IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT

Place:	Wellington
Present:	C M Wainwright, Judge
	Mary Ahpene, Clerk of the Court
Date:	4 March 2005
Application No:	A20040005105
Subject:	Tatawai Claim No 3 – Confirm Final List of Beneficiaries and Summon Meeting of Owners
Section:	18(1)(a)/93, 173/93
Hearing:	
Applicant:	Robert Alexander Osborne

RESERVED DECISION

Introduction

The present case arises under section 345 of The Ngāi Tahu Claims Settlement Act 1998. Under that section, the Māori Land Court has jurisdiction for the purposes of attachment 14.2 of the deed of settlement to confirm the list of beneficiaries of ancillary claims, and hear and determine objections to the list(s).

In respect of the ancillary claim about Lake Tatawai, the ancillary claims trust has prepared a list of beneficiaries. Edward James ("Ted") Palmer objects to the list. Mr Palmer (objecting to the list) and representatives of the trust (defending the list) appeared before me on 3 November 2004. I now understand why Mr Palmer objects to the list, and why the trustees continue to defend the list in its current form.

By way of clarification, I note that my concern is with the list of beneficiaries only. It was indicated to me that the settlement property to which the list demonstrates beneficiaries' entitlement is itself the subject of controversy. The suitability of the wetlands area set aside for these beneficiaries is in question. Concerns were expressed to me about its isolation and inaccessibility. However, this issue falls outside my purview, and I express no opinion on it.

The nub of the difference between Mr Palmer and the trustees is that Mr Palmer contends for benefit by a much more limited group than those appearing in the list prepared by the Ngāi Tahu Ancillary Claims Trust. He says that the Lake Tatawai

Reserve of about 121 acres was gazetted in 1902, for the use of the Māori people then living at Taieri Māori Village. Mr Palmer says that this reserve was "a local solution for local Taieri Māori use" arrived at against a background of various European activities (dredging, drainage, flax cutting, shooting and fishing) that were adversely affecting the Maori residents' ability to access eel and fish for food.

I have now read a considerable quantity of material relating to this matter. I take the view that the definition of the group who should benefit from the settlement property is by no means straightforward. There are a number of well-informed people, including the objector, Mr Palmer, who have been engaging with the issues over a number of years. All have used their best endeavours to come up with the most robust basis on which to compose the list of beneficiaries.

For my own part, I struggle to find any of the positions put to me wholly wrong or wholly right. In addition to the problem of defining the most entitled class, there is the practical problem of accessing reliable census information for a period, or periods, now very distant in time. In short, the issues are difficult ones, and it was for the neutral resolution of just such issues that the legislation provided for recourse to the Māori Land Court.

I will now summarise the various points of view that I understand have influenced the Ngāi Tahu Ancillary Claims Trust in arriving at the list of names filed as "GGII", namely attachment II to the affidavit of Graham Grant, Chairperson of the Trust. The list is dated 2 March 2004, and comprises not less than 1700 names. (I have not counted each and every one, so this is an estimate rather than an actual total).

Background

Before the Waitangi Tribunal, Ngāi Tahu made a claim about Lake Tatawai. The lake was reserved to Ngāi Tahu in 1902. The reserve comprised 121 acres, and was for fishing purposes.

The claimants in the Waitangi Tribunal were Magdeline Wallscott, Craig Ellison, and Edward Ellison. In its Ancillary Claims Report,[1] the Tribunal said (p.213):

> *The claimants referred to the deprivation of traditional mahinga kai resulting from the drainage of Lake Tatawai*

Edward Ellison is quoted as having described the lakes of Taieri as "a food basket for the Taieri as well as the Peninsula." The Tribunal noted (p. 213):

> *As recompense for the loss of the lake Mr Ellison sought a similar fishing right for the descendants of the original beneficiaries, or other 'suitable compensation'*

The Tribunal found that the Crown failed to protect and safeguard the mahinga kai. Indeed, the Taieri River Improvement Act 1920, which allowed Lake Tatawai to be drained, was introduced without consultation, and the compensation specified in the Act was never provided.

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[1] Ngāi Tahu Ancillary Claims Report 1995 8 WTR, Brooker's, Wellington 1995

The process of ascertaining beneficiaries

In working out who should benefit from the settlement property provided to compensate for the loss of Lake Tatawai, the trustees of the Ngāi Tahu Ancillary Claims Trust must follow the process set out in attachment 14.2 of the Deed of Settlement between Ngāi Tahu and the Crown.

In essence, attachment 14.2 requires the Trust to ascertain, in relation to each ancillary claim, who lost what, when, and to what extent (ie the relative loss).

Clause 8 of Appendix 2 : Attachment 14.2 (of the Deed of Settlement) provides:

> *8. Determination of Beneficiaries Interests*
>
> *The interest of a Beneficiary in any Claims Property shall be equal to his/her share of the loss which gave rise to the Ancillary Claim.*

In my opinion, this clause focuses the task of formulating the beneficiary list on an inquiry into not only who suffered the loss, but also on the relative suffering of those affected. This provision appears to me to envisage a detailed rather than broad-brush approach. It directs those formulating the list to arrive at a good correlation between those who own the grievance and those who will own the Claim Property.

Clause 8 goes on to provide:

> *Where a Claim Property is a Fenton Entitlement or Customary Fishing Entitlement, the interest of each Beneficiary... shall be equal.*

I note that clause 8 is not specifically addressed in the helpful affidavit filed by Graham Grant on behalf the Ngāi Tahu Ancillary Claims Trust. There is, for instance, no explanation in the affidavit, nor in any other material that I have perused, as to whether the claimants' interest in Lake Tatawai is regarded as a 'Customary Fishing Entitlement.' Because this term is in capital letters, I assume that it has a particular meaning in the Deed, and that Lake Tatawai is not a 'Customary Fishing Entitlement' even though obviously, customary fishing took place there. I have proceeded on the basis that the Lake Tatawai Reserve is simply an area reserved to local Māori for fishing purposes. As such, it does not fall to be dealt with, like Fenton Entitlements and Customary Fishing Entitlements, such that all shares in the Claim Property must be equal.

Relative interests and effects

With respect to Lake Tatawai it seems to me that there is a good case for arguing that those most directly and profoundly affected by the loss of the lake as a mahinga kai were those who lived in its immediate vicinity. They would have been affected during the whole period when the lake was deteriorating as a mahinga kai.

This was a long period over which the impact of European agriculture-related activities gradually intensified, leading eventually to the drainage of the lake in or about 1920.

This is not to say, however, that a wider section of the Ngāi Tahu population were not also affected. The effect of the way in which Mr Ellison articulated this claim is to

acknowledge that Lake Tatawai had significance as a mahinga kai for people of the whole Otakou Peninsula. According to the research undertaken by A G Pātete for the Ngāi Tahu Ancillary Claims Trust, "The Otago people usually migrated to the Taieri Plain in late spring and early summer." [2] Lake Tatawai formed part of a seasonal migration for the purposes of gathering kai, particularly eels.

But traditional resources were rapidly disappearing by the 1850s.[3] And as early as 1860, the Taieri Lakes were silting up.[4] "By the 1870s, the trips from the Peninsula up to the Maniatoto Plains and Central Otago had been discontinued",[5] perhaps because of the decline in the weka population. In short, the use that was made of Lake Tatawai as part of a kai trail for Ngāi Tahu whānui had probably ceased by 1870.

Dependence on Lake Tatawai as a mahinga kai for people living in its immediate vicinity continued for longer, to which the 1885 petition to create the reserve itself bears witness. In 1897 there was a complaint about encroachment by Pākehā on the 4-acre reserve then in existence,[6] and the locals' interest in the fishing continued into the early twentieth century at least. But by 1920, the lake was virtually a lake no longer. It was reported to be 'practically tideless' and 'almost dry.'[7] Under these circumstances, Lake Tatawai could no longer sustain a significant fishery. The Taieri kāika was gradually abandoned.

In terms of relative interests and effects, and from what is known of the use of this mahinga kai in the late nineteenth and early twentieth centuries, I believe it is possible to say that the whānau of the kāika suffered more as a result of a Crown's failure to protect this mahinga kai than the wider population of Ngāi Tahu living on the Otakou Peninsula. This is because the kāika whānau lived in close proximity to Lake Tatawai which inevitably enabled them to use it continuously rather than occasionally. As a result their dependence on it as a food source would have been higher. Arguably, too, its role in the sustenance of their cultural and spiritual identity would have been greater than for the wider kin group who visited annually. Moreover, in the era that Lake Tatawai was being degraded as a fishery, the Ngāi Tahu-wide migrations to gather kai (which included seasonal travel to Lake Tatawai) had either ceased, or were rapidly diminishing as a feature of their lives as Māori.

This meant that in the era in which the grievance arose, the proportion of use of Lake Tatawai by Māori living locally would have been relatively higher than in earlier times.

This analysis leads me to the view that the loss suffered by the whānau who lived in the locality of Lake Tatawai – the people for whom the reserve was created, in fact – was significantly greater than that suffered by the wider kin group.

Odious though it is to apportion percentages to suffering, it seems to me that clause 8 quoted above requires such an approach. And here, where in my view there has been some loss suffered by a large group, but a more severe loss suffered by a relatively small part of that group, a mathematical apportionment may be called for.

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[2] A G Pātete, "Report for the Ngāi Tahu Ancillary Claims Trust concerning Claim No. 53 (Tatawai) August 2003, page 14
[3] Ibid, page 15
[4] Idem
[5] Idem
[6] Ngāi Tahu Ancillary Claims Report 1995, page 213
[7] Ibid, page 215

Of course, there can be no real precision about such an apportionment. It is an art rather than a science, and in the present case arises from a general impression and feeling about the material presented in evidence.

It is on that basis that I conclude that 75% of the loss was suffered by the people for whose benefit the Lake Tatawai Reserve was created, namely the people of the Taieri Kāika, and 25% was suffered by the wider kin group who used the lake seasonally as a mahinga kai. This means that 75% of the interest in the Claim Property belongs to the people of the Taieri Kāika, and 25% of the interest belongs to Ngāi Tahu of the Otakou Peninsula.

Practical Considerations

I am happy that the beneficiary lists prepared by the Ngāi Tahu Ancillary Claims Trust fairly reflect the identity of those falling in the wider group to whom I have determined 25% of the interests in the Claim Property should belong.

There now arises, though, the difficulty of identifying those falling within the group to whom I have determined 75% of the interests in the Claim Property belong. I acknowledge immediately that this is no easy task, and perhaps the Trust shied away from it for good reason. I note, however, that the objector, Mr Palmer, considers that the problem is not insuperable. He said in his submission to the court (page 10):

> *Having studied the 1891 census I personally believe other than for several names I can identify most individuals and believe it fairly represents Taieri Māori living in the immediate area and who identified with and participated in kāika life.*

It may be that this will suffice. However, I believe that I need to understand better what may be the practical difficulties arising from my judgment set out here. Accordingly, this judgment will have the status of a provisional determination until such time as I am able to meet with the parties to explore with them more fully the practical implications of my decision in terms of compiling a list to reflect the 75% interest in the Claim Property of the group for whom the reserve was created in 1902.

Accordingly, I direct the Deputy Registrar to liaise with the parties with a view to arranging a meeting between them and me in Christchurch to discuss the practical issue raised above as soon as practicable.

Dated at Wellington 4 March 2005

C M Wainwright
JUDGE