

**THE MĀORI LAND COURT OF NEW ZEALAND
TE TAI TOKERAU DISTRICT
AUCKLAND**

A20100008382

IN THE MATTER of applications pursuant to sections 332 and 183 of
Te Ture Whenua Māori Act 1993

AND

IN THE MATTER of Kopuakawau block

**MEMORANDUM OF COUNSEL ON BEHALF OF THE AFFECTED MĀORI
LAND OWNERS OF KOPUAKAWAU**

Dated this 23rd day of October 2020



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MAY IT PLEASE THE COURT

Introduction

1. As the Court is aware, this matter was commenced as part of the Māori Freehold Land project. The starting point for the application was that Māori Land Court maintained a title record for the Kopuakawau block, however, it was apparent that through the issue of LINZ titles for Lots 1 – 4 and 9 on DP102868, title to Kopuakawau had been apparently mistakenly overridden and thereby effectively cancelled.¹
2. Through initiating this application, the Court sought to provide a forum to assist the resolution of this situation for the Māori owners.² Our firm was appointed to assist the Māori owners to try and find a resolution.³
3. In December 2015, the application, which started as a survey requisition, was amended to include an application to appoint an agent.⁴
4. The most recent Court Minutes in relation to this matter are from a hearing on 1 March 2016⁵, and following this hearing, a judicial teleconference on 4 April 2016 (128 Taitokerau MB 99). At that time, the focus of Judge Ambler's intention for this matter was that our firm should establish:
 - (a) Who the agent should be; and
 - (b) What the terms of the agency should be;in order to develop a pathway forward.
5. Since the amendment of the application providing for the appointment of an agent, our firm's work has focused primarily on engaging with the owners in order to gain their instructions and confirming their support for, the appointment of an agent, the purpose being to have a focus point for instructions.

¹ 9 Taitokerau MB 88 to 90, 3 September 2010

² Ibid

³ 66 Taitokerau MB 108, 24 September 2013

⁴ 118 Taitokerau MB 21, 17 December 2015

⁵ 126 Taitokerau MB 222

6. This Memorandum is to provide an update to the Court on the current status of this matter and to set out what Counsel sees as the possible pathways forward to progress towards a resolution of this matter.

Reports / Investigations

7. Three reports have been prepared in relation to Kopuakawau, which look at the background to this matter. These are:
 - (a) The Patterson Pitts report, dated 10 July 2010;
 - (b) A report by the Far North District Council, dated 5 November 2010; and
 - (c) A report by the Registrar General and Surveyor General of lands, dated 20 September 2010 and an update to this report, dated 16 September 2011.

Possible Solutions

8. The Patterson Pitts report ("**PP Report**") proposed three possible solutions:
 - (a) Provide a replacement – the report suggested that the easiest solution may lie with Lot 9 DP 102868 which is a Local Purpose Reserve (Esplanade) subject to the Reserves Act 1977 with the Bay of Islands County Council pursuant to s 306(4) of the Local Government Act 1974. Conveniently, the reserve is roughly the same shape as the original Kopuakawau block. The PP Report suggested that the Ministry of Justice could pursue, with the local authority, the acquisition of the reserve as a replacement block for the original Kopuakawau block as a redefinition of the Kopuakawau block;
 - (b) Ownership Adjustment – this option involves adjusting the cadastral record to reinstate the block in its original form. This option will be problematic because it deals with a number of private owners with indefeasible titles. There is also the question of how suitable access might be achieved to Kopuakawau block; or
 - (c) Financial Compensation.

9. Broadly speaking, the PP Report identified three proposals that may provide a resolution in this case, and this report has formed a basis for discussions with the Māori owners to understand the issues and possible resolutions to this matter. As referred to in more depth below, we have ascertained that the majority of owners have indicated a preference for the replacement option.

Last known position of the Crown

10. The Crown and the Far North District Council (“**FNDC**”) were last involved in this application in December 2015 when each sought to be excused from further attendances until an agent could be appointed to represent the owners.⁶
11. On 31 October 2014, LINZ filed a Memorandum setting out its position, including:
- (a) LINZ noted Lot 9 was a Local Purpose Reserve vested in the Far North District Council (“**FNDC**”);
 - (b) LINZ noted the suggestion of Counsel for the affected Māori owners that LINZ should purchase Lot 2 in lieu of compensation under s 172 of the Land Transfer Act 1952;
 - (c) LINZ submitted that the assumption of liability under this section was premature at this stage;
 - (d) The RGL and the Surveyor-General continue to reserve their position in the Patterson Pitts Report.
12. Regarding Lot 9, the FNDC has previously stated that “...*Kopuakawau was initially excluded from the Crown Grant, but later absorbed into the title issued from that Crown Grant, presumably by adverse occupation. If that is the case then subsequent titles issued are correct and the status quo should remain.*”⁷ Counsel submit that this “presumption” by FNDC is not only inappropriate but cannot be relied upon to further alienate Māori from their lands. Māori are entitled to rely upon the indefeasibility of their title and the

⁶ 118 Taitokerau MB 21, 17 December 2015

⁷ Letter from Mark Lagerstedt to the Māori Land Court, dated 5 November 2010

Crown cannot simply absorb Māori title to land and assert that the subsequent titles are, as a result of that illegal absorption, correct.

13. Counsel submits that it could be productive to understand the Crown and FNDC's current position. In particular it would be helpful if the Crown and the FNDC could respond to the following questions:
 - (a) Is the FNDC willing and/or able to provide Lot 9 to the owners by way of substitution of the original loss of the Kopuakawau land?
 - (b) In addition, is the Crown willing and/or able to include either Lot 1 or Lot 2 to be alongside Lot 9 (by way of compensation and also to provide access)?
 - (c) If this is not possible, what other solutions do they consider appropriate in order to resolve the loss of Kopuakawau.
14. If the answers to the above questions were apparent, in Counsel's submission this would be helpful to elucidating the logical next steps for the Māori owners.

Owner Preference for a Resolution

15. A Consolidated Order, dated 17 June 2009, attaching a list of the owners for this block is attached as **Appendix A**.
16. Counsel understands that succession has occurred for Tireiniama Wepiha Reo, however there may still be outstanding succession orders required for Te Aroha Pongia, Geneva Pongia, Stan Pongia, Te Aroha o Te Mangai Wepiha Reo, and Amelia Te Rangi Maria Wepiha.⁸ Nevertheless, we have been touch with the descendants of a number of these (excluding Te Aroha Pongia, Geneva Pongia and Stan Pongia).
17. As at 2014, based on an owner hui, with Counsel (Mrs Peters) present (which took place on Friday 15 August 2014, at MacDonald's, Bader Drive, Mangere) and a number of phone contacts, our file shows that a majority preference had been indicated by the owners around the

⁸ Based on an inquiry our firm (Ihipera Peters) made to the Māori Land Court (Nanette Rahui) on 20 June 2016, and response received.

replacement/substitution option (with Lot 2 as compensation). This is indicated by the summary from our file which is attached as **Appendix B** to this Memorandum. It should be noted that the preference indicated by Hoani Pita (as trustee of the majority shareholder) appears to have come via phone contact with him on 15 May 2015.⁹

18. The owner preferences for this option do require confirmation and updating given the passage of time. Nevertheless, we think discussion with the Crown on this option could and should continue regardless.

Memorandum of 16 December 2015

19. On 16 December 2015, Counsel (Mrs Ihipera Peters) filed a Memorandum with the Court which set out where matters had progressed to up to that point. A copy of this Memorandum is attached as **Appendix C**. The key points to note are as follows:

- (a) Counsel had had some success in contacting the 50% shareholder, the Rameka Waitai Pita Whanau Trust (the trustees for which are based in Australia), and one of the trustees had indicated a preference for a resolution (paragraph 3);¹⁰
- (b) Some successions still needed to take place for deceased owners (in order for our firm to be able to take instructions from those successors) (paragraph 4);
- (c) Of 12 owners who Counsel had been able to contact, a summary of their position was (paragraph 6):
 - i. They seek the return of land in one form or another.
 - ii. They accept that a substitution of land would be more practical than a reinstatement of the original land block, at least as identified in the Patterson Pitts' report, because of the overlap with five other Land Transfer titles.

⁹ File note, 15 May 2015

¹⁰ A file note dated 15 May 2015 records a phone call that Mrs Peters made to Hoana Pita which states "he is happy for us to keep the ball rolling with LINZ"; a further note on the file indicates his preference is "return of land/substitute"

iii. The consensus was that Lot 9 of DP 102686 should form part of any resolution by way of substitution land but not on its own because:

1. Lot 9 is landlocked by Lots 1-4 of DP 102686;
2. there is no legal access from the driveway;
3. as a result of the access issues there would be no ability for the affected Māori land owners to develop or utilise the land effectively;
4. Lot 9 is 542m² smaller than the area of land depicted by Patterson Pitts as the original Kopuakawau block (as discussed previously in paragraphs 10 and 22 of our memorandum dated 27 February 2015); and
5. there is concern that more of the land that forms part of Lot 9 may subside into the Waikare stream, as appears to have occurred in the past, which would further diminish the land available for use by the affected Māori land owners.

iv. The majority therefore seek either Lot 1 or Lot 2 in addition to Lot 9 as part of any substituted land area as discussed in our earlier memoranda.¹¹

v. In respect of the possibility of appointing an agent to act on behalf of the owners pursuant to s183 of Te Ture Whenua Māori Act 1993, the general consensus is that it is a possible avenue but more time is sought to consider who would be appropriate, if that path is pursued.

20. The above points were discussed at a Judicial Conference on 17 December 2015.¹² The recommendation of Judge Ambler at this time was that an agent be appointed, and the application was amended accordingly.

¹¹ See paragraphs 9 and 14 of our memorandum dated 6 October 2014 and paragraph 7 to 10 of our memorandum dated 27 February 2015.

¹² 118 Taitokerau MB 21

21. From this time on, the focus of our firm's work turned to engaging with the owners around the appointment of an agent. That said, the owners position will need to be updated and instructions will be required.

Discussions with the Māori Owners re: appointment of an agent

22. Having reviewed the file, it is apparent that a large amount of work was undertaken to achieve progress towards who should be nominated as an agent for the Māori owners and to ensure there was broad support for an agent.
23. Our firm filed a number of Memoranda updating the Court on our progress with the owners (and our engagement with the Māori Trustee) in this regard.¹³ In addition, there was a significant amount of correspondence and contact with the owners that continued up until mid-2018.
24. In summary, while some ambivalence was expressed regarding the appointment of an agent, generally speaking the owners we were able to contact were generally supportive. However, there was less clarity and consensus around who the agent should be.

Deceased owners

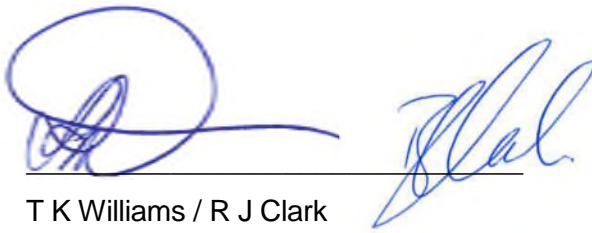
25. On 20 June 2016, we sought an update from the Court regarding the succession of interests of deceased owners. We were advised on one succession application that had been completed at this time (out of a total of 6 deceased owners).¹⁴
26. This may be a discrete area where, if an agent was appointed, it would be helpful for them to assist the owners. This was one of areas the Māori Trustee proposed he could assist with, see MOC of 1 April 2016, at para 3(c). However, our firm could work to progress succession matters with the owners unless and until an agent is appointed.

¹³ See Memoranda of 29 February 2016, 1 April 2016, 1 June 2016, 13 June 2016

¹⁴ Ibid, note 8

Conclusion

27. In Counsel's submission, it would be productive to understand the parameters of the Crown and FNDC's position with regard to the proposed replacement / substitution solution, centring on the provision of lot 9 as a substitution for the loss of Kopuakawau, along with an additional lot by way of compensation and to provide access. Counsel has proposed a list of questions for the Crown and FNDC at **paragraph 13** which could provide a useful starting point for (recommencing) discussions.
28. A clear understanding of the Crown's position should assist in advising the next steps for the owners who are likely to be more pro-active if there is a real opportunity for a positive outcome and if they have a concrete proposition to consider.
29. Once we have a clear understanding of the Crown's position, the continuation of efforts to achieve the necessary level of support from owners for the appointment of an agent could also be recommenced at that time, if that was deemed appropriate and useful.
30. With regards to the deceased owners and any outstanding succession orders, it seems logical for our firm to take steps to progress this unless and until an agent is appointed, in which case this role may transfer to them.



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