

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAITKATO-MANIAPOTO DISTRICT**

**A20080016575
CJ 2009/8**

UNDER Section 45 of Te Ture Whenua Māori Act 1993

IN THE MATTER OF Hauturu East 7, 12, 13, 14 and Section 44 Block
X Orahiri Survey District

BETWEEN NORMAN TANE
Applicant

AND TANETINORAU OPATAIA WHĀNAU TRUST
and TANETINORAU OPATAIA WHĀNAU
AHU WHENUA TRUST
Respondents

Hearing: 17 June 2011, 2011 Chief Judge's MB 173
(Heard at Hamilton)

Appearances: K J Catran, counsel for the applicant
J P Koning, counsel for the respondents

Judgment: 22 February 2013

RESERVED JUDGMENT OF CHIEF JUDGE W W ISAAC

Solicitors:

Cooney Lees Morgan, 87 First Avenue, P O Box 143, Tauranga 3140
Attention: Keith Catran

Koning Webster, Unicorn House, 14 Willow Street, P O Box 13309, Tauranga 3140
Attention: John Koning

Introduction

[1] This is an application under s 45 of Te Ture Whenua Māori Act 1993. The application relates to interests in Hauturu East 7, 12, 13 and 14, and Section 44 Block X Orahiri Survey District currently held in a whenua tōpū trust.

[2] The applicant is Norman Tane. He seeks to have the order which constituted this trust amended.

Background

[3] Hauturu East 7, 12, 13, 14 and Section 44 Block X Orahiri Survey District (formerly Part Hauturu East 1A5C) were taken by the Crown under the Public Works Act in the early 1900s.¹ On 30 September 1988, Section 44 Block X Orahiri Survey District was revested in Tane Tinorau Opataia, the original owner at the date of taking.² The Tanetiorau Opataia Whānau Trust was created pursuant to s 438 of the Māori Affairs Act 1953, and the block was placed in that trust.³ On 4 October 1989, Hauturu East 7 was also revested in Tane Tinorau Opataia.⁴ It was then also placed in the Tanetiorau Opataia Whānau Trust which had been created in 1988.⁵

[4] The WAI 51 claim sought return of Hauturu East 1A5C, and compensation. A mediation was held at Tokikapu Marae on 7 and 8 September 1989, and an agreement for settlement was reached. As a consequence of the settlement, the Minister of Lands applied to the Māori Land Court in October 1990 for an order under s 436 of the Māori Affairs Act 1953 vesting the land in the names of the original 1906 owners.⁶ The Hauturu East 12, 13 and 14 blocks were vested in the names of the twelve owners recorded on the title at the date of taking. Purangi Tanetiorau was among the owners listed. Purangi Tanetiorau is the son of Tanetiorau Opataia.

[5] The minutes from the hearing on 1 October 1990 note intention to create one trust pursuant to s 438(2) of the Māori Affairs Act 1953 in respect of Hauturu East 12, 13 and

¹ Details of which are set out at 109 OT 91-94.

² 103 OT 241.

³ 103 OT 241.

⁴ 104 OT 48.

⁵ 104 OT 47-48.

⁶ 104 OT 244-250.

14, and another trust pursuant to s 438(2) of that Act in respect of Hauturu East 8.⁷ On 2 October 1990, the Court confirmed those orders be made as indicated in the minutes of the previous day.⁸

[6] On 27 February 1995, a whenua tōpū trust was constituted in accordance with s 216 of Te Ture Whenua Māori Act 1993 over Hauturu East 7, 12, 13, 14, and Section 44 Block X Orahiri Survey District. The trust order notes that Hauturu East 7 and Section 44 Block X Orahiri Survey District were “revested in the Tanetinoarau Opataia Whanau Trust”, and that Hauturu East 12, 13 and 14 were “revested in the descendants of Tanetinoarau Opataia” following the settlement of WAI 51.⁹ The whenua tōpū trust was named the Tanetinoarau Opataia Whānau Trust.

[7] Purangi Tanetinoarau died on 3 May 1971. He named his grandchildren, Norman Tane and Lani Dawn Tane Stockler, as his heirs in his will. Norman Tane was granted administration of Purangi Tanetinoarau’s estate on 16 February 1972.¹⁰

[8] In 1996, Norman Tane made an application under s 81A of the Māori Affairs Amendment Act 1967 relating to interests in Uekaha A12A and Hauturu West G2 Section 2B2. In a letter to the Court dated 29 May 2007, Norman Tane states that “[i]t was not until 5 December 1996 when the MLC provided a search schedule that we were fully informed of our grandfather’s other land interests, such as HE 12, 13 and 14”.

[9] On 22 December 2003, Norman Tane filed an application for an order vesting the interests of Purangi Tanetinoarau in Hauturu East 8, 12, 13 and 14 blocks in him as the executor of Purangi Tanetinoarau’s estate pursuant to s 81 of the Māori Affairs Amendment Act 1967. The interests were vested in Norman Tane as executor on 26 April 2004.¹¹

[10] On 15 March 2004, Norman Tane filed an application to vest those interests into the persons beneficially entitled pursuant to s 81A of the 1967 Act. These interests were

⁷ 104 OT 254-256.

⁸ 104 OT 272. This statement was made at the end of an order otherwise dealing with Hauturu East 3B1 and 1A6.

⁹ 109 OT 91-100

¹⁰ Probate (P No. 116/72), noted in 7 ADWM 154.

¹¹ 7 ADWM 154.

accordingly vested equally to Norman Tane and Lani Dawn Tane Stockler in a succession order dated 29 April 2004.¹²

[11] On 14 December 2004, Georgina Tane Gibbons, cousin of Norman Tane and Lani Dawn Tane Stockler, filed an application pursuant to s 45 Te Ture Whenua Māori Act 1993 asserting that she had been adversely affected by that succession order as it defeated her entitlement to shares in the Hauturu East 8 Block, and should therefore be amended.

[12] A hearing was held before Judge Milroy on 26 July 2007 in relation to Georgina Tane Gibbons' s 45 application. At the hearing, along with submissions relating to Hauturu East 8, Norman Tane made submissions on whether the Hauturu 12, 13 and 14 Blocks ought to be held in a whenua tōpū trust.¹³ Judge Milroy advised Norman Tane that a further s 45 application would be required if he wished to challenge the creation of this trust.¹⁴

[13] Judge Milroy's report and recommendation dated 17 June 2008 was sent to me for consideration. The report noted in relation to Hauturu East 12, 13 and 14, that as they are subject to a whenua tōpū trust, succession should not have occurred in relation to these blocks.

[14] On 19 August 2008, I upheld Georgina Tane Gibbons' s 45 application in respect of Hauturu East 8.¹⁵ With reference to the report compiled by Judge Milroy, I also considered whether the Hauturu East 12, 13 and 14 Blocks had been dealt with appropriately. I stated that as the 12, 13 and 14 Blocks are subject to a whenua tōpū trust, no person shall be entitled to succeed any interests vested in the trustees. Therefore it is clear that these blocks should not have been included in the 2004 vesting orders, and the orders were cancelled accordingly.¹⁶ I reiterated Judge Milroy's advice that a further s 45 application in respect of Hauturu East 12, 13 and 14 was required if Norman Tane wished to challenge

¹² 6 RGWM 162.

¹³ 131 OT 159-187.

¹⁴ 131 OT 119-121.

¹⁵ A2004007847 CJ 2005/23 (2008 CJMB 339).

¹⁶ 2008 CJMB 339 at [18].

the creation of the trust.¹⁷ Norman Tane was given a limited amount of time in which to make an application pursuant to s 45.¹⁸

[15] There are several other matters that have been before the Court in relation to Hauturu East 8 and other succession issues, but they will only be dealt with as far as they are relevant to the present application.

Submissions

The applicant's original s 45 submission

[16] Norman Tane made an application under s 45 of Te Ture Whenua Māori Act 1993 on 7 October 2008. With regard to Hauturu East 7, 12, 13, 14 and Section 44 Block X Orahiri Survey District, the applicant alleges that:

1. When the blocks were returned around 1990, all the owners were deceased.
2. Without owner approval, the blocks were then placed in the Tanetinoarau Opataia Whānau Trust (TOWT) Ahu Whenua Trust.
3. Around 1995, the TOWT Ahu Whenua Trust was converted to a Whenua Topu Trust, again without owner approval.
4. Consequently, successor owners have been prejudiced, and deprived of their right to succeed to their Tupuna interests.

[17] A hearing was held on 17 June 2011.

The respondents' submission

[18] Mr Koning for Tanetinoarau Opataia Whānau Trust and the Tanetinoarau Opataia Whānau Ahu Whenua Trust submits that although the s 45 application filed by Norman Tane did not comply with rule 85 of the Māori Land Court Rules 1994, the respondents

¹⁷ 2008 CJMB 339, at [20].

¹⁸ 2008 CJMB 339, at [21].

assume that the applicant wishes to cancel or amend the orders constituting the whenua tōpū trust and the ahu whenua trust because the beneficial owners did not consent.

[19] The respondents state that the trusts were established as a result of the WAI 51 settlement between Ruapuha and Uekaha hapū and the Crown. The implementation of the WAI 51 settlement required the Māori Land Court to amalgamate various titles to make the appropriate vesting orders. The first order was made in respect of Hauturu East 8, the core caves block. On 2 October 1990, the Māori Land Court made an order under s 438 of the Māori Affairs Act 1953 vesting the land in trustees for the benefit of all the descendants of the 22 original owners of Hauturu East 8.

The whenua tōpū trust (applications 58231 and 58232)

[20] The respondents submit that the Hauturu East 7, 12, 13 and 14, and Section 44 Block X Orahiri Survey District Blocks are subject to a whenua tōpū trust constituted at 109 Otorohanga MB 91-100 dated 27 February 1995.

[21] The applicant for this trust was the Tanetiorau Opataia whānau, represented by counsel Winifred Jardine. In the minutes it is noted that the Tanetiorau Opataia Trust had held numerous meetings to discuss the application and that the applicants had waited until Te Ture Whenua Māori Act 1993 was enacted so they could form a whenua tōpū trust.¹⁹

[22] The responsible trustees of the whenua tōpū trust appointed on 27 February 1995 under s 222 of Te Ture Whenua Māori Act 1993 at 109 OT 91-100 were: Canon Rua Anderson, Josephine Huti Anderson, Hineanwea Carr, Tony Maniauruahu Green, Pauline Pou-Haereiti, Joseph Tahī Hohaia, Reopiki King, Angela Edith Pope and Riley Blake Thompson.

[23] The current trustees were appointed on 3 May 2004 under s 239 of the Act by an order at 123 Otorohanga MB 103. They are: Thomas Kohe-Love, Lynette Green, Desmond Te Kanawa, Hineanewa Carr, Angela Edith Pope, Marama Henry, Pokohinu Dick Wright, and William Andrew Taane.

¹⁹ 109 OT 94-95.

The ahu whenua trust (applications 60304 and 60305)

[24] The respondents state that an ahu whenua trust was established on 4 November 1997 by an order at 112 Otorohanga MB 154-156.

[25] The blocks vested in this trust are Hauturu East 20, 22, and 23.

[26] On 2 September 1997, applications came before the Māori Land Court to create a whenua tōpū trust over Hauturu East 20, 22 and 23.²⁰ The applicant in this instance was the Minister of Lands, represented by G Williams from Land Information New Zealand. The application was originally filed on 11 June 1991 and scheduled for hearing on 9 July 1991, but was adjourned at the request of the Tanetinorau Opataia whānau.

[27] A hearing was held on 2 September 1997. At the hearing, Judge Carter indicated that he was not satisfied that the owners of Hauturu East 20, 22 and 23 had been given sufficient opportunity to consider the applications, and that the issue ought to be taken to the owners at the annual general meeting that October. Judge Carter made an interim order constituting an ahu whenua trust over Hauturu East 20, 22 and 23, with the same trustees as the whenua tōpū trust already in existence for Hauturu East 7, 12, 13, 14, and Section 44 Block X Orahiri Survey District. The interim order gave the trustees “full power to deal with the land in the same manner as the powers of the Whenua Topu trust”.²¹

[28] On 4 November 1997, these applications came before the Court again. Counsel for the respondents submits that by this time the trustees and the Crown had reached an agreement on the various leases and easements that would encumber Hauturu East 22 and 23: “It appears that these negotiations delayed applications 60304 and 60305 whereas there were fewer complications with Hauturu East 7, 12, 13, 14 and Section 44 Block X Orahiri Survey District”. Judge Carter made another interim trust order for no longer than two years requiring the trustees to “take the question of the establishment of a trust over these lands to an annual general meeting of the Whenua Topu Trust and seek approval of the owners to the constitution of a formal trust over this land”.²² The order states that the trust

²⁰ 112 OT 68-83.

²¹ 112 OT 68-83.

²² 112 OT 154-156.

“shall form part of the Tanetīnorau Opataia Whānau Trust”.²³ The trustees appointed on 4 November 1997 under s 222 of the Act by an order at 112 Ototohanga MB 154-156 were: Canon Rua Anderson, Josephine Huti Anderson, Hineanewa Carr, Tony Maniauruahu Green, Pauline Pou-Haereiti, Joseph Tahī Hohaia, Reopiki King, Angela Edith Pope and Riley Blake Thompson.

[29] The current trustees were appointed on 3 May 2004 under s 239 of the Act by an order at 123 Otorohanga MB 103. They are: Thomas Kohe Love, Lynette Green, Desmond Te Kanawa, Hineanewa Carr, Angela Edith Pope, Marama Henry, Pokohinu Dick Wright, and William Andrew Taane.

[30] Counsel for the respondents submits that the intention of the Tanetīnorau Opataia whānau and the Crown was to vest all the blocks in a whenua tōpū trust for the benefit of all the descendents of Tanetīnorau Opataia, and that this is clear from the order constituting the interim ahu whenua trust, which expressly declares it to be part of the Tanetīnorau Opataia Whānau Trust (the whenua tōpū trust). The ahu whenua trust was established as an interim trust pending beneficiaries' approval of a whenua tōpū trust, however, applications 60304 and 60305 remain adjourned.

[31] It is submitted that the applicant has failed to show on the balance of probabilities that the orders constituting the whenua tōpū trust or the ahu whenua trust were erroneous in law or fact. Particularly the applicant has not shown the submission made by counsel Winifred Jardine in relation to the application for the creation of the whenua tōpū trust was mistaken in its presentation of facts. In her submission, Winifred Jardine stated that numerous meetings had been held with beneficiaries about the creation of the whenua tōpū trust over a period of approximately five years. Counsel for the respondents submits that the applicant has not produced any evidence that the beneficiaries did not have sufficient opportunity to discuss the creation of the whenua tōpū trust, or that there were any meritorious objections from beneficiaries. It is finally submitted that the applicant has failed to show that he has been adversely affected or that it is in the interests of justice to cancel or amend the orders.

[32] The hearing was adjourned for the applicant to engage legal counsel.

²³ 112 OT 154-156.

The applicant's response

[33] Mr Catran was engaged as counsel for the applicant. He notes in his submission that because of time constraints, he was not able to carry out independent research. Counsel submits that the application is based on the assumption that the whenua tōpū trust which exists over Hauturu East 7, 12, 13, 14 and Section 44 Block X, was originally constituted as an ahu whenua trust in 1988. "That assumption may not be correct, and the [whenua tōpū] Trust may have been established as a new trust in 1995, with the 1988 Trust forgotten or ignored". The applicant seeks to amend the 1995 order constituting the Tanetiorau Opataia Whānau Trust (the whenua tōpū trust). The applicant believes that Hauturu East 7, 12, 13, 14 and Section 44 Block X Orahiri Survey District should not have been vested in the whenua tōpū trust.

The 1988 Trust

[34] The applicant submits that in 1988, the Minister of Lands applied to the Court seeking to vest Section 44 Block X being Part Hauturu East 1A5C, which had been taken under the Public Works Act in the early 1900s, in the beneficial owners under s 436 of the Māori Affairs Act 1953. The Tanetiorau Opataia Whānau Trust was constituted by the Court on 30 September 1988 and the land was vested in it (103 OT 241). The applicant submits that this trust was an ahu whenua trust as it provided for succession. The return of this land was not part of the WAI 51 settlement. Hauturu East 7 was also returned prior to the WAI 51 settlement and may have been vested in the same 1988 ahu whenua trust, although the applicant was unable to find any court records setting out the destination of Hauturu East 7 when it was returned.

Hauturu East 12, 13 and 14

[35] Hauturu East 12, 13 and 14 were returned by the Crown in October 1990. Hauturu East 12 was a vacant site, formerly the Waitomo Hall, 13 was vacant farmland adjoining 12, and 14 was the site of the caves museum. They had also been taken from Tanetiorau Opataia under the Public Works Act in the early 1900s. Their return was associated with the return of the caves block Hauturu East 8 under the WAI 51 settlement. However, the applicant submits that it is clear from the minutes that Cabinet saw the 12, 13, and 14

blocks in a completely different light to the caves themselves. The applicant quotes the Cabinet minute of 12 February that “ownership of the 3 acres claimed in the caves core area should be vested in the [WAI 51] claimants”.²⁴ The applicant notes that the minute makes no such direction about the non-core caves lands, and the Crown representative did not address the destination of 12, 13 and 14 in a hearing dealing with Hauturu East 8.

[36] The applicant contends that it is possible that these blocks were also vested in the existing 1988 trust by Judge Carter in October 1990 at 104 OT 244-250, but the court records do not explicitly refer to their destination at that time. However the Māori Appellate Court decision refers to three vesting orders made by Judge Carter in 1990 – which the applicant states were presumably for HE 8 and HE 12, 13, and 14, and for the other HE blocks returned at that time.

[37] The applicant submits that between 1990 and 1995, beneficiaries frequently requested the return of those lands, and for succession to be allowed. The trustees did not allow this. “The 1988 Trust was effectively managed as a whenua tōpū trust by the trustees. But the beneficiaries did not get to see the trust order”.

The 1995 whenua tōpū application

[38] In 1995, an application was brought to establish a whenua tōpū trust. Mr Tane understood that this was an application to convert the 1988 trust from an ahu whenua trust to a whenua tōpū trust, however, it may have been to create a new trust. Mr Catran submitted:

Whichever was the case, it was done, and the lands, including not only HE12, HE13 and HE14, but also Section 44, and Block HE7, were all vested in the whenua topu trust. As such they became subject to constraints, community purposes and objects equivalent to those imposed on the HE 8 caves lands when those were vested in the hapu trust created on settlement of the WAI 51 claim in 1990. This was despite the fact that:

- a) At least two of the blocks (Section 44 and HE7) had been vested in an ahu whenua trust prior to the WAI 51 settlement; and

²⁴ As quoted in Judge Milroy's decision of 29 September 2009, 134 Waikato MB 3-43, at [29].

- b) The 1988 Trust was established specifically for the purpose of protecting the beneficial interests of successors and assigns.

[39] Although those lands were vested in a whenua tōpū trust in 1995, Norman Tane and Lani Dawn Tane Stockler succeeded to interests in those lands in 2004. The applicant submits that there were also other succession orders made in favour of Christina Pealing, John Tane, Gladys Burke, Thomas Heta Holden, and the Te Aue Tanetiorau Whānau Trust. However in 2007, the Court held that as these lands are actually held in a whenua tōpū trust, they should not have been succeeded to.

The 1997 ahu whenua trust

[40] An interim ahu whenua trust was established in 1997 to receive HE 20, 22 and 23 until such a time as the wishes of the beneficial owners could be established.²⁵ The trustees of the 1995 whenua tōpū trust were given management of the land in the meantime.

This application

[41] Norman Tane submits that the whenua tōpū order was made without proper consultation with affected owners. Mr Tane seeks to have the whenua tōpū trust revert to the ahu whenua trust that was “originally created in 1988 (if that occurred), or if it is a separate trust, to have the lands vested in it placed back in the 1988 trust for the benefit of the beneficial owners and their successors”. He also seeks to have the 1997 trust completed and regularised, so that the normal powers to remove and elect trustees are established.

Evidence showing mistake of law or fact

[42] The applicant submits that there was a lack of sufficient opportunity by those entitled at the time to succeed to consider the application, and that there would have been objection to it had beneficial owners been given a proper opportunity to be heard. He believes that the Court would not have made the 1995 order had it been properly aware of the true views of beneficial owners.

²⁵ 112 OT 58-83.

[43] He submits that the 1995 order ignored the existence of the 1988 trust, and the fact that "Section 44 (and possibly HE7) was already in an ahu whenua trust". Mr Catran submits that these blocks were all treated as part of WAI 51 when clearly some were not. The memorials were "clearly incomplete on their face, and there may well be missing vesting orders too".

[44] The lands were returned to the original owner, Tanetinorau, in order to be held for the benefit of the rightful owners. Norman Tane submits that the 1995 application was a wrongful attempt to take these lands and use them for wider purposes without the informed consent of those entitled. If that had been intended, one would assume they might have been placed in the hapū trust created by Judge Carter in 1990. That they were not suggests that there was a different intention for their treatment, as does the Cabinet minute. This would be consistent with their inclusion in the same ahu whenua trust which already held the pre-WAI 51 returns, and the subsequent succession orders made in relation to the land.

[45] Counsel for the applicant submits that the minutes of the hearing of 17 June 2011 (2011 CJMB 173) show that Mr Tane gave evidence on behalf of beneficial owners of the lack of consultation with them about the constitution of the whenua tōpū trust at the time it was created; that no meetings were held or advice given to seven of the beneficial owners who had succeeded in the block; that letters to the same effect were produced for Judge Milroy by Lani Dawn Tane Stockler at a hearing on 26 July 2007 and; Lani Dawn also referred to minutes of an AGM in 1994 or 1995 which she says should record that there was opposition to forming a whenua tōpū trust at that time. The applicant submits that s 216 is limited to "iwi/hapu uses", and is not directed at whānau interests or purposes, and this "highlights the improbability of beneficial owners agreeing to the establishment of a whenua topu trust if they had been properly informed". It is submitted that there is ample probative evidence that the requirements for forming a whenua tōpū trust were not met.

[46] It is further submitted that there are clear adverse effects of the 1995 order:

The obvious adverse effect is that in 1995, if views opposing the whenua topu trust had been made known to the Court, a whenua topu order could not have been made by Judge Carter because of the requirements of s 216(4). The evidence brought forward now, the fact that persons entitled did in fact seek and obtain successions to these lands, and Judge Carter's response with the 1997 order creating the current ahu whenua trust, all indicate there was an

underlying concern to retain beneficial ownership and the right to succeed to tupuna interests and control of their lands.

[47] The applicant also wishes that the whenua tōpū trust be reviewed.

The Law

[48] Section 216 of Te Ture Whenua Māori sets out the requirements for the establishment of a whenua tōpū trust. At the time the trust in question was established, s 216 read as follows:

216 Whenua topu trusts

- (1) The Court may, in accordance with this section, constitute a whenua topu trust in respect of any Maori land or General land owned by Maori.
- (2) A whenua topu trust may be constituted where the Court is satisfied that the interests in land to which the application relates constitute the whole or a substantial part of the total interests in land owned by the members of any iwi or hapu, and that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the iwi or hapu.
- (3) An application for the constitution of a whenua topu trust under this section—
 - (a) Shall be made in respect of all the beneficial interests in 1 block or in 2 or more blocks of land; and
 - (b) May be made by or on behalf of any of the owners or the Registrar of the Court.
- (4) The Court shall not grant an application made under this section unless it is satisfied—
 - (a) That the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
 - (b) That there is no meritorious objection to the application among the owners, having regard to the nature and importance of the matter.
- (5) The land, money, and other assets of a whenua topu trust shall be held for Maori community purposes, or for such Maori community purposes as the Court may specify

either on the constitution of the trust or on application at any time thereafter, and shall be applied by the trustees in accordance with section 218 of this Act or as otherwise ordered by the Court for the general benefit of the members of the iwi or hapu named in the order.

- (6) Except as provided in subsection (7) of this section, while a whenua topu trust constituted under this section remains in existence, no person shall be entitled to succeed to any interests vested in the trustees for the purposes of the trust.
- (7) Notwithstanding anything in subsection (5), but subject to subsection (8), of this section, the Court may, either on the constitution of a whenua topu trust or on application at any time thereafter, order in respect of any specified interests vested in the trustees for the purposes of the trust that the interests shall be deemed to be held for the persons named or described in the order, and the income arising from those interests shall thereafter be paid to those persons and their successors accordingly.
- (8) The Court shall not make an order under subsection (7) of this section unless it is satisfied that the order is necessary to protect the interests of any owner of a large interest in the land vested or to be vested in the trustees for the purposes of the trust.

[49] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in s 44(1) of Te Ture Whenua Māori Act 1993:

44 Chief Judge may correct mistakes and omissions

- (1) On any application made under s 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under s 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court of the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

The Trust Orders

[50] On 30 September 1988, Section 44 Block X Orahiri Survey District, being Part Hauturu East 1A5C, was revested in Tane Tinorau Opataia pursuant to s 436 of the Māori

Affairs Act 1953.²⁶ A further order was made pursuant to s 438(2) of that Act vesting that land in Josephine Huti Anderson, James Thomas Holden, Hine Anewa Carr, Angela Edith Pope and Haumia Green as trustees and creating the Tanetiorau Opataia Whānau Trust to hold that block.²⁷ On 4 October 1989, Hauturu East 7 was revested in Tane Tinorau Opataia pursuant to s 436 of the Māori Affairs Act 1953.²⁸ It was then vested in the trustees of the existing Tanetiorau Opataia Whānau Trust that had been created in 1988 to hold Section 44 Block X.²⁹

[51] On 1 October 1990, following the settlement of WAI 51, the “land formerly known as Hauturu East 1A5C now named by the Court as Hauturu East 12[, 13 and 14]” were revested in the “former owners of Hauturu East 1A5C as recorded in the Māori Land Court at the date taken in 1906”, pursuant to s 436(3) of the Māori Affairs Act 1953 in accordance with the WAI 51 settlement.³⁰ The same twelve owners were listed in all three of the respective orders. Purangi Tanetiorau was one of them. On 2 October 1990, a trust order was made pursuant to s 438(2) in respect of Hauturu East 12, 13 and 14, vesting the blocks in James Holden, Josephine Huti Anderson, Sam Haumai Green, Angela Pope, Hineaniwa Carr, Carol Murray, Canon Rua Anderson and Hotukopa Tane as trustees, as set out the previous day at 104 OT 254.³¹

[52] Also on 2 October 1990, an order was made in relation to the “Hauturu East 1A5C Block” stating:³²

Whereas on the 30th day of September 1988 the Court made Orders pursuant to Section 438(2) of the Māori Affairs Act 1953 vesting the above land in: Josephine Huti Anderson, James Thomas Holden, Hine Anewa Carr, Angela Edith Pope and Haumia Green. Now therefore upon hearing all the evidence adduced in support thereof the Court doth hereby order that the said Block be vested in: Canon Rua Anderson, James Thomas Holden, Carol Murray, Hine Anewa Carr, Hotu Kopa Tane, Angela Edith Pope, Josephine Huti Anderson and Haumia Green as joint tenants pursuant to Section 438(3)(a) of the Māori Affairs Act 1953 upon and subject to the existing Trust Order made on the 30th day of September 1988.

²⁶ 103 OT 241.

²⁷ 103 OT 241.

²⁸ 104 OT 48.

²⁹ 104 OT 47- 48.

³⁰ 104 OT 244-250.

³¹ 104 OT 254.

³² 104 OT 270

Presumably this order related solely to Section 44 Block X Orahiri Survey District and Hauturu East 7, and not to the whole Hauturu East 1A5C Block, as Section 44 Block X and Hauturu East 7 were the only blocks subject to the 1988 trust order.

[53] In 1995, Hauturu East 12, 13, and 14, which “the Crown has revested in the descendants of Tanetinatorau Opataia” were placed in a whenua tōpū trust, along with Section 44 Block X Orahiri Survey District and Hauturu East 7.³³ It was noted in the trust order that “[m]eetings of the descendants of Tanetinatorau Opataia have resolved that those areas of the said block [Section 44 Block X Orahiri Survey District, Hauturu East 7, Hauturu East 12, Hauturu East 13, and Hauturu East 14] be vested or transferred to the trustees named below, to be held in a Whenua Topu Trust for the descendants or whanau of Tanetinatorau Opataia”.³⁴ A new trust order was substituted in 2001 at 118 OT 110. New trustees were also appointed in 2001 at 117 OTR 173 and 119 OTR 60.

[54] On 2 September 1997, although the applications were for a whenua tōpū trust, Hauturu East 20, 22 and 23 were placed in an interim ahu whenua trust. The order appointed “the existing trustees of the Tanetinatorau Trust, under a trust to administer the land in the interim with full power to deal with the land in the same manner as the powers of the Whenua Topu Trust”.³⁵ In the meantime “the existing applications will be adjourned so that they can come up at the first available Court sitting after you’ve had your AGM”.³⁶ The applications came before the Court again on 4 November 1997. Another interim ahu whenua trust order was made, with the trust constituted:³⁷

for no longer than two years with full power to deal with the land in the same manner as the existing powers of the Tanetinatorau Opataia Whenua Topu Trust but with the requirement that the trustees take the question of establishment of a trust over these lands to the annual general meeting of the Whenua Topu Trust and seek the approval of the owners to the constitution of a formal trust over these lands.

The trust order also states that this ahu whenua trust “shall form part of the Tanetinatorau Opataia Whanau Trust”.³⁸ The applications to create a whenua tōpū trust over Hauturu

³³ 109 OT 91-100.

³⁴ 109 OT 91-100.

³⁵ 112 OT 83.

³⁶ 112 OT 83.

³⁷ 112 OT 156.

³⁸ 112 OT 154.

East 20, 22 and 23 were adjourned until “the Court is notified that the Tanetiorau Opataia Trust is ready to proceed with those applications”.³⁹ They remain adjourned.

[55] However to complicate matters, on 15 March 2002, the Court ordered:⁴⁰

that Hauturu East 7, 12, 13, 14, 20, 22, 23 Blocks and Section 44 Block X Orahiri Survey District be vested in: Maurice Sinclair Davis, Thomas Kohe Love, Lynette Green, Desmond Te Kanawa, Hineanewa Carr, Angela Edith Pope, Riley Blake Thompson as joint tenants pursuant to Section 239 of Te Ture Whenua Maori Act 1993.

[56] Then in 2004, upon the resignation of some of those trustees, the Court made an order to appoint new trustees to the Tanetiorau Opataia Whānau Trust, replacing three of the trustees appointed on 15 March 2002. This order was also made in relation to all those blocks collectively. This 2004 order states that the trust in question over all the blocks is an ahu whenua trust, but also that the order is “[i]n compliance with the Trust Order made at 118 Otorohanga Minute Book 110 dated 30 July 2001”.⁴¹ This is problematic for two reasons. Firstly, it appears to treat all the blocks as if they are held in a single trust when there was never any order creating one trust to hold all the Hauturu East blocks listed: there was the 1995 order creating a whenua tōpū trust over Hauturu East 7, 12, 13, 14 and Section 44 Block X; and the 1997 order creating an ahu whenua trust over Hauturu East 20, 22 and 23. Although the 1997 trust order gave the trustees the power to “deal with the land in the same manner as the existing powers of the Tanetiorau Opataia Whenua Topu Trust”,⁴² and stated that it would “form part of the Tanetiorau Opataia Whanau Trust”,⁴³ it remains a separate trust to the whenua tōpū trust created in 1995. This is an important distinction as the ability to deal with land, particularly when it comes to succession, differs significantly under each type of trust. Secondly, the trust order made on 30 July 2001 dealt solely with the whenua tōpū trust over Hauturu East 7, 12, 13, 14 and Section 44 Block X, and substituted a new trust order for that trust. It did not deal with Hauturu East 20, 22 or 23. It did not deal with the ahu whenua trust over Hauturu East 20, 22 and 23.

Discussion

³⁹ 112 OT 156.

⁴⁰ 119 OT 159-163.

⁴¹ 123 OT 103-104.

⁴² 112 OT 156.

⁴³ 112 OT 154.

[57] To begin, the general treatment of a s 45 application is set out below:⁴⁴

Pursuant to s 44 of the Act, the Chief Judge may cancel or amend an order made by the Court or a Registrar, if satisfied that the order was erroneous in fact or in law because of any mistake or omission on the part of the Court or Registrar or in the presentation of the facts of the case to the Court of Registrar. The Chief Judge may also make such order as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

In *Tau v Nga Whānau o Morven and Glenavy- Waihao 903 Section IX Block* [2010] Māori Appellate Court MB 167 the Māori Appellate court ruled that the Chief Judge must exercise his jurisdiction by applying the civil standard of proof of the balance of probabilities having regard to that standards' inherent flexibility that takes into account the nature and gravity of matters at issue.

Further, the Chief Judge must be satisfied that an error has been made. In *Ashwell – Ravinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209-225 (2009 CJ 209) I summarised the principles to be considered when determining s 45 applications as follows:⁴⁵

- When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition);
- Section 45 applications are not to be treated as a rehearing of the original application;
- The principle of *Omnia Præsumitur Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;
- Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;
- The burden of proof is on the applicant to rebut the two presumptions above; and
- As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decision. These principles are reflected in s 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the

⁴⁴ As set out in *Hina Temo v Hakeke McGarvey – Estate of Hohapata Heremia* [2012] Chief Judge's MB 194-211 (2012 CJMB 194), at [17]-[19].

⁴⁵ See also *Grant v Raroa – Ngamoe A1B1B* (1993) 22 Tairāwhiti ACMB 35.

date of the order. Parties affected by orders made under the Act must be able to rely on them.
For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[58] It is particularly important to note that s 45 powers are only used in exceptional circumstances where there has been clear mistake of fact or law, and this mistake has had adverse consequences on the applicant. In this instance, it must be considered whether Norman Tane's application has reached this threshold.

Has the applicant shown on the balance of probabilities that the order constituting the whenua tōpū trust was erroneous in law or fact?

[59] Section 216 of Te Ture Whenua Māori sets out the requirements for the establishment of a whenua tōpū trust. Specifically, s 216 states that a whenua tōpū trust "[s]hall be made in respect of all the beneficial interests in 1 block or in 2 or more blocks of land" and that it "[m]ay be made by or on behalf of any of the owners", but that:

The Court shall not grant an application made under this section unless it is satisfied—

- (a) That the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
- (b) That there is no meritorious objection to the application among the owners, having regard to the nature and importance of the matter.

[60] The minutes from the hearing at which the whenua tōpū trust order was made (109 OT 91-100) show that Winifred Jardine, instructed by the Tanetiorau Opataia Whānau Trust, made an application to terminate the trust that existed over Hauturu East 7 and Section 44 Block X Orahiri Survey District and to vest those lands, together with Hauturu East 12, 13 and 14, in a whenua tōpū trust. It was noted that Hauturu East 12, 13 and 14 had been vested in the descendants of the original owner (this being the vesting orders made on 1 October 1990 at 104 OT 244-250).

[61] There were 12 people named in those vesting orders, but Winifred Jardine stated that three of them had died without issue, leaving nine. She stated that these nine descendants were each represented by one nominated trustee, so that each trustee would represent one branch of the family of descendants of Tanetiorau Opataia.

[62] At the hearing, Judge Carter stated:

The main thing I want to be sure of is that each of those lines know what they're doing because what we are doing is replacing existing trusts with the Whenua Topu trust and once that happens, any sort of individualisation of entitlement through whanau lines is going to be lost. You say they've been consulted.

To which Winifred Jardine replied:

There's been a number of meetings with the whanau with the beneficiaries. The meetings have actually been going on for a number of years. Originally what was sought was a Whanau Trust and then when we approached the Maori Land Court having waited for Te Ture Whenua to come into force, we discovered that the Whanau Trust wasn't the proper vehicle so that's when we acted on the Whenua Topu Trust. We've had Jim Shepherd from the Maori Land Court come out and discuss with the beneficiaries and the trustees the implications of a Whenua Topu trust. It's been the subject of a number of meetings and discussions.

Judge Carter directly questioned the seven nominated trustees present as to whether they had any qualms, and to ensure they all tautoko the application. Winifred Jardine replied:

There is a concern Your Honour is that the individual whanaus may lose their identity but ... there are only very small areas, now if they're fractioned partitioned any more, that's what we're trying to avoid and also further succession or successions. And that's why we have one representative from each whanau on the Trust, is to maintain that identity.

Judge Carter then stated:

I've got to make sure that from the point of view of anyone attacking it later on that the procedures are gone through. It maybe that somebody gets disgruntled later in time to come and then they look back to the record of the Court to see what has happened and how this trust was established ... It seems admirable for the purposes of this type of trust that you're seeking to establish and I think it would be a good thing. So if I seem to querying you ... it's only for the reason of making sure the right procedures have been adopted. ... often people don't talk it over.

To which Winifred Jardine said:

Perhaps I should also mention too that there's going to be a general meeting on Saturday. In fact I've never known one whanau to have so many meetings to be honest.

[63] The trust order itself notes that “[m]eetings of the descendants of Tanetiorau Opataia have resolved that those areas of the said block ... be vested or transferred to the trustees named below to be held in a Whenua Topu Trust”.⁴⁶

[64] Norman Tane submitted that the trust order was made in 1995 without proper consultation with the owners. In a letter to the Court dated 29 May 2007, he also states that “[i]t was not until 5 December 1996 when the MLC provided a search Schedule that we were fully informed of our grandfather’s other land interests, such as HE 12, 13 and 14”.

[65] Norman Tane submitted at the hearing on 17 June 2011 that a number of the owners were not advised of the proposed formation of the whenua tōpū trust. He further stated that no meetings were held, or advice, or opportunity to oppose given, to seven of what he believed to be 22 beneficial owners.

[66] Only twelve owners were listed on the 1990 vesting orders for Hauturu East 12, 13, and 14, and the minutes set out above from the hearing at which the whenua tōpū was created state that the nine remaining branches of the 12 tūpuna listed were represented as trustees. Purangi Tanetiorau was clearly listed as one of the 12 owners, and he did not die without issue, but not having a comprehensive whakapapa, it is unclear who, if anyone, was representing his line as a trustee when the whenua tōpū trust was created. It is also noted that prior to being placed in trust, Hauturu East 7 and Section 44 Block X Orarhiri Survey District were re-vested in Tanetiorau Opataia solely as the only owner at the date of taking.

[67] Also at the 2011 hearing, Lani Dawn Tane Stockler referred to letters produced for Judge Milroy in relation to the s 45 application made by Georgina Tane Gibbons. The letters, from Rowena Thompson daughter of Gladys Huti Tane-Burke, Thomas Heta Holden, Christina Pealing and John Tane (who, in an email to Court officer Nadine Warbrick dated 31 May 2011, is noted as “the last surviving child of Parakau Tanetiorau, one of the original owners”) state support for Norman Tane, and “total [opposition] to giving up [their] shares to the Tanetiorau Whenua Topu Trust”. They also state their belief that the trust was “wrongly created” and “should revert to what it was before 1995,

⁴⁶ 109 OT 91-100.

when it was an Ahu Whenua Trust". It is unclear whether these beneficiaries, apart from "fully support[ing] Norman Tane in his efforts to keep our ownership title in Hauturu East Blocks", were involved or aware, or opposed (or had the opportunity to oppose), at the time the whenua tōpū trust was created. The letters do not mention consultation (or lack of) with beneficiaries at the time the whenua tōpū trust was created.

[68] Lani Dawn also gave evidence that she and Norman Tane attended a meeting in relation to the creation of the whenua tōpū trust and that "there were actually people who were quite outspoken in their non approval of it being converted to whenua tōpū".⁴⁷ She referred to trust minutes from "1995 or perhaps late 1994" that she claimed would show this objection, but these have not been provided.

[69] Norman Tane states that prior to the whenua tōpū trust being established, there were "frequent requests from beneficiaries about return of these lands and providing for successions, but the Trustees consistently advised that successions were not allowed". However, he has not provided any evidence of requests or replies from the trustees. The applicant also states that the whenua tōpū trust should not have been created because Section 44 Block X and Hauturu East 7 were already held in a trust. These trust orders were explicitly cancelled in the order creating the whenua tōpū trust.⁴⁸ Further, the 1988 trust never held Hauturu East 12, 13 or 14.

[70] It should also be noted that Judge Carter did not make an order for a whenua tōpū trust over Hauturu East 20, 22 and 23 due to his concern that beneficiaries had not been fully consulted. Although not determinative, it is interesting that this was not a concern for Judge Carter in relation to the application to create a whenua tōpū trust over Hauturu East 7, 12, 13, 14, and Section 44 Block X Orahiri Survey District although many of the same parties were involved in both applications.

[71] Based on the evidence provided, Norman Tane has failed to prove that there was a lack of consultation in the creation of the whenua tōpū trust over Hauturu East 7, 12, 13, 14 and Section 44 Block X Orahiri Survey District. He has not proved that on the balance of probabilities there was a mistake in law or fact in the creation of that trust. In light of this,

⁴⁷ 2011 CJMB 191.

⁴⁸ 109 OT 100.

there is no need to consider whether there were adverse affects, or whether it is in the interests of justice to amend the order.

[72] As to the request for the Court to review the whenua tōpū trust, and “complete and regularise” the ahu whenua trust, these are separate issues which would need to form the basis of another application.

Conclusion

[73] In conclusion, my view is that Norman Tane has failed to show on the balance of probabilities that that the orders constituting the whenua tōpū trust was erroneous in law or fact. Particularly, he has failed to show that there was an error in the presentation of facts to the Court by Winifred Jardine regarding the consultation with the whānau about the creation of the whenua tōpū trust, specifically that numerous meetings had been held with beneficiaries over a number of years (see 109 OT 91-100, also set out above at [62]). Norman Tane has not proved that the beneficiaries did not have a sufficient opportunity to discuss the establishment of the trust, nor that there were any meritorious objections by the beneficiaries to the order being made.

[74] The threshold for a successful s 45 application is high and Norman Tane has not met it. The public interest demands that owners and interested parties must be able to rely on orders made by the Court. Norman Tane has not brought enough evidence to show that there was a patent defect in the order creating the whenua tōpū trust over Hauturu East 7, 12, 13, 14 and Section 44 Block X Orahiri Survey District.

[75] **The application is dismissed accordingly.**

[76] A copy of this decision is to go to all parties.

Dated at Wellington this 22nd day of February 2013.



W W Isaac
CHIEF JUDGE