application (both originally⁹, as amended¹⁰ and in the applicant's proposed statement of issues¹¹), particularly in light of the respondents' position on the ownership of the Waiheke Station Farm and terms of the Waiheke Station Trust.

It was a matter of fact, court record and agreement between the parties that the applicant became, and is currently, the sole trustee of the Waiheke Station Trust and it is a matter of law that trustees legally own the property they hold on trust for the benefit of beneficiaries. The terms of the Waiheke Station Trust were also a matter of fact, court record and agreement. Therefore, there was no need to seek a Court declaration and, in the ordinary course, it would therefore be inappropriate to make any such orders.

In addition to there being no dispute, the respondents consider these proceedings are also moot. As indicated in an earlier memorandum, Ngāti Paoa has ratified and signed a deed of settlement with the Crown and one of the settlement terms is to transfer ownership of the Waiheke Station Farm to the post-settlement governance entity (PSGE) through settlement legislation to manage and hold for the benefit of the same

⁸ At [3]-[10].

⁹ The original application dated 15 March 2021 also included causes of action described as 'a breach of the tort of legitimate expectation; a breach of duty of care and/or fiduciary duty; and/ or a breach of contract'.

¹⁰ The amended application dated 2 August 2021 also included a cause of action described as 'the history of the Waiheke Station Trust, from its return by the Crown to Ngāti Paoa'.

¹¹ The proposed statement of issues included further matters considered by the applicant to be at issue including "Did the Crown gift the Farm to Paoa, and, if it was not a gift but a settlement, was it an outright settlement of the Waiheke Claim (under the Maori Affairs Act and prior to the commencement of Treaty Settlements), and not settlement 'on account'?" and "Does the Trust Board's register meet the requirement under the trust that it, as sole trustee, 'establish and maintain an up to date list of beneficiaries and their addresses'?"

beneficiary class (i.e. those who whakapapa to Paoa). The question of the legality of the transfer of the Farm to the PSGE is currently before the High Court (as acknowledged in the Trust Board's application) and will become a matter for Parliament.

Notwithstanding its position above, the respondents have agreed to the declaration, instead of applying for strike-out, as a pragmatic solution to bring these proceedings to an end and to prevent further costs being incurred.

Declining to replead to resolve a live issue

The respondents also wish to have it recorded that one of the apparent live disputes between the parties is the definition of who, and who does not, fall within the Waiheke Station Trust beneficiary class and therefore who can benefit from being in that beneficiary class. While the description of the beneficiary class is a matter of fact and record (i.e. those who whakapapa to Paoa), the applicant appears to take a different view from the respondents as to who meets that definition.

This dispute between the parties manifests itself in the current High Court proceedings where the applicant says the Crown erred in law by accepting the results of the Ngāti Paoa ratification processes partly on the basis that people who cannot whakapapa to Paoa participated. A declaration by this court on the issue of who can and cannot whakapapa to Paoa could arguably have enabled the High Court to better assess the legality of the Crown's decision to accept the ratification results. Instead, and despite agreement between the Court and counsel at a judicial conference in this proceeding that the applicant would replead under s 18(1)(ba) TTWMA, the applicant declined to put that question before this Court and instead pursued declarations on matters the parties were already in agreement about.

Next steps

As indicated above, the respondents are not seeking a declaration or determination on anything in its position above but merely seek the inclusion of its position alongside the agreed declaration to provide some context as to why these proceedings concluded in this way.

Te Ture

The Law

[18] Section 18(1)(a) of the Act provides:

18 General jurisdiction of court

- (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
- (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest...

[19] Case law makes it clear that the Court’s jurisdiction is declaratory in nature – the Court may declare existing ownership rights at law or in equity but cannot create new ownership rights.¹²

Kōrerorero

Discussion

[20] All parties in this matter agree that the applicant is the owner of the farm. By confirming this, no new ownership rights would be created. It is therefore appropriate for the Court to make declarations to that effect, noting the respective positions of the parties as set out above.

[21] The parties agreed for the declaration to confirm the terms of the trust on which the farm is held by the applicant. However, these terms do not strictly match the original terms of trust as articulated by this Court when the trust was established.¹³ I raised this point with the parties by minute dated 18 May 2022. In that minute I indicated that the declaration as sought regarding the terms of the trust did not reflect the terms of the trust. I observed that I did not appear to have the power to declare different terms of trust to those specified originally by the Court and nor could I amend those terms because the requirements of s 244 of the Act had not been satisfied. I proposed a reformulated declaration in relation to the terms of the trust and called for submissions on this point from the parties. By memoranda of counsel dated 26 and 27 May 2022, the parties agreed with the reformulated declaration regarding the terms of the trust.

Kupu whakataunga

Decision

[22] Pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993, I make the following declarations:

- (a) The Ngāti Paoa Trust Board as sole trustee of the Waiheke Station Trust is the legal owner of the blocks of Māori freehold land together known as Waiheke Station Farm (and any other assets of the Waiheke Station Trust).

¹² *Nga Uri a Maata Ngapo Charitable Trust v McLeod* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223), *Williams v Williams – Matauri 2F2B* (1991) 3 Taitokerau Appellate MB 20 (3 APWH 20), *McCann – Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Takitimu Appellate MB 2 (11 ACTK2) and *Paki – Matauri X Inc* (1996) 5 Taitokerau Appellate MB 16 (5 APWH 16).

¹³ 91 Hauraki 83-88.

(b) The terms of the Waiheke Station Trust are as set out at 91 Hauraki 83-88, noting that various of those terms were to apply for a finite period which has expired. The key terms that remain are as follows:

- (i) All trust property is held and administered for the benefit of those who whakapapa to the eponymous ancestor Paoa; and
- (ii) The trustee shall establish and maintain an up-to-date list of beneficiaries and their addresses.

[23] The Case Manager is directed to distribute a copy of this judgment to all parties.

I whakapuaki i te 3.00 pm i Te Whanganui-a-Tara, toru tekau o ngā rā o Haratua i te tau 2022.

D H Stone
JUDGE