IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20130005643
APPEAL 2013/5

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Lake Taupō Forest Trust
	ANN TUPUIVAO CLARKE Appellant
AND	RANGIKAMUTUA DOWNS, JAMES BIDDLE, TIMOTI TE HEUHEU, TE KANAWA PITIROI, TUMU TE HEUHEU, STEPHEN ASHER, HUPA MANIAPOTO, ARTHUR GRACE, JUDITH HARRIS, CLINTON ELLIS AND JOHN TUPARA Respondents

Hearing: 12 May 2014
(Heard at Rotorua)

Judgment: 12 May 2014

ORAL JUDGMENT OF THE MĀORI APPELLATE COURT

Introduction

[1] This appeal relates to a decision of the Māori Land Court dated 22 April 2013 whereby the Court varying the terms of Trust for the Lake Taupō Forest Trust by amending the third schedule of the Trust Order to include Ngāti Tutetawha.

[2] The grounds for appeal are:

a) Whilst the Appellant accepts that the eponymous ancestor Tutetawha was a member of the Ngāti Tuwharetoa iwi his hapū origins are based on the south side of the Lake.

b) He could not nor could his descendants claim mana whenua in the Tauhara sector.

[3] The appellant expanded on the grounds of appeal in her letter filed with the appeal dated 22 May 2013:

a) Ngāti Tutetawha is but one of numerous hapū who link to Ngāti Tuwharetoa;

b) Ngāti Tutetawha qualify for inclusion within the wider Tuwharetoa group based on whakapapa and ahi kā;

c) Ngāti Tuwharetoa tikanga is that iwi structure is comprised of numerous hapū, but each respective hapū has its own exclusive jurisdiction;

d) Ngāti Tutetawha had its pre-colonial base outside of the Tuwharetoa sector of Ngāti Tuwharetoa.

e) Ngāti Tutetawha is not tangāta whenua in the Tauhara sector of Ngāti Tuwharetoa;

f) Court records record a view from 1869 onwards, whereas the preceding history of several hundred years is not reflected; and

g) The effect of including Ngāti Tutetawha as a hapū in the Tauhara sector is to dilute the beneficial rights of tuturu tangāta whenua.

Section 244 of Te Ture Whenua Maori Act 1993

[4] Section 244 reads as follows:

> **244 - Variation of trust**
>
> (1) The trustees of a trust to which this Part applies may apply to the Court to vary the trust.
>
> (2) The Court may vary the trust by varying or replacing the order constituting the trust, or in any other manner the Court considers appropriate.

(3) The Court may not exercise its powers under this section unless it is satisfied—

(a) that the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and sufficient opportunity to discuss and consider it; and

(b) that there is a sufficient degree of support for the variation among the beneficiaries.

The Lower Court Decision

[5] The lower Court's decision given at 301 Aotea MB 20-26 referenced s244 of the Act. In particular the learned Judge stated that the power to vary a Trust Order is limited unless the Court can be satisfied that the beneficiaries of the Trust have had sufficient notice of the application by the trustees to vary the Trust, and sufficient opportunity to discuss and consider it.

[6] The learned Judge also referred to the discretion available to the Court pursuant to s244 of the Act. The Judge referred to matters of disputed whakapapa, the views of the respondent trustees, the fact that this issue had been researched, argued and adjudicated upon in a process outside the Māori Land Court and that the number of objections were very small compared to those who supported.

[7] The learned Judge went on to say that he had the power to make the order sought, the owners by in large supported the decision and the trustees unanimously supported the application.

The Appeal Hearing

[8] We record that at the opening of the appeal we heard an application by counsel for the appellant to admit new evidence. We did not admit the new evidence which consisted of three unsigned, undated "briefs of evidence" by persons who were not present at Court. There was also an attempt to admit counsel's interpretation of the Native Land Court minutes which we did not admit.

[9] As the appeal unfolded before us it became apparent that the grounds of appeal had shifted. In essence, Mr Nee-Harland counsel for the appellant conceded that the Ngāti

Tutetawha hapū did have mana whenua rights in the rohe of Tauhara but this should be limited to those members of the hapū who descended from the tupuna Te Okore. It was conceded that Te Okore had mana whenua rights in the Tauhara area. Te Okore's husband was Te Rangihopuku, the son of Tutetawha.

[10] Te Rangihopuku also had a relationship with Kurakatea II. Mr Nee-Harland argued that their descendants could not be considered as members of Ngāti Tutetawha as they did not descend from Te Okore.

[11] Thus Mr Nee-Harland's submission was that Ngāti Tutetawha could remain as a named beneficiary of the Lake Taupo Forest Trust but the Court should impose a condition to the effect that any Ngāti Tutetawha beneficiaries had to descend from Te Okore.

[12] The trustees were represented by Amy Walker their group manager, and the current chairperson Mr Clinton Ellis. They opposed the appeal in both its original and amended form.

[13] We also heard from Mr Matiu Northcroft spokesperson for Ngāti Tutetawha.

The nature of the appeal

[14] Before varying a trust pursuant to s244 the Court has to be satisfied of two preconditions, they being:

a) That the beneficiaries of the trust have had sufficient notice of the application to vary the trust and sufficient opportunity to consider and discuss it- s244(3)(a); and

b) That there is a sufficient degree of support for the variation among the beneficiaries – s244(3)(b).

[15] Once the preconditions are met the Court also has a discretion pursuant to s244 to determine whether or not in all the circumstances it should grant the variation.

[16] We accept the approach taken by the lower Court was correct in that it first considered the preconditions and then went on to consider a number of factors which went to its discretion.

[17] There was no suggestion in the grounds for appeal, nor was it argued before us today that the preconditions were not met. Having considered the material available to the lower Court we consider that the beneficiaries did have sufficient notice of the application to vary the trust and sufficient opportunity to consider and discuss it. We also agree that there was a sufficient degree of support for the variation from those who attended hui to discuss the issue.

[18] The reality of this appeal is that the appellant is arguing that the lower Court wrongly exercised its discretion to grant the order.

[19] In that kind of case as the Supreme Court recently confirmed, the criteria for a successful appeal are:

a) Was there an error of law or principle?
b) Did the Court take into account irrelevant considerations?
c) Did the Court fail to take into account a relevant consideration?
d) Was the decision plainly wrong?[1]

Discussion

[20] There was no error of law or principle. The learned Judge correctly identified the relevant section of the Act, the prerequisites and the discretion available to him.

[21] We consider that the learned Judge did not take into account anything irrelevant nor did he fail to take into account a relevant consideration. The Judge had before him and identified the following issues:

a) That this case involved entrenched views as to whakapapa;

[1] *Kacem v Bashir* [2010] NZSC 112 at para 32

b) That disputes as to whakapapa are not uncommon;
c) That the views of the trustees were unanimously in support of the application;
d) That the trustees were senior people within Ngāti Tuwharetoa;
e) That the matter had been the subject of a separate adjudication. That adjudication involved research and was resolved by two senior figures within Māoridom, Messrs Tamati Kruger and Tahu Potiki; and
f) That the beneficiaries by and large supported the application.

[22] The only possible ground for appeal is "was the decision plainly wrong?" We do not consider that it was. In order for the appellant to succeed on this ground would require evidence before us to indicate that the lower Court was clearly wrong.

[23] At best all the appellants can refer to is whakapapa evidence given at various Native Land Court hearings in the 19th and early part of the 20th Century, which refer to Ngāti Tutetawha being descended from Te Okore.

[24] We have considered that material. Extracts of various Native Land Court minute books hearings was available to us as part of the case on appeal for example:

a) Native Land Court investigation into the Tauhara block on 16 March 1869 – 1 TPO MB 194-206;
b) Tauhara Middle subdivision case 21 May 1886 – 6 TPO MB 22-81; and
c) Tauhara Middle No. 4 – 8 March 1909 – 23 TPO MB 338-371.

[25] It is clear to us from reading the evidence and judgments given in those decisions that Ngāti Tutetawha were considered to be one of a number of hapū who had mana whenua rights in the original Tauhara block and its various partitions.

[26] We also take into account that for a different purpose, the question of Ngāti Tutetawha entitlements in the Tauhara block was argued as part of a recent mana whenua adjudication. The context we understand from those who appeared before us being Treaty settlement rights. In that particular instance the adjudicators had the relevant parties before them, a considerable amount of evidence and reached the conclusion that Ngāti Tutetawha had proven mana whenua rights in the Waimihia and Tauhara areas. Those adjudicators

traversed a great deal of evidence from the parties including Native Land Court records in reaching that view.

[27] We accept that there will always be different versions, interpretations and views on whakapapa and associated land rights. Whilst we respect that the appellant and those that support her have taken a strong stance on the position of Ngāti Tutetawha mana whenua rights in the Tauhara area, we do not accept that there is any principled basis on which we can say that the lower Court decision was plainly wrong.

Decision

[28] The appeal is dismissed pursuant to s56(1)(g) of the Act.

Pronounced in open Court at 3:05pm in Rotorua on the 12th day of May 2014

C T Coxhead	S R Clark	S F Reeves
JUDGE	**JUDGE**	**JUDGE**