In the Maori Appellate Court
of New Zealand
Waiariki District

Appeal No: 2002/11
A20020003781

IN THE MATTER of an appeal by Mrs Rihi (Vercoe) Niao pursuant to section 58 of Te Ture Whenua Maori Act 1993 against a decision of the Maori Land Court made on 14 June 2002 at 266 Rot MB 23-26 to dismiss an application to appoint Mrs Niao as Kaitiaki trustee for Te Aokahari Niao, her son.

DATE OF HEARING:	13 February 2003
PLACE OF HEARING:	Rotorua
APPELLANTS:	Mrs Rihi Vercoe Niao
COUNSEL	Mr Cain
RESPONDENTS:	Mr Graham Niao
COUNSEL	Mr Weeks
CORAM:	Deputy Chief Judge W Isaac, Presiding Judge A Spencer and Judge C Wickliffe

The primary issue before this Court is whether the Maori Land Court erred in fact and law and whether there was some procedural unfairness demonstrated when his Honour Judge Savage delivered his judgment dated 14 June 2002 dismissing an application to appoint the appellant as kaitiaki trustee for her son.

Background

This case concerns the .0042238 shares of Te Aokahari Niao, who was fourteen years of age at the time of the lower Court decision. Te Aokahari Niao's father is Lawrence Niao and his mother is Rihi Vercoe, the appellant.

Te Aokahari holds these shares in a block of Maori freehold land known as Matata Parish 72B3R4D. Matata Parish 72B3R4D is administered by an ahu whenua trust constituted by order of the Maori Land Court on 4 February 1992 at 85 Whakatane MB 54. The Niao whanau refer to this trust as the Piarimu Lands Trust. According to the Court records the trustees for the trust are Paki Wineti, Amelia Koia and Katarina Waiari. (See 96 Whakatane MB 135)

On 7 December 2001 the Maori Land Court in Rotorua made an order dismissing an application under section 117/93 seeking the appointment of the appellant as Kaitiaki trustee of Te Aokahari. (263 ROT 41) On that date the Court heard evidence from Mr G Niao objecting to Ms Vercoe's appointment. However, on 27 February 2002, after receiving information from Ms Vercoe, the Court directed that the matter be set down to determine whether a rehearing of the original application should be granted.

On 7 May 2002 the Maori Land Court adjourned the application for a rehearing in order to allow the parties to meet. (265 ROT 188-193) That meeting never took place and the case was back before the Court on 11 June 2002 when his Honour Judge Savage reserved his decision on the application. (266 ROT 183-215) The case proceeded on the basis that the rehearing application had been granted.

Maori Land Court Judgment

In his decision released on 14 June 2002, Judge Savage noted that the appellant's appointment as kaitiaki trustee would have been routine and appropriate in the normal case. But in this case while the appellant had a good deal of support from other siblings of her husband, there was also opposition by a large section of the Niao whanau who presented evidence during the proceedings.

In making his final determination, Judge Savage, stated he was focusing entirely on what was best for Te Aokahari and on how his interests as an owner were best advanced. However, he also had regard inter-alia to:

- the documentation and evidence put before him;
- the history of the matter;
- the Court's difficulty in having confidence that the family could work together;
- the inability of the family to reach resolution on family matters;
- the need to consider section 17/93 particularly the need for kin groups to be empowered in their dealings;
- the lack of necessity for the appellant to cross the line that was imposed by the other owners and the whanau.

Taking these matters into account, Judge Savage dismissed the application. It is the dismissal of this application which is the subject of the appeal before this Court. Judge Savage concluded that the appellant's sister-in-law could hold kaitiaki status for the appellant's husband, Mr Lawrence Niao who could be the primary kaitiaki trustee, however, as there was no application before the Court in that regard he could not make an order. After making certain adverse findings against the appellant he then dismissed the application.

Grounds for the Appeal and Submissions

The Notice of Appeal, filed without the assistance of counsel, basically alleges mistake of fact and unfairness based on statements made in the judgment regarding the appellant.

In submissions, Mr Cain argued that Judge Savage erred in his decision when he allowed issues relating to whanau dynamics to be raised and considered as these were issues relating to the Piarimu Lands Trust and its administration and, therefore, not subject to any application before the Court. The thrust of submissions concerned:

- The failure of the Maori Land Court to give effect to section 17/93;
- The Maori Land Court took into account irrelevant considerations and there was no valid basis for the appellant not being appointed kaitiaki trustee; and
- The Maori Land Court acted with procedural unfairness by making statements about the appellant in breach of the rules of natural justice.

1. Failure to Give Effect to Section 17

In this regard, Mr Cain basically submitted that consistent with section 17(1)/93, the primary objective of the Maori Land Court was restricted to consideration of the retention and utilisation of the interests of Te Aokahari, not the broader issue of retention and utilisation of the land by the whanau owning shares in the same block. In this respect, the Judge erred at law because he had regard to the broader concerns of the whanau holding shares in the land block as a whole.

He went on to contend that under section 17(2)(a)/93 it is only the wishes of Te Aokahari, the owner of these shares, that should have concerned the Court not the wishes of the family or other owners in the block nor any issues of tikanga. In this respect, the Judge also was in error.

In relation to section 17(2)(b)/93 and as a result of Judge Savage's decision, Mr Cain submitted that Te Aokahari, does not have any one to represent him. Therefore, there is no means by which he as an owner may be kept informed or participate in discussions concerning any proposals relating to the land. In this respect, the Judge erred at law by failing to appoint a kaitiaki trustee.

As for section 17(2)(c)-(d)/93 these provisions are not pertinent to the application because the only owner of the shares was Te Aokahari. The Niao whanau while they own shares in the same block, do not have standing in respect of that minor because their shares were not subject to the application. Their participation was an attempt to supplant Te Aokahari's parents' knowledge with their own views. Issues of tikanga and other matters raised by the whanau concerned the broader ahu whenua trust and not Te Aokahari's best interests. In this respect, the Judge erred at law by having regard to the broader whanau view of who should be kaitiaki trustee and using that as a basis for dismissal of the application.

Finally, in relation to section 17(2)(f)/93 and the objective to find practical solutions to the problems arising in the use or management of land, the decision to dismiss the application provided no such practical solution.

In summary, the case for the appellant under this head was that Judge Savage erred at law in the manner in which he interpreted section 17/93. Alternatively, he failed to give effect to the provisions of the section.

In reply, Mr Weeks submitted that:

- The Appellant's influence in and involvement with the whanau creates disruption, division and conflict.
- Her personal attacks against whanau members and other beneficial owners of the land have had an unhealthy and negative impact.
- The Joint Respondent does not believe that the Appellant will be able to work constructively with or co-operate with the whanau, or other owners and therefore this would interfere with their ability to develop and utilise the land.

Mr Weeks went on to submit that the objectives of the Court under section 17(1)/93 would not have been met if the appellant had been appointed a trustee. He further submitted that there were other people who could represent the interests of Te Aokahari while still being able to work with the whanau and others.

Our View

The responsibility for making the final determination as to the suitability of a person to be kaitiaki trustee belongs to the Maori Land Court. In arriving at its decision it exercises a certain amount of judicial discretion while it follows the important steps listed below.

- The Court considers constituting the kaitiaki trust in accordance with section 217/93 which inter-alia allows the Court to have regard to the degree to which the person for whom a trust is established is or is likely to be subjected to, undue influence in the management of his or her own affairs concerning his or her property. We note that while Te Aokahari is a minor living with and under the influence of his parents, there was no hint in the judgment suggesting that undue influence was an issue in this case. Under section 217/93, the Court must also

be satisfied that the constitution of the trust would best protect and promote the interests of the person for whom it is established. In such a case, the Court must rely on its own interpretation of the evidence and the law to arrive at a judgment on the suitability of a particular individual to be a trustee. The judgment of the lower Court in this case demonstrates that Judge Savage did focus on what was best for Te Aokahari and on how his interests as an owner were best advanced. That is relevant to whether or not Te Aokahari's interests could be advanced by Ms Vercoe. As his representative, she would have to attend owners' meetings. She would have to participate in all decisions concerning the land where the views of the owners were sought. As mentioned by Judge Savage, there are many issues that confront all the owners. Judge Savage was entitled to consider the documents and history of the relationship between the owners and Ms Vercoe. He was also entitled to find that it was unlikely the parties could work together. That being the case, his conclusion that it was unlikely Mrs Vercoe could advance Te Aokahari's interests was reasonable in the circumstances. Consequently, in our view this provision was complied with.

- The Court will also consider declaring the terms of trust under section 219/93. In this case, that was unnecessary as no kaitiaki trust was ordered.

- The Court considers who should be a trustee. In determining this question the Court must apply the legal tests in section 222/93. First, that requires having regard to the ability, experience, and knowledge of the individual or body. In this case the judge did consider the qualities of the appellant and rejected her as a possible appointee. While people may disagree with that result, that is the decision the learned judge came to after hearing all the parties.

- The Court, under section 222(2)(b)/93 can not appoint any individual unless it is satisfied that the appointment of that individual would be broadly acceptable to the beneficiaries. Te Aokahari is a minor so is not in a position to be able to make a decision himself on who should be his kaitiaki trustee. There is no other beneficiary. The Maori Land Court has the power to fill such a void and make or decline to make an appointment of a trustee. (See section 237(1)/93 and sections 51 & 67 Trustee Act 1956) In doing so it should be guided by the principles that pervade Te Ture Whenua Maori Act 1993 as set out in the Preamble and sections 2 and 17/93. Therefore, although a kaitiaki trustee is

responsible for advancing the interests of the person for whom the trust was established, that role must be performed within the context of a collective of Maori owners who have tikanga responsibilities towards the land and each other. Te Aokahari is a part of such a collective of owners, people who are members of his whanau and hapu. Taking a purposive approach to Te Ture Whenua Maori Act 1993 and consistent with section 5 of the Interpretation Act 1999, there must be a default back to those other owners in the land to ascertain their views on the application. While this is not articulated in the judgment, the result reached by the lower Court and Judge Savage's express recognition of the views of the owners and the family is consistent with this approach.

- The Court then considers vesting the assets of the trust in the trustee appointed pursuant to section 220/93. As no trust was established there was need to consider this.

- Although each step outlined above is distinct and subject to specific legal tests, before the Court may make any of these orders, it must have regard to the Preamble and section 2/93 and how they impact on the Court's consideration of the facts in any particular case. In our view, the approach Judge Savage took in having regard to the wishes of the Niao whanau was consistent with the reaffirmation of the spirit of the exchange of kawanatanga for the protection of rangatiratanga, and the principles of retention and utilisation by the owners, their whanau and hapu as declared in the Preamble of Te Ture Whenua Maori Act 1993. The approach recognises that as far as possible the owners, their whanau, hapu and their descendants should make decisions regarding their lands and not the Court. It is also an approach consistent with the duty imposed on the Maori Land Court and the trustees by sections 2(2)/93, to exercise powers, duties and discretions conferred by the Act in a manner that facilitates and promotes the retention, use, development and *control* of Maori land as a taonga tuku iho by Maori owners, their whanau, their hapu and their descendants. The Court was required to have regard to the views of all the owners in the block, not just those of Te Aokahari's parents.

- The Court must also give effect to the general objectives of the Maori Land Court as set out in section 17(1)/93. In light of our findings above, it is axiomatic that

Judge Savage's approach was also entirely consistent with the primary objective of the Court in section 17(1)/93.

- The Court must also seek to achieve the further objectives set out in section 17(2)/93. In that regard we reject the contention of Mr Cain, that section 17(2)(a)/93 is restricted only to ascertaining and giving effect to Te Aokahari's wishes as he is a minor. In such circumstances, there must be default back to the owners to ascertain and give effect to their wishes as a collective. In their view, as Te Aokahari's father was a direct descendant, they believed that it was up to him to act as kaitiaki trustee. In relation to section 17(2)(b)/93, we reject Mr Cain's submission for the appellant and we find that Judge Savage recognised the land was best administered on Te Aokahari's behalf by a member of the land holding whanau, namely Te Aokahari's father. Although the application for the appointment of Ms Vercoe was dismissed, the learned judge specifically made this point clear and a fresh application to achieve this end can be brought. We also find that the provisions of section 17(2)(c)-(d)/93 were relevant and the judgment clearly makes the point that the issues concerning the disputes between the parties were carefully considered by the judge and weighed in the balance. In relation to section 17(2)(e)-(f)/93 the determination of what is fair rests on knowledge of the facts, the law and the parties. There can be no criticism that the judgment was unfair towards Te Aokahari, as his interests can easily be accommodated by the appointment of his father as kaitiaki trustee. Finally, in our view the appointment of Mr Niao as suggested by Judge Savage, was the most practical solution to the dispute.

At each step in the above process, Judge Savage had to exercise a certain amount of discretion. In *Harris v McIntosh* [2001] 3 NZLR 721, the Court of Appeal stressed that to succeed on an appeal against the exercise of judicial discretion the appellant must show that the Judge acted on a wrong principle or failed to take into account some relevant matter or took account of some irrelevant matter or was plainly wrong. We can not, therefore, substitute, our view of the case where the lower Court has complied with the law. In respect of section 17/93 Judge Savage clearly did comply with the law, so the appeal based on these grounds must fail.

2. Irrelevant considerations

Mr Cain for the appellant, submitted that the allegations made by the whanau members objecting to her appointment due to her influence in the whanau causing division that they claimed was unhealthy and disruptive having a negative impact on some family members was irrelevant. Additionally, he submitted that Judge Savage erred in allowing issues relating to whanau dynamics to be raised and considered as they more properly related to the Piarimu Lands Trust and not the issue of whether a kaitiaki trustee should be appointed.

As we have explained above, the views of the other owners who are whanau and hapu members was a relevant consideration as were the whanau dynamics and tikanga issues. There was, therefore, a valid basis for not appointing the appellant kaitiaki trustee. That being the case, the appeal must fail based on this ground.

1. Procedural Unfairness

Mr Cain submitted, that the competency of the appellant to be a kaitiaki trustee was never challenged by the owners and whanau members who opposed her appointment. Rather they raised issues concerning the administration of the Piarimu Lands Trust. The main basis of their concern was that they did not want any one not of the Piarimu decent line involved in the decision-making concerning the land. That being the case, Mr Cain submitted, there was no basis for the Court to determine as follows:

> The second reason advanced by those opposing Rihi is, in my view, a valid one. I do not believe it is in Te Aokahari's best interest to have his rights as an owner advocated for by a person with such fixed views and unflinching determination as his mother Rihi has demonstrated. She appears to have unbounded self-confidence and be entirely unafflicted by self-doubt. She has little ability to compromise and has alienated a major section of the whanau. Her attitude is to be witnessed by her correspondence on the Court file, but also from her evidence at the two Court hearing[s]. I am referring to not only to what she said but the way she said it.
>
> I do not believe that it is in Te Aokahari's best interest, as an owner, for matters to be inflamed in this way. The application is dismissed. (266 ROT 26)

At the hearing of the appeal, this Court invited submissions from counsel on the decision of the High Court in *O'Regan v Lousich* [1995] 2 NZLR 620. These judicial

review proceedings arose from a decision of the Maori Land Court where the Hon Judge Hingston (now retired) stated:

> The evidence before me highlighting the overbearing manner of the former chairman [Sir Stephen] when dealing with dissenting shareholders engenered a disquiet that has not been lessened with the evidence, demeanour and observed attitude of the present chairman and some committee members. I gained the impression that not only are the minor shareholders considered by them to be a nuisance but the Court itself in taking them seriously is out of line.

The High Court found that such a conclusion made by a judicial officer had the capacity to damage Sir Tipene O'Regan's reputation. Furthermore, Sir Tipene had not been given any notice that the Judge had it in mind to make any finding in his decision and he had not been given an opportunity to put his side of the story. This was held to be a breach of the rules of natural justice involving a serious breach of elementary fairness.

In this case, Mr Cain contended that Judge Savage made a similar finding of fact adverse to the appellant. The finding of fact is to be inferred by the statement *"The second reason advanced by those opposing Rihi is, in my view a valid one."* This statements relates to his summary of the reasons for the opposition to her appointment at 266 ROT 24, where he noted that they do not want the appellant in particular because *"they regard her as disruptive and over bearing."* These statements in addition to the further statements made by Judge Savage were in breach of the rules of natural justice, that it was a substantial breach and therefore unfair as no notice or opportunity to respond or reply was given to the appellant. Mr Cain sought to have these findings quashed and for this Court to substitute its findings for that of the lower Court.

In reply, Mr Weeks submitted that the decision in *O'Regan v Lousich* (1995) should be distinguished because notice of the grounds of opposition to the appellant were given to her by Judge Savage at 266 ROT 184 for response when he asked her whether she had seen and read certain documents tendered by the respondents. She did not respond. Further to that Judge Savage flagged his concern about the appellant's assertive manner at 265 ROT 193(a). In the *O'Regan v Lousich* (1995) case Sir Tipene had no warning of the allegations to made against him and he was not present at the hearing. In this case, the appellant was a full participant in the hearings and submitted a number

of letters to the lower Court explaining her position. Judge Savage's comments regarding the appellant were a summary of the material that was tendered to the Court recording the views of the respondents. She never once refuted the allegations made against her indicating at 266 ROT 184 that she would not bother. Mr Weeks suggested that was all the Judge could do, anything further would have placed the Judge in the role of an advocate. Finally, he submitted that the Judge's findings were well founded.

Our View

We agree with the submission of Mr Weeks, and as noted in *O'Regan v Lousich* (1995) by Justice Tipping (page 631) that whether there has been adequate notice of adverse findings against an individual depends on the individual circumstances of any case. In this case, there was ample opportunity for the appellant to refute some of the allegations made by the opposition. She did not. In that sense this case can be distinguished from the facts in *O'Regan v Lousich* (1995).

While we believe that the statements of the judge complained of were unnecessary, we do not believe they were of sufficient weight in the circumstances to warrant granting the appeal. In other words, we do not consider that this case hinges on statements made by Judge Savage. In our view, Judge Savage decided the issues after considering all relevant considerations required by the law.

Order & Direction

For the reasons given in this judgment, the appeal is dismissed.

Signed at Gisborne 30th September 2003

Deputy Chief Judge Isaac Judge Spencer Judge Wickliffe