

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

A20190001840

UNDER Section 43, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Mangorewa Kaharoa 6E3 No 2 Papakainga
15A2A

BETWEEN ISABELLA PHILLIPS
Applicant

AND GLORIA MOANA PAUL and CAROL BIDOIS
Second Applicants

AND ALAN PAUL, MARIA PAUL and RUDOLPH
PATRICK PAUL AS TRUSTEES OF THE
MANGOREWA KAHAROA 6E3 NO 2
PAPAKAINGA 15A2A AHU WHENUA TRUST
Respondents

Hearing: 5 June 2019, 213 Waiariki MB 128-142
(Heard at Rotorua)

Appearances: Ms E Phillips on behalf of the applicant
Ms C Haumaha for the second applicants
Ms M Insley for the respondents

Judgment: 23 July 2019

JUDGMENT OF JUDGE C T COXHEAD

He hōnore, he kororia ki te Atua, he maungārongo ki te whenua, he whakaaro pai ki ngā tāngata katoa tētahi ki tētahi

E tangi tikapa ana te kanohi ora mō rātou kua hoki ki te marinotanga, ki te urunga tē taka, tāoki mai rā koutou. Heoi, me pēnei noa te whakataua, ko rātou ngā mate ki a rātou, ko tātou te kanohi ora ki a tātou.

Hei tīmatanga korero – Introduction

[1] Isabella Phillips has applied for a rehearing of an application to create the Mangorewa Kaharoa 6E3 No 2 Papakainga 15A2A ahu whenua trust (the ahu whenua trust).

[2] Her application for rehearing is supported by Gloria Moana Gibbons (nee Paul) and Carol Bidois. While Gloria is an owner in the land subject to the trust, Carol is not. Carol's partner of 30 years was an owner in the land before he passed away. She continues to live in the homestead they once occupied together on the land. Carol joins this application due to an interest arising from her occupation of the subject land.

[3] The majority of the trustees of the ahu whenua trust, that I constituted on 7 December 2018, oppose the application for rehearing except for Robert Trotman, who spoke in support of the application at the hearing.

[4] The issues in this case are:

- (a) Whether the rehearing application should be accepted out of time; and
- (b) Whether a rehearing should be granted.

Kōrero whānui – Background

[5] On 3 October 2018, the Court received an application by Alan Paul to create an ahu whenua trust in respect of Mangorewa Kaharoa 6E3 No 2 Papakainga 15A2A (the block). The application noted that a hui had been advertised in the Rotorua Daily Post on 1 August 2018 and held on 22 August 2018. Six people attended. The application further indicated that some phone calls had been made to local owners and no objections had been received.

[6] The application came before the Court on 7 December 2018 and orders were made for immediate effect, establishing the ahu whenua trust over the block and appointing Alan Paul, Maria Paul, Rudolph Patrick Paul and Robert Trotman as trustees.

[7] On 3 February 2019, Isabella Phillips filed an application for rehearing with the Court. Her application falls outside the 28-day time period for filing required under s 43(2) of Te Ture Whenua Māori Act 1993 (the Act).

Ngā kōrero a te kaitono – Submissions of the applicant

[8] At the hearing, the applicant was represented by her daughter, Ms Elizabeth Phillips. Elizabeth submitted that the application was filed out of time as her mother was unaware of both the 7 December Court sitting and the 22 August meeting of owners to discuss the establishment of the trust. The applicant submits she did not receive proper notice of either of these events either before or after they happened and had to seek out further information from the Court.

[9] The applicant first heard of the ahu whenua trust from her daughter in mid-January 2019. Elizabeth was informed by a whānau member that the trust had been established and immediately sought advice from the Māori Land Court office in Auckland. The applicant submits that, until then, neither she nor her daughter had seen the minute of the Court hearing where the orders were made.

[10] It is submitted the applicant filed for rehearing shortly after receiving advice from Court staff.

[11] In terms of the original application, the applicant argued she ought to have been notified of the proceedings as she is an owner in the land and the eldest living child of the original owner. Isabella did not receive notice of the 22 August hui nor did she receive a copy of the minutes. As such, she was unable to express her views on the establishment of the trust in general and the election of trustees in particular.

[12] The applicant also expressed concern that only one branch of the family was involved in the establishment of the trust.

Ngā korero a ngā kaitono tuarua – Submissions of the second applicants

[13] The second applicants filed separately in support Isabella Phillip’s application.

[14] Counsel for the second applicants submits that a rehearing is justified due to a lack of notice to relevant parties. Only six owners of the thirty-eight (38) attended the meeting to vote on the potential trust. This cannot be considered a wide enough representation of owners.

[15] Counsel submits that the notice for the meeting was inadequate. Although it is accepted that advertisement in a newspaper is normally sufficient notice, the advertisement was run only once and no other form of notice was used, limiting the reach. The notice would have been better spread using Facebook and letters, especially to older owners such as Isabella Phillips. Counsel particularly noted that Isabella Phillips lives outside of Rotorua area where the newspaper is delivered, making a letter all the more suitable.

[16] Without notice, owners were unable to properly consider the proposal and participate in discussions regarding formation of the ahu whenua trust. Additionally, the applicants were unable to nominate trustees for election nor participate in the vote to determine representation.

[17] It is further submitted the applicants ought to have been notified of the application to the Court to establish the trust and appoint trustees. As they were unable to consider the proposal or express their views, the Court cannot be satisfied that it properly met the test under s 215(4) of the Act and Counsel submits the trust was therefore, not properly constituted. The same principle applies to the appointment of the trustees, who cannot rightly be considered broadly acceptable to the beneficiaries.

[18] In order to properly obtain the views of the owners, counsel submits the rehearing should be granted and seeks orders requiring a further meeting of owners before the matter comes back to be determined anew.

Ngā korero a ngā kaiurupare – Submissions of the respondents

[19] Counsel for the respondents submits that the rehearing should not be granted. The process of establishing the ahu whenua trust was considerable and not only put the trustees to some trouble but has left them responsible for a trust that has no income and rates owing.

[20] By establishing the ahu whenua trust, the respondents sought to create some certainty around management of the land, particularly in relation to the house on the land and its occupancy. The trust now established is working to clear the debts on the land from unpaid rates and counsel submits that unpicking the trust will undo their good work and create further uncertainty.

[21] The respondents submit the meeting was properly notified in the newspaper and that notice made it clear the formation of an ahu whenua trust would be discussed. At the meeting, all parties present supported the establishment of the trust.

[22] In addition, the respondents contend that Isabella Phillips was aware of the plan to establish the ahu whenua trust as a telephone conversation was had with her. Regardless, counsel submits that the newspaper advertisement must have been sufficient as an owner from Australia was able to send a son as his proxy to attend the meeting.

Te Ture – Law

[23] Rehearings are governed by s 43 of the Act, which reads as follows:

43 Rehearings

- (1) Subject to subsection (2), on an application made in accordance with the rules of court by any person interested in any matter in respect of which the court has made an order, the Judge by whom the order was made or any other Judge may order a rehearing upon such terms as the Judge thinks reasonable, and in the meantime may stay the proceedings.
- (2) A rehearing under this section shall not be granted on an application made more than 28 days after the order, unless the Judge is satisfied that the application could not reasonably have been made sooner.
- (3) An application under this section shall not operate as a stay of proceedings unless the Judge so orders.
- (4) The rehearing need not take place before the Judge by whom the proceedings were originally heard.

- (5) On any rehearing, the court may affirm its former determination, or may vary or annul that determination, and may exercise any jurisdiction that it could have exercised on the original hearing.
- (6) When a rehearing has been granted, the period allowed for an appeal to the Maori Appellate Court shall not commence to run until the rehearing has been disposed of by a final order of the court.

[24] The principles underlying an application under s 43 were discussed by the Māori Appellate Court in *Henare v Māori Trustee*.¹ I adopt the following summary of them:

- (a) The proper administration of justice must be balanced against the need for finality in Court proceedings.
- (b) An application under s 43 must be filed within 28 days of the order in question unless the Judge is satisfied it could not have been filed sooner.
- (c) The Court has a discretion to grant a rehearing where to do otherwise may result in a miscarriage of justice.
- (d) A rehearing is justified in *inter alia*, a case where the successful party has acted improperly or unfairly and caused prejudice to the opposing party; new, material evidence has been discovered; misconduct of a witness may have affected the result; and the rehearing will prevent an injustice to the applicant while causing no injury to other parties.
- (e) Rehearing cannot be used to repair a poorly stated case.
- (f) The Court retains a discretion to refuse to grant rehearing even where it may be justified.

[25] The ultimate issue, however, is where the interests of justice lie.²

¹ *Henare v Māori Trustee – Parengarenga 3G* [2012] Māori Appellate Court MB 1 (2012 APPEAL 1) at [14]-[21].

² *White v Potroz - Mohakatino Parininihi No IC West 3A2* [2016] Māori Appellate Court MB 143 (2016 APPEAL 143).

Kōrerorero – Discussion

Should the rehearing be accepted out of time?

[26] As stated, orders establishing the ahu whenua trust were made on 7 December 2018. The application for rehearing was not received until 3 February 2019. Even allowing for the Christmas and New Year break, this falls well outside the 28-day filing period.

[27] It has been noted that Elizabeth Phillips sought advice from the Māori Land Court staff as soon as she heard about the ahu whenua trust. Once she had been provided with minutes of the hearing it was then that she spoke to her mother who filed the application.

[28] In summary, the applicant sought to file the rehearing application as soon as she became aware of the situation. As she had not been notified of the 7 December 2018 hearing or its outcome, there is no possibility she could have filed earlier.

[29] I am satisfied that the delay was no fault of the applicant and the application could not reasonably have been made within 28 days given the lack of notice. The application for rehearing is accepted out of time.

Should the rehearing be granted?

[30] In this situation there are 38 owners on this land block. At the hearing it became clear that Alan Paul and his family have taken the lead in terms of establishing the ahu whenua trust. Unfortunately, other than Alan and his family, very few owners have participated or had the opportunity to participate in discussions regarding the formation of an ahu whenua trust.

[31] Although an ahu whenua trust will clearly provide for better administration of the land block it must be properly constituted and account for the opinions of as many of the owners as possible. It is clear from these proceedings that there are owners who feel strongly about the whenua and wish to take an active role in its management yet feel they haven't been able to do so.

[32] I accept that the notice in the Rotorua Daily Post was in line with standard procedures, but it cannot, in these circumstances be considered sufficient. Very few owners

attended the meeting and a number of owners feel they have been left out or were not properly notified.

[33] In the Court hearing, it was apparent that the owners in this block are closely related and generally aware of each other's contact details. Indeed, at one point Josephine Paul, a niece of Isabella Phillips, stated that in order to have a previous whānau hui, she had collected the addresses of nearly all of the owners.

[34] In light of these circumstances, I see no reason why more effort could not have been made to notify owners.

[35] At the hearing, Robert Trotman, a current trustee spoke in support of the rehearing. He reasoned that all the trustees except himself are from a single family when in fact there are eight whānau who are owners in the land. When only one group of owners are determining matters on behalf of all others despite their desire to participate, this cannot be considered representative.

[36] I am satisfied that the notice of both the meeting of owners and the Court hearing was not sufficient in these circumstances of a small group of owners of a closely related family. The original decision does not, therefore, properly account for the opinions of the owners as a whole. The rehearing is granted.

[37] At the hearing, counsel agreed that a way forward may be for the Court to fund a meeting of owners and its proper advertisement. In my view, it would be best for the original applicants to call another hui with proper notice. The Māori Land Court can assist by advertising the hui in the Rotorua Daily Post and The Herald, Court staff can also assist with sending notice to owner addresses. The Court would be assisted by Josephine Paul, providing address of owners.

Kupu whakataua – Decision

[38] Pursuant to section 43(5) a rehearing is granted and the orders made at 7 December 2018 are annulled.

[39] The parties are directed to hold a meeting of owners to discuss management of the land going forward and election of trustees if necessary.

[40] On notice from the parties, the Registrar is directed to advertise the meeting of owners twice in the Rotorua Daily Post and once in The Herald newspapers.

[41] The Registrar is further directed to send notice of the meeting of owners by post to those addresses collected by Josephine Paul and any other addresses that can be gathered from the electoral role.

I whakapuaki i te 10:30am i Rotorua te 23 o ngā rā o Hūrae te tau 2019

C T Coxhead
JUDGE