Appeal No 1993/2

In the Maori Appellate Court
of New Zealand
Waikato-Maniapoto Registry

IN THE MATTER OF Hopuhopu and Te Rapa Blocks

AND

IN THE MATTER OF An appeal by Stephen Anaru Berryman and 36 Others against final orders of the Court made at Ngaruawahia on 17th March 1993

(i) vesting the said lands in Potatau Te Wherowhero upon cancellation of the existing trust in terms of section 444 of the Maori Affairs Act 1953

(ii) vesting the lands in Te Arikinui Te Atairangikaahu, Tumate Charles Mahuta and Robert Te Kotahi Mahuta as trustees in terms of section 438(2) of the Act as Custodian Trustees

(iii) appointing The Tainui Maori Trust Board as Managing Trustees and declaring the terms of trust in pursuance of section 438(5) of the Act

Hearing: At Hamilton, Founders Theatre on Monday, 16th August 1993

Parties: Stephen Anaru Berryman and 36 Others, represented by Counsel Mr J A Grant - Appellants

Te Arikinui Te Atairangikaahu, Tumate Charles Mahuta, Robert Te Kotahi Mahuta and The Tainui Maori Trust Board represented by Counsel Ms D Henare - Respondents

Richard Barnaby, District Manager of DOSLI at Hamilton and William Korver DOSLI Solicitor to observe.

Decision: Delivered at Rotorua on 27th day of October 1993

Coram: Judge N F Smith (Presiding Officer)
Judges H K Hingston and J L Rota (Members)

Background

"I can confirm that the Cabinet Expenditure Control Committee, having power to act from Cabinet at its meeting on 28 September 1992, agreed to ..... return the Te Rapa Air Force Base to Tainui as part of settlement of Tainui Treaty claims .....

Johnny Edmonds
Commissioner of Crown Lands"

This was the message that presaged the application under section 437 of the Maori Affairs Act 1953 for the return of Te Rapa and Hopuhopu lands to Tainui and the vesting in Potatau Te Wherowhero the first Maori King, deceased as tipuna or ancestor representative on behalf of Waikato-Tainui.

We accept that the Crowns intention was to return the lands as part settlement of the Tainui raupatu lands claim.

The settlement was with Tainui and not any individual hapu.

On the 4th November 1992 the Minister for Lands signed and filed with the Court at Hamilton an application under section 437 of the Maori Affairs Act 1953 "for an order vesting [the Hopuhopu] lands ..... in Potatau Te Wherowhero, the first Maori King, at no cost, and vesting control under section 438/1953 Maori Affairs Act in a Trust to hold and administer the said lands for the use and benefit of Maori."

On the 14th December 1992 the Maori Land Court made orders under section 437(1)/53 vesting the Hopuhopu lands in Potatau Te Wherowhero as the person beneficially entitled, and in terms of section 437(4)/53 then vested the lands in the Tainui Maori Trust Board as trustee for the benefit of Waikato Tainui Tribes such trust to be an interim trust pending further vesting in terms of section 438/53.

The Court also signed and sealed an order in terms of section 30(1)(i)/53 recording the status of the lands as Maori freehold land.

On the 18th December 1992 the Minister of Lands signed an application under section 437/53 "for an order vesting the [Te Rapa] lands ..... in Potatau Te Wherowhero, the first Maori King, at no cost, as at the thirteenth day of January 1993 and vesting the control under section 438/53 in the Tainui Maori Trust Board to hold and administer the said lands for use and benefit of Maori."

That application was heard by the Maori Land Court on the 23rd December 1992 when the Court made the following orders:

(i) Order section 437(1)/53 vesting the Te Rapa lands in Potatau Te Wherowhero the first Maori King as Tupuna or ancestor representative of the persons beneficially entitled in terms of the application.

(ii) Order section 437(4)/53 vesting the lands in the Tainui Trust Board as trustee for the benefits of the Waikato Tainui Tribes, such trust to be an interim trust until a section 438/53 or some other Trust vehicle was established.

(iii) Order section 30(1)(j)/53 determining the status of the lands to be Maori freehold lands.

The orders made in respect of the vesting of both blocks of land were made subject in terms of section 34(8A)/53 to the conditions; that rent and other income from the lands up to the 31st December 1992 in respect of Hopuhopu lands and 12th January 1993 in respect of Te Rapa lands belonged to the Crown and a section 438/53 Trust in respect of each block being established not later than the 31st March 1993.

On the 17th March 1993 at Turangawaewae (74 Waikato MB 27-31) the Court heard applications for orders in terms of section 438(2)/53 and 438(5)/53 filed by the Tainui Maori Trust Board on the 15th March 1993.

At this March hearing having heard submissions from the Honourable Ministers for Lands and Justice, and addresses from 20 Tangata Whenua who attended the hearing, the Court proceeded to make the following orders:

(i) Orders section 444/53 determining the existing Trusts in respect of each Hopuhopu and Te Rapa blocks and vesting them in Potatau Te Wherowhero.

(ii) Orders section 438(2)/53 vesting the said lands in Te Arikinui Te Atairangikaahu, Tumate Charles Mahuta and Robert Te Kotahi Mahuta to hold as Custodian Trustees.

(iii) Orders section 438(5)/53 of the Act declaring the terms of trust including the appointment of the Tainui Trust Board as Managing Trustees.

Before commencing the substantive appeal the Court refused an application by Counsel for the respondents, seeking leave to produce further affidavit evidence. We now give our reasons for refusing to admit the affidavits of Robert Mahuta, John Te Maru and Shane Solomon; The authorities cited by Mr Grant when opposing the introduction of this further evidence clearly spell out the tests this Court applies in these circumstances viz:- it must be demonstrated that the 'new' evidence could not have with, reasonable diligence, been obtained at the lower Court hearing.

We are clearly of the view that the new evidence offered could have been obtained and adduced at the lower Court hearing.

We are also of the view that evidence of events post the lower Court hearing should not in this case be admitted by us.

Appeal

The amended notice of appeal sought the overturning of the following orders:

1 The orders made by the Court on 14th & 23rd December vesting the Hopuhopu and Te Rapa lands in Potatau Te Wherowhero

2 Three orders made by the Court on the 17th March 1993

(a) The order section 438(2) vesting the land in Custodian Trustees

(b) The order appointing the Tainui Maori Trust Board Managing Trustee

(c) The order declaring the terms of Trust pursuant to section 438(5)/53

Decision

The notice of appeal was filed on 14 May 1993 and insofar as the orders made in December 1992 are concerned is out of time; this Court has no authority to enlarge time in respect of those two orders and in the normal course of events that would end consideration of them. However notwithstanding our having no jurisdiction to ourselves review or cancel the vesting orders we must acknowledge that all subsequent orders appealed against depend upon the validity of those vesting orders. In essence if the December vesting orders are bad, and this Court can set in train the mechanism to correct them, we believe it would not be doing its duty if it proceeded to deal with the later orders because these may be inherently flawed.

Before considering Mr Grant's submissions on the December orders we believe we should record our view of what appears to have been intended, what happened and where matters are now.

The Crown having negotiated with Tainui representatives reached agreement that the Hinehopu and Te Rapa military bases would be handed back to Tainui as part of the Tainui raupatu settlement. The Crown then made applications to the Court pursuant to sections 437/53 and 438/53 in respect of both bases. We note that in each of the section 437/53 applications the Crown nominated Potatau Te Wherowhero as the person in whom the land should vest and at no cost.

We note that section 437/53 does not provide for the Crown nominating the vestee or that a purchase price is a possibility but provides that the Court shall proceed to determine the persons beneficially entitled to the land. As well subsection 4 provides that the Court can create a trust by vesting the land in Trustees.

We also note that section 436/53 contemplates the Crown nominating the vestee when surplus Crown lands are being returned to Maori. The section also provides that the Crown may stipulate a price to be paid by Maori for the land and finally there is no provision within that section for the creation of a Trust.

It is clear that the Crown intended the lands to be vested in Potatau Te Wherowhero at no cost, and that a Trust be created to manage the lands. We are of the opinion that the initial application should have been lodged pursuant

to section 436/53 and not section 437/53. This being our view the lower Court could have amended the application to one pursuant to S 436/53 and proceeded from there.

We do not believe the applicant (the Crown) anticipated or wanted an investigation in terms of section 437/53 to determine in whom the lands would vest, since the intention of the Crown was to implement a raupatu settlement with Tainui, and not merely return land no longer required.

The Crown also sought a section 438/53 vesting in Trustees to ensure future utilization and management of the land; it chose the Tainui Maori Trust Board as the Trustee.

The Court in December vested the lands pursuant to section 437/53 in Potatau Te Wherowhero then made an interim Trust Order pursuant to section 437(4)/53 leaving at large the section 438/53 application. A further section 438/53 application was filed and the Court on 17th March after hearing from the Crown and Tainui representatives terminated, pursuant to section 444/53, the interim section 437/53 Trust vested the lands in Potatau Te Wherowhero, and then made section 438 orders:

(1) Vesting the land in Te Arikinui Te Atairangikaahu and two others

(2) Declaring a Trust Order that, inter alia, set out that the Tainui Maori Trust Board was Managing Trustees and Te Arikinui Te Atairangikaahu and the two others were to be Custodian Trustees

This Court's overview is that Mr Grant's arguments before a forum with jurisdiction to review the section 437/53 vestings may well be unanswerable; he argues that there was insufficient or no notice and consequently no judicial enquiry conducted as required in section 437/53, when the applications were before the Court in December.

If these returns of land are to be effected by way of section 437/53 we believe a full enquiry by the Court after adequate notice must precede any determination, we also believe that the Chief Judge pursuant to an application made pursuant to section 44/93 could ensure a review of both the December orders.

Mr Grant also argues in respect of the March orders that the Court was lacking in jurisdiction, because of lack of or flawed notice, and as well his clients were not given a reasonable opportunity to present their objections at that hearing.

This Court is of the opinion that Mr Grant's arguments are not without merit but his plea that this Court, could rectify matters, if pursuant to section 45(1)(e)/53 it allows the appeal and directed a full rehearing, ignores the realities as the December vesting orders would still be vulnerable and any person disatisfied with the results of such a rehearing could then proceed pursuant to section 44/93.

We believe the proper course of action is for this Court to direct the Registrar to make an application in terms of section 44/93 to the Chief Judge for the cancellation of both the December vesting orders and the substitution thereof of orders made pursuant to section 436/53 upon the grounds that there was a

breach of natural justice when the section 437/53 orders were made and the intent of the applicant (the Crown) demonstrates that what was being sought were section 436/53 orders because of the following:

(a) The nomination of Potatau Te Wherowhero as the person in whom the land should vest.

(b) The reference in the applications to the land being vested "at no cost."

(c) The request for a section 438/53 Trust when if section 437/53 was intended the Trust would have been pursuant to section 437(4)/53.

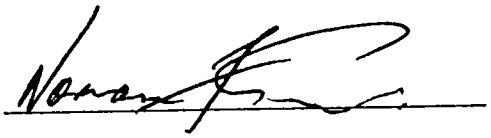
The Lower Court Judge may also when considering the section 44/53 application, enquire into the question of the Trusteeship under section 438/53.

We acknowledge that intervention by the Chief Judge by way of cancellation of the section 437/53 orders will mean the March section 444/53 and S 438/53 orders will be of no force and effect and this Court will be functus officio.

This Court intends to adjourn this appeal sine die primarily because until the section 437/53 orders are finally dealt with by the Chief Judge the lands must be administered and the management currently in place is best left intact in the interim.

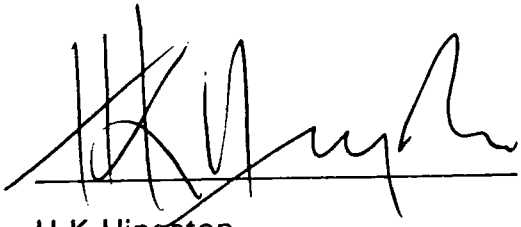
1 This appeal is adjourned sine die

2 The Registrar Hamilton is directed to make an application section 44/93 as outlined above



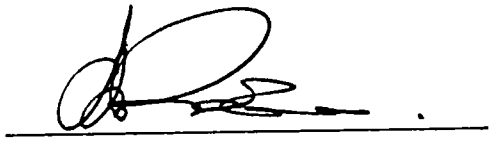
N F Smith

(Presiding Judge)



H K Hingston

Judge



J L Rota

(Judge)

In the Maori Appellate Court
of New Zealand
Waikato-Maniapoto District

IN THE MATTER of an appeal by STEPHEN ANARU BERRYMAN and Others against orders of the Court at Hamilton in respect of the lands known as HOPUHOPU MILITARY CAMP AND TE RAPA AIR FORCE BASE

Parties

Stephen Anaru Berryman and 36 Others, represented by Mr J Grant
Appellants

Te Arikinui Te Atairangikaahu, Tumate Charles Mahuta, Robert Te Kotahi Mahuta and the Tainui Maori Trust Board represented by Ms D Henare
Respondents

Mr Sturm to observe on behalf of the Crown.

Hearing

At Wings Conference Centre, Te Rapa, Hamilton on Tuesday, 30 November 1993.
(Adjourned from 16 August 1993)

Coram

N F Smith, Presiding Officer
Judge H K Hingston and H B Marumaru

DECISION

The Crown as a goodwill condition in the raupatu negotiations between Tainui and the Crown applied to have the subject lands vested in Potatau Te Wherowhero the first Maori King as Tupuna or ancestor representative of the Waikato-Tainui tribes.

The lands known as Hopuhopu Military Camp and Te Rapa Air Force base and more particularly described in the orders of the Court were acquired by the Crown for defence purposes from the Anglican Church of New Zealand and the Livingstone family respectively, compensation having been paid.

The lands were vested in Potatau Te Wherowhero solely by order of the Court in terms of section 437(1) of the Maori Affairs Act 1993 and then vested in the Tainui Maori Trust Board as trustees for the benefit of the Waikato Tainui Tribes by order of the Court on the 14th and 23 days of December 1992.

Although Counsel for the Appellants in his submissions challenged those orders, they are outside the purview of this Court and we will not comment thereon other than to say that any review of those orders culminating in the revoking thereof would result in the revesting of the lands in the Crown.

Upon application by the Tainui Maori Trust Board for an order in terms of section 438 of the Maori Affairs Act filed in the Court and stamped the 15th March 1992 seeking to vary the Trust Order in respect of Te Rapa lands only made in terms of section 437(4) of the Maori Affairs Act 1953, the Court at Hamilton on the 17th March 1993 made the following orders:

(i) Orders section 444/53 terminating the Trusts in respect of the two blocks and revesting the lands in Potatau Te Wherowhero

(ii) Order section 438(2)/53 vesting the lands in:

Te Arikinui Te Atairangikaahu
Tumate Charles Mahuta
Robert Te Kotahi Mahuta
as joint tenants

(iii) Order section 438(5)/53 determining the terms of trust and recording the trustees mentioned above as Custodian Trustees and the Tainui Maori Trust Board as Managing Trustees.

The appellants have filed notice of an appeal from all of those orders made on 17 March 1993.

During the hearing of the appeal on 16 August 1993 Counsel for the Appellants made the following submissions, inter alia, in respect to those orders:

(i) The Lower Court on 17 March 1993 had before it an application in terms of section 438/53 to vary an existing trust order and had no jurisdiction in the absence of an appropriate application with notice to make the orders in terms of section 444/53.

(ii) The order made in terms of section 438(2)/53 was contrary the provisions of section 438(1)/53 in that the Court failed to give the owners of the land reasonable opportunity to express their opinion as to the persons or persons to be appointed trustees.

(iii) That the trust order made pursuant to section 438(5)/53 was made in excess of the powers of the Court in that:

(a) The Court had no power to appoint Custodian Trustees and

(b) That the objects of the trust do not appear to be for the benefit of the persons beneficially entitled to the land

This Court accepts, that the orders made by the lower Court in terms of section 444 of the Maori Affairs Act 1953 were made without jurisdiction in the absence of any application or notice of intention to exercise jurisdiction in terms of section 27(2)/53 and those orders should be revoked.

It follows therefore that the subsequent orders made in terms of section 438(2) and 438(5) of the Maori Affairs Act 1953 must also be revoked.

This would have the effect of restoring the trusts created in terms of section 437(4)/53 whereby the lands were vested in the Tainui Maori Trust Board and preserve the management structures.

This Court is entitled however to consider what was sought by the Crown in the applications filed, and may in terms of section 45(1) of Te Ture Whenua Maori Act 1993 make such other orders as the lower Court may have made or refer the matter back to the lower Court with directions for that Court to make any other order or orders, for the purposes of giving effect to the true intentions of the Court.

In re succession to Rangi Koti (1968) 12 Whanganui ACMB 260 where the Appellate Court amended a succession order to include the appellate and others wrongfully excluded.

In re Ngapuna 4 and anor Ruku v H Allen Mills and Son Limited (1972) 5 Waiariki ACMB 332 where it was held that the Appellate Court had power to rectify orders made in excess of jurisdiction and substituted an order in terms of section 182 of the Maori Affairs Act 1953 for an order of the lower Court made in terms of section 435 without jurisdiction.

It is clear from the record that the Crown sought the return of the subject lands to Waikato-Tainui through the vesting thereof in Potatau Te Wherowhero the first Maori King.

It is equally clear that there was an intention to establish a trust in respect of the lands under the management of the Tainui Maori Trust Board for the benefit of the Waikato Tainui Tribes.

The question is however, is a trust constituted in terms of section 438 of the Maori Affairs Act 1953 in the form of that effected by the Court appropriate?

This Court finds that the provisions of the trust created in terms of section 438(5)/53 are inappropriate for the following reasons:

1 Section 438/53 provides for the establishment of a trust to facilitate the future use management and alienation of land for the benefit of the beneficial owners.

Sub Section 438(10)/53 provides that all assets other than land are held for the benefit of the beneficial owners in the proportion in which they hold shares in the land, and although these lands were vested in Potatau Te Wherowhero the trust empowers the trustees to apply the proceeds of the trust to others, viz the Waikato Tainui Tribes and the Hopuhopu Charitable Trust Trustees.

2 The vesting of the lands in:

Te Arikinui Te Atairangikaahu
Tumate Charles Mahuta
Robert Te Kotahi Mahuta
as Custodian Trustees is contrary the provisions of section 50 of the Trustee Act 1956 which provides for the appointment of a Corporation as Custodian Trustee.

It is the decision of this Court that the expectations of the Crown and Tainui can best be advanced through the provisions of Te Ture Whenua Maori Act 1993 and in particular, section 225 thereof which permits the appointment of individuals as Custodian Trustees and section 216 of the said Act providing for Whenua Toopu Trusts one of the advantageous of which is the prohibition on succession.

Neither of these avenues were available to the learned Judge in the lower Court at the time of the hearing from which the orders challenged issued, but can be applied now.

The lands were vested in Potatau Te Wherowhero by the court in December 1992 and for the purposes of the above sections, he is to be regarded as the legal owner of the lands.

To that intent, the Court in exercising its jurisdiction in terms of section 37(3) of Te Ture Whenua Maori, need only consider the consent of the Tainui Maori Trust Board, the trustees under the provisional Trust created in terms of section 437(4) of the Maori Affairs Act 1953 and the consent of those intended to be appointed as trustees.

For the above reasons, the appeal is allowed, and in terms of section 45 of the Maori Affairs Act 1953 as continued by section 56 of Te Ture Whenua Maori Act 1953 this Court makes the following orders:

(i) Order section 45(1)(b)/53 revoking the orders made by the Court on the 13th March 1993 in terms of sections 444, 438(2) and 438(5) of the Maori Affairs Act 1953 and

(ii) Order section 45(1)(d)/53 directing the lower Court to assume jurisdiction in terms of section 37(3)/93 and make orders in terms of sections 225, 216 and 219 of Te Ture Whenua Maori Act 1993 re-creating a trust to accord the intentions of the trusts now cancelled.

The determination of this appeal means that there is no substantive application before the Court to accord the granting of the injunction sought, and consequently that application is now dismissed.

While this Court is of the opinion that there is no justification for the issue of an order for costs in respect of either matter Counsel are entitled to be heard thereon.

Accordingly Counsel are invited to file and exchange memoranda on the question of costs relating to both the Appeal and the application for injunction within 1 month of the date of promulgation of this decision.

N F Smith Presiding Officer

H K Hingston Judge

H B Marumaru Judge

This decision was promulgated at the Maori Land Court at Rotorua at 10 am on Monday the 13th day of December 1993.

Presiding Officer

COPY

NOTES:

RE: APPELLATE COURT DECISION ON HOPUHOPU and TE RAPA

1. Last paragraph on page 4 of the Decision -
"To that intent, the Court in exercising its jurisdiction in terms of Section 37(3) of the Te Ture Whenua Maori, need only consider the consent of the Tainui Maori Trust Board, the trustees under the provisional Trust created in terms of section 437(4) of the Maori Affairs Act 1953 and the consent of those intended to be appointed as trustees."

Comments:

This finding that the Lower Court does not have to take into account any representations by the appellants would appear to constitute a determination that the appellants had no standing in the appeal. If this is the case why was the appeal not simply dismissed?

2. Second paragraph at page 3 of the Decision -
"This Court accepts, that the orders made by the Lower Court in terms of section 444 of the Maori Affairs act 1953 were made without jurisdiction in the absence of any application or notice of intention to exercise jurisdiction in terms of section 27(2)/53 and those orders should be revoked."

Comments:

At this stage I cannot accept that the orders were made without jurisdiction. Section 27(2)/53 clearly gives the Court during the course of any proceedings power to exercise any other part of its jurisdiction which the Court deems necessary or advisable. The only qualification to this is the requirement as to such notice to the parties and otherwise as the Court thinks fit. There are a number of decisions indicating that it is a breach of natural justice for the Court to exercise such jurisdiction without giving proper notice to the parties.

The finding in Item 1 above would appear to indicate that the only party affected by this termination of the Section 437(4) order was the Tainui Maori Trust Board which was trustee under that order. The Tainui Maori Trust Board was the applicant under Section 438 application and if that application was to be granted it was essential that the Section 437 order be cancelled. In making the Section 438 application the Tainui Maori Trust Board must anticipate the cancellation of the Section 437 order. In addition the Section 437 Orders were made only as interim orders and were conditional upon a Section 438 order being made by 31 March 1993. Given those circumstances it still seems to me quite reasonable that the Court should exercise its discretion under Section 27(2) without notice to the Trust.

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3. Top of page 4 of the Decision -
"This Court finds that the provisions of the trust created in terms of section 438(5)/53 are inappropriate for the following reasons:

1. Section 438/53 provides for the establishment of a trust to facilitate the future use management and alienation of land for the benefit of the beneficial owners.

   Sub Section 438(10)/53 provides that all assets other than land are held for the benefit of the beneficial owners in the proportion in which they hold share in the land, and although these lands were vested in Potatau Te Wherowhero the trust empowers the trustees to apply the proceeds of the trust to others, viz the Waikato Tainui Tribes and the Hopuhopu Charitable Trust Trustees."

Comments:

I failed to find anything in Section 438 which states that the establishment of a trust is for the benefit of beneficial owners. If this is the case then there would be many trusts which contain wrong provisions. Included among those would be those which provide for descendants of owners and for establishment of Putea accounts. I have established a number of trusts at the behest of sole owners who wish to provide for the retention of their land for the benefit of their children and grandchildren. I would interpret Section 438(10) as merely clarifying the basis on which any additional property would be held, i.e. in trust for the beneficial owners in accordance with their proportionate shareholding. That clause would then have to be read subject to the terms and conditions of the trust order as regards trustees power of distribution to the beneficiaries named in the trust.

4. Third paragraph on page of the Decision -
"2 The vesting of the lands in:

   Te Arikinui Te Atairangikaahu
   Tumate Charles Mahuta
   Robert Te Kotahi Mahuta
   as Custodian Trustees is contrary to the provisions of section 50 of the Trustee Act 1956 which provides for the appointment of a Corporation as Custodian Trustee. "

Comments:

Section 50 of the Trustee Act commences -

"(1) Subject to the provisions of this section and to the instrument (if any) creating the trust, any corporation may be appointed to be custodian trustee of any trust in any case where it could be appointed to be trustee, in the same mannere as it could be so appointed."

The section then goes on to list provisions which apply to a custodian trustee, again subject to the provisions of the instrument.

In my view Section 50 is merely permissive, enabling a corporation to be appointed custodian trustee. It does not provide that a custodian trustee shall only be a corporation. There is nothing to stop a settlor in the trust instrument establishing a trust and appointing custodian and managing trustees as he thinks fit.

Section 50 of the Trustee Act could perhaps be compared with Section 48 which provides that any trustee corporation may be appointed and act as the sole trustee in respect of any trust. Again that is permissive and it does not mean that where a sole trustee is appointed it must be a corporation.

Section 2(4) and 2(5) of the Trustee Act clearly indicate that the powers conferred on a trustee under the Act are in addition to the powers given under the instrument creating the trust and can be negatived by the instrument. I have always been of the view that the Court in creating a trust is not bound simply by the the provisions of the Trustee Act but can include in its terms and conditions of trust any powers which a settlor is able to include in a trust instrument. Our trust orders seem to recognise this in that they provide various powers within those orders, such as provision for majority decision of trustees, which if not included in the instrument would mean that all decisions had to be unanimous.

23 December 1993

COPY

1993 CHIEF JUDGE'S MINUTE BOOK 583

PLACE: Wellington

DATE: 10 November 1993

PRESENT: A G McHugh, Deputy Chief Judge
J Keepa, Court Assistant

CJ 1993/90

Application by the Registrar of the Maori Land Court at Hamilton under Section 45 of Te Ture Whenua Maori Act 1993 for an Order cancelling Vesting Orders pursuant to Section 437(1) of the Maori Affairs Act 1953 and Section 437(4) of the Maori Affairs Act 1953 made on the 14th of December 1992 and 23rd December 1992 in respect of the Maori Freehold lands known as **HOPUHOPU** and **TE RAPA**.

Deputy Chief Judge

This application has been made following a decision of the Maori Appellate Court delivered at Rotorua on the 27th of October 1993 which sets out the grounds for the application as follows:

> "We believe the proper course of action is for this Court to direct the Registrar to make an application in terms of Section 44/93 to the Chief Judge for the cancellation of both the December vesting orders and the substitution thereof of orders made pursuant to Section 436/53 upon the grounds that there was a breach of natural justice when the Section 437/1953 orders were made and the intent of the applicant (the Crown) demonstrates that what was being sought were Section 436/53 orders . . ."

The following report and recommendation accompanies the application. The report has been prepared by the Registrar:

"**REPORT**

1. On 14 December 1992 the Maori Land Court at Hamilton made an Order under Section 437(1)/53 vesting the Hopuhopu lands in Potatau Te Wherowhero and on 23 December 1992 made a similar Order in respect of the Te Rapa lands.

2. An appeal against these and other subsequent decisions of the Court was filed on 14 May 1993. The Appellate Court at page 6 of its decision acknowledged that insofar as these Orders were concerned the appeal was out of time. A copy of the decision is annexed.

3. Notwithstanding that the Section 437 Orders were therefore outside the jurisdiction of the Appellate Court, it entered into a consideration as to whether Section 436 or 437 was the appropriate Section under which the application and orders should have been made. At the foot of page 7 of the decision the Appellate Court expressed the opinion that the initial application should have been lodged under Section 436/53 and not Section 437/53 and that the Court could have amended the application to one pursuant to Section 436/53 and proceeded from there.

4. The Appellate Court, then, at the foot of page 9 directed the Registrar to file this application seeking the cancellation of the two Section 437 orders and the substitution thereof of orders made pursuant to Section 436/53.

5. I an not sure of the authority under which I am directed by the Appellate Court to make this application. Firstly, the notice of appeal was out of time in respect of these orders. Secondly, the direction does not appear to be within the powers of the Court on appeal under Sections 42/53 or 56/93. However, to ensure that the matter is dealt with as the Appellate Court directed, I have lodged the application.

6. Having lodged the application as directed, I then have to report on it. This places me in an awkward situation, since, for the reasons I am about to give I do not support the application. Insofar as technical legal questions are involved I have conferred with Judge Carter as to the basis of his dealing with the applications under Section 437 and the comments in respect of that Section are his.

7. The question as to what Section of the Maori Affairs Act 1953 was appropriate was considered before the applications were filed. Sections 267, 436 and 437 were considered. Section 436 was discarded as being not applicable as a prerequisite to the exercise of jurisdiction under that Section was that the land was Maori land or General land owned by Maoris which was acquired by the Crown or by any local authority or public body for the purposes of a public work. Neither Hopuhopu nor Te Rapa qualified under that provision. For similar reasons Section 267 was also rejected.

8. The application was therefore dealt with under Section 437. Section 437(1) provides:

> "Where any Crown land has heretofore been or is hereafter set aside or reserved for the use or benefit of Maoris, the Court, on the application of the Minister of Lands, shall proceed to determine the persons who are beneficially entitled to the land, and their relative interests therein. and, subject to the provisions of subsection (4) hereof, shall thereupon make an order or orders vesting the land in the persons found by it to be entitled thereto."

This was not Crown land set aside or reserved for the use or benefit of Maoris and therefore, Section 437(1) had no immediate application.

9. The application was made in reliance on Section 437(7):

> "[Notwithstanding that any Crown land, has not formally been set aside or reserved for the benefit of Maoris, the Court, on the application of the Minister of Lands, may exercise in respect of the land the jurisdiction conferred by this Section, and all the provisions of this Section shall apply accordingly.]"

While in an application under Ss(1) the Court has to determine the persons beneficially entitled out of the classes of persons for whom the land is set aside or reserved, in an application under Ss(7) the Court can only determine the person beneficially entitled from the terms of the application. In other words the beneficial owners derives his interest by virtue of the fact that the Minister is prepared to see the land vested in him.

10. As Ss(1) provides for the vesting of the land in the person beneficially entitled the Order vesting the land is made under Section 437(1) but the provisions of that subsection must necessarily be modified to fit the circumstances of Section 437(7).

11. It is recommended that you decline, pursuant to Section 44(5)/93, to exercise your discretion in respect of this application upon the following grounds:

    (i) That the determination of the Appellate Court that the Section 437 Orders should be substituted by orders under Section 436 cannot be given effect to as the Court has no jurisdiction to make orders under Section 436 as the subject lands were not Maori land or General land owned by Maori at the time of taking.

    (ii) That generally the right of a Registrar to bring an application under Section 45/93 should only be made where there is a latent or obvious mistake, error or omission apparent from the record.

    (iii) That there is no apparent mistake, error or omission in the making of the Section 437 Orders.

    (iv) That the Section 437 Orders until set aside by a Court of competent jurisdiction must be presumed to be valid and remain binding Orders of the Court. (See decision of Maori Appellate Court in Re Whaiti Kuranui 1BY2 and Other Blocks; D.P. R.F. & S.J Coles, 8 Waiariki A.M.B 200 at page 205.)

    (v) That a determination as to the validity or otherwise of the Section 437 Orders could only be made after consideration of legal argument and if it is alleged that the Orders are in error then it is appropriate that any application under Section 45/93 be brought by the party making such claim."

Deputy Chief Judge continues

There appear to be two jurisdictional matters at issue in this present application which need to be first addressed. The first is whether the Registrar of the Court can make an application under Section 45 of Te Ture Whenua Maori Act 1993 for an order under Section 44 of the said Act. The second is whether the Maori Appellate Court had jurisdiction to direct the Registrar of the Court to make such an application under Section 44 of the Act. The circumstances set out in these present proceedings are unusual in that the Chief Judge is being called upon to review matters of both fact and law and also to determine the question of jurisdiction of the Maori Appellate Court. This is not the first time that the Chief Judge of the Court has been called upon to review decisions of the Maori Appellate Court. In re Nga Tarawa 2E1, Chadwick v Guardian Trust and Executive Co Ltd (1964) 3 Ikaroa ACMB 32 and (1966) and 9 Ikaroa ACMB 99 reported in Tai Whati vol 1, pp 140-141, the Maori Appellate Court itself

ruled that the Chief Judge had power to review decisions of the Maori Appellate Court even although in that particular instance the Chief Judge was a member of the Appellate Court. The Chief Judge should not exercise jurisdiction to review the Appellate Court decisions lightly and generally, where the issues relate to matters of jurisdiction and may be outside the competence of the Chief Judge to determine, the matter should be referred to the High Court. Power is given to the Chief Judge to state a case for the opinion of the High Court by Section 46(2) of Te Ture Whenua Maori Act 1993 - see Rangitoto Tuhua and Ormsby (1959) CJMB reported in Tai Whati at folios 72-73. Having looked at the jurisdictional matters involved in the present application I am prepared to proceed without the need for a case to be stated to the High Court. I deal first with the question of the Registrar's jurisdiction.

Section 37 of Te Ture Whenua Maori Act 1993 hereinafter referred to as the said Act allows the Maori Land Court to exercise jurisdiction on the application of any person claiming to have an interest in the matter or the Minister, or the Chief Executive or a Registrar. However Section 37, subsection 1 makes this jurisdiction subject to any express provisions of the Act. Sections 44-49 set out the special powers of the Chief Judge. These are the powers now sought to be invoked by the Appellate Court. Section 45 of the said Act expressly states that the jurisdiction conferred on the Chief Judge to cancel or amend orders under Section 44 shall be exercised only on application in writing made by or on behalf of a person who claims to be adversely affected by the order to which the application relates or by the Registrar. Under the repealed Maori Affairs Act 1953 there was no provision for a Registrar to apply to the Chief Judge to exercise this special jurisdiction. The power is now given under the 1993 Act to the Registrar presumably as a matter of practical convenience because there are circumstances in which the Registrar may become aware of an error that has been made in the presentation of evidence to the Court by reference to some other minute or record. The Registrar sees the need for rectification and generally the matter is a straight forward one which is proven by the record and calls for cancellation or amendment. In the above report from the Registrar this matter is adverted to and I agree with the view expressed in paragraph 11(ii) that a Registrar should exercise this jurisdiction sparingly and use it to correct latent or obvious mistakes, error or omissions which are apparent from the record held in the Court. Although the Registrar has power to make the application, clearly in the present case he had some strong reservations about making the application for two reasons. Firstly, the appeal which was before the Maori Appellate Court was dealing with later orders of the Court and the Section 437(1) orders which were sought to be corrected were made in December 1992 and time for filing of an appeal against those orders had expired. Secondly the Registrar had some difficulty in making the application when his knowledge of the Court records and facts persuaded him to the view that the application was not merited on those facts and that there was no error or omission on the part of the Court when it made the order. The Registrar was therefore put into a difficult position by the Appellate Court direction and quite properly has brought this to notice. In my respectful view he would have been quite in order in refusing to make the application sought.

The second question is a mixture of fact and law. Again, in rather unusual circumstances there is a report from Judge Carter whose orders are subject to the appeal setting out the facts on which the Court moved to deal with the application under Section 437. On the face of it these facts would seem to indicate clearly that Section 436 was not available to the Lower Court judge and he was prompted to move under another statutory provision.

I return for a moment to the second leg of the jurisdiction question and this relates to the power of the Maori Appellate Court to direct a Registrar to make an application. Section 42 of the 1953 Act and Section 53 of the said Act are identical. These respective provisions set out the powers of the Appellate Court on appeals. Again with the greatest respect I do not consider that the Maori Appellate Court had jurisdiction under its statutory powers on appeal to direct the course of action it did. In my view it was acting outside its jurisdiction.

The Appellate Court has suggested also that the Chief Judge in exercising jurisdiction under Section 44/93 should cancel the December 1992 orders under s.437/53 and substitute s.436/53 orders. I shall come back to the s.437 orders shortly but already on the face of the brief background material available to me in the Registrar's report it would seem that a s.436/53 order would not be available as a remedial order for the reason set out in paragraph (7) of the Registrars' report. Obviously the status of the land and its history did not come to the attention of the Appellate Court in suggesting a Section 436 alternative order. Some other alternative courses of action may have to be looked at by the Appellate Court and the parties before it. In my view the circumstances surrounding this present application are such that I should decline jurisdiction which I now do. The application is accordingly dismissed.

It may be helpful to the Appellate Court and the parties before it if I express some views as to how I see the law as expressed in Section 437/53. These comments are made by way of indication only and may well change upon hearing legal submissions directed expressly to the interpretation thereof.

I am not proposing to consider questions relating to the validity of those orders, whether such validity is questioned on the basis of breaching natural justice or on jurisdiction. The present application is dismissed and any further determination as to the validity of those December 1987 orders can only be made by review in a Court of competent jurisdiction or by an action brought under Section 45/93 to the Chief Judge by a person adversely affected. I accept of course that such application may yet be made. The Appellate Court and Counsel for the appellant, clearly recognise the limitation upon the Appellate Court's power to review those orders now. The same view is also put forward in the Registrar's report. No doubt the Appellate Court in resuming its hearing will be addressing the validity of the orders made on 17 March 1993 in the light of the prior orders made in December 1992 and on the basis that those earlier orders are binding orders of the Court.

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I am of the preliminary view, subject as aforesaid to change upon meritorious submission, that Sections 437(1) and 437(4) provide for the Court to make alternative orders. The Court may either vest in the persons beneficially entitled - ss(1) or vest in trustees for any Maori or group or class of Maori specified in the order - ss(4).

I would presume that if the ss(4) alternative was followed by the Court it would then or later set out the trusts to be reposed in the trustees. In 1983 a new sub-Section (4A) was inserted into s.437. The 1983 amendment appears to give wide powers to vary the trust and replace trustees. I do not propose to deal with the provisions under the 1993 Act which would apply to existing trusts. They are wide powers vested in the Court and set out in Sections 236-245 and s.335 of the said Act.

There is a direction to the Registrar of the Court at Hamilton that this decision be conveyed to the presiding Chairperson and members of the Appellate Court as soon as possible.

Copies also to parties before the Appellate Court.

A G McHugh
Deputy Chief Judge