**IN THE MĀORI LAND COURT OF NEW ZEALAND**
**WAIARIKI DISTRICT**

**I TE KOOTI WHENUA MĀORI O AOTEAROA**
**TE ROHE O TE WAIARIKI**

**A20170005966**
**A20170005972**

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| UNDER | Sections 135 and 244, Te Ture Whenua Māori Act 1993 |
| IN THE MATTER OF | Tumu Kaituna 14 Block |
| BETWEEN | MALCOLM SHORT, ANARU BIDOIS, KEITA EMERY, UENUKU FAIRHALL, PIRIHIRA FENWICK, WALDO HOUIA AND EMILY ROTA AS TRUSTEES OF THE TUMU KAITUNA 14 TRUST<br>Applicants |
| AND | KAREN STOWERS ON BEHALF OF THE TUKERE AND GRACE REHU WHĀNAU TRUST<br>First Respondent |
| AND | RANIERA ERUERA MORGAN<br>Second Respondent |
| AND | GEORGINA WHATA, TE HURIHANGANUI WHATA AND MARY WHATA AS TRUSTEES OF TE HURIHANGANUI DAVID WICKLIFFE WHĀNAU TRUST<br>Third Respondent |

Hearing: 18 June 2018, 190 Waiariki MB 226-342
19 June 2018, 191 Waiariki MB 34-143
(Heard at Rotorua)

Appearances: G Dennett/L McEntegart for the Applicants
M Sharp for the First Respondent
M Malcolm for Second Respondent
M Kyriak for Third Respondent

Judgment: 24 October 2018

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## JUDGMENT OF JUDGE C T COXHEAD

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Copies to:
L McEngtegart, P O Box 1417, Auckland liam.mcentegart@waterlooquadrant.co.nz, M Sharp, P O Box 5111, Mt Maunganui michael@michaelsharp.co.nz , M Malcolm, Corban Revell Lawyers, DX DP92558 Auckland, and M Kyriak, Kyriak Law, 4/40 Eden Crescent, Auckland 1010 mtk@kyriaklaw.co.nz

*He korōria ki te taumata mutunga kore, he apakura, he poroporoaki i ngā aituā maha. Rātou kua huri ki te pō, haere atu ra. E ngā wai karekare, e ngā wai marino, ngā maunga whakahī, tātou te kanohi ora, tēnā tātou katoa.*

**Hei tīmatanga kōrero - Introduction**

[1] Tumu Kaituna 14 block is a 240.7626 hectares block of Māori freehold land. It is located on the Bay of Plenty coast, adjacent to Papamoa and bordering the Kaituna River. There has been significant land development in the surrounding area and the demand for development of this land block and adjoining blocks has gained momentum.

[2] The Tumu Kaituna 14 Trust are wanting to develop the land as part of significant development in the area. Mr Short, chairperson of the trust, says the key to development of the trust's land without a development partner is access to funding to meet the costs of preparing the land for development. Changing the status of 55.48 hectares of the 240.7626 hectares block from Māori freehold land to General land is said to be one credible avenue to securing such funding, and will unlock far greater funding than that achievable if the land remains Māori freehold land.

[3] The trustees of the Tumu Kaituna 14 Trust have filed applications for a change of status and a variation of the terms of trust. They apply for the following orders:

(a) An order changing the status of part of the Tumu Kaituna 14 block from Māori freehold land to General land, being an area of 55.48 hectares; and

(b) An order varying the terms of the trust to:

(i) specifically permit the formation of legal entities (including limited partnerships in a charitable trust);

(ii) facilitate commercial administration of the lands; and

(iii) otherwise modernise aspects of the trust, including providing for an increase in trustees remuneration and for the rotation of trustees.

[4] The applications are opposed. The change of status application is opposed, on the basis that there is no jurisdiction for this Court to make orders changing the status of part of a Māori land title.

**Kōrero whānui - Background**

[5] Tumu Kaituna 14 block is Māori freehold land, 240.7626 hectares in area. It is located on the Bay of Plenty coast, adjacent to Papamoa and bordering the Kaituna River. The block was created by amalgamation order dated 27 May 1971.[1] There are currently 4,817 owners holding 42,200 shares.

[6] The Tumu Kaituna 14 Trust ("the trust") was constituted over the land on 14 December 1973 pursuant to s 438 of the Māori Affairs Act 1953 and vested in the Māori Trustee.[2] The current trustees are Anaru Bidois, Emily Rota, Malcolm Short, Pirihira Fenwick, Uenuku Fairhall and Waldo Houia.[3]

[7] In his affidavit attached to the application, Mr Short advised that approximately 90 hectares of the land is constrained from development due to wetlands, beachfront and other environmental and cultural factors, however, 151 hectares is considered capable of development. He pointed out that when the trust was vested in trustees in 1990, there was a vision and expectation that the trustees would be developing the lands, an approach that has been supported since that time. During the 1990s and early 2000s the trustees were very active in looking for development opportunities, including joint ventures, and formed a development company, known as Te Tumu Kaituna Lands Limited, which holds a 120-year lease over the land. Despite this, none of the development opportunities came to fruition. The land to date has been used for forestry, pasture, casual grazing, cropping and sand extraction. Mr Short says the development company structure and the existing lease are unlikely to be appropriate for the trust's forward development plans.

[8] The demand for development in the area has gained momentum in the last few years and the trust has an opportunity to be involved in the Te Tumu Urban Growth Area project, which is part of a wider strategy known as "SmartGrowth" for the sustainable management

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1 158 Rotorua MB 128 (158 ROT 128).
2 173 Rotorua MB 262 (173 ROT 262).
3 182 Waiariki MB 48-50 (182 WAR 48-50).

of future growth in the Western Bay of Plenty sub-region, involving several councils, such as the Tauranga City Council ("TCC"). The trust's lands are within the Te Tumu Urban Growth Area and parts are proposed to be zoned in the future by TCC for roading, infrastructure and servicing corridors. For any development to proceed within Te Tumu, infrastructure must firstly be provided to and through the trust land, as there is currently no viable alternative. Mr Short says the key to development of the trust's land without a development partner is access to funding to meet the costs of preparing the land for development. The change of status of 55.48 hectares from Māori freehold land to General land is said to be the one credible avenue to securing such funding, and which will unlock far greater funding than that achievable if the land remains Māori freehold land.

**Ngā kōrero e pā ana ki te tono nei - Procedural History**

[9] The application for a change of status was filed with the Court by the trustees of the trust on 29 September 2017, followed by an application for a variation of trust on 3 October 2017.

[10] The substantive hearing for these matters was held over three days from 18 – 20 June 2018.[4] At the conclusion of the hearing days, I confirmed that closing submissions were to be filed in writing by the parties, following which the Court would convene to hear the closing arguments.

[11] An amended change of status application was subsequently filed by the applicants on 26 June 2018 and a further teleconference held on 24 July 2018 to confirm a hearing date for closing arguments.[5] The final hearing was then held on 27 August 2018.[6] At the conclusion of that hearing, I reserved my decision and indicated it would be issued in due course.

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4 190 Waiariki MB 226-342 (190 WAR 226-342); 191 Waiariki MB 34-143 (191 WAR 34-143); 191 Waiariki MB 144-233 (191 WAR 144-233).
5 193 Waiariki MB 135-137 (193 WAR 135-137).
6 197 Waiariki MB 168-255 (197 WAR 168-255).

**Ko te tono - The application for a change of status**

[12] As noted, following the hearing held on 20 June 2018, but prior to closing submissions being filed and heard, the applicants filed an amended change of status application.

[13] The amended application confirms that an order is sought to change the status of part of Tumu Kaituna 14 from Māori freehold land to General land, being an area of 55.48 hectares. The relevant land to be changed is made up of 11 different parts of the land, located in an area marked as future residential use in TCC's framework plan, and including other areas for potential road extensions. The amended application, now provides however, that the grant of the change of status order would not take effect until separate title to the land is obtained and evidence of that title is filed in the Court.

[14] The current block of land is 240.7626 hectares. The applicants ask the Court to change only 55.48 hectares of the land to General land on the following basis:

(a) The change of the 55.48 hectares to General land is clearly desirable for the purpose of commercial operation by the trustees, in whom Tumu Kaituna 14 is vested; and

(b) While the status will change in respect of part of the land, the entirety of Te Tumu Kaituna 14 will be retained either in the hands of the trustees or by a development entity owned by the trust. The 55.48 hectares will not be alienated or vested in any party without the approval of owners and the Court.

[15] The sole purpose of the change of status is to secure funding for the development of all of Tumu Kaituna 14. This is to optimise its use, but with full control of the entire land and all associated benefits remaining with the owners of Tumu Kaituna 14 alone.

[16] The proposal has been put before the owners, supplemented by further information, and ultimately approved by a postal ballot administered through formal procedures adopted by the trust.

[17] Further grounds for the order include that:

(a) The trustees cannot advance development of Tumu Kaituna 14 without access to the level of funding available through the securitisation of the land as General land;

(b) Development of Tumu Kaituna is clearly desirable;

(c) The transfer of the land will be to a development entity beneficially owned by the owners of Tumu Kaituna 14;

(d) All the lands will remain with the trustees and no alienation by the development company will be permitted by the trustees without approval from: first, a majority (by shares) of owners participating in a postal vote following consultation with owners at a general meeting; and thereafter the Court;

(e) Given the level of financial resource currently available to the trust, it is not sensible or prudent to commit funds to the surveying of the land, and the obtaining of separate title, ahead of the Court's approval of conversion of the land to General land; and

(f) The alienation of the land is clearly desirable for the purpose of the planned commercial operation of the trustees.

*Tētahi kaupapa hukihuki - ko te mana whakahaere o te Kooti - Preliminary issue - Court jurisdiction*

[18] The first respondents, the Tukere and Grace Rehu Whānau Trust, raise a jurisdictional issue regarding the ability of the Court to make the change of status order as sought.

[19] It is fair to say that the jurisdictional issue has, in part, been recognised by the applicants and hence the amended application.

[20] Mr Sharp on behalf of first respondents, submits that the Court cannot make an order under ss 135 and 137 of the Te Ture Whenua Māori Act 1993 ("the Act") to change the status of *part* of a block of Māori freehold land. He points out that the trustees' amended

application has attempted to deal with this issue by seeking orders for change of status, subject to obtaining a separate title to the land in question. However, in his submission, as it is Māori freehold land, the only way to obtain a separate title is by partition order pursuant to s 289 of the Act.

[21] Mr Sharp further submits that the proper process would be for the trustees to attempt to obtain a partition order and then seek a change of status for the new title.

[22] Overall, the first respondents submit that there is no jurisdiction for this Court to make orders changing the status of part of a Māori land title, and the intended plan to create a separate General land title has no legal basis.

*He aha te kiko o te tono hou? - What is proposed by the amended application?*

[23] I spent some time with the applicants discussing and clarifying the orders sought and how this would operate. As I now understand it, what is proposed is as follows:

(a) The Court would make orders changing part of the 240.7626 hectares by declaring 55.48 hectares of that land to be General land;

(b) The trust would then apply to the TCC essentially for a subdivision, in order that the 55.48 hectares of the title that would be declared to be General land could be taken out of the current title and put into a separate title;

(c) The proposal goes further in that, having gained subdivision consent from the TCC to subdivide the parent block in this way, Land Information New Zealand ("LINZ") would then be asked to issue a separate title; and

(d) That title would be brought back to the Māori Land Court where final orders would be made to change the status of the new title to General land.

[24] There are some obvious difficulties with this proposal.

[25] Mr Sharp submits that what is being proposed and the intended plan to create a separate General land title, has no legal basis. He states that there is no jurisdiction for this

Court to change the status of *part* of a title that has the status of Māori freehold land. He referred to s 4 of the Act, which defines "land" as either being Māori land, General land or Crown land, and it is implicit that "land" is held in a title with one of these designations.

[26] Mr Sharp noted that past decisions of this Court have shown that if an owner of Māori freehold land wants to change the status of part of that land, the proper approach is to apply for a partition of those areas and when a partition is granted and a new title produced, then apply for a status change over the partitioned area.

[27] However, the trustees are not seeking a partition of the land, rather they propose that with a declaration of status change over part of the untitled areas, they can then seek subdivision for these titles from LINZ. In Mr Sharp's view, it would seem highly doubtful that LINZ would issue such titles and there would probably also be issues with the TCC issuing subdivision consent for, in his view, land locked areas.

[28] Overall, the first respondents argue that there is no legal way forward for the trustees obtaining the change of status order sought. In order to achieve their objectives, they would need to firstly obtain partition orders to create separate titles for the different areas and then seek a change of status.

[29] The applicants raise five points with regards to the jurisdictional issue. These are:

(a) Firstly, the Court's primary objection in exercising its jurisdiction under the Act is promoting and assisting in the retention of Māori land and General land owned by Māori in the hands of the owners, and the effective use, management and development by or on behalf of the owners of such land. This engages by its very terms the exercise of a discretion.

(b) Secondly, the use of "may" in s 137 reinforces the legislative intention that the Court is to exercise its discretion in determining applications under this section.

(c) Thirdly, and again reflecting the inherent flexibility in the Court's powers necessary to meet its primary objective, s 73 of the Act provides that orders

may be made subject to any conditions, thereby permitting the Court to approve applications subject to, for example, the issuing of titles or survey plans.

(d) Fourthly, in reply submissions, Mr McEntegart submitted that the argument the Court has no jurisdiction to make an order in respect of part of the land, is misconceived. He referred the Court to s 147(1)(d) which explicitly confers capacity on trustees to alienate part of land subject to terms of the Act thereby engaging Court's jurisdiction under ss 135 and 137.

(e) Finally, Mr McEntegart submitted that there is no question that the Court has the jurisdiction and flexibility in the exercise of its powers to make orders. In his view, there is no basis for the submission that a partition order is required.

**Ngā Kōrerorero - Discussion**

[30] What has been proposed is unique. The difficulties are obvious. The Court is being asked to change the status of part of a title. Not the whole title, just 55.48 hectares of the 240.7626 hectares currently held in Tumu Kaituna 14.

[31] I do not currently have a separate title for the 55.48 hectares and, not until the proposed subdivision is completed, will I have a separate title. So as the application stands, I am being asked to change part of the current title, conditional on that part being separated into its own title.

[32] As I stated at the hearing, I cannot make a "half-caste" title. The Court does not have jurisdiction to make a title that has the status of General land for part of that title and the status of Māori freehold land for another part of the title.[7] As Mr Sharp noted, s 4 of the Act defines "land" as being either Māori land, General land or Crown land. Section 129 of the Act further defines those land statuses and provides that, for the purposes of the Act, all land in New Zealand shall have *on*e of those statuses. There is no provision for land to have two different statuses.

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[7] See *Paikea – Otara 5D1* (2016) 140 Taitokerau MB 78 (140 TTK 78); *Craig v Kira – Wainui 2F4D* (2006) 7 Whangarei Appellate MB 1 (7 APWH 1) at [28] – [29]; and *Management Committee of Mangatawa Papamoa Blocks – Lot 1 DPS 65413* (2018) 156 Waikato Maniapoto MB 77 (156 WMN 77).

[33] The conditions noted in the amended application do not persuade me or provide a way around the obvious difficulty of making an order to change the status for part of the title. There is no jurisdiction allowing the Court to do what is being proposed.

[34] I agree with Mr McEntegart that the Court does have flexibility and may look to take a flexible approach, in order to help owners develop their land. However, in this situation taking a flexible approach does not in my view allow the Court to make orders which are, in essence, legally impossible. In my view, the Court does not have the jurisdiction to make the orders being sought.

[35] I also have concerns with what has been proposed in terms of seeking a subdivision and new title of Māori freehold land outside the jurisdiction of the Māori Land Court. The Court has exclusive jurisdiction to partition Māori freehold land. I am sure that LINZ would, given the flagging process in place in their system, alert the Māori Land Court when Māori land owners seek to obtain separate title of Māori land. There have been occasions in the past when the LINZ system did not operate as effectively as it does today with regards to identifying Māori freehold land title. Some land owners were able to obtain separate titles by way of subdivisions, with LINZ issuing and registering the separate titles on the basis that LINZ was not aware the land was Māori freehold land. Those owners were able to retain those titles despite non-compliance with this Court's requirements, through the principle of indefeasibility. I would hope that that is not the situation today. If LINZ was to have land that is Māori freehold land put before it, it would be flagged and referred to the Māori Land Court in order for a partition to be considered to derive a separate title.

[36] Given the Court does not have the jurisdiction to grant the orders being sought by the applicant, I do not intend to take this matter any further and assess whether I would grant a change of status if the Court did have such jurisdiction.

**Ko te tono kia panoni te ota taratī - The application for a variation of the trust deed**

[37] The applicants seek several changes to the trust terms to, as they argue, variously facilitate efficient commercial administration of the land and modernise other aspects, including the remuneration of trustees. The variations are opposed.

[38] In respect of the variation of trust application, the trust submits:

(a) The variations proposed are sensible and appropriate;

(b) Sufficient notice of the variations and their effect were given to owners for whom contact details were held;

(c) Further notice was by way of advertisement which specially made reference to a website where all details in respect of resolutions, current trust deed, minutes, meeting date and associated material was advertised publicly in several newspaper editions;

(d) The variations were discussed at meetings which occurred over a period of approximately six months, supported (by substantial majorities) in a survey and ultimately approved in a postal vote;

(e) Mr Patchell, in his affidavit, states that the meeting notices were issued to 1,368 owners and notices were placed in the Rotorua Daily Post and the Bay of Plenty times on three occasions in each paper. The applicants submit that sufficient notice has been given;

(f) There is no authority requiring that public newspaper notices set out the degree of detail and nor should there be. A newspaper is not the appropriate medium for such detail and inclusion of it would result in excessive cost;

(g) The notices referred readers to the website which contained links to the text of the resolutions and all background information, including the current deed. The information in the website discloses the term of an explanatory note of the proposed variations sent to all owners for the 18 November 2016 notice of the meeting scheduled for 3 December 2016.

[39] Ms Malcolm on behalf of Raniera Morgan, submitted that the notice was not sufficient as the advertisement should have been placed in a national newspaper to ensure the notice was far reaching.

[40] Further, the notice itself did not provide sufficient notice to the beneficiaries of the variation to the trust deed. The advertisement stated “draft resolutions” with a bullet point

stating "draft order variation". Ms Malcolm submits that this does not provide a clear indication as to the practical effect of the proposed variation and it is not clear what is intended and how it differs from the existing trust order. In her view, the advertisement did not meet the requirements providing notice of the proposal with the degree of precision that provides certainty as to what exactly is to be altered.

[41] Ms Malcolm also submits that there was insufficient opportunity to discuss and consider variations. Her client's evidence is that in the meetings held by the trust, the trust did not want to engage in any discussion regarding the opposition raised to these applications.

[42] Ms Malcolm also submits that there is not a sufficient amount of support to satisfy s 244(3)(b). Her submission is put on two fronts. The first being that there are 4,657 owners on the register of owners. The results from the poll vote show that 276 registered owners responded to the poll vote for approval of the variations to the trust deed and 232 approved the variation. This is less than 6 per cent of the total owners. Of the 276 who responded, only 4.98 per cent of the total registered owners approved the variation. Ms Malcolm submits that 4.98 per cent of the total owners is not a sufficient amount of support to satisfy s 244(3)(b).

[43] The second plank of Ms Malcolm's argument is that, when notice of the hearing was sent to owners, at least 103 owners advised the Court that they oppose the application. She submits that there is insufficient amount of support for the proposed variation and accordingly the application should be dismissed.

[44] For the trust, Mr Short's affidavit notes of the 126 responses to the survey, 94 (74.60 per cent) supported the proposed trust order variations to facilitate the development strategy. 20 (15.87 per cent) did not support the variations and 9.52 per cent were undecided. On a shares basis, 88.99 per cent of shares of those persons responding were in favour of the proposed variations and 10.20 per cent of shares of those who responded opposed the variations.

**Ngā Kōrerorero - Discussion**

*He pai te pānui? - Was there sufficient notice?*

[45] Substantial efforts were made to provide notice to the owners. One of the trustees wrote to those owners whom the trust holds addresses for and provided those persons with sufficient notice in terms of what was being proposed and the effect of the resolution. Further, while I take Ms Malcolm's point that the advertisements simply said "draft variations", the notice did have reference to the website which specifically contained, not only the resolutions, but information regarding the variations, minutes of meetings and other relevant information.

[46] Read on its own, and taking into account the comments of Judge Harvey in *Naera v Fenwick*, the notice was arguably insufficient.[8] However, in my view the trustees have been saved with the reference to the website where further information could be obtained. The notice was sufficient.

*He pai te wā kōrerorero? - Was there sufficient opportunity to discuss matters?*

[47] There were two hui held, at which the issue of the variations could be discussed. Further, following that there was a survey allowing further input from the owners regarding the variation. I consider that there was therefore sufficient opportunity for the owners to discuss and consider the proposed variations.

*Pēhea te tautoko mo ngā panonitanga? - Is there sufficient support for the variations?*

[48] The crux of this part of the application really sits with whether there is sufficient support for the variation. On one side Ms Malcolm submits that I should be looking at those who support the variations in terms of the total ownership, which on her count, means that 4.98 per cent of the total owners support the variation. She says this is not a sufficient amount of support to satisfy s 244(3)(b).

[49] Counsel for the applicants asked me to look specifically at those who responded to the survey which shows a clear 74.60 per cent support for the proposed variations. On a

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8 *Naera v Fenwick – Whakapoungakau 24 Block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [66].

shares basis, 88.99 per cent of shares of those responding were in favour of the proposed variations. The applicants asked me to focus on the 126 responses to the survey as opposed to considering the support in terms of full ownership.

[50] There is one other factor that I think does need to be considered. That is with regards to those owners who have advised the Court that they oppose the application. Counsel for the applicants submitted to the Court that those views should be disregarded as they were template submissions, generated from the respondents "petition" against the application. Counsel for the applicant submits that caution should be exercised when receiving these submissions, as it is unclear what information those owners received and how informed their submissions were. Those filing template opposition to the application could not be seen to be providing full informed views of the application but were rather part of a campaign against the application.

[51] Despite the concerns raised by the applicants, I consider the Court still must take some notice of the 103 owners who filed opposition to the application. Their views cannot be disregarded in totality. They have expressed a view, albeit in template form, taken the time to file that view and the Court should therefore take some notice of the fact that 103 owners have filed opposition to the application including opposition to the variations.

[52] On Ms Malcolm's calculations there is minimal support for the variation. However, as is common with Māori land ownership lists, many of the owners are deceased, many are not engaged with trust matters and many are difficult to contact. What the trust undertook in terms of holding meetings and conducting a survey is not uncommon and is a valid way to seek the views of owners.

[53] Of the 126 responses to the survey it is clear that nearly 75 per cent supported the proposed trust order variations to facilitate the development strategy. However, I do note that since then there has been much opposition to the applications from both those who participated in the survey and those who did not participate in the survey.

**Kupu whakatau - Decision**

[54] Taking into account the number of owners who support the application, total ownership, those who participated in the survey, those who support the proposed trust order

variations and those who now oppose the applications I am of the view that there is insufficient support for the variations.

[55] Both applications are therefore dismissed.

Pronounced at 10:45 am in Rotorua on Wednesday this 24th day of October 2018.

C T Coxhead
**JUDGE**