

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

A20160004050

UNDER Section 19(1)(a) of Te Ture Whenua Māori Act
1993

IN THE MATTER OF Petane Marae situated over Part Lot 7
Deposited Plan 3351 and Petane No 1 & 3 Lot 8
DP 3351 blocks

MARY ANNE SIMPKIN on behalf of THE
MERE POHIO BROWN WHĀNAU
Applicant

Hearing: On the papers

Judgment: 29 July 2016

JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Mary-Anne Simpkin, on behalf of the Mere Pohio Brown whānau, sought an urgent injunction on 6 July 2016 in an attempt to halt the impending demolition of the whareniui at Petane Marae, Te Amiki.

[2] The applicant alleged that the trustees had mismanaged funds for the restoration of Te Amiki, misinformed the beneficiaries and failed to follow proper processes. In addition, the applicant argued that Heritage New Zealand had recommended a way forward to restore Te Amiki which the trustees should have considered.

[3] The trustees provided evidence to the Court of the relevant consents and permits and other documentation demonstrating that they had followed the necessary procedures required to demolish Te Amiki. They also filed evidence of support for the demolition from the beneficiaries.

[4] Having considered the evidence, on 8 July 2016 I declined to grant the injunction and confirmed that written reasons would follow in due course.

Background

[5] It is said that Te Amiki meeting house was built in the late 1800s and was originally situated upon Petane No 1 & 3 Lot 8 DP 3351 block (Lot 8). That block is General land and was originally owned by Henare Pangopango who during his lifetime expressed a desire for the meeting house and grounds to be ‘an area for everybody’.¹

[6] On 26 September 1934 the Court determined ownership of Te Amiki in favour of Wiremu Pohio, Arama Pohio and Henare Pohio Brown as trustees.² At some time prior to 1971 Te Amiki was moved to its present position now situated over Part Lot 7 Deposited Plan 3351 (Lot 7) being the block of land adjacent to Lot 8.

[7] On 10 September 1971 the Court recommended that Lot 7, being General land owned by the estate of Wiremu Pohio, be set apart as a Māori reservation for the purpose of a meeting place for the benefit of Ngāti Whakaari.³ Lot 7 was formally set apart as a Māori reservation on 12 October 1972.⁴

[8] On 16 June 2014 Deputy Chief Judge Fox heard an application to add Lot 8 to the Māori Reservation over Lot 7 and include the Ngāti Matepu hapū in the beneficiary class for the Māori reservation. Judge Fox was satisfied that Lot 8 had been used as part of the marae for some time and confirmed the recommendation should be made as sought.⁵ As at the date of this application that recommendation has not been formally gazetted, for some reason.

[9] The current trustees of Lot 7 are Diane Brown, Maree Brown, Rose Marie Ngaire Hiha, Catherine Gaynor McLean, Mary Spooner Martin and Tony Paniani.⁶

[10] The current trustees of Lot 8 are Alice Taylor, David Moa, Diane Vera Wiki Brown also known as Diane Brown, Maree Brown, Rosie Marie Ngaire Hiha and Julian James Watene Whiting.⁷

¹ 77 Napier MB 280 (77 NA 280)

² 77 Napier MB 280 (77 NA 280)

³ 105 Napier MB 185 (105 NA 185)

⁴ “*Setting Apart Land as Māori Reservation*” (12 October 1972) 83 *New Zealand Gazette* 2274 at 2292

⁵ 32 Takitimu MB 281 (32 TKT 281)

⁶ 39 Takitimu MB 261 (39 TKT 261)

⁷ 30 Takitimu MB 139-144 (30 TKT 139-144)

Procedural history

[11] The application for an urgent injunction was filed on 6 July 2016 and was received by me later that evening. I subsequently directed the case manager to contact the trustees of the Marae and invited them to file a response to the application by 3pm on 7 July 2016. That was duly done and the opportunity was then given to the applicant to respond further.

[12] The applicants filed a reply this time raising the issue of whether consent was required before Te Amiki could be demolished. The case manager then requested from the trustees confirmation that all of the necessary consents were in place or the trustees would risk the consequences of failing to obtain such approval.

[13] The trustees subsequently provided evidence that they had obtained a fire permit for the demolition and confirmation from the Hastings District Council that Te Amiki is a standalone building, meaning consent was not required. The trustees also provided documentation evidencing that a search of the Heritage New Zealand database did not reveal Te Amiki to be listed as an historical site.

[14] Following receipt of the necessary consents I determined that the injunction should be declined and dismissed the application on 8 July 2016.

Applicant's submissions

[15] The applicant submitted that an injunction should be granted because, it was alleged, the trustees had mismanaged funds for the restoration of the marae. The applicant also asserted that the trustees had misinformed the beneficiaries and failed to follow proper processes. In addition, the applicant argued that the New Zealand Heritage Trust had recommended a way forward to restore the marae which should be considered by the trustees. As this had not occurred then the applicant contended that a hold should be placed on the proposed demolition.

[16] The applicant expressed serious concern as to the management of funds the whānau contributed for the restoration of Te Amiki. It was also alleged that the trustees have acted “deceptively and dishonourably” to the people who contributed to the fundraising given that Te Amiki is now to be demolished. The applicant argued that she had been misinformed by trustees who had failed to follow proper process with the result that Te Amiki would be demolished, which was opposed by the applicant and her supporters.

Respondents' submissions

[17] Rose Hiha, chairperson of the Petane Marae, submitted that the trustees were disappointed that another injunction application had been filed by the applicant. Ms Hiha confirmed that a similar application was recently filed by Michael Brown on behalf of the Mere Pohio Brown Whānau. As a result of that application a hui was held on 3 April 2016 to hear the concerns of whānau and the plans for Te Amiki.

[18] Ms Hiha pointed out that at the hui a vote was held as to the options for Te Amiki with the result that the meeting voted in favour of rebuilding Te Amiki. Further to that, Ms Hiha submitted that the minutes of the hui record that Richard Brown, spokesperson for the Mere Pohio Brown whānau, confirmed that the whānau supported the decision.

[19] In addition, Ms Hiha argued that a development hui was held and plans were put in place and the date set for demolition however the applicants had asked for a further hui which the trustees held. Ms Hiha stated that four members of the whānau attended along with Mary Martin and herself as trustees. During that hui she confirmed that they spoke with Dean Whiting from Heritage New Zealand about options for restoration. Ms Hiha submitted that nothing was resolved at that hui and in any event the kaumātua and whānau of the marae had already decided by two hui to rebuild Te Amiki.

[20] Ms Hiha also confirmed that Mr Whiting previously provided advice on options for Te Amiki however due to the length of time elapsing since his assessment, the delays in funding and the continuous conflicts, Te Amiki had fallen into further decay and had rapidly deteriorated causing serious health and safety concerns.

[21] Regarding the allegations of financial mismanagement, Ms Hiha submitted that the trustees were unaware of what the applicant was referring to and confirmed that their financial records will prove that the trustees have only covered their normal monthly overheads.

Submissions in response

[22] The applicant filed a further response on 7 July 2016 and argued that the hui held on 3 April 2016 was not about the future of Te Amiki.

[23] In addition, the applicant submitted that at the development hui the whānau requested that the trustees reconsider the decision to demolish Te Amiki in light of the evidence presented by Heritage New Zealand. The applicant noted that Mary Martin walked

out of that hui and their request for the trustees to hold an additional hui with kaumātua received no response from the trustees.

[24] The applicant contended that the trustees had received funds from Eastern and Central Community Trust and the Mere Pohio Brown Whānau toward *restoration* of Te Amiki yet they now seek to demolish the whare tipuna.

[25] The applicant requested a meeting with the hapū be held to inform them that Te Amiki can be placed on a Heritage list and to discuss the options for restoration. The applicant submitted that she has received overwhelming support for restoration of Te Amiki and given that it is a tāonga and is of critical importance, the injunction should be granted.

The Law

[26] Section 19 of Te Ture Whenua Māori Act 1993 provides:

19 Jurisdiction in respect of injunctions

- (1) The court, on application made by any person interested or by the Registrar of the court, or of its own motion, may at any time issue an order by way of injunction—
 - (a) against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land, Maori reservation, or wahi tapu; or
 - (b) prohibiting any person, where proceedings are pending before the court or the Chief Judge, from dealing with or doing any injury to any property that is the subject matter of the proceedings or that may be affected by any order that may be made in the proceedings; or

...

[27] In *Taueki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* the Māori Appellate Court discussed the requirements for granting a permanent injunction as follows:⁸

[15] In applying for a permanent injunction, applicants must also fulfil the legal elements relating to the action of trespass before the Court will exercise its jurisdiction to grant the remedy. These elements are set out below

The action for trespass to land is primarily intended to protect possessory rights, rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass. Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons. Either element alone is not sufficient...

[16] Once the elements for the trespass action are made out, the Court then considers what remedy is appropriate. The prima facie rule is that a landowner is

⁸ *Taueki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* [2014] Māori Appellate Court MB 60 [2014 APPEAL 60]

entitled to an injunction to restrain a trespass. However, the Court still has discretion as to whether to grant the injunction or not. Matters affecting the exercise of the discretion include the parties' conduct.

[28] In *Te Hokowhitu v Proprietors of Matauri X* the Appellate Court considered:⁹

[39] There are limited Māori Appellate Court authorities on this point. But some guidance can be taken from the Māori Appellate Court decision of *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust* (2005). Although involving a Māori land trust, the principles concerning the rights that attach to legal owners apply equally to Māori land incorporations. The Court found that legal ownership prima facie entitles the trustees to an injunction where a trespass has been committed. This rule applies whether the tort of trespass is committed by a stranger or beneficial land owner of a trust. The Māori Appellate Court did note that an injunction may not issue where there was some matter that could have influenced the exercise of discretion to the contrary.

[40] We consider that the position adopted in the English Courts and in the High Court of New Zealand, elaborates upon what test is needed when a judge, in the exercise of their discretion, may consider that an injunction may be unduly oppressive and thus when damages may be substituted for an injunction.

(Emphasis added)

[29] In determining whether to grant a permanent injunction, consideration must be given as to whether the elements of trespass have been established. Following that I can then assess whether an injunction is an appropriate remedy in this case.

Discussion

Is there a continuing trespass?

[30] As foreshadowed, the action for trespass to land is primarily intended to protect possessory rights, rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass. Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons.¹⁰

[31] In accordance with my earlier judgment *Eriwata*, affirmed by the Māori Appellate Court in 2005, the trustees are the legal owners of the land and have all of the powers of an absolute owner.¹¹ The trustees are entitled to make decisions in the best interests of the

⁹ *Te Hokowhitu v Proprietors of Matauri X* [2010] Maori Appellate Court MB 566 (2010 APPEAL 566)

¹⁰ *Tauaki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* [2014] Māori Appellate Court MB 60 [2014 APPEAL 60]

owners as a whole, taking into account relevant considerations in the exercise of their discretions.

[32] In my assessment, the issue of a continuing trespass does not arise in this case since the Court will not issue injunctions against the legal owners of the land including trustees where they are complying with their terms of trust and their legal obligations.

What was the evidence in support of the demolition of Te Amiki?

[33] The trustees provided minutes for the hui held on 21 February 2016 and 3 April 2016. At the hui held on 21 February 2016 the following motion was put:

MOTION TO THE FLOOR: Chairman: “That Te Amiki be demolished and cremated and a new Building erected All in Favour Say Aye – Those against Nil. Henare Ratima asked to abstain and not in Minutes. Everyone else was in favour.

[34] At the hui held on 3 April 2016 three options were put to the vote:

MOTION: THAT WE CONSIDER THE 3 OPTIONS.

Moved: Alice Taylor Seconded M. Nepia

MOTION: Do we want to restore Te Amiki? Option 1 Show of hands 1

MOTION: Do we want to Rebuild Te Amiki? Option 2 Show of hands 27

MOTION: Do we want to Restructure Te Amiki? Option 3 Show of hands 24

Voting Result: TO REBUILD TE AMIKI 27

Moved: Rose Hiha Seconded James Robin

[35] The trustees submitted that the applicant and her whānau have been afforded the opportunity to voice their concerns but the minutes of these hui confirm there was support for the demolition of Te Amiki.

[36] The applicant maintains that more time should be taken to consider the options put forward by Heritage New Zealand. It appears that the evidence provided by Heritage New Zealand is not new to the trustees. They have previously obtained an assessment and have considered the option to restore Te Amiki. I note that the cost to undertake that option is recorded in the minutes as being double the cost of the options to rebuild or restructure.

¹¹ *Eriwata - Waitara SD Sections 6 and 91 Land Trust* (2005) 155 Aotea MB 269 (155 AOT 269); and *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) 15 Whanganui Appellate Court MB 192 (15 WGAP 192)

[37] The option to restore was put to the hui held on 3 April 2016 and received only 1 vote in support of restoration. There is no evidence that the trustees have not properly considered this option and in light of the fact that the option has been put to the beneficiaries and received little support I can see no reason why the decision to rebuild Te Amiki is somehow improper.

[38] As foreshadowed, the trustees are the legal owners of the land and are entitled to make decisions in the best interests of the owners as a whole, taking into account relevant considerations in the exercise of their discretions. I consider that they have done so.

Was there consent to demolish Te Amiki?

[39] A further issue raised by the applicant was whether the trustees had obtained the necessary consents and permits to proceed with the demolition.

[40] Following the issue being raised, the case manager contacted the Hastings District Council where Trevor Mitchell confirmed that he would provide confirmation as to whether consent was required to pull down the building. He also stated that the trustees would require a permit from Bay Forest Rural Fire District and may also need a permit from Regional Council to burn the building material.

[41] Andrew Nichols, the building inspector for Hastings District Council, subsequently advised the case manager that a consent to pull down the building was not required if it is free standing. He also stated that no demolition work could be undertaken on heritage or character buildings but did not think Te Amiki was on their list of character or historical buildings.

[42] The case manager relayed this information to the parties. The trustees subsequently filed a permit obtained from Bay Forest Rural Fire District, a letter from Hastings District Council confirming that a consent or permit is not required to burn a standalone building and then submitted evidence of a search of the New Zealand Heritage list which did not identify Petane Marae. The Hastings District Council also confirmed that a building inspector had visited the Marae and deemed the building free standing.

[43] In light of the evidence filed by the trustees demonstrating that they had the support of the beneficiaries, that they had also obtained the necessary consents and permits for the

demolition and having regard to the fact that the action for trespass has not been made out, the application for an injunction is dismissed.

Decision

[44] The application of Mary Simpkin on behalf of the Mere Pohio Brown Whānau Trust for an interim injunction to prevent the trustees of Petane Marae from demolishing Te Amiki wharehenui is dismissed.

[45] There will be no order as to costs.

Pronounced at 10.05 am in Rotorua on Friday this 29th day of July 2016

L R Harvey
JUDGE