

**IN THE MĀORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT****A20180003539**

UNDER The Māori Reservation Regulations 1994

IN THE MATTER OF Hauhungaroa 1A3 Block (Poukura Pā)

BETWEEN PARANAPA REWI OTIMI ON BEHALF OF
THE KAUMĀTUA KI TE TINI O
PAREKAAWA
Applicant

AND JASON FA'UHIVA, KAHURANGI
DAVISON, TE AURERE HEPI, WILLOW
DAVISON, GREGORY RIWAI, CRAIG
PARANIHI AND ATONIO FA'UHIVA AS
TRUSTEES OF POUKURA PA
Respondents

Hearing: 16 July 2018, 390 Aotea MB 83-101
(Heard at Turangi)

Appearances: Paranapa Otimi in person
Antonio Fa'uhiva and Kahurangi Davison in person

Judgment: 24 December 2018

INTERIM JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Paranapa Otimi seeks an inquiry into the Māori reservation over part of Hauhungaroa 1A3, known as Poukura Pā. He alleges there has been serious breaches of tikanga and of the terms of the marae charter, which the trustees have failed to investigate or satisfactorily address. Mr Otimi confirms that a beneficiaries meeting was held in April 2018 where a vote of no confidence in the current trustees was passed. Mr Otimi and those he represents now seek the removal of all trustees.

[2] The trustees deny the allegations. They say that the applicant has shown no desire to resolve the concerns, rather, he has moved to demand the immediate removal of all trustees. The trustees argue that they have sought support from the marae beneficiaries and from the

immediate predecessors but note that this has not been forthcoming, which has created its own challenges. The trustees also say that they have upheld their duty to act in good faith in the exercise of their powers, for the benefit of those entitled to use and enjoy the reservation, to the best of their abilities and without proper support from the outgoing trustees.

[3] The application was heard on 16 July 2018 with the applicant and several of the current trustees present as part of a large number of attendees, several of whom made oral submissions.¹ At the conclusion of the hearing I reserved my decision. Since then, several further submissions were filed with the Court by both the applicant and trustees and by other interested parties.

Issues

[4] The issues for determination are:

- (a) Should an inquiry be conducted into the allegations?
- (b) Should the current trustees be removed?

Background

[5] Hauhungaroa 1A3 is Māori freehold land with an area of 16.329 hectares created by partition order dated 16 October 1924.² There are currently 237 owners in the land with a total shareholding of 1.00 shares.

[6] On 2 May 1968, part of the land was set aside as a Māori reservation for the purposes of a meeting place and building site, for the common use and benefit of the Ngāti Parekaawa sub-tribe.³ The original trustees were Arekatera Mariu Gage, Hauauru Howard Kahura and Ira Kahura.⁴ The latest marae charter was filed with the Court on 9 May 2018.

[7] The current trustees are Jason Fa’uhiva, Kahurangi Davison, Te Aurere Hepi, Willow Davison, Gregory Riwai, Craig Paranihi and Atonio Fa’uhiva.⁵

¹ 390 Aotea MB 83-101 (390 AOT 83-101)

² 20 Tokaanu MB 74-75 (20 ATK 74-75)

³ “Setting Apart Māori Freehold Land as a Māori Reservation” (2 May 1968) 26 *New Zealand Gazette* 701 at 704

⁴ 59 Tokaanu MB 91-92 (59 ATK 91-92)

⁵ 380 Aotea MB 298-300 (308 AOT 298-300)

Applicant's submissions

[8] Mr Otimi submitted, on behalf of the Kaumātua Ki Te Tini o Parekaawa that he and those he represents have no confidence in the Poukura Marae trustees. He referred to the following as the grounds for such lack of confidence, for the application seeking an inquiry into the reservation and for the removal of the trustees:

- (a) serious breaches of Ngāti Parekaawa and Ngāti Tuwharetoa tikanga;
- (b) ongoing disrespect of kaumātua o te haukainga;
- (c) a failure to investigate circumstances surrounding the resignations of two trustees and a failure to resolve matters with those trustees before accepting their resignations;
- (d) a failure to uphold the Poukura Marae charter guiding principles;
- (e) a failure to uphold the Poukura Marae charter and the Poukura Marae procedures manual for managing and resolving conflict, in relation to the concerns raised by kaumātua of Poukura Marae and Ngāti Parekaawa Hapū and despite requests by the kaumātua to meet and address the matters of concern; and
- (f) breaches of due process of the Māori Reservation Regulations 1994, regs 6(b) and 7(e)-(g) by:
 - (i) Failing to confirm the agenda for the annual general meeting (“AGM”);
 - (ii) Failing to allow points of order to be heard;
 - (iii) Failing to follow proper procedures as a forerunner to closing the AGM; and
 - (iv) Failing to call for a resolution and vote from the floor before arbitrarily declaring the AGM to be closed.

[9] The application also details the steps taken by the kaumātua to address their issues directly with the trustees prior to the filing of the application. The documents show an initial meeting of the kaumātua was held on 16 March 2018, following which the trustees were advised of the outcome and invited to attend a meeting with the kaumātua to discuss their concerns directly. The trustees replied but did not attend the meeting and a vote of no confidence in the trustees was subsequently carried at that meeting. The kaumātua advised the trustees of that vote and requested that the removal of trustees be placed on the agenda for consideration at the AGM. However, when the AGM was held, there was no opportunity for the issues to be raised and the chairperson “arbitrarily” closed the meeting.

[10] Mr Otimi submits that all trustees should be removed. He proposes that interim trustees be appointed for the remaining term of the existing trustees, to maintain a kaitiaki role until May 2019 when a special general meeting be facilitated by the Court to elect new trustees and consider trust order amendments

Other interested parties

[11] Several other parties filed submissions confirming the issues raised in the application and referring to particular incidents which had occurred. A common theme was reference to breaches of marae tikanga, failures in matters of administration of the reservation, such as the booking and use of the marae, and difficulties with communication between the trustees and beneficiaries, sometimes resulting in confrontations. Many of these individuals supported the vote of no confidence and removal of the trustees.

[12] For example, Carmen Te Rerehau Gage referred to several incidents she experienced with the trustees, where they failed to uphold the tikanga of Parekaawa. She says the trustees are disrespectful to the kaumātua and have shown no support to welcome the local school onto the marae, who have been visiting the marae for the past 30 years. Further, Ms Gage submitted the trustees have failed to fulfil their duties, including the failure to hand over the keys of the marae to people that have booked the marae, and the trustees did not allow the use of facilities on the marae, such as the chiller, generator and the tool shed.

[13] Bronwyn Hunt and Craig McGregor, from the Kuratau School submitted that they have always been welcomed onto the marae, during their visit to the marae. However, the current trustees informed them, if they wanted to be welcomed on to the marae with a pōhiri, this was something they would have to organise themselves.

[14] Gail Ngapaki Joyner, the daughter of a former trustee Junior Hona Grant, submitted that upon her father's death the whānau were under the impression the trustees would provide the key or have the wharekai opened so the whānau could hang her father's picture. However, Ms Joyner was disappointed to find upon arrival, that the wharekai was locked and none of the trustees had arrived to show respect to a former trustee.

[15] Marydeane Paranihi-Morris referred to an incident she encountered involving Neil Edwards, who was the Chairman of Poukura Marae in 2014. The incident essentially was of Mr Edwards using physical force against her kuia, then aged in her mid-80s, when collecting

pūtea for the rental of the use of the marae. Ms Parahi-Morris, submitted that using physical force against a kaumātua is akin to using the same method in a vulnerable infant.

[16] Kim Alexander, a beneficiary of Parekaawa, submitted concerns with the lack of cooperative behaviour the trustees have displayed and recalled an incident involving a request made to the trustees to have a copy of the trust's charter. The trust secretary replied in an e-mail that the trust's charter cannot be e-mailed out or made available outside of the trustee meetings and if a copy is wanted, then this could only be obtained independently from the Māori Land Court.

Trustees' submissions

[17] As foreshadowed, the trustees denied the allegations and made submissions specifically addressing each of the matters raised in Mr Otimi's application.

[18] Regarding the allegations of breach of tikanga, the trustees submitted that there is no common understanding of what constitutes Ngāti Parekaawa tikanga and therefore they cannot uphold something which has not yet been clearly defined. They argue that this issue was previously raised in 1999 by the then chairperson but has remained unresolved. Unfortunately, they say, this issue has been the source of many of the problems experienced between hapū members over the years and the trust records show identification of the need for wānanga to address this.

[19] The trustees also submitted that when they were appointed, the incumbent trustees neglected to provide them with any tangihanga procedures. The trust has attempted to address this and has sought input from the hapū, however, to date no solution or guidance has been forthcoming. More generally, the trustees noted that several matters concerning marae administration were not properly handed over by the incumbent trustees and there was no ongoing support from them. This was a challenge for the trustees, but they have worked tirelessly to set and achieve goals identified as being of most benefit to Ngāti Parekaawa.

[20] The trustees denied any disrespect to kaumātua of the haukainga. The incident which the applicant refers to relating to the pae, involved an exchange of words between three or four individuals, resulting in offence being taken and those parties leaving. The trustees say that none of those individuals involved were current trustees and the trust does not have the authority or responsibility to control what individuals say to each other on the reservation. The trustees' understanding is that management of the pae has always been

outside of the trust and such responsibility rests upon members of the pae, with endorsement and guidance from the kaumātua. The trustees believe this is a matter for the individuals themselves to resolve.

[21] Regarding allegations of failures to follow due process and the marae charter guiding principles, the trustees argued that this was a vague allegation with no examples offered as evidence. They contend that all required processes have been followed and guiding principles adhered to, except where ambiguity has made it difficult. In such situations, the trust has proceeded by majority decision whilst seeking further guidance if necessary. In addition, the trustees denied breaches of the Māori Reservation Regulations 1994. They claimed that they have upheld their duty to act in good faith for the benefit of those entitled to use the reservation, to the best of their ability and that a process is being undertaken to review the current charter.

[22] The trustees further submitted that there is no requirement, either in the legislation or the marae charter, for the trustees to investigate resignations. They noted that the trustees successfully encouraged the secretary to refrain from resigning and continue in her role, implementing additional measures to assist her. In relation to the resignations of the treasurer and maintenance officer, their resignations were given at a trustee meeting and there was no opportunity to discuss their decision.

[23] Finally, regarding conflict resolution, the trustees argued that it was the trust who first alerted the kaumātua to the conflict resolution process in the charter and marae procedures manual. They argue that the kaumātua have shown no desire to amicably resolve their concerns and instead demanded the immediate removal of all trustees. The trustees took advice from Court staff regarding the vote to remove them and the AGM agenda and notified the kaumātua they would be required to raise this with the Court. The trustees argue that the actions of the applicant and kaumātua have brought the character of individual trustees and their families into disrepute, by spreading untruths bordering on defamation. The trustees believe that had proper process been followed, there would have been a more positive outcome in the best interest of Ngāti Parekaawa and all Tuwharetoa.

[24] Further submissions were also filed in support of the trustees. Those submissions generally sought for the matter to be resolved without resorting to removal of the trustees, especially given the effect this would have on the name of those involved and if it would mean they could not be trustees in the future.

The Law

[25] The Court has jurisdiction to conduct an inquiry into the administration of a Māori reservation per reg 21 of the Māori Reservation Regulations 1994. It provides:

21 Inquiry into administration of reservation

- (1) The court may at any time, upon application made to the court by any beneficiary or person whom the reservation is intended to benefit, conduct or order such inquiry into the administration by any trustee of a reservation, as the court thinks fit.
- (2) No inquiry shall be conducted by the court unless—
 - (a) the applicant for such inquiry has filed with the court a statement, signed by the applicant, containing the detailed grounds upon which the applicant requires the inquiry; and
 - (b) the applicant has given to each trustee a copy of the application made to the court under subclause (1); and
 - (c) either—
 - (i) the court received a written statement, in relation to the application, signed by or on behalf of the trustees; or
 - (ii) the court has dispensed with compliance with subparagraph (i).

[26] Regulation 21 contemplates a two-stage process. Firstly, the Court determines whether to conduct or order an inquiry. Secondly, if the Court decides to undertake an inquiry, it may conduct the inquiry in the manner it thinks fit. In doing so, the Court may invoke its various powers pursuant to ss 237-245 of the Act as necessary.⁶ This includes the removal of trustees per s 240.

Discussion

Should an inquiry be conducted into the allegations?

[27] There was sufficient evidence before the Court to require an inquiry into the conduct of the trustees once the application and subsequent supporting documents were filed and once the trustees had an opportunity to file responses to those claims. This includes concerns over the tikanga of Ngāti Parekaawa to be observed on the marae. When the proceedings were set down for hearing I was satisfied, in the absence of any further defences from the trustees, that an inquiry was appropriate. Having now heard from them, and received their submissions, that initial view has only been reinforced. So, the first limb of reg. 21 has been satisfied.

⁶ *Hamilton – Tuahu 3X (Erepeti Marae)* (2009) 34 Gisborne Appellate MB 230 (34 APGS 230)

[28] In addition, as a result, a division amongst the trustees and beneficiaries has been created which could have wide reaching effects on whānau and hapū. The beneficiaries and the trustees have become divided, apparently over fundamental issues of process, tikanga and accountability. This was also evident from the large attendance at the last hearing where there was standing room only for many attendees, most of whom spoke or behaved in a manner that was clearly not in support of the trustees. That attendance included the presence of Tā Tumu Te Heuheu, a rare event in proceedings before this Court and, in accordance with tikanga, an important point to note. There is now sufficient doubt over whether the trustees have retained the support of the beneficiaries, notwithstanding subsequent claims some individuals who attended the hui in April 2018 may have had only a tenuous affiliation to the marae.

[29] My conclusion is that serious concerns have been raised over the conduct of the current trustees sufficient to consider both an inquiry into the allegations and whether the trustees have either misconducted themselves or lost the support of their beneficiaries or both, sufficient to warrant their removal.

Should the trustees be removed?

[30] Section 240 of the Act provides:

240 Removal of trustee

The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—

- (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
- (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[31] The prerequisite for removal of a trustee is not a simple failure or neglect of duties, but a failure to perform them satisfactorily. An assessment of trustee performance will be necessary, considering the standard duties of trustees, the special nature of Māori land trusts and the provisions of the Act.⁷

[32] In addition to s 240, reg 3(f) of the Māori Reservation Regulations 1994 provides the Court with the power to remove trustees of Māori reservations where their conduct has been

⁷ *Rameka v Hall* [2013] NZCA 203 at [30]

assessed as warranting such a drastic step. In *Perenara v Pryor – Matatā 930*, the Māori Appellate Court stated:⁸

As a general approach the Court should proceed with caution when asked to consider removal. Conversely, we also endorse the notion that immediate removal should follow obvious abuse, failure or malfeasance. However, ... the test to apply is not one confined to obvious abuse, failure or malfeasance. Rather the legislation may, depending on the circumstances of each case, also require a consideration of trustees' performance to assess whether they have carried out their duties satisfactorily. In considering performance, the rules of natural justice must be observed, the appropriate legal thresholds as provided for in the Act, the Trustee Act 1956 and the Reservation Regulations have to be reached and the Court must consider whether there is any positive defence or reasonable excuse for unsatisfactory performance.

[33] The evidence confirms serious disquiet within the beneficiary community who affiliate to this marae. Some of the examples provided appear inexplicable while the explanations given were unconvincing. It was also not disputed that the most recent general meeting involving the trustees was closed before the various issues raised could be properly discussed and considered. It was also said that Tā Tumu had been treated disrespectfully, although the evidence was conflicting on this point. Even so, I prefer the evidence of those who claimed the disrespectful treatment over the explanation provided.

[34] As to the issues over tikanga and access to marae facilities from time to time, these too seemed serious enough to warrant intervention because from what many of the beneficiaries have said, the marae has not been functioning as it should, contrary to the assertions of the trustees and their supporters. While it became evident that personal challenges exacerbated the relationships, nonetheless, the picture painted was not one that could give the Court confidence in the activities of the trustees, taken as a whole. My conclusion is that, overall, the conduct of the trustees has been below the standard expected for those persons holding that office. Indeed, by their own admission the trustees accepted that they were inexperienced and had sought assistance that had not been forthcoming.

[35] Section 222 is also apposite in the present circumstances. While the provision refers to the appointment of trustees, it also underscores the importance of trustees remaining broadly acceptable to the beneficiaries. Where the trustees no longer hold a mandate from the beneficiaries, the Court may consider whether their trusteeship should continue.⁹ In the

⁸ *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate Court MB 233 (10 AP 233) at 241

present case, the evidence currently before the Court appears to confirm that the trustees have lost the support of the beneficiaries, or at the very least, that support is now in question. Against the background of the allegations made against them, perhaps that diminishment of support is unsurprising.

[36] Accordingly, it is necessary that their mandate be tested at a duly convened meeting of beneficiaries. While Mr Otimi has requested a general meeting be held in May 2019 and that the current trustees be replaced by an interim group, I see no reason why an election should not be held earlier than May. Given the holiday season, the events surrounding Waitangi Day commemorations and the upcoming Matatini Haka Festival, a meeting at the end of January or February 2019 will be too early to arrange successfully. In this context I note that at the last hearing at least one of the trustees acknowledged that whatever the possible outcome, that there “would be no hard feelings”.¹⁰ Ms Davison also agreed that there should be a meeting of the marae beneficiaries to start the process again and “go back to the beginning”.¹¹

[37] It should also be remembered that in accordance with reg 3(h) of the Māori Reservation Regulations 1994, if a reservation trustee is removed by the Court, they will not be eligible for reappointment as a trustee. In such circumstances, it may be appropriate to give trustees the opportunity to resign so that they retain their eligibility for appointment at any subsequent election.¹² I invite the current trustees to resign from their roles. The case manager is directed to contact all current trustees for that purpose. If any trustee refuses to resign, then they will be removed because they have satisfied the provisions of s240 of the Act and secondly, because they have lost the support of their beneficiaries, per s222. They may then offer themselves for re-election at the March meeting.

[38] In the meantime, however, a practical approach is required. This will necessarily involve retention of at least one or two of the current trustees along with the appointment of two additional interim trustees until the election is held. To that end, I consider it appropriate that Mr Fa’uhiva and Ms Davison, both of whom appeared at the hearing, should remain in office until the election. It is important that there be some continuity in the operation of the marae in terms of access to keys and marae facilities, especially during the

⁹ *Ellis v Faulkner – Poripori Farm A* (1996) 57 Tauranga MB 7 (57 T 7); *Naera v Fenwick – Whakapoungakau 24* (2010) 15 Wairiki MB 279 (15 WAR 279); and *Sullivan v Sullivan – Te Haroto 2B2B* (2014) 31 Tākitimu MB 138 (31 TKT 1368) at [13]

¹⁰ 390 Aotea MB 92 (390 AOT 92)

¹¹ *Ibid*, 93-94

¹² *Taueki - Horowhenua 11 (Lake) Māori Reservation* (2005) 163 Aotea MB 99 (163 AOT 99)

busy holiday period. In addition, the appointment of up to three of the individuals nominated at the meeting convened by Mr Otimi and those supporting him is appropriate to ensure that the functioning of the marae continues, and that support is also provided by the appointment of three additional interim trustees.

Decision

[39] All current trustees, excluding Kahurangi Davison and Antonio Fa'uhiva, are invited to immediately resign from their positions as responsible trustees. Failing that they will be removed per s222 and 240 of the Act. Ms Davison and Mr Fa'uhiva will remain in office as interim trustees until the election or until further order of the Court.

[40] Ta Tumu Te Heuheu, Pompy Marshall, and Tikina Kereama are appointed interim trustees on the same terms set out above.

[41] Ngakuru Edwards, Marlene Clemas, Dennis Holster, Te Aurere Hepi and Carmen Gage are appointed advisory trustees on the same terms set out above.

[42] The registrar, in concert with the trustees and the applicant, should convene an election of trustees on or before 31 March 2019 at Poukura Pā.

[43] Following that, a special sitting will be convened for hearing an application for the appointment of replacement trustees.

[44] Leave is reserved for any party to seek further directions at any time.

[45] There is no order as to costs.

Pronounced at 11.45am in Rotorua on Monday this 24th day of December 2018



L R Harvey
JUDGE