BEFORE THE CHIEF JUDGE OF THE MAORI LAND COURT
OF NEW ZEALAND
WAIKATO-MANIAPOTO-DISTRICT

IN THE MATTER OF	Harataunga 2C1 Block
A N D	
IN THE MATTER OF	An application made by Dean Katipa pursuant to Section 45 of Te Ture Whenua Maori Act 1993 for the amendment of an order made on 2 July 1962 setting aside Harataunga 2C1 as a Maori Reservation under Section 439 of the Maori Affairs Act 1953

SUBMISSION IN REPLY ON BEHALF OF
THE MAJORITY OF TRUSTEES OF RAKAIROA MARAE

Dated this 17th **day of** February **2012**

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JPK-020318-2-5-V2

May it please the Chief Judge

Introduction

1. Counsel refers to the submissions of counsel for the applicant dated 3 February 2012 (**the Applicants Submission**).

2. Ms Nepe of the Chief Judge's Office has advised that the response to the submissions of the applicant should be filed by 17 February 2012.

3. This memorandum sets out the submission in reply on behalf of the following eight current trustees of this marae:

   3.1 Marie Dobbs;

   3.2 Sharon Whittle;

   3.3 John McLeod;

   3.4 John Rabarts (Chair);

   3.5 Cam Hunter;

   3.6 Quinton Potae;

   3.7 Jacquie Hamon; and

   3.8 Walter Te Moananui.

4. For the avoidance of any doubt, neither counsel nor these submissions is representative of, or made on behalf of, Mr Winiata Harrison, the ninth and other current trustee.

5. For the further avoidance of any doubt, counsel submits that the case manager's report which appears to be relied on to some extent by the applicant's counsel, especially in the case of certain opinions reached, has no judicial weight. It is not a report of the kind referred to under Section 46 (1) of the Act.

Summary of the applicant's case

6. The applicant files under Section 45 of Te Ture Whenua Maori Act (**the Act**).

7. As such, counsel takes no issue with the exposition of the law at paragraphs 6, 7, 8, 9, 10, and 11 of the Applicants Submission.

8. The applicant's case is that the said order, made over 50 years ago, was erroneous because:

    8.1 Firstly, the Donor, Heni Ngaropi White, did not consent to the eventual setting aside. This is an issue of fact;

    and/or

    8.2 Secondly, the Court did not have the jurisdiction to recommend the setting aside a marae reservation for donees who are other than Maori. This on the basis that the phrase "*the residents of Kennedy Bay*" is an overreach, by extending to non-Maori persons, and that its operation is, as a consequence, prejudicial to the applicant. This is principally an issue of law

Summary of the Trustees reply

9. The trustees by their majority oppose this application.

10. In more particular terms, and as to the first argument they say:

    10.1 That in contradistinction the evidence presently before the Chief Judge, on balance, is demonstrative of the Donor's support for the current way in which the reservation is framed for the donees;

    10.2 That the applicant has not yet provided any new (or fresh) and positive evidence establishing even a prima facie case for the Donor's alleged hostility, and instead, resort is had to speculation of the Donor's intention in all things;

10.3 If the Chief Judge calls for a hearing, they will (among other things) provide testimonials of personal conversations and experiences with the Donor evidencing both her acknowledgment and support for the marae at Harataunga as it is functioning today.

11. As to the second argument, they say that the interpretation of "the residents of Kennedy Bay" being effectively ultra vires the statute, is, with respect fanciful. They argue that:

11.1 The setting aside of this reservation is non-justiciable under Section 45 of the Act, since it is not clear to what extent the exercise by the Secretary of his discretion relied on the Lower Courts recommendation;

11.2 In the alternative, and if the issue of the interpretation is at issue, they say that the better and correct interpretation is as follows:

(a) The said phrase (in any event) is well within the statutory contemplation. For completeness, it is not repugnant to or inconsistent with the Act or its predecessor;

(b) The context in which the said phrase exists is provided by the overall purpose of "a meeting place (or marae)" which is ultimately determinative;

(c) The said phrase is synonymous with the practice of that tikanga well known to Ngati Porou under the axiom "te ahi kaa roa", as that in turn relates to the keeping of a meeting place (or marae).

12. Accordingly, they say that there is no basis upon which the remedial jurisdiction under Section 44(1) of the Act relies arises. Moreover, and with respect, they are of the view that:

12.1 The applicant's articulation of his prejudice is overstated. A derivative owner in the subject land has a voice. It is wrong to complain that such people cannot participate. The Lower Court

has already affirmed such participation (refer decision of Judge Milroy at 139 Waikato MB 229);

12.2 The applicants distinction between Maori and non-Maori is unnecessarily divisive, in the context of their community;

12.3 The applicants wish to amend the reservation, in the terms that he has put forward, would be better dealt with under the adjourned Section 338 (5) application A20070011715.

Reply to the first argument expanded

13. It is submitted that the evidence presently before the Chief Judge, on balance, is demonstrative of the Donor's support for the current way in which the reservation is framed for the donees. The particulars are as follows:

13.1 There are five telling pieces of evidence, which when taken together, must mean that the Donor supported the use that he land is presently put to. These are as follows:

(a) First, the Donor had already applied to set aside her land as a marae. In short, and it does not appear to be contested, that she wanted a marae there;

(b) Second, Richard Hovell's application in 1962, and presentation to the Court, noted the Donor's knowledge of and approval to the application that he fronted. Wilson Bright who was also present, confirmed Mr Hovell's statements;

(c) Third, the Donor did not live at Kennedy Bay. She visited occasionally. Relevantly however, the Applicants Submission shows that by 1962, the establishment of the reservation was "in full swing"[1];

(d) Fourth, the Lower Court has on file testimonials from both Wilson Bright (the only surviving original trustee)

[1] The Applicants Submission at paras 63 and 64.

and Marie Dobbs (a current trustee, and whose parents maintained close association with the Donor) who both say that the Donor finally gave the land for the residents of Kennedy Bay;

(e) Fifth, she did nothing about it between 1962 and her death in 1971;

13.2 Taking that further, and again all together, it is submitted that the following, based on *the* evidence, is also open to be deduced:

(a) That between 1954 and 1962 the Donor had indeed changed her original intention;

(b) That it is fairer to infer that the Donor was well aware of what was going on, whether by one of her visits, or by her contact maintained with residents there including Marie Dobbs parents, rather than the opposite;

(c) That the Donor's silence, in these circumstances, and on this evidence, is more reasonably a reflection of support, than any hostility of whatever kind;

(d) That it cannot be true to say (as the applicants counsel appears to do at for instance paras 43 and 46) that there is *no* evidence that Heni Ngaropi amended her application or that the order was made without her consent. Rather, it is submitted that, accurately, there *is* evidence (as set above), and that that evidence is demonstrative of exactly those points;

(e) That if the applicants case that the Donor absolutely did not consent (or approve) the reservation, that is tantamount to proposing that Messrs Hovell and Bright in 1962 misled the Court, which the trustees must utterly reject.

13.3 It is further submitted that as the applicant is yet to provide any new (or fresh) and positive evidence establishing even a

prima facie case for the Donor's alleged hostility, the factual threshold (in positive terms) required by Section 45 has not been made out. Counsel enlarges:

(a) First, the applicants case instead draws heavily on what the Donor would have done or intended, but without evidence for such allegations. Such assertions are entirely speculative and ought have no weight. It is submitted that such instances are indicative of the weakness, factually of the case. Examples are:

(i) At para 19 "Heni Ngaropi's specific wish...It is therefore surprising...that Heni Ngaropi's wish had changed";

(ii) At para 26 "...that Heni Ngaropi would have been unlikely to support the 1962 application..."

(iii) At para 50 "...Heni Ngaropi did not support the application and in fact knew nothing of it";

(iv) At para 72(a) "The applicant also questions why Heni Ngaropi would confide in Mr Hovell when they were not related and she had a number of other senior whanau members living in Kennedy Bay that would have been consulted about her wishes."

(v) At para 77 " It is inconceivable that as a matter of tikanga that Heni Ngaropi would have deliberately wished to exclude her uri that did not reside in Kennedy Bay, especially when she did not reside there herself".

(b) Second, the applicant has not produced one piece of new evidence, which goes to the Donors intention, that he subscribes to, and which conflicts with what the evidence goes to and actually does demonstrate. Submitted that it is fair to assume that no such thing exists, otherwise it would have been produced by now, two years on since filing;

(c) Third, as already mentioned, the answer to this case does not require speculation. The key evidence is there. It's there on the Courts record. Counsel has set it out above. The inferences that we say are fairly available, are merely corroborative of the grounds to refuse this application. They are not determinative. The applicants case on the other hand (and with respect) requires the acceptance of speculation to succeed;

14. It is further submitted that if the Chief Judge calls for a trial, on the basis that the issue of fact requires hearing, the trustees would (among other things) like to have the opportunity to provide testimonials of personal conversations and experience with the Donor evidencing both her acknowledgment and support for the marae at Harataunga as it is functioning today. Relevantly this will likely come from Wilson Bright and Marie Dobbs.

Reply to the second argument expanded

15. It is submitted that the order does not fail for error of law by using the phrase "the residents of Kennedy's Bay". Counsel enlarges:

15.1 Factually:

(a) The subject land (Harataunga 2C1) is Maori freehold land;

(b) In terms of title (meaning a Crown grant as recognised by the Court), it derives from the parent or head title to Harataunga which was awarded to certain chiefs and people of Ngati Porou as the first owners;

(c) In the material period of the 1950's and 1960's, the trustees can demonstrate that the inhabitants predominantly living at Kennedy's Bay were the living descendants and successors of the first owners. It was, and still is, "a Maori (Ngati Porou) community", notwithstanding that a small minority of Pakeha also live there;

(d) The reservation set aside is "a meeting place and sports recreation ground", with the focus on the use being a marae

15.2 Legally:

(a) The setting aside of maori reservations has its more recognisable genesis in Section 232 of the Native Land Act 1909;

(b) Such reservations are fundamentally about protecting lands having special significance and offering communal and cultural facilities[2];

(c) Consistent with that fundamental purpose, the donees are to be limited to Maori of the class or classes specified in the Notice;

(d) The Court's power is to recommend to the Secretary the setting aside of such lands under Section 439 (1) of the Maori Affairs Act 1953. The Secretary however acted alone, and using his own discretion, on such a recommendation, in actually setting the land aside

15.3 Accordingly it is submitted that:

(a) The order complained of is not the authority by which the setting aside was done. It was accurately the action of the Secretary, acting alone, and using his discretion under Section 439(1)/53. The Secretary's action is non-justiciable under Section 45/93;

Or in the alternative (and if the order complained of is justiciable)-

(b) The phrase "*the residents of Kennedy Bay*" is not (in any event) repugnant to the statutory prescription. This is because:

[2] *Nukutaurua 3C2B* (1987) 32 GIS ACMB 217-249.

(i) When one understands the context and setting, that this *is* a Maori, or more particularly Ngati Porou community, the said phrase can only speak to and be about the Ngati Porou residents. It can *only* be of a class of Maori;

(ii) It is a marae, a meeting place, a Ngati Porou institution constituted by the people who inhabit Kennedy's Bay. Again it can only be of a class of Maori people because of the nature of the use and the land on which it is situate;

(iii) In terms of tikanga it is synonymous with the Ngati Porou axiom of ahi kaa roa, and thus is consistent with the cultural imperative necessarily required of all maori reservations (again refer the *Nukutaurua* case cited earlier);

(iv) In terms of tikanga, the donee class would not by application of principle exclude Pakeha, or non-Ngati Porou for that matter. Rather by analogy one only has to attend any urupa reservation and see the presence of non-whakapapa spouses lying there to understand that this is so;

(v) The lower Court has already ruled on it's meaning, which decision apprehended no difficulty with reconciling the said phrase and the Act (refer 139 Waikato MB 229)[3];

[3] Judge Milroy decided as follows: *"Those entitled to vote at the hui will be the underlying owners of the land, the permanent residents at Kennedys Bay, and those temporary residents, who cannot be called permanent residents, but who regularly visit and stay at Kennedys Bay for a period of about four months per annum. This definition is intended to include those who stay in Kennedys Bay for such a period that they would attend the marae on a regular basis. It is not included to include those who visit the bay for a holiday or happen to be visiting the area for a day or two. Voting procedures will include requirements that proof be provided where there is any doubt as to whether a person falls within the definition of resident. The voting process will also be such that the Court will be able to distinguish between the votes made by the underlying owners and the votes made by the residents of Kennedys Bay."*

(vi) There is no difficulty posed with its prescription. It does not suffer from uncertainty, as alleged in the Applicants Submission (refer para 35). As mentioned above, the said phrase is entirely capable of being read to clearly identify the class of Maori to whom it applies. Submitted that the Lower Courts ruling already referred to is more than enough proof of that;

(vii) It is also entirely reconcilable in these circumstances (as demonstrated by the evidence) for the Donor to have created a reservation for the residents of Kennedy's Bay. Two obvious reasons are:

(A) It was a gift by an absentee land owner;

(B) She wasn't living there

15.4 It is further submitted that the applicant's claim of prejudice is rejected. Counsel enlarges:

(a) The applicants claim at para 78 of the Applicants Submission that they cannot enjoy the benefits of the reservation if they do not reside there cannot be true;

(b) While it is not clear what is meant by not being able to enjoy benefits, Counsel understands that he is now an owner, notwithstanding that the Donor deceased some 40 years ago. The authorities of *Mount Tauhara* (1977) 58 Taupo 168-204 and the already mentioned *Nukutaurua 3C3B* say that owners are inherently participant. Additionally, the Lower Courts determination of voting (at 139 Waikato MB 229) expressly included the participation of the underlying owners;

(c) There is an important distinction that needs to be maintained between owners and beneficiaries as pointed out by counsel for the applicant and in reference to the *Tuatini Township* decision of Judge Fox

in 2002. In other words, the underlying ownership is fundamentally part of this;

(d) Nevertheless, the Trustees can and do operate "an open door" policy for the marae, within of course the scope of the operations of the reservation.

Conclusion

16. For the reasons given it is the 8 respondent trustees reply that this application cannot succeed.

17. Instead, the applicant would be better to pursue an amendment to the reservation (which is what he seeks) by resurrecting application A20070011715.

Dated the 17th day of February 2012

John Pera Kahukiwa
Counsel for the respondent Trustees of Rakairoa Marae