

**IN THE MAORI LAND COURT OF NEW ZEALAND  
TAITOKERAU DISTRICT**

**22 Taitokerau MB 201  
(22 TTK 201)  
A20090009350**

UNDER Section 18(1)(a), Te Ture Whenua Maori  
Act 1993

IN THE MATTER OF Part Mohinui Pt Lot 22 DP 9584 and Part  
Mohinui No.1 Block

BETWEEN NISHA MARSH  
Applicant

Hearing: 14 February 2009  
14 April 2010  
14 July 2010  
(Heard at Kaikohe)

Judgment: 13 June 2011

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**RESERVED JUDGMENT OF JUDGE D J AMBLER**

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**Background**

[1] Some years ago the Crown closed the Waiomio School and returned the land to the descendants of the original owners. The land is contained in two titles, CFR 497790 (6646m<sup>2</sup>) and CFR 510326 (1.7178 hectares). On 26 April 2001 the Court constituted the Ngakoti Whanau Trust under ss 214 and 219 of Te Ture Whenua Māori Act 1993 (“the Act”), appointed trustees and vested the land in the trustees (“the Trust”). The trust order is a standard whanau trust order with ahu whenua trust provisions.

[2] The land includes the original school buildings, swimming pool, tennis court and a school house and garage. The house and garage are situated on the larger block, CFR 510326. By 2004 the house had fallen into substantial disrepair. In January 2004 Nisha Marsh, a beneficiary of the Trust, and her husband, Joseph Marsh, and their children began living in the house and undertook repairs to make it liveable. In November 2004 Nisha and Joseph Marsh put a proposal to the trustees to be granted a licence to occupy part of the land (488m<sup>2</sup>) and to purchase the house for \$10,000.00 payable at \$50.00 per week. The trustees agreed to

the proposal. On 27 November 2004 the parties entered into a licence to occupy and an agreement to transfer the house in terms of the proposal.

[3] Nisha Marsh has now applied to the Court for an order under s 18(1)(a) determining her and her husband to be the owners of the house. She has the support of the Trust and the beneficiaries. Indeed, there is no opposition to the application. Nevertheless, I reserved my judgment as there were certain evidentiary matters that Nisha Marsh needed to address and as I needed to consider whether the trustees' transfer of the house was in accordance with their powers under the trust order.

### **Evidentiary matters**

[4] Nisha Marsh has submitted proof of payment of the \$10,000.00 to the Trust and the missing page of the document recording the transfer of the house which includes the consent of all the trustees. She has also submitted a revised calculation of the area of the licence to occupy, which I will return to shortly. Accordingly, she has addressed the outstanding evidentiary matters that I raised with her.

### **Trustees' powers**

[5] As mentioned above, the trust order is a standard whanau trust order with ahū whenua trust provisions. The relevant provisions are as follows:

#### OBJECTS

Subject to any express restrictions set out in this order, the objects of the trust shall be to administer and preserve the interests of the whanau and to use the income derived from those interests to be applied for the purpose of promoting health, social, cultural and economic welfare, education and vocational training and general advancement in the life of the descendants of ERANA & TE RATA NGAKOTI

#### POWERS

The trustees are empowered:

##### I. GENERAL

Subject to the terms of this order in carrying out the objects of the trust the trustees are deemed the owners of the land PROVIDED HOWEVER that they shall not alienate the whole or any part by gift or sale.

Parts II and IV relate to land solely owned by the whanau trust.

## II. SPECIFIC

Without limiting the general powers in the preceding provision the trustees are expressly authorised:

### 1. To permit occupation by the descendants

At the trustees discretion in any arrangement made for the use of the land to reserve or otherwise provide for any one or more of the descendants to personally occupy, use or otherwise enjoy such defined part or parts of the land as the trustees shall determine having regard to the following:

- (a) the availability of sites to other descendants
- (b) the apportionment of rates and any other charges to any occupier in such proportions as the trustees shall consider fair without necessarily having regard to area occupied.

The trustees may grant licences to occupy to descendants.

[6] There then follow various other standard specific powers. Importantly, there is no express power enabling the trustees to sell any of the Trust's assets and specifically any improvements on the land such as the house.

[7] Did the trustees have the power to transfer the house to Nisha and Joseph Marsh?

[8] The extent of trustees' powers are governed by the trust order, the Act and the general law. Although the trust order does not expressly permit the sale of assets such as the house, neither does it prohibit it: the prohibition in clause I is against the gifting or sale of the land itself.

[9] In *Karena – Owhaoko C1, C2, C4, C5 and C7*<sup>1</sup> and *Joe – Tatarakaia C Trust*<sup>2</sup> the Māori Appellate Court confirmed that specific powers in trust orders are to be read as an inclusive list rather than an exclusive list. Thus, in the present circumstances, the fact that the power to sell assets is not included in the specific clauses does not thereby exclude that power.

[10] Where a trust order is silent regarding a particular power, s 226 of the Act governs the situation:

### **226 General powers of trustees**

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<sup>1</sup> *Karena – Owhaoko C1, C2, C4, C5 and C7* (2004) 14 Takitimu Appellate Court MB 4 (14 ACTK 4).

<sup>2</sup> *Joe – Tatarakaia C Trust* (2004) 14 Takitimu Appellate Court MB 26 (14 ACTK 26).

- (1) The Court may, in the trust order, confer on the trustees such powers, whether absolute or conditional, as the Court thinks appropriate having regard to the nature and purposes of the trust.
- (2) Subject to any express limitations or restrictions imposed by the Court in the trust order, the trustees shall have all such powers and authorities as may be necessary for the effective management of the trust and the achievement of its purposes.

[11] Thus, the question is whether the power to sell the house is “necessary for the effective management of the Trust and achievement of its purposes.” I conclude that the power to sell the house is “necessary” as it enables a beneficiary to occupy the land and to maintain and improve an asset that would otherwise have deteriorated and likely been lost to the Trust. I emphasise that I am not saying that was the only option open to the trustees but that in the circumstances such a step was consistent with the purposes or objects of the Trust. This interpretation is, furthermore, consistent with the Preamble and ss 2 and 17 to the Act.

[12] I therefore conclude that an order under s 18(1)(a) is appropriate determining Nisha and Joseph Marsh to be the owners of the house.

### **Ancillary matters**

[13] There are two ancillary matters that need to be addressed.

[14] First, as I pointed out at the hearing, the licence to occupy identifies the subject area as 488m<sup>2</sup>. That is incorrect. Nisha Marsh has recalculated the area as 8519.4m<sup>2</sup> approximately. The area was understated in the original document because of a miscalculation. Nevertheless, the actual boundaries were shown correctly on the original plan and are not in dispute. The Court does not have the power to amend the licence to occupy as the Court does not create the licence. It is up to the trustees and Nisha and Joseph Marsh to correct the situation. The trustees should now file a variation to the licence to occupy to record the correct area.

[15] Second, the whanau trust order of 26 April 2001 contains an error in referring to the title of trust as the “Ngatoki” Whanau Trust rather than the “Ngakoti” Whanau Trust. I will issue an order under ss 37(3) and 86 to correct the order.

### **Orders**

[16] I make orders as follows:

- (a) **Section 18(1)(a) of Te Ture Whenua Māori Act 1993 determining that Nisha and Joseph Marsh are the owners of the school house on CFR 510326.**
  
- (b) **Section 37(3) and 86 of Te Ture Whenua Māori Act 1993 correcting the whanau trust order of 26 April 2001 by substituting the erroneous title of the Trust “Ngatoki Whanau Trust” with “Ngakoti Whanau Trust”.**

**Pursuant to Rule 66(3) of the Māori Land Court Rules 1994 the orders are to issue immediately.**

Pronounced in open Court in Whangarei at                      pm on Monday this 13<sup>th</sup> day of June 2011.

D J Ambler  
**JUDGE**