IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

IN THE MATTER	**HARATAUNGA 2C1 BLOCK**
A N D	
IN THE MATTER	of an application pursuant to Section 45 Te Ture Whenua Māori Act 1993 for the amendment of an Order made on 2 July 1962 setting aside Harataunga 2C1 as a Māori Reservation under Section 439 of the Māori Affairs Act 1953

SUBMISSIONS IN SUPPORT OF APPLICATION PURSUANT TO SECTION 45 TE TURE WHENUA MĀORI ACT 1993

Dated this 3rd day of February 2012

Director
A H C Warren

One on London
1 London Street
PO Box 9348
Hamilton 3240
New Zealand

DX GP 20020
T 64-7-838 2079
F 64-7-839 4652
W www.mccawlewis.co.nz

McCaw Lewis
LAWYERS

MAY IT PLEASE THE COURT

Introduction

1. These submissions are filed on behalf of the applicant Mr Dean Katipa ("the applicant") in respect an application pursuant to section 45 Te Ture Whenua Māori Act 1993 ("the TTWMA") for amendment to an order made on 2 July 1962 regarding Harataunga 2C1 ("the application").

2. The order set aside Harataunga 2C1 ("the land") as a Māori Reservation "*for the purpose of a meeting place and sports recreation ground for the common use and benefit of the residents of Kennedy Bay"* ("the order").

3. The applicant argues that the order made by the Court was in error and seeks an amendment to the order to correctly show the true intention of the owner Heni Ngaropi when she made the original application to have the land set aside as a Māori Reservation in 1954 ("the original application"). The original application sought the creation of a Māori Reservation for the purpose of a meeting house site and Marae for the use and benefit of Te Aitanga-a-Mate, Te Whānau o Raikairoa and Te Aowera ("Ngā Hapū e Toru").

4. These submissions are made based on the evidence currently before the Court as outlined in the report and recommendations prepared by Samantha Nepe and Kura Barrrett-A201000001098, CJ 2010/1 (" the Case Managers' Report")

Grounds

5. It is submitted that the order is erroneous in fact and in law because of a mistake and/or omission on the part of the Court as per the following grounds:

   (a) In making the order, the Court failed to consider the requirements of Section 493(3) of the Māori Affairs Act 1953 ("the Act"), in that non-Māori residents of Kennedy's Bay are now beneficiaries of the Harataunga Marae Trust ("Harataunga Marae");

   (b) The Court had no jurisdiction to make the order setting aside the land as a reservation for the class of beneficiaries as outlined in the order;

(c) The Court made the order without the consent of Heni Ngaropi, the sole owner of the land. The application on which the order was based was made by Richard Hovell in 1962 ("the 1962 application"). There is no evidence that Heni Ngaropi consented to the 1962 application;

(d) The beneficiaries as defined in the 1962 application did/do not reflect the intentions of Heni Ngaropi in the original application, which was that the reservation be created for the use of Ngā Hapū e Toru. The original application also supports the contention that Heni Ngaropi did not consent to the application and more importantly, to the definition of the beneficiaries being the residents of Kennedy's Bay; and

(e) Heni Ngaropi did not give evidence in any of the relevant hearings and there is no evidence that she was notified of the hearings or sent the minutes.

The Law

6. The application is made pursuant to section 45 of the TTWMA to exercise the Chief Judge's specials powers to amend an order of the Court. Sections 44 and 45 state:

44 Chief Judge may correct mistakes and omissions

(1) On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court [or a Registrar (including an order made by a Registrar before the commencement of this Act)], or a certificate of confirmation issued by a Registrar under section 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

(2) Subject to section 48 of this Act but notwithstanding any other provision of this Act, any order under this section may be made to take effect

retrospectively to such extent as the Chief Judge thinks necessary for the purpose of giving full effect to that order.

(3) Notwithstanding anything to the contrary in this Act, the powers conferred on the Chief Judge by this section may be exercised in respect of orders to which the provisions of section 77 of this Act would otherwise be applicable.

(4) The powers conferred on the Chief Judge by this section shall not apply with respect to any vesting order made under [Part 6] of this Act in respect of Maori customary land.

(5) The Chief Judge may decline to exercise jurisdiction under this section in respect of any application, and no appeal shall lie to the Maori Appellate Court from the dismissal by the Chief Judge of an application under this section.

45 Applications for exercise of special powers

(1) The jurisdiction conferred on the Chief Judge by Section 44 of this Act shall be exercised only on application in writing made by or on behalf of the person who claims to have been adversely affected by the Order to which the application relates, or by the Registrar.

(2) On any application under this section, the Chief Judge may require the applicant to deposit in an office of the Court such sum as the Chief Judge thinks fit as security for costs, and may summarily dismiss the application if the amount so fixed is not so deposited within the time allowed.

7. The key matters to be considered are:

(a) Whether the order was erroneous in fact or in law because of a mistake or omission on the part of the Court or in the presentation of the facts of the case to the Court?

(b) If so, is it necessary in the interests of justice to remedy the mistake or omission?

Key principles

8. To assist with this determination, the Māori Appellate Court in *Grant v Raroa – Ngamoe A1B1B*[1] helpfully articulated the key principles with respect to section 45 applications, these being:

   (a) When considering section 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition);

   (b) Section 45 applications are not to be treated as a rehearing of the original application;

   (c) The principle of *Omnia Praseumutur Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to section 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct ("the first presumption");

   (d) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct ("the second presumption");

   (e) The burden of proof is on the applicant to rebut the two presumptions above; and

   (f) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in section 77 of the TTWMA, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the TTWMA must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

9. However, where the Chief Judge is satisfied that a mistake or omission has occurred in the making of an order, then the final question is whether cancelling or amending the order will bring justice to the situation or create further injustice.

[1] *Grant v Raroa – Ngamoe A1B1B* (1993) 33 Tairawhiti Appellate MB 35 (33 APGS 35)

Standard and Onus of Proof

10. The Māori Appellate Court has held that the standard of proof for section 45 applications is the balance of probabilities, as per *Tau v Nga Whanau o Morven & Glenavy – Waihao 903 Section IX Block*[2]. In *Glenavy* the Court held that:

"[61] ... We rule that the Chief Judge must exercise his jurisdiction by applying the civil standard of proof of the balance of probabilities having regard to that standard's inherent flexibility that takes into account the nature and gravity of the matters at issue."

11. *Glenavy* was subsequently upheld in *White v White*[3], where Chief Judge Isaac held at paragraph [6]:

"The established standard of proof for a section 45 is the balance of probabilities. *... The onus of proof is on the applicant to prove the existence of the alleged mistake or omission."*

Relevant Evidence

12. There are a number of documents referred to in the application and in the Case Manager's Report that are currently before the Court as part of the Court's own record. The applicant and his supporters have advised that they are able to give oral evidence of the events pre and post the making of the order and the intention of Heni Ngaropi in regards to the land and evidence about how the order has caused significant prejudice and disharmony.

13. If the application proceeds to hearing this evidence will be produced by way of written brief or affidavit, unless the Chief Judge is of the view that the applicant's case is made out without the need for further evidence.

14. For ease of reference the relevant documentary evidence currently before the Court is:

    (a) Original application by Heni Ngaropi dated 4 March 1954 pursuant to section 5 of the Māori Purposes Act 1937 to set aside land as a meeting house site and Marae for Ngā Hapū e Toru;

[2] 2010 (2010) Māori Appellate Court 167 (2010 APPEAL 167)
[3] 2011 (2011) Chief Judge's MB 280 (2011 CJ 280)

(b) Minutes of partition hearing on 25 January 1955 at 74 Hauraki MB 280-282;

(c) Partition order – H. 74/282;

(d) 1962 application by R Hovell (dated 6 June 1962) for recommendation to set aside as a Marae for the purposes of a meeting house, dining hall and facilities and recreational purposes for the residents of Kennedy's Bay;

(e) Petition from the Secretary of the Marae Committee of Kennedy's Bay, received by the Department of Māori Affairs on 11 June 1962;

(f) Minutes of meeting held by Kennedy's Bay owners in June 1962;

(g) Minutes of reservation hearing on 2 July 1962 at 78 Hauraki MB 4;

(h) Recommendation that land be set aside as a Māori Reservation – H. 78/4;

(i) Gazette Notice setting apart Māori Freehold Land as a Māori Reservation – 31 January 1963, No. 4, page 95; and

(j) Order vesting Māori Reservation in Trustees - H. 78/4.

The Issues for Determination

15. It is submitted that the key issues for the Court to determine as to whether the Court has erred in making the order are:

(a) What were the intentions of Heni Ngaropi in respect of the land? Did the Court contravene those intentions as well as section 439(3) of the Act by defining the beneficiaries as "residents of Kennedy's Bay" when making the order?;

(b) Could the Court make an order setting aside land for the purposes of a reservation without the consent of the owner of the land? If not, did the Court have the consent of Heni Ngaropi?;

(c) If the Court erred in making the order, have the descendants of Heni Ngaropi and any others been adversely affected by the order? If so, is it in the interests of justice for the Court to amend the order to reflect the intentions of Heni Ngaropi in respect of the land?

Issue One: ***What were the intentions of Heni Ngaropi in respect of the land? Did the Court contravene those intentions as well as section 439(3) of the Act by defining the beneficiaries as "residents of Kennedy's Bay" when making the order?***

Intentions for the land

16. There is no dispute that the original intention of Heni Ngaropi in respect of the land was to set it aside for the purpose of a Marae, as evidenced by the original application. In the letter filed by the Secretary of the Harataunga Marae Trustees dated 23 November 2011 ("the Secretary's letter") it is acknowledged at paragraph 1 that:

"The initial offer of land for the purposes of building a Marae was indeed made to three specific Hapu, Te Aitanga Mate, Whanau a Rakairoa and Te Aowera during the year 1954."

17. The actual position is that it was more than an "offer" as the Secretary's letter puts it, because a formal application was made by Heni Ngaropi in 1954. The wording of the original application in 1954 was clear:

"...a meeting house site and marae...for the use of Te Aitanga-a-Mate, Te Whānau o Raikairoa and Te Aowera".

18. Heni Ngaropi specifically named the three hapū whom she wanted to utilise her land. There is a hand written note on the application under the date 16 June 1954 that states:

"This lady appears and is willing for gift to go on – Court will consider when meeting [in] Kennedy's Bay in summer".

19. It is submitted that Heni's Ngaropi's specific wish was for the land to be used by Ngā Hapū e Toru and it appears that she had further communication with the Court three months after filing the application to confirm that wish. It is therefore surprising that seven months later, in January 1955 at the partition hearing, the Court accepted the evidence of others that Heni Ngaropi's wish had changed.

20. As set out in the Case Manager's Report, on 25 January 1955 at 74 Hauraki MB 280-282, the Court made orders in respect of the partition Harataunga 2C ("the

partition hearing"). At the same time the Court announced that the newly partitioned Harataunga 2C1:

"will be recommended for a Marae for all of the district on payment of survey (even though not done) and on evidence that [sic] *£100 in hand"*.

21. In the absence of consent, which is dealt with below, the Court clearly contravened the clear intention of Heni Ngaropi by making the order and by making reference at the partition hearing that Harataunga 2C1 be recommended a Marae for all the district.

22. The Secretary's letter contends that the original tukuwhenua by Ngati Tamatera in 1852 was made to all of Ngati Porou and not confined to Ngā Hapū e Toru.[4] That position is strongly refuted by the applicant and his supporters.

23. The Chief Judge may well be aware that claims to the Waitangi Tribunal relating to the lands and resources at Harataunga have been heard and determined. Two separate but complementary claims were placed before the Tribunal on behalf of those who were the benefactors of the 1852 tukuwhenua and both claimant groups maintained that the tukuwhenua was made to Ngā Hapū e Toru and not to Ngati Porou whanui.[5]

24. This was also the conclusion reached by the Native Land Court when they accepted the evidence of Ropata Wahawaha in an 1872 hearing relating to the lands at Harataunga/Kennedy's Bay. [6]

25. Although we are not asking the Chief Judge to resolve this historical issue, we submit that the overwhelming evidence supports the view that the land at Harataunga/Kennedy's Bay was a tukuwhenua for Ngā Hapū e Toru and clearly this was the understanding of Heni Ngaropi when she made the original application.

26. It also goes to the gravity of the injustice and prejudice caused by the mistake of the Court in making the order and supports the contention that Heni Ngaropi would have been unlikely to support the 1962 application and the order setting aside her land for the residents of Kennedy's Bay.

[4] Secretary's letter, paragraph 4
[5] Wai 896, Hauraki Report (Waitangi Tribunal) 2006, p 55
[6] Wai 896, Hauraki Report (Waitangi Tribunal) 2006, pp 54-55

Failure to Comply with section 439(3) of the Act

27. It is submitted that the Court failed to comply with the requirements of section 439(3) of the Act when making the order and therefore the Court made a mistake. The section states that:

> ***439 Maori reservations for communal purposes***
>
> *(3) [Except as provided by subsection (12) of this section], every Maori reservation under this section shall be held for the common use or benefit of the owners or of Maoris of the class or classes specified in the [notice]. For the purposes of this subsection the term Maoris includes persons who are descendants of Maoris.*
>
> *[(12) The notice constituting a Maori reservation under this section may, upon the express recommendation of the Court, specify that the reservation shall be held for the common use and benefit of the people of New Zealand, and the reservation shall accordingly be held in that fashion.]*
>
> *[(13) Before issuing a recommendation that a Maori reservation under this section be held for the common use and benefit of people of New Zealand, the Court shall be satisfied that this course is in accordance with the views of the owners, and that the local authority consents thereto.]*

28. The starting point under section 439 is that **every** Māori reservation shall be held for the common use or benefit of the owners (ie. Heni Ngaropi) or of Māori of the class or classes specified in the notice. The clear intent of the section was to ensure that reservations were for Māori only.

29. The only exception was that the Court could recommend that a reservation be set aside for the common use and benefit of the **people of New Zealand**.[7] However, before this recommendation could be made the Court had to be satisfied that this was in accordance with the views of the **owners and that the local authority consented.**[8]

[7] Refer section 439(12) of the Act.
[8] Refer section 439(13) of the Act

30. In 1955 the Court recommended that Harataunga 2C1:

"*be recommended for a Marae <u>for all of the district</u> on payment of survey (even though not done) and on evidence that* [sic] *£100 in hand"*.

31. In 1962, when the order was made, it was confirmed that the reservation was for the residents of Kennedy's Bay.

32. It is submitted that the Court had no jurisdiction to make the order in 1962 under section 439 of the Act, on the basis that subsection (3) only allowed the beneficiaries to be the owners or Māori.

33. If the Court intended to make a recommendation under subsection (12), it is submitted that the Court erred, given that there is no evidence that it sought the views of the sole owner Heni Ngaropi about the class of the beneficiaries or in fact whether she still wished to set the land aside at all.

34. In any case a recommendation under subsection (12) is confined to a reservation for the people of New Zealand. Neither the recommendation in 1955, nor the order set the land aside for "the people of New Zealand". The order therefore contravenes section 439(3).

35. Any argument that the order set aside the land as a reservation solely for Māori residents at Kennedy's Bay, fails in our submission for lack of certainty. The Court ought to have been aware that the definition of "residents of Kennedy's Bay" would capture non-Māori residents living in Kennedy's Bay over time. [9] The Court ought to have considered the practical reality that the order would create unfairness for Māori who, for example, lived in Kennedy's Bay for most of their lives, but moved out of the district and therefore due to their residency status were no longer beneficiaries of the reservation/Harataunga Marae.

36. It would also allow non-Ngā Hapū e Toru Māori to benefit, which would again seem at odds with the intention of Heni Ngaropi.

[9] Evidence can be produced by the applicant confirming that there were a number of non Maori living at Kennedy's Bay as at 1962

37. The Chief Judge will also note the following acknowledgement in the Secretary's letter:[10]

"We accept that the subsequent vesting of the 2C1 Marae Reservation in the residents of Kennedy's Bay has effectively dis-enfranchised the non-resident descendants of Heni Ngaropi, as it also has for many Ngati Porou ki Harataunga who reside in nearby Coromandel township…"

38. It is submitted that even if the Court made the order on the basis that the reservation was for Māori residents of Kennedy's Bay, the Court failed to make that clear in the minutes and in the order. There is no evidence that the Court turned its attention to Heni Ngaropi's wishes as to the class of Māori who would benefit from the reservation as outlined in the original application.

39. Finally, it is submitted that there can be no doubt that the Court had jurisdiction under section 439(3) of the Act to set the land aside for a reservation, in line with the wishes of the Heni Ngaropi, i.e. for Ngā Hapū e Toru.

Issue Two: Could the Court make an order setting aside land for the purposes of a reservation without the consent of the owner of the land? If not, did the Court have the consent of Heni Ngaropi?;

40. The Act and in particular section 439 is silent on whether the Court requires consent before making an order to set aside land for a Māori reservation, save for section 439(13) in respect of a reservation for the benefit of the people of New Zealand.

41. Although not explicit in the Act, it is submitted that the views of the owner would be sought before the Court exercised its powers under section 439 of the Act to recommend setting aside land for the purposes of a reservation. In particular we refer to Her Honour Judge C L Wickliffe in where she notes that one of the key principles of setting aside land for Māori reservation is that: [11]

"The Court must have regard to Māori customary concepts relating to turangawaewae and ancestry in determining beneficiaries of a Māori Reservation. Only in very special circumstances will a Māori Reservation be set aside for anyone

[10] Secretary's letter, paragraph 6.
[11] *Bristow – Section 4C1 Block II Tuatini Township and Ors* (2002) 151 Gisborne MB 250 (151 BIS 250).

other than the whānau, hapū, and iwi traditionally associated with that particular land."

42. We know that Heni Ngaropi sought to set the land aside as a reservation. That fact is not at issue, which is rather that the Court ordered a certain class of beneficiaries without hearing from the owner directly about the change in beneficiary definition from the original application.

43. There is no evidence that Heni Ngaropi amended her application from the original application or her confirmation of the same in June 1954. While a number of people spoke at the partition hearing, Heni Ngaropi did not and nor did anyone in attendance purport to be speaking on her behalf.

44. On 6 June 1962, Richard Hovell filed an application pursuant to section 439 of the Act to set the land apart as a Māori Reservation:

"for the purpose of a Marae for the common use and benefit of the residents of Kennedy [sic] *Bay, for the purpose of a meeting house, dining hall and facilities and recreational purposes"*.

45. The application was heard on 2 July 1962 ("the reservation hearing") where a Mr Dye referred to the partition hearing on 25 January 1955 and said that:

"...Person to whom 2C1 awarded agreed at time to give this 2 acres for a Marae".

46. Heni Ngaropi did not attend the partition hearing and therefore it cannot be accepted by that Court that she agreed to any of the suggestions that came about there. If Mr Dye is referring to the original application, in which she had applied for the land to be set aside for Ngā Hapū e Toru, his comments would not suffice to prove that Heni Ngaropi agreed to any amendments to the beneficiaries. As the Chief Judge will be aware, the original application was filed **prior** to the partition hearing took place (during which the Court granted the land solely to Heni Ngaropi) and therefore had nothing to do with Heni Ngaropi's expressed wishes in her original application.

47. The reservation hearing minutes then go on to record the evidence given on oath by Richard Victor Ray Hovell:

"Chairman of the Marae Committee. Sole owner Heni Ngaropi is Mrs White, lives at Gisborne, comes to K Bay periodically & knows & approves of this appln"

48. Heni Ngaropi is not recorded as being in attendance at the reservation hearing and there is no evidence of her knowledge or approval of the application. The Case Manager's Report confirms this at paragraphs 12 and 13:

"There is no record on any files that show that Heni Ngaropi was notified of a hearing of her own application, the partition application or Richard Hovell's application. She was not given the opportunity to speak to any of these applications.

...

Heni Ngaropi is not recorded as being in attendance at any of the hearings. She was not provided with any of the minutes from those hearings..."

49. The Court therefore effectively made the order on the basis of oral evidence made by others, that Heni Ngaropi consented to the application and, more specifically, to the new class of beneficiaries. Clearly the Court had turned its minds to the fact that the land owner's support was required.

50. It is submitted that Heni Ngaropi did not support the application and in fact knew nothing of it, due to the failure of the Court to notify her prior to and after the reservation hearing. There is no evidence that the Court considered adjourning the hearing to seek Heni Ngaropi's views on the variation of the original application and to test whether the evidence of Mr Hovell was correct.

51. There is no dispute that Heni Ngaropi was alive in 1962 as is confirmed at paragraph 14 of the Case Manager's Report.

52. It is submitted that the Court failed to adhere to basic principles of natural justice in this instance.

53. Further, the Secretary's letter suggests that the application proceeded with Heni Ngaropi's full knowledge and support.[12] Yet at paragraph 6 of the same letter the Secretary says:

[12] Secretary's letter, paragraph 2.

"….I concur also, that a benefactor would be unlikely to intentionally alienate her issue…"

54. That, in our submission, is the point. Heni Ngaropi would never have agreed to the order as it was phrased. Her wishes were made very clear in 1954 as to who would benefit. Under the order she was not even a beneficiary of the reservation as she was resident on the East Coast.

55. The Secretary's letter indicates that evidence can be given to support the contention that Heni Ngaropi knew about and agreed to the application. Although it is difficult to comment on evidence yet to be filed, in the absence of direct evidence, it would be difficult for the Chief Judge to give any weight to what will essentially be hearsay evidence about the state of mind of Heni Ngaropi, who passed away in 1971.

56. In addition, it has been suggested in the Secretary's letter that the original application was an offer of the land for the purposes of building a Marae to Ngā Hapū e Toru and as it was not acted upon for some years, this inaction prompted Heni Ngaropi to widen the base from "Ngā Hapū e Toru" to "the wider Kennedy's Bay community".

57. Firstly it is submitted that the formalisation of the offer by the beneficiaries was not required, in law or in equity, and therefore the above objection is irrelevant to this application. A formal application was made to the Court by the rightful owner of the land, who was entitled to set aside the land for whom she so desired as long as the Act allowed it. The process then involves the Court hearing both parties to the application, followed by a Court recommendation. The proposed beneficiaries are not required to play any role in the process.

58. Alternatively, it is submitted that the Sectertary's contention is not supported by Court records. As per the records, at no time did Heni Ngaropi consent to the land being used as a Marae for the whole district or the wider Kennedy's Bay community.[13]

59. In addition, it has been suggested that Heni Ngaropi was involved in a number of meetings leading up to the decision to have Richard Hovell apply to the Court in 1962 to vest the land as a Marae Reservation for the benefit of the residents of

Kennedy's Bay, and that the 1962 application therefore proceeded with Heni Ngaropi's full knowledge and support.

60. There is no evidence of this. It is submitted that the evidence suggests quite the contrary. Not long after the 1962 application was filed, Mr Hovell also filed a petition signed by residents of Kennedy's Bay and a copy of the minutes of a public meeting of 28 June 1962.[14]

61. The petition states as follows:

"We the undersigned residents of Kennedy Bay (Harataunga) desire to be the registered as owners of the Marae, to be established and named at a public meeting…"

62. There is no reference in the petition to this being the wish of Heni Ngaropi or that she knew of the petition. It is stated simply as the desire of the residents.

63. The minutes of the public meeting of 28 June 1962 record that the purpose of the meeting was to elect a Tribal Committee and Trustees. The list of those present does not include Heni Ngaropi and the minutes do not mention her at all.

64. What the evidence does show is that plans for the land were in full swing in the absence of any contribution and input by the sole owner which is a stark contrast from the suggestion made in the Secretary's letter that Heni Ngaropi had been attending meetings and supported the application.

65. Even if evidence was located to show that Heni Ngaropi somehow agreed to the application, it is submitted that the Court had no jurisdiction to make an order under section 439 of the Act to set the land aside for the benefit of the residents of Kennedy's Bay, as addressed above under Issue One. Therefore the Court has clearly made a mistake to the detriment of Ngā Hapū e Toru, and the uri of Heni Ngaropi not resident in Kennedy's Bay.

First presumption - The principle of Omnia Praseumutur Rite Esse Acta

66. Turning now to the two presumptions that the applicant must rebut – firstly the principle of *Omnia Praseumutur Rite Esse Acta* (everything is presumed to have

[13] S Nepe and K Barrett, *Report and Recommendation*, 13-14 October 2011, paras 11-13.

been done lawfully unless there is evidence to the contrary). In the absence of a patent defect in the order, there is a presumption that the order made was correct.

67. As submitted above under Issue One, the order was made outside the scope of section 439(3) of the Act, in that the Court did not have jurisdiction to set aside the block for the beneficiaries as currently defined, as it had the effect of including both Māori and non-Māori.

68. The order was not for the owner or a class of Māori. The Court did not seek to make an order under section 439(12).

69. Furthermore, we submit that the failure of the Court to confirm the views of Heni Ngaropi before the order was made, was an omission by the Court, one that we submit was fatal in circumstances where Heni Ngaropi's land was to be effectively alienated from her ownership.

70. In short, there are patent defects in the order and the first presumption is rebutted.

Second Presumption - Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct

71. The evidence given at the time of the order was that of Mr Hovell, who confirmed that Heni Ngaropi was in support of the application. It is acknowledged that this evidence was given under oath.

72. It is submitted however, that that evidence must be considered alongside the following facts/factors that lead to the position that Heni Ngaropi knew nothing of the application and therefore could not have supported it, as suggested by Mr Hovell:

    (a) Mr Hovell's evidence although under oath was effectively hearsay evidence. The applicant also questions why Heni Ngaropi would confide in Mr Hovell when they were not related and she had a number of other

[14] The petition was attached to the 1962 application, received by the Department of Māori Affairs (Auckland) on 11 June 1962. The minutes were received shortly after the 1962 application.

senior whanau members living in Kennedy's Bay that would have been consulted about her wishes;

(b) Heni Ngaropi's original application was for a completely different class of beneficiaries and no consideration was made for whether it would be plausible for a non-resident owner to agree to an order that would, effectively, exclude herself and her uri not living at Kennedy's Bay while at the same time benefit/protect non-Maori residents residing there;

(c) Heni Ngaropi was not present at the reservation hearing, yet was alive to receive notice of the same;

(d) The Case Manager's Report highlights that Heni Ngaropi was not notified of any of the hearings nor sent copies of the minutes.[15] This is a further error of the Court, which, it is submittted, is fatal when considering the nature of the application and the order made;

(e) No documentary evidence has been located in the Court record that Heni Ngaropi supported the application; and

(f) Mr Hovell may have had a vested interest in excluding non-resident Māori, given the historical debates about who was entitled to benefit from the tukuwhenua in 1852 and we are instructed that he did not whakapapa to Ngā Hapū e Toru;

73. Even if the Chief Judge takes the view that the second presumption is not rebutted, it is our contention that the Court had no jurisdiction to make the order it made given the clear statutory provisions of section 439 of the Act as outlined above in Issue One. We further submit that the failure to give notice to Heni Ngaropi was also fatal and in clear breach of natural justice, given the nature of the order made, effectively excluding her from the land.

Issue Three: If there was a mistake and/or omission by the Court, have the descendants of Heni Ngaropi been adversely affected by the order? If so, is it in the interests of justice for the Court to amend the order to reflect the intentions of Heni Ngaropi in respect of the land?

[15] S Nepe and K Barrett, *Report and Recommendation*, 13-14 October 2011, paras 12-13.

74. If the Chief Judge accepts the submission that the Court erred as outlined above, the final question to be determined is whether cancelling or amending the order will bring justice to the situation or create an injustice.

75. It is submitted that the order not only created a significant injustice but also breached tikanga. We submit that the injustice or prejudice suffered by the applicant, Ngā Hapū e Toru and Ngā uri o Heni Ngaropi, is obvious and can be remedied without creating an injustice to those currently defined as residents of Kennedy's Bay.

76. The beneficiaries as currently defined do not just exclude those who whakapapa to Ngā Hapū e Toru but more critically also exclude direct descendants of Heni Ngaropi who do not reside in Kennedy's Bay.

77. It is submitted that it is inconceivable as a matter of tikanga that Heni Ngaropi would have deliberately wished to exclude her uri that did not reside in Kennedy's Bay, especially when she did not reside there herself. The land was her connection to Harataunga and tikanga dictates that she would have wanted that connection to continue for her descendants. This point of course has also been accepted by those in opposition to the application.[16]

78. While Heni Ngaropi's descendants may legally be the underlying owners of the land (by virtue of succession), they cannot enjoy the benefits of it if they do not reside at Kennedy's Bay. This includes the inability to participate in and vote on matters relating to the Harataunga Marae, as well as the inability to vote for Trustees of the reservation.

79. In practise, this means that families are divided where children and grandchildren who live at Kennedy's Bay are entitled to vote and have input, yet parents that do not live there have no legal or practical entitlement. This is also true at a Hapū level for those that whakapapa to Ngā Hapū e Toru yet do not reside in Kennedy's Bay. We are instructed that some non-resident members of Ngā Hapū e Toru still retain interests in other land located at Kennedy's Bay. Yet because of the order, they have no legal say in the Harataunga Marae management and direction.

[16] Secretary's letter, paragraph 6.

80. It is submitted that the only way that justice can be brought to the situation is to amend the order to reflect the true intention of Heni Ngaropi – ie. that the land be set aside as a Marae for Ngā Hapū e Toru.

81. We submit that the amended order would have the effect of:

(a) Reflecting the wishes of the owner of the land;

(b) Removing the ability for non-Māori to have a say in an important Māori institution, which we submit cannot have been the true intention of any of the parties to the application, including Mr Hovell and the Court;

(c) We submit that it would also seem to fit well with the tangata whenua who made the tukuwhenua in 1852 to Ngā Hapū e Toru and clearly not for the benefit of non-Māori;

(d) Including as beneficiaries the correct class of Māori, given the strong evidence that the land was part of the tukuwhenua to Ngā Hapū e Toru;

(e) Being in line with the current statutory provisions of the Te Ture Whenua Māori Act 1993 relating to Māori reservations and consistent with the preamble and principles of the Māori Affairs Act 1953. We submit that the order currently infringes on the principle of ensuring the retention of Māori land in Māori hands, given that a significant class of Māori are excluded;

(f) Being more in line with tikanga, i.e. inclusiveness of Māori interests;

(g) Continuing to include those Māori who are residents at Kennedy's Bay who whakapapa to Ngā Hapū e Toru, so as to ensure that those who have maintained elements of ahi kaa roa remain constant;

(h) Ensuring that those who move away from Kennedy's Bay in the future and whakapapa to Ngā Hapū e Toru, will continue to have standing and a meaningful interest in relation to the Harataunga Marae;

82. Those in opposition suggest a variation to the current definition of beneficiaries by including all descendants of Heni Ngaropi wherever they reside.[17] Although that

[17] Refer para 6 of the Secretary's letter

goes some way to removing the injustice, our instructions are that the amended order ought to be made as originally intended for Ngā Hapū e Toru. It is the only plausible and inclusive approach in the circumstances. Rules about ensuring the protection/representation of resident Ngā Hapū e Toru, that seem to be a concern of those in opposition, can be discussed as part of any new trust deed or charter that will no doubt be required if the Chief Judges grants the new order as proposed.

Other Matters

For completeness we address some further matters raised in the Secretary's letter;

The Building and Establishment of Harataunga Marae

83. It has been suggested that the building and establishment of Harataunga Marae has been an inclusive effort on behalf of all residents of Kennedy's Bay, and that this collective and inclusive process was in line with the (alleged) revised wishes of Heni Ngaropi.

84. It is submitted that Heni Ngaropi's wishes were never revised from the original beneficiaries as per the original application, being Ngā Hapū e Toru. This is supported by the Court records as well as the Case Manager's report.[18]

85. The applicant and supporters do not take issue with the efforts of many, both Māori and non-Māori, over the years to build and maintain the Harataunga Marae, but efforts should not equal legal rights and the ability to control and speak about the direction of the Harataunga Marae. What will the residents of Kennedy's Bay look like in 10, 30, or 50 year's time? Will we have a Marae controlled perhaps exclusively by non-Māori or Māori with no whakapapa to Ngā Hapū e Toru?

Benefitting from Improvements

86. While the applicant acknowledges that amending the order to correctly reflect who Heni Ngaropi wished the reservation to be for, Ngā Hapū e Toru will inevitably bestow onto them the structures and improvements which have been made on the land by the wider community, it is submitted that this is an inescapable consequence of the mistake and/or omission on the part of the Court

to make the order in the first place and is no fault of the applicant and/or his supporters.

87. In any case these are not "ordinary" improvements that ought to be sold or used as security for commercial benefit. We are basically dealing with a Wharenui and Wharekai, established for purely cultural purposes. There is no suggestion that resident Kennedy's Bay people will lose any connection to the Harataunga Marae.

88. The order resulted in years of injustice for the descendants of Heni Ngaropi and those of Ngā Hapū e Toru that do not reside at Harataunga. Sadly that injustice can never be restored for those that have now passed on, but future generations can once again be made to feel a sense of belonging at Harataunga if the Court amends the order so as to accurately reflect the wishes of Heni Ngaropi.

89. It is submitted that these are exceptional circumstances whereby the Chief Judge ought to exercise his section 45 powers and amend the order as sought.

Next Steps

90. We support the convening of the telephone conference once all submissions have been filed to determine the pathway forward.

91. We also request that the application for Special Aid be determined as soon as possible.

DATED this 3rd day of February 2012

_____

A H C Warren
Counsel for Applicant

[18] S Nepe and K Barrett, *Report and Recommendation*, 13-14 October 2011, para 16