

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

A20160005226

UNDER Section 67 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF Lot 200 DP 15345 Lower Hutt (WN905/77)
Waiwhetu or Arohanui Ki Te Tangata Marae –
Judicial Conference

BETWEEN TITIHUIA PUKETAPU
Applicant

A20160005612

UNDER Section 239 of Te Ture Whenua Māori Act
1993
IN THE MATTER OF Lot 200 DP 15345 (Waiwhetu Marae Maori
Reservation) – Replace Ihaia Porutu Puketapu
and Mahinarangi Gilbert with Ngapera
Moeahu-Teitinga and Tiana Rahera Roira Awa
as trustees

BETWEEN KURA TE RANGI MOEAHU
Applicant

A20160005653

UNDER Sections 224 of Te Ture Whenua Māori Act
1993
IN THE MATTER OF Lot 200 DP 15345 (Waiwhetu Marae Maori
Reservation) – Variation of trust

BETWEEN KURA TE RANGI MOEAHU
Applicant

Hearing: (Heard at Wellington) dated 3 February 2017

Judgment: 3 February 2017

ORAL DECISION OF JUDGE M J DOOGAN

[1] I am conscious that the application puts at issue the outcome of an election, with that in mind, I think it is important for all parties, for the beneficiaries, for the trustees that there be some clarity in response to the application as soon as possible and for that reason I want to give an outline orally today of how I wish to proceed. Because it is an oral decision I reserve the right to clarify the detail when the minutes are typed back but the substance will not change.

[2] Because it is an application for a judicial conference of itself, it is not an application that normally would be lead to orders being made at the hearing unless the evidence support it and it was on notice to all parties. But for reasons which I will explain, I am going to deal with it by way of a provisional determination primarily in order to try to give the parties some clarity about where matters stand currently and what happens next.

[3] This is an application for a judicial conference filed by Titihuia Puketapu. It challenges the outcome of an election process conducted on the 20th of September 2016 for the change of trustees by rotation of the Waiwhetū or Arohanui Ki Te Tangata Marae Māori Reservation (Waiwhetu Marae).

[4] In essence the applicant challenges both the process and the outcome of the election for the three board reasons. First that the process of voting for the two positions was not fair and excludes members or beneficiaries. Secondly, the process was unclear to many members. Thirdly, that many members were not informed at all formally by the trust of the process for the election.

[5] I will first summarise briefly the procedural steps leading up to today's hearing including the directions I gave in November for the filing of any further information and recording what the Court has received from the parties in support or opposition to the application

[6] On 13 September 2016 this application was filed (A20160005226). It included a request that the Court intervene to suspend the trustees elections to be held on 20 September 2016.

[7] I issued the following directions on 14 September 2016:

- a) The Court will not intervene with the AGM. This is a matter for the trustees to discuss and resolve. Any objections raised to the process of elections can be heard when the application is made to appoint new trustees.
- b) A copy of the application and supporting documents are to be distributed to all current trustees to bring these issues to their attention.
- c) Trustees are to file the minutes of the AGM as soon as they are available
- d) Leave is reserved to the applicant to file further submissions and or evidence following the AGM on or before 30 September 2016.

[8] Kura Moeahu as Chairman responded on behalf of five trustees dated 15 September 2016.

[9] Further submission was received from the applicant Titihuia Puketapu on 30 September 2016.

[10] Following a teleconference on 8 November 2016 this and related matters were set down for hearing in February 2017. Any further submissions were to be filed on or before 19 January 2017.

[11] On 23 December 2016, a notice of intention to appear was filed by Te Rira (Teri) Puketapu in support of this application.

[12] I heard today from Titihuia Puketapu in support of the application and also from her father Mr Te Rira Puketapu, who has been involved with the marae since its establishment in the 1950s.

[13] I heard from Mr Eric Reriti, who was asked to be a scrutineer on the evening of the election and from Mr Ihaia Puketapu (the applicant's brother), who was an unsuccessful candidate for election at the election.

[14] I also heard from Elizabeth Winitana and Noel Woods. Mr Woods is a trustee who in the lead up to the election suggested via social media that a new date should

be set to allow whanau more time. He along with Ihaia Puketapu had nonetheless been part of a unanimous decision of trustees in July 2016 to set the date and the election process.

[15] I had also heard in response from the trustees including the trust chair Mr Kura Moeahu and Peggy Luke-Ngaheke (Advisory Trustee) and Emai Owen and Kararaina Luke, trustees.

[16] Martha Gilbert and Tiana Awa spoke in support of the election process.

[17] By way of context, the evidence that I have before me establishes that in 2009 there was a change to the voting process for the trust. Mr Teri Puketapu has filed a number of documents which include legal advice the trust at that time received concerning both amendments to the trust order and advice as to a process for election. At that time, the process involved a combination of methods of voting, including voting in person, proxy voting and voting by post. Of relevance to this application is the fact that since 2009 the process adopted by the trust has again changed and, as I understand the evidence, since at least 2012 the process adopted has been one by which voting is conducted in person at the AGM and subject to the approval of the whakapapa committee as to entitlement to vote.

[18] The current form of the trust order appears at 338 Aotea Minute Book 172-197, it is dated 29 May 2015. The trust order at clause 8(a)(ii) provides as follows:

At general meetings any resolution that the meeting wishes to vote on shall be determined by a show of hands or by secret ballot of those present, or at the request of the trustees by postal voting.

[19] I heard today from a number of trustees who confirmed that in April and again in July 2016 there was discussion at trust meetings of the forthcoming election and the process. As I understand it, the trustees in July 2016 approved a method of voting that they understood was to be a repetition of the voting process adopted at the prior election in 2012.

[20] A notice in the July Waiwhetu Marae pānui notified the date for the annual general meeting and recorded that two trustees on rotation will stand down and their

positions will be up for election. Mrs Robyn Hurunui–Luke is identified as the returning officer (and includes her previous experience) There is also a timeline for the election.

[21] A further notice in the marae pānui was sent in August 2016. That notice summarised the nature of the election process. It records those nominated. It says the candidates' statements will run in the next pānui and will also be available to read on the election's board at the marae from next week. It records that registrations to vote will take place on Tuesday the 20th of September 2016 from 9.00 am to 4.30 pm. The whakapapa committee will then endorse your right to vote. It goes on to say that:

Voting will take place on Tuesday the 20th of September 2016 from 4.30 pm to 6.00 pm when voting closes. The returning officer will issue voting papers to those eligible to vote from 4.30 pm to 6.00 pm when voting closes and results will be announced before the AGM finishes on Tuesday the 20th of September 2016.

[22] The September pānui reiterates the information from the August 2016 pānui and publishes the five candidate's statements.

[23] There was some difference in the evidence as to how frequently marae pānui are published. The marae chair Mr Moeahu indicated that they are issued as frequently as weekly. The applicant Ms Puketapu is of the view that they are less frequent and go on a monthly basis.

[24] In addition to the marae pānui, there is a letter dated 3rd of August 2016 from the Waiwhetu Marae signed by the chair which describes in general terms the rotation cycle for trustees, the appointment of Ms Robyn Luke as returning officer, and the details of the election process. I understand from the marae chair that the pānui notice goes by hand to those marae beneficiaries who live in proximity to the marae and by electronic means to approximately 486 listed on the marae notification list.

[25] The letter of 3rd of August 2016 which also contains the nomination forms and registration forms was, as I understand it, available at the marae from the returning officer and was issued to those who wished to nominate candidates and

those who asked for a copy of what is essentially an information pack and registration form for the election process.

[26] There were originally five candidates for the two available positions. Wikitoria Ratu withdrew as a candidate by letter on 19 September 2016. A total of 137 voters were approved by the whakapapa committee and voted on the night. The results that were announced at the AGM (and are recorded in the draft minutes filed with the Court). The outcome was close; candidate Tiana Awa (67 votes) and candidate Ngapera Moeahu (65 votes) were the two successful candidates. Ihaia Puketapu (64 votes), and Ihakara Puketapu (45 votes), were the unsuccessful candidates.

[27] Among the issues and concerns raised were concerns that the process adopted on the day of the AGM were not as rigorous and proper as would be expected so that when the vote was being counted by the returning officer in the wharekai others were present and came and went from the wharekai while the vote was being counted.

[28] Mr Eric Reriti, who was asked to sign the tally of the first count, gave evidence of the circumstances in which he was asked to perform that role and in his understanding of what took place,. He indicated that he was unable to remain after he was asked to review the tally as he had to leave for work and his first glance at the tally sheet appeared to him to be mathematically wrong. He nonetheless did sign that tally and understood that a further count was going to be done but he was not present for that further count. He did take issue of what he understood was announced subsequently to the AGM which was that he had scrutinised and verified the tally.

[29] I also heard evidence from Wikitoria Ratu who was also present for some of those events and information was also provided by way of email correspondence from Mereana Storey and Rangipaia Dentist recording their observations of the vote counting process.

[30] The trustees point to the fact that the process adopted had been utilised previously without complaint as to fairness and had also been approved without

objection by the trustees in July 2016. The trust chair also points to clause 7 of the trust deed which sets out a process for review of decisions of the trustees.

[31] That process requires a beneficiary who feels aggrieved with any direction, determination or resolution to first take steps to require or requisition a notice supported by no fewer than 20 beneficiaries following which the trustees must fix the time and place for a general meeting to discuss the issue. Once that process has been followed the process can then be referred to the Court.

[32] One of the matters at issue between the parties is the adequacy of notice of the decisions of the trustees. As I understand it, trustee decisions are communicated primarily by way of the pānui, whether that be on a monthly or weekly basis and in minutes.

[33] The AGM minutes are presented in draft to the subsequent AGM and adopted at that time.

[34] In this particular instance, whilst I accept the point made that the dispute resolution mechanism in the trust deed ought to be followed prior to referral of any matter in dispute to the Court, in this particular case, I am satisfied that I can deal with this application given the proximity of the decision by the trustees to adopt the method of voting in July, subsequent notice by way of the pānui to beneficiaries in August, and then the meeting itself in September. In those circumstances, it seems to me not unreasonable or improper that the application has come to the Court in the way that it has.

[35] I also record that the application was at least to some extent linked to related matters that I have already dealt with concerning issues that were before the trust and have been raised before the trust during 2016 by Ihaia Puketapu¹.

¹ A20160004849 filed by Ihaia Puketapu was dismissed at 361 Aotea MB 186-187 dated 16 November 2016 with written reasons held at 361 Aotea MB 188-192 dated 28 November 2016.

[36] There was a question raised as to whether or not the returning officer Robyn Luke was sufficiently qualified or independent. Her independence was under question because of a relationship by marriage to the marae manager.

[37] I heard from trustees and Wikitoria Ratu who spoke in support of Robyn Luke's qualifications and training as a returning officer and also her integrity in the running of election processes.

[38] The outcome of the election was reported to the Court and the marae trustees have also made application to the Court for appointment of trustees as a result of the election process (A20160005612).

[39] Among the information provided to the Court is a separate report from the returning officer. The returning officer also, independently of the trustees, has sent to the case manager the election papers which consists of the registration forms and the voting forms and the tallies.

[40] That information is held by the case manager. It is not information that I have yet reviewed or seen but the Court holds that information and has done so since shortly after the election.

How I propose to deal with the application is as follows:

[41] First, I am satisfied that the process followed was consistent with the voting processes available to the trust under the trust deed. It is important to appreciate that as the trust deed currently stands the option is for a vote to be determined by a show of hands or by a secret ballot of those present, or at the request of the trustees by postal voting. The trust deed does not allow for a combination of methods of voting. It clearly requires one of those alternatives to be adopted and to be used by the trustees for the election. In this instance, the trustees adopted the secret ballot method which had been the method used at the previous election and I am informed that this was done without change.

[42] I take into account that the trustees decided to proceed in that way in July last year without debate or objection from any of the trustees. The decision to proceed in that way is not of itself a matter which the Court would see reason to intervene. It is perfectly open to the trustees to select one or other of those methods of voting and then to proceed in that way. On the evidence before me, I am not satisfied that there is any reason or grounds for the Court to intervene in the decision to proceed by way of a secret ballot.

[43] Having said that, it has been fairly acknowledged by Mr Noel Woods who is a current trustee, by the current chair that in light of the concerns that were raised by some beneficiaries in the lead up to the annual general meeting, in the light of the concerns that the applicant Titihuia Puketapu and others raised at the AGM itself that the whole question of what is a fair process is a matter the trustees have acknowledged is going to need further discussion. My understanding of the draft minutes filed with the Court and confirmed by the trust chair was that when concerns were raised at the AGM the indication from the chair was that there would be further discussion about voting processes going forward. The minutes also record that the meeting proceeded and the results of the election were then announced at the conclusion of the meeting.

[44] I am conscious that a number of questions have been raised about the integrity of the process and that is a serious matter. It is very important for all, for trustees, for beneficiaries to have confidence that the process is fair to everybody, is robust and that the outcome is reliable.

[45] I am also conscious that in the case of Ihaia Puketapu who had stood again for election the outcome is very close, one vote.

[46] I am going to direct the Registrar to examine the records that have been provided to the Court and to conduct a tally of the voting papers. As I understand it there were two counts, the one that Mr Reriti signed and a further count done after Mr Reriti left. I would like the Registrar to scrutinise all of the registrations, the voting papers, the two counts and to check the outcome of the election against the

returning officer's report and the returning officer's tally of the votes. The Registrar's report will then be made available to the parties.

[47] If that review reveals any discrepancy in the announced result I will give some consideration to what is then required. I will need to understand what the nature of the error or the discrepancy is before I can make any further direction on that point. If the result of that review reveals that there is no discrepancy or error in the returning officer's reported result, I will then proceed to make the appointments of the new trustees in accordance with the election.

[48] I expect that this process can be done relatively quickly. I will after today's Court make enquiries of the Registrar in Whanganui. As I indicated previously, I do not think it is in anybody's interests that this uncertainty remains for too long so I will endeavour to expedite that review and to communicate the outcome of that to all parties as soon as possible.

[49] As I said, if the review reveals that there is no apparent error in the counting of the votes, the recording of the votes, then in chambers I will make the resulting orders for appointment of the trustees (A20160005612).

[50] I simply note for the record that given the nature of the issues raised before me and the nature of the concerns expressed throughout the course of this application that it would be prudent for the new trustees once this has finally been settled to provide an opportunity for these issues to be canvassed again amongst trustees and beneficiaries. If there is a wish for, if I can put it this way, a more inclusive or a different voting process, then steps will need to begin in the medium to near term in order to address that.

[51] Some changes to the trust order would be necessary because, as I said, the trust order at the moment does not provide for a combination of methods. It provides for three methods of voting, only one of which can be adopted.

[52] Now that is how I propose to proceed in relation to this application. It also of course deals with the next application which is the appointment of the trustees. I

will deal with that in chambers once I have had the Registrar review the voting papers.

[53] The final matter to be dealt with today was the amendment to the trust order (A20160005653) which, as I understand it, was voted on at the AGM and approved and that is the amendment to give effect to what I understand is a drug free policy. I understand there has been no objection to this and given that the meeting overwhelmingly voted in favour of the policy and the amendment I am happy to approve it.

[54] I would simply note that, and again this is a matter for the trustees going forward, you may wish to revisit the wording of the clause itself because in my view it could be clearer. And it is not for me to intervene at this point as it was unanimously approved in that form at the AGM. I think what I ought to do is simply approve the amendment and include that into the trust order.

[55] However, I note that the phrasing of the clause to be added (and I understand the policy to be that trustees essentially are to lead by example) so that anybody, if I have understood the policy correctly, standing to be a trustee or anybody in the role of a trustee is expected at all times to be drug free. If at any time such a person is in breach of that expectation, then it is the expectation of the beneficiaries that that trustee would be removed. The wording of the clause says that:

Anyone wishing to stand as a marae trustee and found to be entertaining illegal drug such as methamphetamine, cannabis and others, or under the influence will be subject to being stood down as a marae trustee.

[56] The issue I am raising here is that it is intended obviously to cover both those standing and those who are current trustees but the wording runs them together. So it could be clearer that, "Anyone standing to be a trustee, anyone who is a current trustee is expected to comply." But I will simply note that and invite the trustees in a suitable time to consider whether the intent of the policy should be clarified. I would be happy to approve a further modification to the wording at a future time.

[57] The Court makes an order pursuant to section 244 varying the terms of trust as set out above.

[58] The foregoing orders to issue immediately pursuant to rule 7.5(2)(b) of the Māori Land Court Rules 2011.

[59] The Court makes the following direction:

[60] The Registrar is to scrutinise all of the registrations, the voting papers, the two counts and to check the outcome of the election against the returning officer's report and the returning officer's tally of the votes. That Registrar's report will then be made available to the parties.

Pronounced at 3.50 pm in Wellington on Friday this 3rd day of February 2017

M J Doogan
JUDGE