

In the Maori Appellate Court
of New Zealand
Tairāwhiti District

Appeal 1993/9 and 10

APPEAL by TAMARUINGA BROWN against a decision of the Maori Land Court promulgated at Gisborne on the 10th day of February 1993 in respect of Waipaoa 1A1 and Waipaoa 3B

CORAM: Judges N F Smith (Presiding), H K Hingston and H B Marumaru

COUNSEL: Mr Ron Barber (for the Appellants)
Mrs Bev Murray (for the Maori Trustee)

HEARING: 23 August 1993.

Mr Barber:

I have prepared a synopsis in my argument. With respect to these two blocks, the full facts are set out particularly well in folio 140 of the application file 9179. As it appears from the records they are two very large blocks. One Waipaoa 1A1 which is part of Arowhana which is one of our local mountains here, is virtually land locked. The company of Hukurangi Forest Farms which appears throughout the file, that is its neighbour on one side and Waipaoa Station is the neighbour on the other. As appears from the records these two blocks 1A1 and 3B, their real future lies in forestry. With respect to both the blocks, neither of these blocks now have leases. They both have fairly new 438 Trusts in place, private trusts, and the point I want to stress with both blocks is that both have accumulated rent. That was a point I stressed in the Lower Court. In my submission it is vital to my argument later with respect to the Trustee agency dichotomy. As well 3B has lease surrender monies and 1A1 has easement compensation monies and of course by Section 2, those monies are the result of alienations as defined in the Act, even though in my argument, as you are aware, in the Lower Court, I tried to show that they were capital payments and should be dealt differently from alienations.

In my investigations over the last couple of weeks there has been some fresh facts come to light. We know already that with respect to 3B there was the investigatory 438 trust in place so that while these monies have come to hand with respect of 3B there was already in existence a 438 Trust which is something that possibly I should have hammered harder in the Lower Court or which is something that His Honour Judge Rota didn't agree with me on. But there has been a 438 Trust in place there since 1986. But I have found out with respect to 1A1 there was a .74 amendment agency in place from virtually the same date and I have a copy of that minute, it is from 127 Gisborne Minute Book. It's not actually in the appeal papers.

(Produces copies of those minutes to the Court)

With the one block we do have an investigatory 438 Trust and on the other block we have an investigatory agency to negotiate compensation etc. I may be able to make something of it later, I may not, but for all practical purposes the Maori Trustee has treated both blocks as though they were subject to a 438 Trust. I'm not saying that it changes the status of the agents on the 1A1 block but they have been deemed to be acting as a unit 438 on the 3B block and the agency on the 1A1 block, but they have been treated as trustees, by the Maori Trust, for both blocks. It may be of some assistance to me later, I hope so.

The agents under this 74 amendment trust, they negotiated the compensation and negotiated the forestry proposals with respect to 1A1. The trustees on 3B negotiated the surrender of that lease and they investigated forestry. Both blocks proceeded in the forestry schemes, trees were planted, and as the Court is well aware, planting trees is an expensive exercise and there is no income for some considerable time. As a matter of interest and it wasn't a matter of evidence at the time except generally, but the projected budget for 3B in the year 2020 is a net profit of 2.99 million. The budgeted profit for 1A1 is 1.342 million. I appreciate that that is of no legal significance in the matter at issue but of course it is something that is of vital importance to the trustees.

While we have the trust in place the trustees are liable for rates. That point was questioned in the Lower Court by Judge Rota. As often happens in these cases when you are put on the spot you can't recite the authority but the authority is in the Rating Power Act Part XIII. I have copies of that Act here. Section 184, "the Trustee of any Maori Freehold Land shall out of money whether capital or income derived from that land and held by him or her for the beneficial owners pay all rates levied on the land". So the Trustees do have the ongoing responsibility to pay the rates on the land.

The Court will be well aware from the minutes and the number of times we have been to Court, the Trustees intention and the intention of the owners the whole way through was that these blocks would become afforested and in due course benefit the owners and of course in the meantime the trees are serving the function up there of protecting the land downstream from erosion.

The question of the special aid fund. The Trustees raised the point whether they would be eligible for aid from the special aid fund and I've made the submission here, and I made it in a letter to the Registrar, suggesting that as the Judge advised the Trustees who had been appearing personally to seek legal advice, perhaps the Court could take that as a direction under 57(a) that the Trustees get legal representation and that it be paid for from the special aid fund. When I first came into the matter the Court file was bristling with yellow stickers with problems that His Honour Judge Rota had found with the applications and the matter had already been to Court and it was at that stage that the Judge suggested to the Trustees that they seek legal advice and they did that. Possibly if I can leave it there that I'm making the application that Section 57(a) does apply and the Trustees can have their legal fees paid out of the special aid fund. On the other hand, if my submissions are successful and the Court agrees with me that there is jurisdiction under Section 32 and the Court exercises that jurisdiction there may be no need for the special aid fund to come to the party at all.

With respect to these applications under Section 32, the Court will be aware from the minutes and all that transpired therein, Judge Rota took the view that he did have jurisdiction under Section 32. There were other matters that were causing him concern, questions of notice etc, but it wasn't until the beginning of this year on our third or fourth appearance in Court that Judge Rota advised us that he was bound by the Ranga decision and although we raised arguments against that he said he was bound by the decision and therefore the Maori Trustee was holding the monies as agents for the owners and there was no jurisdiction under Section 32.

My job here today is to ask the Court to reconsider the question raised in Ranga and if I can successfully do that, that will be the end of the matter and hopefully the Court will make the order sought or in the alternative, the facts of the present case, the two appeals, are so different from the facts in the Ranga case that in my submission it is easily distinguished in any event. I would really like the Court to have a second look at Ranga so that the decision there can be reviewed.

The Ranga decision itself was a case that is well known to this Court. Ranga owned a protected interest in Motiti. He went bankrupt in February 1988 and in May of 1990 the block was sold. Sale proceeds went to the Maori Trustee and Ranga at that stage was still an undischarged bankrupt. The Maori Trustee, for whatever reason, paid the monies that were due to Ranga into Ranga's own numbered beneficiary account so that from that point of view the Maori Trustee had

distributed the money and Ranga had the right to call for the money in his own numbered account. The Official Assignee applied under Section 32 on the basis that the money was held by a Trustee, the Lower Court refused the application on the basis that the money was held by an agent, the Official Assignee appealed and the Appellate Court upheld the Lower Court decision, holding that the Maori Trustee held the money as agent.

Page 10 of the Ranga decision, the second paragraph

"Accordingly the Court finds that those proceeds of alienation that are paid to the Maori Trustee and distributed by him under Section 231(3) are handled by him as agent

those funds that for one reason or another are not distributed but are intentionally retained on behalf of the owners are held on Trust. These are the funds which are referred to as being held upon Trust under Section 32 or be it a Trust under Section 8 of the Maori Purposes Act."

It is strongly arguable that even in the Ranga decision the Maori Trustee was still holding those funds as Trustee.

The Matata decision, I have copies of the relevant parts of the case here, from Rotorua Minute Book 182 page 194. It goes rather comprehensively into the difference between Trustees and agents.

(Produces copies of the typescript pages 3 and 4)

The decision is Lot 59B2C2B2 Parish of Matata.

Judge Hingston:

You brought our attention to Ranga, page 10. Can you show us that the funds we are talking about here are intentionally retained on behalf of the owners. They're not distributed we know that. Are they intentionally retained or are they just here waiting for the Court to decide what to do? Why were they accumulated?

Mr Barber:

I don't know the answer to that. They've been accumulated for some period and not distributed. They could have been distributed. They've been around for a while. There is a lot of accumulated rent there and they were accumulated on Trust.

Judge Hingston:

Were they intentionally retained on behalf of the owners. This distinguishes the Ranga situation.

Mr Barber:

I do know the monies were invested and returned a good investment return, as a lot of the Maori Trustee's funds were.

Judge Hingston:

In the Ranga case we decided that the colouration could change. At one stage the Maori Trustee would be agents, at a later stage they could be Trustee. We discussed that and that's how it comes about. If they are not distributed but are intentionally retained on behalf of the owners then they are held on Trust.

Mrs Bev Murray:

In the case of Waipaoa 1A1, \$20,000 that was received by the Maori Trustee on behalf of the two agents appointed, John Ruru and Nona Haronga, it was actually on the request of Mrs Haronga

that the Maori Trustee retain those funds. We had a meeting with both Trustees back when the monies were first received. It was actually a request by Mrs Haronga.

Judge Hingston:

She was one of the Trustees was she?

Bev Murray:

Yes, one of the agents.

Judge Hingston:

What was her intention behind retaining?

Bev Murray:

There was a meeting held on the 25th of February 1991. John Ruru did not actually appear at that meeting so it was just Nona and myself. The file note here says that Nona would prefer monies invested to remain until further notice. She considers a distribution uneconomical as the monies could be put to far better use in the future if there is a substantial amount available. On the basis of that the Maori Trustee invested the monies on behalf of the owners until a decision could be made for their distribution.

Waipaoa 3B, the monies that the Maori Trustee is holding have actually been accumulating since 1985. Part of the monies that have actually been accumulated were alienation monies from a former lease. These monies were actually invested at a very high return. I think it was something like 20% in those times. So they doubled their money almost in a very short time. But then in 1986, as Mr Barber has already told the Court, the block was vested in Private Trustees. It was only an investigatory trust. There was no actual power on that Trust Order to distribute monies held.

The rest of the monies that the Maori Trustee is holding is actually Bola compensation monies which we received in July 1989. There are surrender of lease monies from the Hikurangi Forest Farms amounting to \$15,866 and interest that has been credited to those accounts since 1990.

Judge Smith:

How are those accounts set up within your office?

Bev Murray:

Up until 1990 we were investing monies outside of the common fund, in investment houses.

Judge Smith:

Are they shown in your records as Waipaoa 1A1 and Waipaoa 3B?

Bev Murray:

Yes. They are separate accounts in our Section 92 ledger of the Maori Trustee's financial accounts. They have their own separate accounts in their block names.

Judge Smith:

Any tax paid on the income received?

Bev Murray:

Yes we retain income tax 31 March each year to IRD.

Judge Smith:

For an interested party you have helped us considerably.

Mr Barber, my feelings are that we have gone beyond the realms of an Appellate Court hearing in so far as we have heard evidence which was not available, may have been capable of being produced in the Lower Court, but in the absence of any opposition in this matter. The fact that you have got some measure of support from the owners for the monies to be paid to the Trustees in any event, we feel inclined to allow the evidence which has been produced now and it may be that the evidence which has been produced on behalf of the Maori Trustee could establish by virtue of the fact that these monies have been invested by the Maori Trustee under separate block names and that with-holding tax has been deducted and paid, that these monies are in fact held for the owners of those respective blocks in Trust by the Maori Trustee. This is not evidence which was before the Court in the first instance and we are not saying that what the Court at first instance has done was wrong, but in the light of additional evidence which has been produced it may be that we could find in favour of the Trust. We wonder whether or not we should perhaps just address that matter briefly before we continue.

Mr Barber:

I had this morning tossed around in my mind whether to apply to have this additional evidence produced because I had discussed the matter last week with Mrs Murray. I had hoped that Mr Kinder's admission in the Lower Court that the accounts were held in a global sum might have covered that but at the end of my submissions I was going to ask the Court if the Court didn't accept that, the Maori Trustee could give short formal evidence. That's where I've been coming to, that the Maori Trustee has been treating both blocks as Trusts. I was fortunate to get that evidence myself last week from Mrs Murray.

(Court adjourns)

(Court resumes)

Judge Smith:

We've considered your submissions in so far as we've allowed you to give them to us. We have taken into account the matters mentioned by Mrs Murray, on behalf of the Maori Trustee. We have reached a decision on the appeal and the decision of the Court is that taking into account the evidence which was before the Lower Court, the Court was correct in refusing the orders sought under Section 32. In refusing the orders the Court applied the principles announced by the Appellate Court in the official assignee in bankruptcy of the property of Andy Runga which was sighted at Waikato Appellate Court Minute Book on the 20th of August 1991. We recorded Mr Barber endeavoured to distinguish that decision and in particular referred the Court to the second paragraph of page 10 of that decision

"Accordingly the Court finds that those proceeds of alienation that are paid to the Maori Trustee and are distributed by him under Section 231 subsection 3 are handled by him as agent. Those funds that for one reason or another are not distributed but are intentionally retained on behalf of the owners are held on trust. These are the funds which are referred to as being held "upon trust" in Section 32 of the Maori Affairs Act 1953 or on a bare Trust in Section 8 subsection 3 of the Maori Purposes Act 1993".

Mrs Murray on behalf of the Maori Trustee stated that Mrs Haronga, one of the agents appointed for Waipaoa 1A1, directed the Maori Trustee to hold the proceeds received for the Grant of Easement and invest it for future use. The investigatory trustees for Waipaoa 3B who negotiated a surrender of the lease of that block also directed the Maori Trustee to invest the funds for future use. The Maori Trustee accordingly invested all funds held for both blocks in separate block accounts for Waipaoa 1A1 and Waipaoa 3B respectively and has paid with-holding tax on the income received from those investments. It is clear therefore that the Maori Trustee was no longer acting as agent and was in fact holding the funds in Trust for the owners of the respective blocks. The Maori Appellate Court is entitled in terms of Rule 140 subrule 3 of the Maori Land Court

Rules of 1958 to admit additional evidence, and in this present matter accepts the evidence of Mrs Murray on behalf of the Maori Trustee. This Court finds that in terms of the Ranga decision that those funds were intentionally retained for and on behalf of the owners and that the status of the Maori Trustee had changed from agent to Trustee.

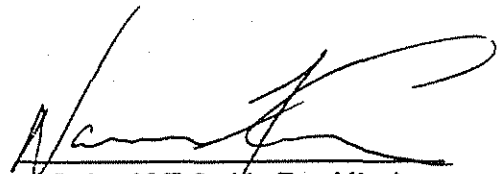
Accordingly the Appeal is allowed. In terms of Section 45 subsection 1(f) of the Maori Affairs Act 1953 there is an order under Section 32 of the Maori Affairs Act 1953 directing the Maori Trustee to pay all monies held on behalf of the owners of Waipaoa 1A1 and Waipaoa 3B to the Trustees of the respective blocks.

There is an order under Section 34(10) of the Maori Affairs Act 1953 for the immediate release of those funds.

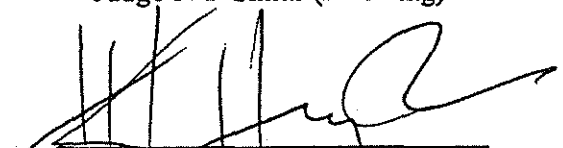
There is a direction that the funds paid for the cost of preparation of the record is to be refunded.

In light of the orders made Mr Barber is protected as to his costs and his application for costs from the special fund is not being addressed.

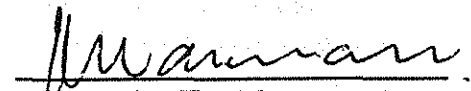
That is the decision of the Court.



Judge N F Smith (Presiding)



Judge H K Hingston



Judge H B Marumaru