IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

Application No: A20100001098

IN THE MATTER	of **HARATAUNGA 2C1**
A N D	
IN THE MATTER	of an application pursuant to section 45/93 for the amendment of a Order made on 2 July 1962 setting aside Harataunga 2C1 as a Māori Reservation under section 439 of the Māori Affairs Act 1953
ON BEHALF OF	Dean Katipa for and on behalf of the descendants of Heni Ngaropi

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SUBMISSIONS ON BEHALF OF THE APPLICANT IN RESPONSE TO THE RESPONDENTS' SUBMISSIONS DATED 7 OCTOBER 2013

Dated October 2013

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MAY IT PLEASE THE COURT:

1.0 Background

1.1 In August 2013 Counsel were invited by the Court to file submissions by the end of September 2013 setting out reasons (if any) that the Court not adopt the recommendation passed at the Court-directed hui held on 10 November 2012 ("the hui").

1.2 Counsel had already intended to file submissions principally in support of the making of orders in line with the resolutions passed at the hui ("the resolutions"). However, once Mr Kahukiwa confirmed that he would be filing a submission on behalf of his clients against the making of such orders, Counsel considered it more efficient if this submission also contained a response.

1.3 The purpose of this Memorandum of Counsel is therefore twofold:

(a) to respond to the respondents' submissions dated 7 October 2013; and

(b) to address the issue of whether the Court should adopt the resolutions passed at the hui. The Court has previously indicated its intention to make orders in accordance with the resolutions without a further Court hearing.

2.0 Respondents' Submissions

2.1 Mr Kahukiwa submits that his Honour Chief Judge Isaac does not adopt the resolutions made at the hui based on two principle submissions:

(a) That the Chief Judge has no jurisdiction to do so; and

(b) That the resolution is unreliable.

2.2 Counsel replies to each of these submissions in turn below.

Jurisdiction

2.3 In terms of the jurisdictional issue, Mr Kahukiwa essentially now submits that, in light of the provisions of section 44 of Te Ture Whenua Māori Act 1993, the resolutions cannot be adopted without the Chief Judge first being satisfied that the order setting apart Harataunga 2C1 was erroneous in fact or in law.

2.4 From the outset counsel must point out that his Honour Chief Judge Isaac directed that the hui proceed at the hearing held on 17 August 2012 ("the hearing"). His Honour made the proposed purpose of the hui clear.[1] The respondents therefore had the opportunity to raise this issue of jurisdiction at or soon after the hearing. They chose not to do so and have now waited over a year before doing so - after the hui has been held and the parties have finally arrived at a resolution.

2.5 It is submitted that all parties were very clear on what the Chief Judge was trying to achieve by directing that the central issue be resolved by the people affected by it and that, if no resolution was found, the Chief Judge would make a determination as required under section 44 of the Act.

2.6 In summary, John McLeod gave evidence effectively accepting the following:

[1] 2012 Chief Judge's MB 396-397.

(a) that the current definition of beneficiaries has the effect of alienating Ngā Hapū e Toru from Harataunga Marae, including his own daughter;

(b) that a way to alleviate the above grievance was to enfranchise all descendants of Heni Ngaropi White wherever they reside;

(c) that he was interested in having a proper debate about changing the definition; and

(d) that, if there was a way to define the beneficiaries to ensure that everyone is included he would consider it, as long as Māori ahi kā of Kennedy's Bay are included.

2.7 This must have influenced the Chief Judge in his decision to refer the matter to a hui for discussion and resolution. We repeat that no one at the hearing or until now have questioned that decision. We submit, that there is an element of consent on behalf of all parties to this proceeding to the hui process, with the backstop being, returning to Court for a determination, if the central issue could not be resolved.

2.8 Counsel submit that, through the hui, Mr McLeod and the other respondents had the opportunity to have a proper debate about changing the definition of beneficiaries of Harataunga Marae, which is what they wanted (as evidenced by Mr McLeod's evidence at the hearing). Furthermore, the respondents' role as trustees are to act in the best interests of the beneficiaries. The beneficiaries, along with other interested parties, have spoken - they have agreed on a definition of beneficiaries that is inclusive, which is what Mr McLeod, on behalf of the other respondents, said that he wanted. That said, counsel note that there are some issues regarding the proposed definition, which are dealt with below.

2.9 From the attendance list it is clear that the respondents were all present at the hui and did not raise any objection to the passing of the resolutions. There has in fact been no argument from Mr Kahukiwa that key people were not present at the hui. In the circumstances, counsel submit that Mr Kahukiwa's clients are now making an overly technical argument, after the fact, and suggest that this goes totally against what the beneficiaries of Harataunga Marae resolved at the hui.

2.10 That said, counsel have been unable to locate any authority that assists with determining whether Mr Kahukiwa's argument is in fact correct.

2.11 However, counsel note that there is a live application to redefine the beneficiaries and purposes of Harataunga Marae dated 10 September 2007 (A20070011715), on which an order in line with the resolutions passed at the hui could potentially be made. That application was put on hold pending the outcome of the section 45 application. Our clients, had serious issues with the way in which her Honour Judge Milroy had determined who had the ability to attend and vote at any hui to discuss the redefinition of the beneficiary class. Because of that they decided that the better path was to confirm that there was an error and to ask the Chief Judge to remedy the error via the special powers contained in section 44 of the Act.

2.12 Counsel submit that part of the Court process in determining an application for redefinition involves obtaining the views of the underlying owners and the current

beneficiaries.[2] Although this has not been carried out in the usual way, it has effectively occurred through the hui.

2.13 If the Court accepts the jurisdictional argument or finds that there was no error of law and/or fact, the applicants will revive their application to redefine the beneficiaries of the marae. This will effectively repeat the hui process that the Chief Judge directed, which in the circumstances will be a complete waste of time and resources. We note that both parties are in receipt of special aid.

2.14 In Counsels' submission an order in line with the resolutions passed at the hui would also promote the key principles of the preamble to Te Ture Whenua Māori Act 1993 ("the Act") and those set out in section 17 of the Act. In particular, such an order would:

(a) reaffirm and protect the rangatiratanga of the descendants of Heni Ngaropi White and Ngā Hapū e Toru over Harataunga 2C1;

(b) in recognition that Harataunga 2C1 is a taonga tuku iho of special significance to the descendants of Heni Ngaropi White and to Ngā Hapū e Toru:

(i) include them, as true beneficiaries, and allow them to regain the mana to make decisions affecting the land that they were meant to benefit from, decisions that will be made for the benefit of their whānau and hapū;

(c) give effect to the wishes of the underlying owners, the descendants of Heni Ngaropi White;

(d) enable the settlement of the ongoing and protracted disputes between whānau in relation to the issues arising out of this application; and

(e) be a practical solution to the problems that have arised in the use and management of Harataunga 2C1 as a result of the issues arising out of this application.

2.15 If his Honour accepts the respondents' submission on jurisdiction, Counsel anticipate that his Honour will make a finding that an error was made, which error requires a remedy. Counsel's case has been that there is clear evidence to make such a finding.

Reliability

2.16 Mr Kahukiwa submits that there are real questions regarding the resolutions passed at the hui. Firstly, he submits that certain comments made by Mr Johnson Raumati, the facilitator of the hui:

(a) raise questions as to the reliability of the resolutions passed at the hui;

(b) put Mr Johnson at risk of being in contempt of Court; and

(c) risk the appearance that the integrity of the legal process has been compromised.

[2] *Tangitu v Parish of Te Puna Lot 154A2 Trustees* 21/11/05 82 T 274.

2.17 Mr Kahukiwa bases the above submission on his argument that the relevant comments made by Mr Raumati may have lead hui attendees to think that the Chief Judge was of the view that an error had been made and that a change in the definition of the beneficiaries of Harataunga 2C1 was therefore necessary. Mr Kahukiwa submits that, on that basis, the comments of Mr Raumati may have been influential of the hui.

2.18 However, Counsel notes that Mr Raumati commenced the hui by reading out an extract from the hearing that encapsulated his Honour's reasons for calling the hui. That extract (as read) includes the following statements made by his Honour: [3]

"*I am going to reserve my decision in relation to this application but in so reserving my decision, and in my view in the interests of justice, I'm going to direct that a meeting take place and I'd like that meeting to be held within two months. It's clear that this issue needs to be resolved and, in my view, it should be resolved by the parties rather than the Court. If it cannot be resolved by the parties, then I'm going to ask that it come back to the Court and I'll issue a decision in relation to what I've heard today…*

…The sole purpose of this meeting is to consider whether or not the class of beneficiaries for this marae should change and if it's agreed that they should change to whom should they change to is the next question. If it's thought that the beneficiaries should not change or if there is no resolution and you cannot agree, then that is to be recorded and it will come back to me to make a decision on the evidence of the submissions."

2.19 Counsel submit that, by reading out the above, Mr Raumati made it clear at the outset of the hui what his Honour's intentions were in calling the hui. Counsel submits that the above statements clarified for the hui attendees:

(a) that his Honour's preference was for the parties reach a resolution rather than for the Court to make a decision on the application;

(b) that the sole purpose of the hui was to consider whether the beneficiaries of Harataunga Marae should change and, if so, who it should change to;

(c) that his Honour had not yet issued a formal decision on the application; and

(d) that a formal decision would not be issued by his Honour unless the parties at the hui could not reach a resolution on the two questions they were asked to consider.

2.20 On that basis, counsel submit that the hui attendees are unlikely to have been lead by Mr Raumati into thinking anything different to the above, as Mr Kahukiwa suggests.

2.21 Secondly, Mr Kahukiwa submits:

(a) that the voting was not unanimous. However, considering the above statement by the Chief Judge, it was anticipated that any agreement on the two questions that the hui was asked to consider would be by

[3] Transcript of hui, pp1-2.

resolution, not *unanimous* resolution. Indeed there is no requirement for resolutions of this nature to be unanimous in the Act or otherwise;

(b) that his instructions are that some attendees chose not to indicate a vote. However, after both resolutions were passed, Mr Raumati asked if anyone who was against the resolutions wanted to be recorded as such.[4] It is clear from the transcript that no one asked to be recorded as being against the resolution to change the beneficiaries and that only one attendee, Haarangi Harrison, asked to be recorded as being against the resolution regarding who the beneficiaries should be.[5] Counsel submit that the transcript further records Mr Raumati being satisfied that the resolutions were passed by majority, the votes being taken by show of hands.[6]

2.22 Thirdly, Mr Kahukiwa submits that, rather than being inclusive (in terms of the marae being for the local people) the resolution will have the "unintended consequence" of excluding owners or Māori residents of Kennedy Bay.

2.23 As previously submitted by counsel, this is not about who is or is not welcome at the marae. This is about who should be able to vote on important *take* such as who the trustees of the marae should be and who should have a say on other important issues. As it stands, there are people who should have that right that do not. Harataunga Marae will still be a local marae for local people (among others) if the resolutions passed at the hui are adopted by the Chief Judge, as it always has been. Our assessment is that the resolution is more inclusive and more certain given that the current definition excludes those who do not reside at Kennedy's Bay and can be interpreted to include non-Māori.

2.24 In addition, counsel is not clear about whose 'intention' Mr Kahukiwa is referring to, however, it is clear from the transcript that the intentions of those who voted at the hui for the new definition, the vast majority of those in attendance, including current beneficiaries, were to pass the resolutions in their current form.

3.0 The Applicant's Position

3.1 The applicant and his whānau support the making of the orders in principle, however, counsel raise issues (below) with the proposed new definition of beneficiaries.

3.2 Set out below are counsels' submissions on the following:

(a) why orders should be made in line with the resolutions;

(b) why the proposed definition of beneficiaries is not sufficiently certain; and

(c) what, in our view, can be done to remedy the above issue of certainty.

3.3 Counsel address each of the above matters in turn.

4.0 Why the resolved orders should be made

4.1 Counsel submit that the following factors support the making of orders in accordance with the resolutions. In essence, the beneficiaries have made the

[4] Transcript of hui, pp 19 & 28.
[5] Transcript of hui pp 19 and 28.
[6] Transcript of hui pp 19 and 28.

decision themselves and that in our submission must be the best outcome in the circumstances, given the long and protracted history of this issue.

4.2 As referred to above, a previous application has been made under section 338 of the Act to redefine the beneficiary class for Harataunga Marae. The application was put on hold because of serious concerns with the Court's direction for a hui to be held to obtain the views of the beneficiaries as presently defined and the underlying owners thereby excluding descendants of Ngā Hapū e Toru who do not reside in Harataunga.

4.3 As noted above, the redefinition application was overtaken by the section 45 application, which was made on the basis that the evidence suggested the Court had made historical errors. It was also made in light of the fact that the Court-directed hui under section 338 would have excluded interested parties and the status quo would likely have remained.

The people have spoken

4.4 **All** interested parties have now been given the opportunity to have their say at the hui. 133 people (according to the hui facilitator report) attended. As stated above, this includes all of the respondents and their supporters.

4.5 This has led to a result of there being overwhelming support for the proposed change to the beneficiary class. In short, the people have been given the opportunity to speak and they have spoken.

4.6 In our submission, it would create a further injustice and unnecessary further costs for all, if the Court did not follow the will of the people.

Promotion of key Te Ture Whenua Māori Act principles

4.7 As submitted at paragraph 2.14 above, an order in line with the resolutions passed at the hui, would in our submission promote the key principles of the preamble to Te Ture Whenua Māori Act 1993 ("the Act") and those set out in section 17 of the Act.

Proper process followed

4.8 In terms of the process itself we note that the hui was managed by Court staff and therefore would have been advertised in accordance with the Act's notice requirements.

4.9 A wide and inclusive group of interested parties was invited to attend the hui, as directed by his Honour Chief Judge Isaac at the hearing and a large number did attend (133 people according to the hui facilitator report, as mentioned above).

4.10 In terms of the hui itself, according to the transcript and based on Counsels' instructions:

(a) those who wanted to speak at the hui had the opportunity to do so;

(b) as submitted above, no one that was present at the hui voiced any opposition to the motion that the definition of beneficiaries be changed;

(c) there was a full and frank discussion of the issues; and

(d) ideas on what the new definition of beneficiaries should be were put forward by various parties and discussed.

4.11 It also appears that there was agreement that the change in definition should be an inclusive one – that it should not be limited to the three hapū known as Ngā Hapū e Toru - Te Aitanga-ā-Mate, Te Aowera and Te Whānau Rakairoa (despite that being the intention of Heni Ngāropi White). It appears from the transcript that this was particularly so that Harataunga Marae ahi kaa/hau kainga ki Harataunga that do not whakapapa to Ngā Hapū e Toru will not be excluded.

4.12 The resolution that was ultimately passed on what the definition of beneficiaries should be changed to is recorded in the transcript as follows:

"Resolution that the land known as Harataunga 2C 1 Block is set aside as a Māori reservation for the purpose of a Marae for the common use and benefit of the beneficiaries being the descendants of Heni Ngaropi White, Te Aitanga A Mate, Te Aowera, Te Whānau Rakairoa and the hau kainga of Harataunga (Kennedy Bay)."

4.13 It appears from the transcript that the resolution was passed by a significant majority – only one person (Haarangi Harrison) being recorded as being opposed.

5.0 Issues of certainty

5.1 As stated above, the applicant and his whānau support the making of orders in line with the resolutions in principle, however, counsel submits that the resolutions as currently drafted are not sufficiently clear in two respects.

First issue

5.2 It is not clear whether the intention was that the phrase "the descendants of":

(a) was only meant to be related to Heni Ngaropi White;

(b) was also meant to relate to Ngā Hapū e Toru (which we are instructed is in fact the case); and/or

(c) was also meant to relate to the hau kainga of Harataunga (which we are instructed is not the case).

5.3 Counsel submits that simple structure/layout can be used to cure this issue, for example, if the resolution was set out as follows:

"Resolution that the land known as Harataunga 2C 1 Block is set aside as a Māori reservation for the purpose of a Marae for the common use and benefit of the beneficiaries being:

(a) the descendants of Heni Ngaropi White; and

(b) the descendants of Te Aitanga A Mate, Te Aowera and Te Whānau Rakairoa (also known as Ngā Hapū e Toru); and

(c) the hau kainga of Harataunga (Kennedy Bay)".

[Counsel submits that Ngā Hapū e Toru should be added to paragraph (b) for completeness, given the three hapū are also referred to in that way].

Second issue

5.4 The resolution also does not define what is meant by "hau kainga". Counsel submit that this could give rise to some future issues of interpretation. It appears from the hui transcript and our instructions that this issue was raised and discussed at the hui. The hui faciliator suggested that, whatever term it was decided would replace the term 'residents', could be defined in the marae charter.

5.5 Whilst that is a possibility, Counsel submits that leaving this issue open may lead to further disagreement and tension. It is submitted that the better course for all parties is for all of the issues arising out of this application to be finally addressed and disposed of on the Chief Judge making his orders and ultimately in the resulting Gazette Notice.

5.6 Counsel has conferred with the applicant's whānau and they propose that hau kainga is defined as follows:

"Persons of Māori descent who may not be descendants of Ngā Hapū e Toru or Heni Ngaropi White but, as determined by the trustees of Harataunga Marae:

(a) actively assist in the organisation of events held at Harataunga Marae; or

(b) work at Harataunga Marae during the course of events held at the marae; or

(c) help to maintain and look after the grounds and buildings at Harataunga Marae".

6.0 Proposed next step

6.1 In light of the matters raised, we propose a judicial conference whereby all parties are required to be present, or at the very least representatives, together with counsel to discuss the issues and the proposed next steps.

DATED this day of October 2013

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A H C Warren/L M S Farquhar
Counsel for the Applicant