

**IN THE MAORI LAND COURT
TE WAIPOUNAMU DISTRICT**

A20040004441

UNDER Section 45 of Te Ture Whenua Māori Act 1993

IN THE MATTER OF Aperahama Hutoitōi

ELIZABETH SARAH WRIGHT
Applicant

Hearing: 16 September 2005
(Heard at Invercargill)

Judgment: 24 July 2007

**DECISION OF DEPUTY CHIEF W W ISAAC
ON DELEGATED AUTHORITY OF THE CHIEF JUDGE**

Application

[1] On 8 July 2004 Elizabeth Sarah Wright made an application to the Chief Judge under Section 45 of the Act seeking amendment of an order made on 21 February 1910.

[2] The Order was made pursuant to Section 15 of the Native Land Court Act 1894 and determined those persons entitled to beneficial rights in the Tītī Islands.

[3] The Applicant claims that the Order was incorrect because it did not include the interests of Aperahama Hutoitōi in the manu of Heretatua. The Applicant contends that Heretatua is a separate manu within the island of Taukihepa (Long Island) and that it originally belonged to Aperahama Hutoitōi.

Previous applications

[4] The Applicant had previously filed an application under Section 6 of the Māori Affairs Act 1983 seeking a determination of the beneficial interests of Aperahama Hutoitōi in Heretatua. This was accompanied by an application for an injunction under Section 19(1)(a) of the Act to prevent Dean Te Au from trespassing on Heretatua.

[5] These applications stemmed from a dispute between the Applicant's whānau and the Te Au whānau as to who had rights to bird on Heretatua. According to a letter from Robert Coote to the Southern Islands Manager (Department of Conservation) dated 23 March 2005 both whānau groups have claimed rights to Heretatua. On "permit day" 2002, members of the extended Te Au whānau were permitted to build on Heretatua to the angst of the Hutoitoi whānau."

[6] The applications under Section 6 of the Māori Affairs Act 1983 and Section 19(1)(a) of the Act were heard before the Māori Land Court on 3 February 2004 (105 South Island MB 172). The Court issued a direction to the Applicant on 19 May 2004 (106 South Island MB 216) directing her to:

"...file an application pursuant to section 45 of Te Ture Whenua Māori Act for amendment of the original order. An inquiry under the section 45 process will address the issue of whether Heretatua was, or should have been, specifically reserved for the descendants of Aperahama Hutoitoi, and whether the Native Land Court made an error in omitting him from the original list of owners.

The issue as to whether the Māori Land Court has jurisdiction to issue the injunction as sought turns on the outcome of a section 45 determination. Unless, or until, the Court finds the applicant to be entitled to a beneficial ownership in Heretatua there are no grounds for issuing an injunction preventing other persons from going there."

[7] The Applicant subsequently filed an application under Section 45 of the Act. We note from the file that the Te Au whānau expressed their intention to fight the application in Court. The Applicant, Richard Nicol Anderson Fisher and Robert Tawhiri Coote, Chairman of the Rakiura Tītī Committee, all filed affidavits in support of the application.

[8] The application was heard before me at Invercargill on 16 September 2005 (113 South Island MB 1). The hearing was well attended by persons both in support of the application and those opposed to it, including the Te Au whānau. After hearing from all those present, I reserved my decision.

[9] The application was referred to Tuia Legal pursuant to section 40(1)(e) Te Ture Whenua Māori Act 1993 to complete a report in respect of this application. That report is contained on the Court file for this application. This report referred to the background to the Tītī Islands and I now quote the relevant sections from that report.

“Background to the Tītī Islands

11. The background to the Tītī Islands and the sale of Rakiura (Stewart Island) to the Crown in 1864 is set out as follows. It is necessarily an overview of the events that were happening at the time and for a more comprehensive analysis of the determination of beneficial interests in the Tītī Islands we refer to the research work of Mr Jeff Mason, particularly his report “Nga Manu Tītī O Taukihepa”, a copy of which is on file. We cannot of course advise on the authenticity or correctness of that report.

Rakiura Deed of Cession

12. On 29 June 1864 Rakiura Māori, led by Teone Topi Patuki, entered into an agreement with the Crown for the purchase of Rakiura (Deed of Cession). The Tītī Islands are scattered along the coast of Rakiura. The agreement with the Crown ensured that Rakiura Māori retained access to 21 of the most favourable Tītī Islands, so that they could continue with their traditional food gathering of the tītī / mutton birds. For the purposes of this report we will refer to those islands as the Tītī Islands. The remaining islands went to the Crown.

13. Each of the Tītī Islands was originally entrusted into the hands of a group of local Māori as kaitiaki or trustees for everyone connected to the islands. A copy of the Deed of Cession and the list of those persons to whom each of the Tītī Islands was reserved are attached at Annexure A. The Deed of Cession named the following Tītī Islands to be reserved for Rakiura Māori:

Horomamae	Kaimohu
Wharepuaitaha	Huirapa
Kaihuka	Taketu
Potuatua	Heretatua
Pomatakiarehua	Te Pukeotakohe
Tia	Tamaitemioka
Taukiepa	Pohowaitai
Rerewhakaupoko	Poutama
Mokinui	Herakopare
Mokiti	Pikomamaku
Timore	

14. The enclosure to the Deed of Cession refers to Taukiepa as embracing the following names; Taketu, Heretatua and Te Pukeotakohe.

15. Following the Deed of Cession, Rakiura Māori entitled to go on the Tītī Islands and take tītī enjoyed a profitable and lucrative business. However this led to increased competitiveness and jealousy, including trespassing, by those who did not have any ancestral rights. Eventually, and following pressure from Rakiura Māori, the Crown took measures to determine those persons beneficially entitled to interests.

Order in Council 1909

16. On the 10th of August 1909 the Governor issued an Order in Council (Order in Council) conferring extended jurisdiction upon the Native Land Court under Section 15 of The Native Land Court Act 1894 to determine the persons entitled to rights and interests in the Tītī Islands and the persons entitled to succeed to such of them as are dead. A full copy of the Order in Council is attached at Annexure B.

17. The Native Land Court sittings were heard before Chief Judge Jackson Palmer between the 3rd and the 21st of February 1910. The hearings were well publicised and a record of the proceedings was reported daily in the Southland Daily Newspaper. The enquiry took place based on lists of persons prepared and presented to the Court, and those that wished to claim as successors to those named in the 1864 Deed of Cession submitted an application under each of their respective ancestor's names.

18. On the 21st of February 1910 the Chief Judge made an order pursuant to Section 15 of the Native Land Act 1894 determining the persons and their successors entitled to rights in the Tītī Islands. The order and schedule of persons entitled were published in the Gazette on the 10th of August 1911. A full copy of the order and list is attached at Annexure C.

19. In contrast to the Deed of Cession and the Order in Council, Chief Judge Palmer's list does not acknowledge the three separate manu of Taukihepa, namely Taketu, Heretatua and Te Puketakohe. It simply lists those persons entitled to interests in Taukihepa as a whole.

20. Not everyone recognised in the 1864 list was included in the 1910 list. This led to increased pressure on the Crown by persons apparently entitled to participate in the benefits of the Tītī Islands, but who were not acknowledged in the 1910 list, to be given an opportunity to prove their right. As Chief Judge M. Gilfedder noted in his report of the 18th of August 1921:

"In recent years the number of birds frequenting both the Tītī and the Crown islands has enormously increased. There is a growing demand for mutton-birds all over New Zealand, and, as the Natives privileged to visit the islands are driving a lucrative business, the jealousy of those who are not on the lists and have no prospects of being included in succession orders has been aroused, and they are determined to make strong efforts to secure mutton-birding rights."

Amended List

21. In 1918 Sarah Gilroy and forty five others signed a petition, requesting the right to take mutton birds from the Tītī Islands (Re Petition 16/1918). At the time the petition was made there was no power under the Native Land Act 1894 to alter the Court's order of 1910 by introducing new owners or by amending the regulations giving non-owners rights with owners. This was noted by Chief Judge Jackson Palmer in a memorandum to the Minister of Lands dated 23rd of December 1918, in which he recommended a change to the legislation.

22. As a result, the Crown enacted the Native Land Amendment and Native Land Claims Adjustment Act 1921. Section 11 of that Act authorised and empowered the Native Land Court to inquire and determine whether the names of any persons other than those mentioned in the order of 21 February 1910 were entitled to be included in the lists and if so, to amend or vary the said order accordingly.

23. The petitioners were heard before Chief Judge M. Gilfedder at Invercargill on the 6th of June 1921. The claims of the petitioners were heard individually, or in conjunction with their brothers and sisters who could claim equal rights although not signing the petition. In his 1921 report to the House of the General Assembly, Chief Judge M. Gilfedder noted the difficulties in compiling a comprehensive list of those entitled, noting in particular that:

"As many were included in the lists of 1910 as the results of conferences, consultations, and compromises rather than through evidence adduced to show ancestral right and occupation, it is somewhat difficult to ascertain the principles and bases upon which the lists were ultimately compiled."

24. Notwithstanding the above comment, the Chief Judge found that an additional twenty eight persons were entitled to take up the unoccupied parts of Taukihepa (Tītī Island MB 190-194, 14 July 1922). The amended schedule of owners entitled to rights in the Tītī Islands was published in the Gazette on the 24th of January 1924 in accordance with the provisions of Section 11(3) of the Native Land Amendment and Native Land Claims Adjustment Act 1921. A complete copy of that list and a copy of Chief Judge M. Gilfedder's order of 14 July 1922 are attached at Annexure D.

25. Unlike the 1910 list, the schedule of owners published in 1924 lists the persons entitled to interests in Taketu and Te Puketakohe separately from those entitled to interests in Taukihepa. Heretatua, however, is omitted and so is any reference to Aperahama Hutoitōi or his successors.

26. 1922 was certainly not the last time issues surrounding interests in the Tītī Islands came before the Native Land Court. During the second half of 1928 the Native Land Court heard a number of applications concerning disputes over manu (bird-catching areas) and the boundaries on Taukihepa. Following these disputes a committee of Rakiura Māori were appointed to allot manu on Taukihepa Island and to prepare a sketch map of the island setting out the various manu. While the sketch map was sent to the Commissioner of Crown Lands it does not ever appear to have been accepted as an official representation. The Māori Land Court has never defined or issued title for the respective manu's and the boundaries on the Island are recognised as a matter of custom.

27. Throughout the years the Judges have defined relative shares of succession in the Tītī Islands in the usual way but have not defined what the shares are relative to. The modern practice is simply to vest ownership of the deceased's interests in the deceased's successors without regard to the relative interests.

28. I note that Te Puketakohe, Taketu and Heretatua are not listed separately from Taukihepa as an island under the Māori Purposes Act 1983 or the Tītī (Muttonbird) Islands Regulations 1978."

[10] Having regard to this background I now turn to deal with the present application.

Discussion

[11] As previously stated the Applicant has requested that the Chief Judge amend the Order of Chief Judge Palmer dated 21 February 1910. The Applicant claims that the Judge made an error by not including Aperahama Hutoitōi or the manu of Heretatua in the list of beneficial entitlements in the Tītī Islands.

[12] The Chief Judge's jurisdiction to amend or cancel an order of the Court is set out in Section 44(1) of the Act which states that the Chief Judge may, if satisfied that an order made by the Court was erroneous in fact or in law because of any mistake or omission on the part of the Court, or in the presentation of the facts of the case to the Court, cancel or amend the order or make such other order as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[13] Also notwithstanding, the Tītī Islands are subject to special legislation and are not governed under the provisions of Te Ture Whenua Māori Act. Section 6(5) of the Māori Purposes Act 1983 provides that the:

“(5) The Chief Judge may exercise the jurisdiction conferred on him by section 452 of the principal Act in respect of any order of the Court relating to the islands or any of the owners, whether the order was made before or after the commencement of this Act.”

[14] The effect of Section 6(5) of the Māori Purposes Act 1983 was considered by the Court in *Re an Application by Aperahama Hutoitoi* (19 May 2004 at 106 South Island MB 216). Judge Wainwright found that the ability of the Court to vary an order of the Court has been carried through into the Māori Purposes Act 1983.

[15] The Chief Judge's power to amend or cancel an order of the Court in respect of the Tītī Islands or any of the beneficial owners must be read alongside the provisions of the Tītī Island regulations. Section 6(8) of the Māori Purposes Act 1983 acknowledges the limits on the Court to involve itself in the management and administration of the islands and states that “nothing in this section shall limit or affect the power to make regulations in respect of the islands conferred by section 23(2) of the Land Act 1948, nor limit or affect any regulations made under that section.”

[16] Section 23(2) of the Land Act 1948 has since been repealed and replaced by Section 48(1)(d) of the Conservation Act 1987:

“48 Regulations

(1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

(d) In fulfilment of the conditions of the deed of cession of Stewart Island dated the 29th day of June 1864, and after consultation with the Māori owners, securing to the Māori the Tītī Islands and other Islands adjacent to Stewart Island mentioned in the deed, and protecting the islands from trespassers, and the birds frequenting them from destruction:”

[17] The Tītī (Muttonbird) Islands Regulations 1978 were enacted pursuant to Sections 23(2) and 184 of the Land Act 1948. The Regulations are effectively a code, setting out how the Islands are to be managed and administered and making provision for the election

of a Rakiura Tīti Committee. The Regulations also govern the allotment of manu to the beneficiaries:

“4 Provisions relating to birding and use of islands

Manus (or bird-catching areas) on a beneficial island shall be allotted to persons by the majority of the beneficiaries present on their island in the year the manus are allotted or, if such a majority of beneficiaries cannot agree on allotment, by the Supervisor for the island.”

[1] Under the Māori Purposes Act 1983 the Court simply determines who is entitled to a beneficial interest in the Tīti Islands. The Court does not allocate a particular manu to a beneficiary nor does it define share entitlement. The relationship between the Court’s jurisdiction under the Māori Purposes Act 1983 and the management of the Tīti Islands under the Regulations was clearly described in a letter from Mr S J Hadfield, Deputy Registrar of the Māori Land Court, to Mr W T McQuarrie dated 22 January 1992:

“In short it is the Court’s duty to determine who the successors are and the management and allotment of manu on the islands is dealt with under the Tīti Island Regulations 1978. If the Court was to put the manu in the succession orders, it would also be allotting the manu on the land.”

[19] This point was reinforced by the Court of Appeal in *Reihana v The Māori Land Court* (CA80/01, 25 March 2002, Tipping J) in the context of Regulation 6(2) of the Regulations. At paragraph 2 of the judgment Justice Tipping stated:

“Regulation 6(2) provides that failing agreement on any dispute arising out of the Regulations, and hence failing agreement in respect of a boundary dispute of the present kind, the Director-General shall make the decision “which shall be final and binding on all parties”. This finality is subject only to the capacity of the Director-General to reconsider his own decision under Regulation 9. It is essentially the combination of these provisions which led the Māori Land Court, the Māori Appellate Court and the High Court to conclude that the Māori Land Court has no jurisdiction to enter into a matter in respect of which the Director-General’s decision is declared to be final and binding. The Judges below have taken the view that the Regulations are a code providing exclusively for the way in which disputes arising under them are to be resolved.”

[20] It seems therefore, subject to the constraints outlined above, that the Chief Judge’s jurisdiction under Section 44(1) of the Act does extend to orders dealing with determining the entitlement to interests in the Tīti Islands.

[21] As a result, I now turn to look at the issue in this case which is simply which the Court incorrectly omitted the interests of Aperehama Hutoitōi in the manu of Heretatua.

[22] There are two issues that need to be determined in this application:

- i. The first, is whether Aperahama Hutoitōi and his descendants should have been omitted from that list as being entitled to rights in the Tītī Islands.
- ii. The second, is whether Heretatua should be reserved solely for the descendants of Aperehama Hutoitōi.

Aperahama Hutoitōi's entitlement

[23] At 13 South Island MB 4 the Applicant was questioned about Aperahama Hutoitōi's entitlement to the Tītī Islands:

Court: And what's happened since then?

Mrs E Wright: Well nothing. We've just lost years of history.

Court: I'll put it another way. Have you continued with your birding rights in that manu?

Mrs E Wright: Yes we have. We have birded from Puketakohe and we have birded Heretatua, because we believed it was ours.

Court: Have there been any successions done to Aperahama Hutoitōi?

Mrs E Wright: Yes there has, but it was only to land elsewhere. The Tītī rights did not come through on those successions.

Court: But those successions show that you have an entitlement and direct descent to him?

Mrs E Wright: Yes.

Court: And has anyone contested that?

Mrs E Wright: No.

Court: So it comes down, if there is no contesting of that entitlement, the contest comes down to the entitlement to this manu, Heretatua?

Mrs E Wright: Yes."

[24] This was supported by those present and we note in particular the comments of Mr Stewart Bull, for while he raised some objections to Heretatua being a separate manu he did acknowledge that Aperahama Hutoitōi was entitled to rights in Taukihepa (113 South Island MB 10):

“Court: Would you agree that the descendants of Aperahama Hutoitōi have got birding rights on this island?

Mr S Bull: On Taukihepa?

Court: Yes.

Mr S Bull: Yes.

Court: All right.”

[25] The inclusion of Aperahama Hutoitōi in the Deed of Cession and the comments of the persons present at the hearing, provide clear evidence that he should have been included in Chief Judge Palmer’s order of 1910 and that his omission is an error that can be remedied by the Chief Judge pursuant to Section 45 of the Act.

Are Aperahama Hutoitōi’s descendants solely entitled to succeed to interests in Heretatua?

[26] The starting point is the Deed of Cession of 1864. The Deed of Cession lists Taukihepa as embracing the following names: Taketu; Heretatua; and, Te Puketakohe. Those islands were reserved for the following chiefs:

1. Rawiri Mamaru
2. Henare Paremata
3. Horomona Patu
4. Reweti te Akau
5. Aperahama Hutoitōi
6. Matiu Keapane
7. Tioti (Teoti) Mauhe
8. Rawhiri te Awha
9. William Fisher
10. Ihaia Mi
11. Patepa te Huruhuru
12. John Paina
13. Tauira (Tutuaira)
14. Tioti (Teoti) Turi
15. Tukurua

[27] There is no reference in any of the documents on record of Heretatua being specifically reserved for Aperahama Hutoitōi. The 1910 order does not acknowledge Taketu, Heretatua and Te Puketakohe. It simply lists those persons entitled to interests in Taukihepa as a whole.

[28] Following the 1910 inquiry, Chief Judge M Gilfedder sat at Invercargill and heard succession applications to the manu of Kaikaiwara, Te Pukeotakohe and Taketu. None of the applications were opposed. These manu continue to be recognised separately from the Taukihepa island in the Māori Land Court records and there are separate succession orders in respect to each of them.

[29] The applicant's argument is that Aperahama Hutoitōi's family have always worked the manu of Heretatua. However, the Court has also heard evidence that the Te Au whānau have 'birded' and exercised rights on Heretatua.

[30] Regulation 4(9) provides that "manus (or bird catching areas) on a beneficial island shall be allotted to persons by majority of the beneficiaries present on their island in the year the manus are allotted..." This provision is clear. The Court no longer has jurisdiction to allot and determine entitlement to separate manu in Taukihepa.

[31] As a result of the above discussion the application as it relates to the applicants claim that Heretatua be recognised as a separate manu for the descendants of Aperahama Hutoitōi must fail.

Orders

[32] Having regard to the above findings I make the following orders:

- a) An order amending the Order of Chief Judge Palmer on 21 February 1910 including in the Schedule of that Order Aperahama Hutoitōi underneath the heading "Taukihepa or Long Island".
- b) The application as it relates to Heretatua being recognised as a separate manu for the descendants of Aperahama Hutoitōi is dismissed.

[33] A copy of this judgment to all parties.

Dated at Wellington this day of 2007

W W Isaac
DEPUTY CHIEF JUDGE

