

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

A20120006345

UNDER Section 134, Te Ture Whenua Māori 1993

IN THE MATTER OF Awapuni 1F3

BETWEEN THE CHIEF EXECUTIVE OF LAND
INFORMATION NEW ZEALAND
Applicant

AND MATHEW TAARE AND OTHERS
Respondents

Hearings: 37 Tairawhiti MB 127-130, 31 January 2014
38 Tairawhiti MB 253-260, 31 March 2014
44 Tairawhiti MB 294, 20 January 2015
50 Tairawhiti MB 150-153, 6 July 2015
52 Tairawhiti MB 103-111, 3 September 2015

Appearances: G Melvin and B Arapere for the applicants
N R Milner for the respondents

Prior Judgments: 38 Tairawhiti MB 209-214, 31 March 2014
56 Tairawhiti MB 56-68, 18 February 2016

Judgment: 19 July 2016

RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX

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Introduction

[1] The Awapuni 1F3 block was acquired by the Crown under the Public Works Act 1928 in 1952 for the “use, convenience, or enjoyment of an aerodrome (Transmitter-station and Radio Beacon)”.¹ Compensation was assessed at £120 plus 15 months’ interest at 4 per cent, minus rates arrears owed to Gisborne Harbour Board. The land was subsequently transferred to Airways Corporation of New Zealand Limited (Airways). In May 2007, Airways determined that the Awapuni 1F3 block was no longer required for public works and was surplus.

[2] On 14 May 2012, acting by delegation granted by the Chief Executive of Land Information New Zealand (LINZ) and pursuant to s 41 of the State Sector Act 1988, Ainslie Drysdale applied for a conditional order under s 134 of Te Ture Whenua Māori Act 1993 (the Act) to vest the Awapuni 1F3 block in the successors to the original owners.² The conditions included that the successors to the former owners enter into an agreement to purchase the land at current market value and that the settlement date would be one month after obtaining sealed orders from the Māori Land Court. If such an agreement was not executed within three months of the application, the application would lapse.

[3] On 31 March 2014, I made a conditional order vesting Awapuni 1F3 in the successors of the original owners. The orders were subject to the completion of an independent valuation for the benefit of the potential owners and a valuer was appointed to provide a report. The order under s 134 was conditional on the parties reaching an agreement within three months. If there was no agreement, the order would lapse.³

[4] The independent valuation was completed and the market value of Awapuni 1F3 was calculated to be \$110,000 inclusive of GST.⁴

[5] The application was adjourned from 19 August 2014 to 3 September 2015 to enable the respondents to explore different funding options to enable the purchase and to allow the

¹ *The Property Group – Awapuni 1F3* (2016) 56 Tairawhiti MB 56 (56 TRW 56).

² The applicant was originally represented by The Property Group but is now represented by Crown counsel.

³ At [9].

⁴ *The Property Group – Awapuni 1F3* (2016), above n 1, at [13].

parties to negotiate an agreement.⁵ The matter then returned back to the Court for determination.

[6] A further hearing took place on 3 September 2015. Efforts by the parties to reach an agreement for sale had not been successful. The applicant wished to sell the property at market value because the potential successors did not have funding to negotiate an agreement.⁶ The applicant wanted the matter to come to a close and believed that it had done all it could to effect the sale of the land to the successors of the former owners.⁷

[7] At the hearing, the respondents raised several issues including a concern that the company did not understand the depth of the relationship between them and the land,⁸ which they considered to be like a tīpuna. It was submitted that the applicant was commercially driven and had not considered the depth of emotion that is involved in the current application.⁹ Furthermore, the applicant had not considered the respondents/descendants' rights with regards to the Treaty of Waitangi and its principles.¹⁰

[8] In my decision of 18 February 2016, I concluded that had the parties reached an agreement, the Court would have had jurisdiction to make the vesting order sought.¹¹ The Registrar had been able to establish the identity of those who were entitled as successors should the land be returned, and the independent valuer had assessed the market price of the block to be \$110,000. I acknowledged that the successors to the original owners were not in a position to raise the sum required and that they still sought to have the land returned by vesting order.¹²

[9] I noted that the Māori text of the Preamble of the Act refers to the Treaty of Waitangi. It also reinforces the connection between the principle of exchange in the Treaty; namely the right of kāwanatanga in exchange for the guarantee of rangatiratanga, and the principle that land is a taonga to be retained.¹³ Section 2(1) of the Act requires the Court to

⁵ At [14].

⁶ At [16].

⁷ At [17].

⁸ 52 Tairawhiti MB 103 (52 TRW 103) at 108.

⁹ *The Property Group – Awapuni IF3* (2016), above n 1, at [23].

¹⁰ At [23].

¹¹ At [27].

¹² At [27].

¹³ At [30].

interpret its provisions (e.g. s 134) in a manner that best furthers the principles set out in the Preamble. I noted that s 2(2) requires that I exercise my discretion in a manner that as far as possible, promotes the retention, use, development and control of Māori land as a taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants.¹⁴ I opined that but for the public works legislation, the land would still be Māori land. Even though the status of the land is vested in Airways as a State Owned Enterprise, it was (and continues to be) a taonga for the descendants of the original owners.¹⁵

[10] I considered that the decision of the Court whether to finalise orders may turn on the role of the public works legislation in the alienation of Māori land. Various reports of the Waitangi Tribunal have held that certain takings under the public works legislation have been in breach of the principle of exchange pursuant to the Treaty of Waitangi.¹⁶ In relation to Awapuni 1F3 it was not known if any owner filed consent or an objection in 1952. There were no owners present at the 1953 hearing to ascertain compensation for the taking, although the owners had received notice of the hearing.¹⁷

[11] Given these circumstances, I directed the parties to file submissions regarding the following issues:

- (a) Whether the approach taken was a breach of the essential exchange principle of the Treaty of Waitangi, referenced in the Preamble to Te Ture Whenua Māori Act 1993?
- (b) If so, can this Court continue to exercise its jurisdiction under s 134.¹⁸
- (c) Does the fact that the applicant does not wish to continue to pursue the application amount to an abuse of the Court's process in the circumstances of this case?

¹⁴ At [31].

¹⁵ At [32].

¹⁶ At [36].

¹⁷ At [38].

¹⁸ I note that at the time, I inferred from the applicant's submissions that they wanted to withdraw the application. That misunderstanding has now been clarified, and I was advised that there was no attempt made to withdraw the application.

[12] I directed the applicant to file legal submissions within 14 working days indicating whether it could provide evidence of owner consent to the public works taking, and to respond to the legal issues I had outlined above, including whether the Court has jurisdiction to make the order under s 134 of the Act based on Treaty considerations. The respondents were also directed to reply to the applicant's submissions should they wish to do so.

Submissions of the applicant

[13] It was submitted that the Māori Land Court was now *functus officio* in these proceedings. The Court had made an order consistent with the terms of the application. Section 134 does not provide the Court with jurisdiction to make an order outside the terms of the application. Therefore, it is not open to the Court to make an order that differs from that specified in the application. In this case, the conditions of the order have not been met and the order has lapsed.

[14] Te Ture Whenua Māori Act 1993 provides that orders may be made subject to the performance of any condition within such period as may be specified in the order. The Māori Land Court Rules 2011 (the Rules) state that the Court may dismiss an application if the applicant fails to comply with an order or directions of the Court,¹⁹ and an order must not be completed until any conditions to which the order is subject have been satisfied.²⁰ The applicant submitted that because the conditions of the order have not been satisfied and the order had lapsed, the proceeding is at an end and the Court no longer has jurisdiction.

[15] As authority for this principle, the applicant referred to the English case of *Re VGM Holdings Ltd* where an order was made that would become ineffective if the applicant did not pay a security £5,000 to the Court within four weeks of the date of the order.²¹ The applicant could not pay the sum and applied to the Court for a variation of the terms of the stay. In those circumstances, the Court had considered that it was *functus officio*.

¹⁹ Māori Land Court Rules 2011, r 6.28(1).

²⁰ Rule 7.5(1)(c).

²¹ *Re VGM Holdings Ltd* [1941] 3 All ER 417 (Ch).

[16] Regarding the issue of whether the original owners were consulted before the taking of the land, it was submitted that limited evidence on public works takings had been presented to the Tribunal in the *Turanga Tangata, Turanga Whenua* inquiry and significantly, the Tribunal did not make a finding of Treaty breach in respect of Awapuni 1F3. The Tribunal had commented that it knew too little about the majority of takings in Turanga to comment directly on most of the individual takings. Although the Crown had conceded that there had been insufficient justification for two of the takings, this did not include the taking of Awapuni 1F3.

[17] Based on the observations and findings of the Waitangi Tribunal in its report, the applicant submitted that there is no basis to conclude now, on the same evidence, that the taking of Awapuni 1F3 breached the essential principle of exchange in the Treaty of Waitangi. Furthermore, Awapuni 1F3 had been listed in the Tribunal's statement of issues as a Rongowhakaata block and the historical claims of Rongowhakaata have been the subject of settlement negotiations and a deed of settlement.

[18] On 2 May 2016, the applicant replied to the respondent's submissions outlined below. The applicant stated that it did not seek to withdraw the application because it believes the order has lapsed and the matter is at an end. Mr Tuuta's report as referred to by the respondents provides mere tangential background information about Awapuni 1F (the parent block) and does not assist with the current matter. It was submitted that it is not appropriate to draw inferences about the justification of taking Awapuni 1F3 in 1952 based on the taking of Awapuni 1F several decades earlier.

[19] The applicant stands by its submission that the Waitangi Tribunal's inability to make a specific finding in respect of Awapuni 1F3 is significant and if the Tribunal had the evidence to make specific findings about the block, it would have done so. There is no evidential support for the claim that the compensation paid was minimal and inadequate. Furthermore, the adequacy of compensation paid in 1952 is not relevant to the Court's jurisdiction in the current case where an order is sought to vest the land in accordance with the terms of the application.

[20] Airways has instructed that it is not aware of any archaeological assessment of Awapuni 1F3. The applicant opposes any further adjournment and submits that because the

conditions of the conditional order were not met, the matter is now at an end. However, the applicant is open to entering into good faith negotiations with the respondents outside these proceedings and has offered a right of first refusal to them should Airways receive an offer from a third party within 12 months.

Submissions on behalf of the Potential Successors/Respondents

[21] On 8 April 2016, submissions were filed on behalf of the respondents. They submit that the application remains live before the Court because it has not lapsed and has not been withdrawn.

[22] Conditional orders were made on 31 March 2014 but the conditions were not satisfied. It was submitted that when conditional orders are made and those conditions are not met, the order does not automatically lapse as the applicant claims. Section 73(3) of the Act provides the Court with a range of options where a conditional order has been made, including extending the time for the condition to be satisfied. The Court is not therefore *functus officio* and it is still open to the applicant to withdraw its application.

[23] It was further submitted that the Māori Land Court's clear jurisdiction to extend the period pursuant to s 73(3) distinguishes this case from that of *Re VGM Holdings Ltd.*²²

[24] The respondents consider that the taking of Awapuni 1F3 was in breach of the principles of the Treaty of Waitangi. The applicant has stated that it does not hold evidence of the owners' consent to the taking of Awapuni 1F3. The respondents do not consider that the owners ever consented to the taking.

[25] They believe that it is an overstatement to say that the lack of any specific finding in the Waitangi Tribunal's *Turanga Tangata, Turanga Whenua Report* in respect of Awapuni 1F3, is significant. It is not the Tribunal's usual practice to reach a finding on every aspect of the claims submitted. This was particularly so in the Turanga/Gisborne inquiry which was the first to use the Tribunal's "new approach" designed to expedite the completion of inquiries. It was therefore inappropriate to draw any significance from the lack of a specific finding in relation to Awapuni 1F3.

²² *Re VGM Holdings Ltd*, above n 21.

[26] The limited evidence of public works takings presented in the Turanga/Gisborne inquiry does not, it was submitted, point towards the compulsory taking of Awapuni 1F3 being Treaty compliant. Furthermore, the Crown acknowledged at the hearings that there was insufficient justification for the compulsory taking of Awapuni 1F, from which Awapuni 1F3 is derived. According to the respondents, there is a reasonable basis to conclude that the compulsory acquisition of Awapuni 1F3 without consent, and with inadequate compensation, breached the Treaty principle of exchange.

[27] Contrary to the submission of the applicant, the Tribunal's statement of issues does not record Awapuni 1F3 as a Rongowhakaata block. Rather the block was listed in the Rongowhakaata claims and "Awapuni" was listed in another tribal group's claims – namely by the Te Aitanga a Mahaki tribe. The evidence before the Tribunal was that numerous tribal groups had appeared at the initial 1875 title investigation of the Awapuni block, from which 1F and 1F3 were later partitioned.

[28] The respondents' primary concern is to seek the return of Awapuni 1F3 but they are also concerned about the initial purchase price of \$179,000 proposed by Airways. The court appointed valuer assessed the value of the block to be \$110,000. They point out that these figures are in stark contrast to the minimal amount of compensation ordered by the Native Land Court after Awapuni 1F3 was taken. According to them, the purchase price sought should reflect the fact that Airways and its predecessors have had the benefit of using the land since 1952.

[29] Some of the respondents raised the issue that there may have been disturbances to historic burial sites on the land during the time the land was owned and administered by Airways. Their counsel was informed that burial sites had been identified on adjoining land near the fence line with Awapuni 1F3. The respondents have requested that Airways review its records to determine whether archaeological assessments of Awapuni 1F3 have been conducted.

[30] The respondents submit that the spiritual significance of the land to the descendants of the owners, including the location of a number of burial sites, the lack of consent in the taking of the land, the small consideration given for the taking compared to its modern-day book value, and the almost 65 years of use of the land that Airways and its predecessors

have enjoyed, should be taken into consideration by the Chief Executive of LINZ in assessing what would be “fair consideration” in relation to Awapuni 1F3.

[31] The Chief Executive of LINZ has a statutory role under s 41 of the Public Works Act 1981 (PWA) to comply with s 40 of that Act and s 40(2)(d) permits a sale by the Chief Executive “at any lesser price”. The respondents remain committed to further discussions with both Airways and LINZ in relation to Awapuni 1F3.

[32] For these reasons, the respondents request that the Court, in accordance with s 73(3)(b) of the Act, extends the period for meeting the conditions of the 31 March 2014 orders for a further three months.

The Law

[33] Section 134 of Te Ture Whenua Māori Act 1993 provides the Court with jurisdiction to make a vesting order for the return of any Māori land or General land owned by Māori that has at any time been acquired by the Crown or by any local authority or public body for a public work or other public purpose and is no longer required for that public work or other public purpose. It also has jurisdiction to make such a vesting order for the return of any Crown land. No issue has been taken in these proceedings regarding the jurisdiction of the Court to make such an order.

[34] I have noted above the effects of the Preamble and s 2 of the Act permeate all aspects of the legislation including s 134.

[35] Under s 73 any orders of the Court may be made subject to the performance of any condition within such period as may be specified in the order and no such order can be sealed while it remains subject to a condition that has not been fulfilled. In other words, until the conditions are met then no such order is finalised.

[36] Section 73 also provides, at subsection (3), that where such an order has been made subject to the performance of any conditions, the Court may, without further application but subject to the giving of such notices (if any) as it may direct:

(a) amend or cancel the order on the failure to comply with the condition within the specified period; or

(b) extend that period for such further time as the court thinks fit.

[37] Finally, I note that the Māori Land Court Rules 2011, state that the Court may dismiss an application if the applicant fails to comply with an order or directions of the Court,²³ and an order must not be finalised until any conditions to which the order is subject have been satisfied.²⁴

Functus officio or not?

[38] On behalf of the applicant it was submitted that the orders made in March 2014 had lapsed and that the principle of *functus officio* as demonstrated in *Re VGM Holdings Ltd* applies in the current case. In that case the Court stated:²⁵

... it is well settled that the court may vary an order before it is passed and entered. After it has been passed and entered, the court is *functus officio*, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

[39] That decision is consistent with my judgment in *Morrison – Te Kaha No 2C Block*,²⁶ where I found that I was *functus officio* in respect of all substantive issues but not in terms of the conditions of an order still to be performed.²⁷ It is also consistent with the decision of the Māori Appellate Court in *Re Rangitane o Tamaki Nui-a-Rua Inc*²⁸ where that Court made it clear that the orders made under s 73 were not final orders until the conditions attached to such orders were completed or performed.

[40] I note further the recent decision of *Ngataki v Kumete Parish of Karaka* where his Honour Judge Clark stated:²⁹

²³ Māori Land Court Rules 2011, r 6.28(1).

²⁴ Rule 7.5(1)(c).

²⁵ *Re VGM Holdings Ltd*, above n 21, at 417.

²⁶ *Morrison – Te Kaha No 2C Block* (2014) 105 Waiariki MB 183 (105 WAR 183) at [90].

²⁷ At [18].

²⁸ [1996] NZAR 312; (1996) 11 Takitimu Appellate Court MB 96 (11 TKT ACMB 96).

²⁹ *Ngataki v Kumete – Parish of Karaka Lot 64D* (2016) 121 Waikato Maniapoto MB 184 (121 WMN 184) (footnotes omitted).

[70] From the material set out above, it appears that the Court has a wide discretion to make any orders subject to conditions as it thinks fit. While this power is wide, the conditions imposed must be within the purpose or contemplation of the provision pursuant to which the relevant order is made. Further, once a conditional order is made and there has been a failure to comply with the conditions, the Court can amend or cancel the order, or can extend the specified time for the condition to be met. While there appear to be no general principles noted for exercise of this discretion, guidance can be taken from the approach of the general Courts, which promotes consideration of the overall justice of the case.

[71] The Court is limited to amendment or cancellation only in relation to the remaining conditions. It appears that the Court cannot review the order via the provision in s 73 of the Act on any other basis, as it would be considered *functus officio* in relation to its substantive decision. In other words, the condition is either met or not. If it is met, the order becomes final. If the condition is not met the Court can extend the time, amend or cancel the order in relation to that condition.

Discussion

[41] In this case, the Court made conditional orders in March 2014. Those conditions were not satisfied. Section 73(3) of the Act may now be invoked by this Court.

[42] That provision provides the Court with the ability to amend, or cancel the order, or extend the time for the conditions to be satisfied. The case law above demonstrates that the Court retains jurisdiction as to the conditions of the order. Thus, unless the application was withdrawn, which it was not (as I have since been advised), the Court was and is not *functus officio* as it has not completed its function of either amending or cancelling the order, or dismissing the application.

[43] The Preamble and s 2 of the Act require the Court assist the Māori people achieve the implementation of the principles of retention and utilisation. As this land was taken by compulsion, it is accepted that ownership was lost for the period of use as a public work. However, the offer back provisions in the Public Works Act 1981 and the ability to make an application to this Court for a vesting order, (ss 40-41) provide a link back to the original owners or their successors. In other words, at the point that the application in this case was made to the Court, the obligation of the Court to assist Māori promote and implement the retention principle was activated.

[44] Both parties have indicated that they are still prepared to negotiate or provide a right of first refusal. I note that Airways prefers to go to the market now and offer the right

of first refusal to the respondents, but I consider that this is not in the interests of justice at this time.

[45] The relationship of the respondents with Awapuni and the fact that 1F and 1F3 were taken from the Māori owners remains an issue for the respondents. Both parties have always understood that the history of how this block was alienated is an important matter. Why else were the numerous adjournments sought and granted by consent.

[46] However, I accept that the time for moving on the debate has arrived. There is no point in continuing a discussion about tipuna rights, if there is no possibility of the respondents raising the finance needed to purchase the block. That is what they must focus on now – price and value.

[47] I also accept that s 9 of the State Owned Enterprises Act 1986, other Treaty settlements, and the s 27 memorial on the title of this land will remain important issues for Airways to have regard to when deciding price and value.

[48] I do not consider that the order made should be cancelled and the application dismissed at this time. It is in the interests of justice to extend the time for the final condition attached to the 31 March 2014 order to be satisfied.

Decision

[49] The time for satisfying the condition attached to the order made on 31 March 2014, is extended from the date of the order until this date of judgment and for a further 4 months.

[50] If an agreement between the parties is not realised within that time, or if the respondents indicate any sooner that they are not in position to make an offer, the order will lapse and the application will be dismissed in Chambers.

[51] The Registrar is to send a copy of this decision to the parties.

Pronounced in Open Court in Gisborne on the 19th day of July 2016.

C L Fox
DEPUTY CHIEF JUDGE