

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

A20150001286

UNDER Rule 3.8(1)(b) of the Māori Land Court Rules
2011

AND Section 338, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Omaha 4C4 Ahu Whenua Trust

BETWEEN OLIVIA THOMPSON
Applicant

Hearings: 39 Tākitimu MB 123 dated 3 March 2015
45 Tākitimu MB 47 dated 4 November 2015

Appearances: Olivia Thompson in person

Judgment: 10 May 2016

RESERVED DECISION OF JUDGE L R HARVEY

Introduction

[1] Olivia Thompson, a trustee of the Omaha 4C4 Trust, seeks directions per r 3.8(1)(b) of the Māori Land Court Rules 2011 regarding its administration. Ms Thompson claims she is being denied access to trust information and may be held liable and accountable for trust misconduct or inactivity.

[2] At the hearing held on 3 March 2015 it became apparent that one of the contentious issues for the trust was whether part of the land should be set aside as a Māori reservation.¹ I directed the trustees to convene a meeting of owners to discuss the financial accounts, the state of the trust lands, the trust order and more importantly the future use and development of the land including the proposal for an urupā.

¹ 39 Tākitimu MB 123-143 (39 TKT 123-143)

[3] A meeting of beneficial owners, convened by Mr Peter Bloor as independent facilitator, was held on 27 August 2015. A postal vote was also conducted in relation to the proposed urupā.

[4] A further hearing was held on 4 November 2015.² I heard from Mr Bloor in relation to the meeting. I also appointed Chris Kemp and Stephen Randell as trustees in place of the current trustees. I adjourned the application for a written decision to issue regarding the urupā.

Issue

[5] The remaining issue for determination is whether part of the land should be set apart as a Māori reservation. It would also appear that the other issues that had been raised have been largely resolved. They certainly did not feature prominently during the hearings.

Background

[6] Omahu 4C4 is Māori freehold land approximately 14.5636 ha in size. There are currently 46 beneficial owners. The land is administered by the Omahu 4C4 Ahu Whenua trust. The trustees at the time the application was filed were Delvia Kemp, Olivia Thompson, Versary Kemp-Winiata and Whakarite Kemp.³

[7] As foreshadowed on 4 November 2015 I appointed Chris Kemp and Phillip Randell as replacement trustees.⁴ I also appointed Olivia Thompson as an advisory trustee.

The Law

[8] Section 338 of Te Ture Whenua Māori Act 1993 provides:

338 Maori reservations for communal purposes

- (1) The chief executive may, by notice in the Gazette issued on the recommendation of the court, set apart as Maori reservation any Maori freehold land or any General land—
 - (a) for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, timber reserve, catchment area or other source of water supply, or place

² 45 Takitimu MB 47-57 (45 TKT 47-57)

³ 22 Takitimu MB 117-121 (22 TKT 117-121)

⁴ 45 Takitimu MB 47-57 (45 TKT 47-57)

of cultural, historical, or scenic interest, or for any other specified purpose; or

- (b) that is a wāhi tapu, being a place of special significance according to tikanga Maori.
- (2) The chief executive may, by notice in the Gazette issued on the recommendation of the court, declare any other Maori freehold land or General land to be included in any Maori reservation, and thereupon the land shall form part of that reservation accordingly.
- (3) Except as provided in section 340, every Maori reservation under this section shall be held for the common use or benefit of the owners or of Maori of the class or classes specified in the notice.
- (4) Land may be so set apart as or included in a Maori reservation although it is vested in an incorporated body of owners or in the Māori Trustee or in any other trustees, and notwithstanding any provisions of this Act or any other Act as to the disposition or administration of that land.
- (5) On the recommendation of the Court, the Chief Executive, by notice in the Gazette, may, in respect of any Maori reservation made under this section, do any one or more of the following things:
- (a) Exclude from the reservation any part of the land comprised in it:
- (b) Cancel the reservation:
- (c) Redefine the purposes for which the reservation is made:
- (d) Redefine the persons or class of persons for whose use or benefit the reservation is made.
- (6) No notice under this section shall affect any lease or licence, but no land shall be set apart as a Maori reservation while it is subject to any mortgage or charge.
- (7) The Court may, by order, vest any Maori reservation in any body corporate or in any 2 or more persons in trust to hold and administer it for the benefit of the persons or class of persons for whose benefit the reservation is made, and may from time to time, as and when it thinks fit, appoint a new trustee or new trustees or additional trustees.
- (8) The Court may, on the appointment of trustees under subsection (7) of this section, or on application at any time thereafter, set out the terms of the trust, and subject to any such terms, the Maori reservation shall be administered in accordance with [, and be subject to,] any regulations made under subsection (15) of this section.
- (9) Upon the exclusion of any land from a reservation under this section or the cancellation of any such reservation, the land excluded or the land formerly comprised in the cancelled reservation shall vest, as of its former estate, in the persons in whom it was vested immediately before it was constituted as or included in the Maori reservation, or in their successors.
- (10) In any case to which subsection (9) of this section applies, the Court may make an order vesting the land or any interest in the land in the person or persons found by the Court to be entitled to the land or interest.
- (11) Except as provided in subsection (12) of this section, the land comprised within a Maori reservation shall, while the reservation subsists, be inalienable, whether to the Crown or to any other person.
- (12) The trustees in whom any Maori reservation is vested may, with the consent of the Court, grant a lease or occupation licence of the reservation or of any part of it for any term not exceeding 14 years [(including any term or terms of renewal)], upon and subject to such terms and conditions as the Court thinks fit.

- (13) The revenue derived from any such lease or occupation licence shall be expended by the trustees as the Court directs.
- (14) Any lease granted pursuant to subsection (12) of this section for the purposes of education or health may, notwithstanding anything in that subsection, be for a term exceeding 7 years [(including any term or terms of renewal)] and may confer on the lessee or licensee a right of renewal for one or more terms.
- (15) The Governor-General may from time to time, by Order in Council, make all such regulations as, in the Governor-General's opinion, may be necessary or expedient for giving full effect to the provisions of this section.
- (16) Any such regulations may apply to any specified Maori reservation or to any specified class of Maori reservations, or to Maori reservations generally.
- (17) Where any Maori reservation (set apart under any Act repealed by this Act or the corresponding provisions of any former Act) is subsisting at the commencement of this Act, this Act, and any regulations made under this Act, have effect,—
 - (a) in relation to the Maori reservation, as if it were a Maori reservation set apart under this section; and
 - (b) in relation to any vesting order made in respect of the Maori reservation (under any Act repealed by this Act or the corresponding provisions of any former Act), as if that vesting order were a vesting order made under this section.

[9] In *Bristowe – Section 4C1 Block II Tuatini Township* the Court identified a number of principles regarding Māori reservations:⁵

- (a) The provisions set out in s 439 of the Māori Affairs Act 1953 relating to Māori reservations were significant as they represented the only legislative acknowledgement of the tribal and communal basis of Māori land ownership and enabled that concept to be applied to areas of special tribal significance;
- (b) In determining the appropriate beneficiaries of a Māori reservation, the Court has regard to Māori customary concepts relating to turangawaewae and ancestry. Māori reservations are generally held for the whānau, hapū or iwi traditionally associated with that land and very special circumstances must exist before a Māori reservation is set aside for the common use and benefit of others. It is important to maintain the customary distinction between hosts and guests, or owners and invitees;
- (c) It is important that the underlying beneficial ownership be maintained and successions completed, as while the legal estate vests in trustees, the beneficial estate remains with the original owners or their successors. All that is passed is a licence as to occupation, use and enjoyment of the land and the benefits accruing there from for as long as the reservation status persists. Conversely, the rights of the beneficial owners to the legal estate or exclusive use and enjoyment as beneficial owners are suspended;
- (d) Reservation trustees are governed by the same rules of trust as other types of trustees, and they are appointed by the Court. Elections are evidence of who those at a meeting support for nomination to the Court. The Court will take a broad range of factors into account in appointing trustees, including

⁵ *Bristowe - Section 4C1 Blk II Tuatini Township* (2003) 66 Ruatoria MB 130 (66 RUA 130)

the people for whom the reservation was set aside, the characteristics of the proposed trustees, and if a proposed trustee is a body corporate, the nature of its structure, operation and business;

- (e) On matters relating the administration of a reservation, the trustees should consult with the persons for whose use and benefit the reservation was created;
- (f) To amend the purposes of a reservation, to redefine the beneficiaries or boundaries or to exclude or add land to the reservation, the trustees should consult with the underlying beneficial owners;
- (g) Māori are entitled to have recognition of the fact that the land is a Māori reservation, that it may have some special tribal significance, that Māori usually control it, and that others use it only for as long as they accept and respect those facts;
- (h) The total or partial cancellation of Māori reservation is appropriate only where circumstances have changed or where it is to enable some development consistent with the purpose reservation (for example pensioner housing on marae) or some commercial development on a peripheral part of the reservation in order to maintain the rest of the reservation. However, the Court's main concern is to ensure the area is not so changed so as to defeat the purposes for which the reservation was created, or allow some incompatible user. The Court has a duty to protect Māori reservations;
- (i) Where a modern generation of beneficiaries propose the exclusion of some central or major part for some commercial reason inconsistent with the legislation and the reservation itself, then if the Court is minded to permit such development, it has to ask itself whether or not the reservation status should remain in respect of the whole land. The Court has to weigh not only the arguments and views of contemporary owners and beneficiaries, but the views of earlier generations, as documented in Court records, who supported the use of their land for some common purpose or the common good when the reservation was created. It may be that in proposing the reservation they sought some measure of retention in perpetuity of an area of tribal significance. The Court is concerned with protecting the values of a past generation from the exigent demands of some future generation with a more materialistic mind. The restrictions on leasing, for example, are consistent with the Court needing to take a strict approach and protect Māori reservations from development proposals requiring long term leases;
- (j) In relation to appointment of trustees, when one considers the retention and utilisation principles underpinning the 1993 Act, an inclusive approach, taking into account the views of both the beneficial owners and persons for whom the reservation was set aside, is preferable.

[10] In *Gibbs v Te Rūnanga o Ngāti Tama* the nature of Māori reservations was explored:⁶

- (a) They come in all shapes and sizes. It is commonplace for land that is covered by a Māori reservation overlay to predate colonisation in terms of its importance to hapū and iwi.

⁶ *Gibbs v Te Rūnanga o Ngāti Tama* (2011) 274 Aotea MB 47 (274 AOT 47)

- (b) Most are set aside for a class of beneficiaries that are hapū based and for the hapū of owners of the land.
- (c) They are normally set up for communal purposes to benefit a particular community of interest that is hapū-based.
- (d) Court record confirms that out of 26,000 titles there are only 2,000 Māori reservations. It is special status normally reserved for communal purposes to benefit Māori communities of interest.
- (e) Usually Māori reservations are established by Māori who have held occupation as tangata whenua since 1840.

[11] These principles were referred to most recently by Chief Judge Isaac in *Grace – Ngarara West A25B2A* regarding an application to set aside land as a Māori reservation where the land sought to be set aside was required by the New Zealand Transport Agency to enable the construction of an expressway.⁷

Discussion

[12] Ms Thompson on behalf of the James Juno Kemp Whānau Trust proposes that an area of the block be set apart as an urupā for all the owners. According to Whakarite Kemp, a former trustee, the proposal to set aside part of the block as an urupā has been the subject of a series of meetings over the years. Mrs Kemp acknowledges that the consensus of those present at the meetings has not been in favour of the urupā.

[13] At the hearings before it was argued that the need for an urupā stems from the fact that although there is a cemetery on the neighbouring Rūnanga block the applicant says her grandmother has always said that their urupā is Omaha. There is a further underlying issue between the owners over a past agreement between whānau to swap land. This was the source of some contention at the hearings.

[14] Ultimately that issue is not integral to the question of whether part of this block should be set aside as an urupā. Rather, the focus is on whether there is enough support from the beneficial owners for the urupā.

⁷ *Grace – Ngarara West A25B2A* (2014) 317 Aotea MB 268 (317 AOT 268)

[15] At the Court directed meeting the proposal for the urupā was discussed. Those owners who were present were given the opportunity to express their views on the proposal. No vote was held given that a postal vote was to take place on the issue.

[16] As foreshadowed, a postal vote was held to determine whether there was sufficient support for the urupā. The response to the postal vote was modest with only six beneficial owners, including representatives of whānau trusts, responding.

[17] On a shareholding basis seven percent of the total shareholding supported the urupā and four percent were opposed. On an ownership basis the James Juno Kemp Whānau Trust supported the application and five beneficial owners were opposed.

[18] I note that the Court also received postal votes from persons for whom the Court could not match to the ownership list. Those persons are Delvia Kemp who at the time was a trustee of the trust and Timoti Gemmell. They expressed opposition to the proposal.

[19] There are no specific provisions regarding the level of support required to recommend land be set apart as a Māori reservation. In *Tamati – Horotiu and Puketapu urupa* the Court, in determining an application to set aside land as a Māori reservation under the provisions of the Māori Affairs Act 1953, commented that:⁸

Application for recommendations that Māori freehold land be set apart as Māori reservations are fairly common in the Māori Land Court. As a rule of practice the Court, save in exceptional circumstance, requires the consent of owners holding the majority of the shares in the block sought to be set apart as a Māori reservation.

[20] In that case the Court in reliance of the Māori Appellate Court decision in *Hetaraka – Karikari BIBI* determined that the sole owner of the land had not consented to the recommendation and as such the application was dismissed.⁹

[21] In the present case the land is not solely owned, there are approximately 46 beneficial owners and it is managed by a trust. The urupā proposal only has the support of the Juno Kemp Whānau Trust it would seem. The trustees have not agreed to it and neither have the majority of the beneficial owners. In such circumstances I cannot see how it would be in the best interests of all the owners to set apart part of the block as a Māori Reservation.

⁸ *Tamati – Horotiu and Puketapu* (1980) 84 Taranaki MB 70 (84 TAR 70)

⁹ *Hetaraka – Karikari BIBI* (1966) 1 Taitokerau Appellate Court MB 287 (1 APWH 287)

[22] Further, I have received no sketch plan of the area proposed to be set aside nor has the applicant provided any details as to the proposed beneficiary class for the Māori reservation.

[23] In the absence of such details, and taking into account the fact that the proposal is not well supported by the trustees and the beneficial owners, I decline to make a recommendation setting apart part of Omahu 4C4 as a Māori reservation at this time. In due course if evidence of increased support emerges then the proposal can be considered again.

Decision

[24] The application is concluded and dismissed.

[25] There will be no order for costs.

Pronounced at 4.00 pm in Rotorua on Tuesday this 10th day of May 2016

L R Harvey
JUDGE