

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAKITIMU DISTRICT**

**A20120007050
APPEAL 2012/4**

UNDER Section 86, Te Ture Whenua Māori Act 1993

IN THE MATTER OF An appeal by Hohepa Mei Tatere and Te Aroha Edwards, against orders of the Māori Land Court made on 29 March 2012 at 15 Takitimu MB 4-14 and on 4 April 2012 at 15 Takitimu MB 203-221 in respect of Mangatainoka No 1BC No 2C, Tamaki 2A2A (Balance) also known as Ngawapurua and Rua Roa Trusts

AND

IN THE MATTER OF A reserved judgment of the Māori Appellate Court dated 14 June 2013 at 2013 Māori Appellate Court MB 243

BETWEEN HOHEPA MEI TATERE and TE AROHA EDWARDS
Applicants

AND THE TE AUTE TRUST BOARD, EDWARDS WHĀNAU, THE WAIAPU BOARD OF DIOCESAN TRUSTEES, ANGLICAN PARISH OF DANNEVIRKE and EMERY WHANAU
Respondents

Court: Judge L R Harvey (Presiding)
Judge S Te A Milroy

Date: 31 August 2016

DECISION OF THE COURT

Solicitors:

L Watson, Barrister & Solicitor, PO Box 92 Paekakariki Kapiti Coast, leowatson@paradise.net.nz
E Dawson, Bramwell Grossman, PO Box 500 Hastings 4156, eeld@bramwells.co.nz
J Appleby, Ladbrook Law, PO Box 37633, Parnell, Auckland 1151
N Milner, Kahui Legal, PO Box 1654, Wellington 6140
S Webster, Sainsbury Logan & Williams, PO Box 41 Napier 4140
N Roberts, Dorrington Poole, PO Box 69, Dannevirke 4930
Mr John Koning, Koning Webster Lawyers, PO BOX 11120, Papamoa 3151.

Introduction

[1] The background to these complex proceedings is set out in our judgment of 14 June 2013, at [8] to [24] and so we will not encumber this direction with that detail.

[2] By that decision we granted orders giving effect to the distribution arrangement between the parties:¹

[118] An order under s 241(1) of the Act vesting the Ngawapurua lands in TATB and the Waiapu Board of Diocesan Trustees as to a 4/5 and 1/5 share in common respectively and terminating the Ngawapurua trust in respect of those lands. The legal description of those lands, which were supplied by the solicitors for the trustees and appear in the record at folio 1143 et seq, in accordance with the Land Transfer title records is:

- (a) 84.3896 ha being part Mangatāinoka No 1 B C No 2 C No 1 Block and part Mangatāinoka No 1 B C No 2 C No 1 Block and Mangatāinoka No 1 B C No 2 C No 1 Block and Mangatāinoka No 1 B C No 2 C No 1 Block and part Mangatāinoka No 1 B C No 2 C No 1 Block as recorded in Identifier WN 370676
- (b) 4,047 square metres being Mangatāinoka No 1 B C No 2 C 3 Block as recorded in Identifier WN 222/82
- (c) 5.3400 ha being Lot 3 Deposited Plan 16586 as recorded in Identifier HBJ 4/1360
- (d) Section 41A Block 1 Makuri Survey District as recorded in Identifier WN 52D/523.

[119] An order pursuant to section 244 of the Act varying the Rua Roa trust order to substitute for the existing capital beneficiaries the nine discretionary beneficiaries, namely Tau Anthony Hōhepa Edwards, Belinda Puanani Edwards, Donna Mahue Marsh, Michell Awhina Edwards, Hester Vanessa Edwards, Josephine Mariana Henderson, Richard Tatere, Brenda Mei Tatere and Denise Casey in common as to a 1/9th share each.

[3] Those orders were subsequently drafted and sealed. The Te Aute Trust Board (TATB) now seeks to have them amended to accurately reflect, it says, the orders made. The amendments requested are:

- (a) Amend any reference to the “Te Aute Trust Board” to read “The Te Aute Trust Board” and amend any reference to the “Waiapu Board of Diocesan Trustees” to read “The Waiapu Board of Diocesan Trustees”; and
- (b) Amend the order varying the terms of the trust for the Rua Roa Trust by:
 - (i) Deleting the “First Schedule” and its contents; and
 - (ii) Deleting where it reads “Second Schedule” to read “Schedule” with the contents to remain.

¹ *Tatere v Te Aute Trust Board - Mangatainoka No 1B No 2C Tamaki No 2A2A (Balance)* [2013] Māori Appellate Court MB 243 (2013 APPEAL 243) at [118] and [119]

[4] All parties agree that the amendment to the names of the trusts should be granted. However, they disagree as to whether the amendment to the Rua Roa trust order should be made.

[5] On 8 March 2016 a new draft order and accompanying minute per s 86 of the Act were sent to the parties for comment. Counsel, have now provided their comments to the Court.

Issue

[6] The issue for consideration is whether the amendments as sought by TATB should be made.

Background

[7] As foreshadowed, we granted an order pursuant to s 244 of the Act varying the Rua Roa trust order to substitute for the existing capital beneficiaries the nine discretionary beneficiaries.² The order contains a reference at recital 3 to the lands vested in the Rua Roa Trust:

AND WHERE on 9 July 1968 at 102 Napier MB 140 the Court ordered that the lands listed in the first schedule attached be vested in Hohepa Mei Tatere II and Alan Raymond Fitchett to hold on trust on the terms and conditions set out in that order

[8] The First Schedule lists two Māori freehold land blocks situated in the Takitimu District – Tamaki 2A2A and Lot 1 Deposited Plan 7840 (Part of Tamaki 2A1C Block) and one General land block known as Lot 2 Deposited Plan 1547 and Lot 1 Deposited Plan 408474.

TATB's submissions

[9] At the outset counsel for TATB records that the Tatere beneficiaries were not parties to this proceeding. Mr Watson counsel for the Tatere beneficiaries has not sought to leave to file a submission on this matter or be heard by this Court.

[10] Counsel for TATB submits that:

- (a) following the circulation of the order sealed on 15 December 2015 TATB identified issues relating to the names of TATB and The Waiapu Board of Diocesan Trustees and the lands included in the First Schedule to the sealed variation of trust order for the Rua Roa trust. Counsel for TATB subsequently emailed requesting that the order be corrected;

² *Tatere v Te Aute Trust Board - Mangatainoka No 1B No 2C Tamaki No 2A2A (Balance)* [2013] Māori Appellate Court MB 243 (2013 APPEAL 243) at [119]

- (b) a new draft order and an accompanying minute per s 86 of the Act were then circulated to the parties for comment;
- (c) no objection has been taken to the correction of the names of the trusts;
- (d) recital 3 of the Rua Roa trust order incorrectly refers to the blocks in the First Schedule as being vested in trustees on 9 July 1968.³ The General land block in the First Schedule was not in fact vested in the trustees on that date. Only the two Māori land blocks were vested in the trustees on that date which the Court noted at [11] of its judgment;
- (e) TATB denies that they are seeking to improve their position by removing the First Schedule. It is the Rua Roa Trust and Taterere Beneficiaries who are seeking to over reach the judgment and secure orders for the benefit of Rua Roa and its beneficiaries;
- (f) TATB seeks only that the sealed orders reflect what was in fact ordered. Accordingly, it is appropriate to amend the order per s 86 of the Act;
- (g) the true intention of the Court is to give effect to the distribution arrangement agreed to by the parties. That arrangement provided that the capital beneficiaries including TATB would take Ngawapurua free of debt; and the nine discretionary beneficiaries would take Rua Roa subject to any debt held by the trusts;
- (h) counsel for the Rua Roa trustees did not particularise the lands said to belong to Rua Roa nor did they seek a determination of the land as being Rua Roa trust property as it was not relevant to the orders sought, whereas in the termination and vesting orders sought by Ngawapurua it was critical to identify the lands which were to be vested;
- (i) correcting the order so it reflects the order made by this Court will not affect Rua Roa to its detriment or make the lands listed in the First Schedule vulnerable;
- (j) the lands of both Ngawapurua and Rua Roa trusts were previously farmed together under the Taterere Farming Partnership (TFP). Other lands were acquired by TFP and belong to the entity rather than Rua Roa and Ngawapurua alone. The issue as to whether certain lands are TFP or Rua Roa property has been flagged in separate Māori Land Court proceedings.

³ 102 Napier MB 140 (102 NA 140)

Certain lands may be TFP assets not Rua Roa assets and is a separate issue to settling the correct form of the orders; and

- (k) to the extent that there is to be no equity left in Rua Roa after the anticipated sale of its assets, the disagreements as to the exclusion of the First Schedule lands and whether they belong to Rua Roa or TFP may be moot.

[11] In conclusion, counsel requests that the Court make a decision on the papers as to amending the sealed order for the purposes of s 86 so that the parties and the Court need expend no further time and resources on the issue.

Rua Roa's submissions

[12] Mr Koning submits that the Rua Roa trust order should not be amended as proposed in the order and minute issued by the Case Manager on 8 March 2016. While there is no objection to amending the names of the trust, the second amendment is opposed.

[13] Mr Koning argues that:

- (a) this Court has jurisdiction under s 86 to correct any clerical mistake or accidental slip in the Rua Roa trust order or the Ngawapurua order; make any amendment that is necessary to give effect to the true intention of this Court judgment; or make any amendment that is necessary to record the actual course and nature of the proceedings before the Court;.
- (b) the amendment to the Rua Roa trust order has been sought by TATB and The Waiapu Board of Diocesan trustees rather than by the Court of its own motion;
- (c) the true intention of the decision of this Court and of the Court of Appeal was to give effect to the trust variation and distribution arrangement agreed to by the parties;
- (d) the General land listed in the First Schedule is an asset of the Rua Roa Trust and there should be no amendment under s 86 as requested by TATB. TATB is seeking to improve its position by way of the proposed amendment and they may make a claim to the General land in different proceedings;
- (e) as noted in *Wilcocks v Teat*, s 86 cannot be used to alter the actual outcome of the judgments of this Court or of the Court of Appeal. The proposed amendment to the Rua

Roa trust order seeks to remove the First Schedule in its entirety which will result in the removal of the two Māori freehold lands. This may make those blocks vulnerable to further claims by TATB. The Court must not exercise its discretion to produce such a result;

- (f) the proposed amendment will not give effect to the true intention of the Court. The order is not erroneous and there should be no amendment per s 86 of the Act. The original application to the Māori Land Court only sought a variation of trust to bring forward the date of distribution. That application was not amended or enlarged at any time during the course of the proceedings. On appeal, the true intention of the Court was to exercise its discretion under s 37(3) to give effect to the variation and distribution arrangement. The Court of Appeal approved the this Court's decision to give effect to the variation and distribution arrangement per s 37(3) to cure any procedural defects;
- (g) the Rua Roa trust order and Ngawapurua order properly reflect the true intention of this Court. They record the actual course and nature of the proceedings from the Māori Land Court through this Court and then to the Court of Appeal;
- (h) at [118] of the reserved judgment the Court records the final order for Ngawapurua and vests specific blocks in TATB and The Waiapu Board of Diocesan Trustees. At [119] the judgment records the variation to the Rua Roa trust. There is no mention of any land blocks being vested in the Rua Roa trustees to give effect to the variation and distribution arrangement.
- (i) it is not clear why the reserved judgment does not record the lands to be vested in the Rua Roa trustees despite counsel filing a memorandum requesting that the lands comprising the Rua Roa trust be vested in the beneficial owners. The distribution arrangement approved by this Court and by the Court of Appeal was expressed to cover the Ngawapurua farm on the one hand and the Rua Roa farm on the other;
- (j) as such, if the lands described at [118] comprise the Ngawapurua farm then all remaining lands must by definition be the Rua Roa farm and should be vested in the Rua Toa trust. It is wrong to suggest that some blocks may now not be subject to the distribution arrangement;
- (k) the orders reflect the intention of this Court and are a proper exercise of the Court's jurisdiction per s 37(3) of the Act;

- (l) the proposed amendment could materially prejudice the beneficiaries of the Rua Roa trust by deleting vesting orders. The Court should be slow to amend the order. Further it is not clear why counsel were not given the opportunity to comment on [118] and [119]. The current order also better promotes the overall purpose of the Act particularly ss 17(2)(a),(c) and (f); and
- (m) the proposed amendment would remove the certainty provided by the Rua Roa trust order. This would be unfair and, in the overall circumstances of these proceedings, an inappropriate exercise of this Court's discretion per ss 37(3) and 86 of the Act. Any orders of this Court must implement the variation and distribution arrangement.

[14] Mr Koning submits that the proposed order does not reflect the true intention of this Court and, accordingly, the original order should not be amended. Counsel asks that the request by TATB be declined.

Tatere Beneficiaries' submissions

[15] Mr Watson submits that

- (a) the Case Manager advised all parties to the proceedings of the minute and order drafted by the Court in respect of the amendments sought by TATB. The parties were invited to comment on the minute and order. he therefore seeks leave to file submissions on the matter;
- (b) TATB have sought to make the proposed amendments via email correspondence with the Case Manager. TATB have not filed an application under either ss 86 or 87 of the Act and now the Court has of its own motion has invoked s 86;
- (c) the Tatere beneficiaries have no objections to the first amendment. However, such an amendment should be made per s 87 under a formal application filed by TATB;
- (d) the Tatere beneficiaries object to the amendment to the Rua Roa trust order. It does not satisfy the threshold requirements of s 86, it is contrary to the principles of *res judicata* and the amendment would likely result in a re-litigation of matters already determined by this Court and the Court of Appeal;

- (e) the request to remove reference to the General land block is erroneous and based on assertions that the issue is live before Judge Doogan in separate proceedings and the order should refer to lands part of the original Rua Roa trust order in 1968. The issue is not live. A20130007311 and A20140009629 are applications concerning a review of the Rua Roa trust and an appointment of trustee. TATB have not filed an application concerning their claimed interest in Rua Roa lands. Further, there are no arbitration proceedings and the purported issue has been determined by the Court of Appeal;
- (f) the order is not intended to reflect the original Rua Roa trust order as at 1968. That would ignore entirely the substantive proceedings in this Court and the Court of Appeal which determined that it was crucial to go behind the application for variation and assess the distribution arrangement which had been agreed to by the parties. The distribution agreement was explicitly intended to divide the Ngawapurua assets from the Rua Roa assets. This is an attempt to re-litigate matters which were fundamental to the proceedings before this Court;
- (g) the proposed amendment to the trust order is well outside the purpose of s 86 which is to amend mistakes or slips, give effect to the true intention of any determination of the Court and record the actual course and nature of the proceedings. Section 86 is not appropriate to apply as a “carte blanche” power to vary an order in a fundamental way or to be used by a litigant to improve a judgment that has been made. That is what is being sought by TATB;
- (h) the orders as sealed do reflect the true intention of the Court’s determination as affirmed by the Court of Appeal. At [118] and [119] of the decision, orders are made concerning the vesting of lands the subject of the appeal. Paragraph [118] sets out the legal descriptions of the blocks relating to the Ngawapurua Trust. However, para [119] does not similarly set out the legal descriptions of the blocks relating to the Rua Roa trust;
- (i) the orders specify those blocks held by the Rua Roa trust. The lands were the subject of considerable submission and focus before the Court regarding the distribution arrangement. The Court upheld the application to vary the trust orders effectively meaning that the Ngawapurua assets went to TATB and The Waiapu Board of Diocesan Trustees and the Rua Roa assets went to the Tatere and Edwards beneficiaries; and
- (j) this Court’s judgment lists the Ngawapurua blocks to be vested in TATB and The Waiapu Board of Diocesan Trustees. By logical necessity, the blocks which were not explicitly listed were Rua Roa assets which would be kept within the Rua Roa trust for the benefit of

the whānau beneficiaries. At [111] the Court stated that there is no reason why they should not exercise their discretion to make the appropriate order and settle the entitlement to the various lands.

[16] Mr Watson submits that the original orders accurately reflect the true intention of the Court and there is no basis for an amendment per s 86 of the Act.

The Law

[17] Section 86 of the Act provides:

86 Amendment of orders, warrants, etc

(1) The court or any Judge of the court may at any time make or authorise to be made in any order, warrant, record, or other document made, issued, or kept by the court all such amendments as are considered necessary to give effect to the true intention of any decision or determination of the court, or to record the actual course and nature of any proceedings in the court.

(2) Every such amendment shall take effect as of the date of commencement of the order, warrant, record, or other document so amended.

(3) Without limiting the foregoing provisions of this section, the court may at any time during any proceedings direct the Registrar to make any amendment of any entry in the records of the court that the Registrar is authorised to make under section 87.

[18] In *Trustees of Aata Paora Keretene Ahu Whenua Trust v Cherrington - Motatau 3B2B3* Judge Armstrong noted that:⁴

[9] Section 86 of the Act provides the Court with the jurisdiction to correct slips, or to vary its own orders to give effect to the true meaning and intention of the judgment. What is to be corrected must be the result of a slip or a failure to express what was decided and intended. This provision cannot be

[19] The general principle is that a judgment, once granted, is final and may not be altered except on appeal or review. Such principle will not be departed from lightly, however a judgment can be amended or recalled in some circumstances.⁵

[20] Both the District Court and High Court Rules make provision for the correction of accidental slips or omissions:⁶

⁴ *Trustees of Aata Paora Keretene Ahu Whenua Trust v Cherrington - Motatau 3B2B3* (2016) 122 Taitokerau MB 218 (122 TTK 218) at [9]

⁵ *BNZ v Mulholland* (1991) 4 PRNZ 299 (HC)

⁶ District Court Rules 2009, r 11.10 and High Court Rules, r 11.10

11.10 Correction of accidental slip or omission

- (1) A judgment or order may be corrected by the court or the Registrar who made it, if it—
- (a) contains a clerical mistake or an error arising from an accidental slip or omission, whether or not made by an officer of the court; or
 - (b) is drawn up so that it does not express what was decided and intended.
- (2) The correction may be made by the court or the Registrar, as the case may be,—
- (a) on its or his or her own initiative; or
 - (b) on an interlocutory application.

[21] In *Willcocks v Teat*, Wylie J stated that r 11.10 is an exception to the rule that once a judgment is given it cannot generally be amended or modified in any manner and the trial judge is *functus officio* once his or her decision has been finally determined or is overtaken by processes in a superior Court. Wylie J considered that under r 11.10 the Court has power to correct slips, or to vary its own orders to make the meaning and intention of the judgment clear.⁷ The Judge went on to say that what is sought to be corrected must be the result of a slip or a failure to express what was decided and intended. The rule cannot be used where there is subsequently found a more convenient form of order, nor can it be used to vary an order in a fundamental way, or used by a litigant to improve a judgement that has been obtained. Wylie J also commented that the power can be exercised despite a judgment being sealed.

Discussion

[22] As there are no objections to the first amendment sought by TATB it is granted.

[23] The concern with the proposed amendment to the Rua Roa trust order is the inclusion of the General land block in the First Schedule. TATB is correct in pointing out that recital 3 of the order states that all blocks in the First Schedule were vested in trustees on 9 July 1968. That statement is incorrect.

[24] Lot 2 DP 15647 and Lot 1 DP 40847 is contained in CFR 430788. Lot 2 DP 15647 was previously contained in CT H2/1392 in the name of Alan Fitchett and Hohepa Tatere. The land was vested in trustees on 7 April 1982.⁸ Lot 1 DP 40847 does not appear to have been specifically

⁷ *Willcocks v Teat* HC Rotorua, CIV-2008-463-784, 15 March 2011 at [14]-[17]
⁸ 116 Napier MB 165 (116 NA 165)

vested in trustees however from 2009 it has been included in Court orders concerning the appointment, replacement and removal of trustees.⁹

[25] The order vesting the land interests of the Ngawapurua trust in TATB and The Waiapu Board of Diocesan Trustees was part of the variation of trust and distribution arrangement which we upheld. The variation was to bring forward the date of distribution and the arrangement was that the Ngawapurua trust land assets were to be vested in the The Waiapu Board of Diocesan Trustees and TATB. An order was made accordingly.

[26] The corollary is that remaining land interests were the Rua Roa trust interests. That is the clear information contained in the letter and accompanying schedule dated 1 December 2010 from Ms Dawson, counsel for the trustees, at 1144 of the Record of Appeal.

[27] Ms Dawson's schedule sets out the land interests in the Ngawapurua trust and the Rua Roa trust. That letter was copied to all counsel (6 of them) at the time and the letter of 21 March 2011 from Ms Dawson confirms that there were no objections received from any of the parties. It is therefore rather late in the day for TATB to be questioning that distribution now.

[28] We agree with Mr Koning that the intent of our decision was to approve the distribution arrangement, and although it is not specified at [118] and [119] of the judgment that there would also be an order confirming the Rua Roa trust lands, it is hard to escape the conclusion that the orders were meant to settle the entitlement to the various lands (as we stated at [111]).

[29] The order to substitute the Edwards whānau and Taterere beneficiaries as capital beneficiaries of the Rua Roa trust was so that, at the termination of the trust, they would become the owners of the Rua Roa lands. Thus an order confirming the Rua Roa lands is not inconsistent with our decision.

[30] Counsel for TATB has stated that the question of ownership of these lands is in issue in proceedings before Judge Doogan. That is disputed by Mr Koning and Mr Watson. Ms Dawson has not presented any evidence, such as a copy of a statement of claim, minutes of the Court or evidence or submissions, which would confirm that the issue is live.

⁹ 15 Takitimu MB 204 (15 TKT 204); 36 Takitimu MB 43 (36 TKT 43); 39 Takitimu MB 109 (39 TKT 109)

[31] Even if it is, it is not a matter that should be dealt with by way of s 86. Rather a proper application should be made for a rehearing or pursuant to s 45 or some other appropriate proceeding. The current order does not prevent the Court below from determining any issues in the partnership arrangement, and making adjustments by way of orders for payment of monies or similar - that is, the Māori Land Court could still make an order determining that the land be vested to TATB to settle partnership debts and accounts.

[32] Given the concern the issue raises, we return to the conclusion that an amendment under s 86 is not the appropriate way to deal with the change requested, and that proper application should be made. To our knowledge this is the first time a request for an amendment to an order under s 86 has been prompted by counsel rather than coming from the Court itself, and while that is not conclusive we would certainly not wish to set a precedent.

[33] There must be finality to Court decisions and it would not assist the efficient administration of justice to allow orders to be questioned pursuant to s 86 of the Act rather than through the correct appeal or review processes. We also acknowledge that the wording of s 86 does not provide for applications to be made by parties.

Decision

[34] The Court makes an order per s 86 amending the orders made on 14 June 2013 at 2013 Māori Appellate Court MB 243-275 to amend any reference to the “Te Aute Trust Board” to read “The Te Aute Trust Board” and amend any reference to the “Waiapu Board of Diocesan Trustees” to read “The Waiapu Board of Diocesan Trustees”.

[35] We consider that costs should lie where they fall unless any counsel considers that further submissions are necessary.

This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

L R Harvey
JUDGE
(Presiding)

S Te A Milroy
Judge