

# Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

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## GLOSSARY OF COMMON ABBREVIATIONS

DC.....	District Council
OTS.....	Office of Treaty Settlements
RMA .....	Resource Management Act 1991
TPK .....	Te Puni Kōkiri / Ministry of Māori Development
TTWMA.....	Te Ture Whenua Māori Act 1993

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## EDITORIAL

By Craig Linkhorn

This issue covers a wide range of cases. This editorial item is a short overview of some of those cases.

A division of the Land Valuation Tribunal has asked whether it is time to review the *Mangatū* guidelines for valuing Māori land. Those non-binding guidelines were issued by the Valuer-General in the wake of the Court of Appeal's decision in *Valuer-General v Mangatū Inc* [1997] 3 NZLR 641 (see *Māori LR Sep 1997 p2*). In the *Tabeke Paengaroa Trust* decision the Land Valuation Tribunal made a number of observations about whether changes to market conditions affecting Māori land since 1997 mean that a greater discount may now be warranted than the 15% maximum figure that is applied under the *Mangatū* guidelines.

Trustee administration of Māori land continues to generate decisions from the Māori Land Court & Māori Appellate Court that identify mistakes amongst those responsible for the management of land on behalf of beneficial owners. In this issue three cases (*Mangakāhia 2B2 No 2A1A*, *Re Witehira* and *Ormsby*) discuss issues associated with the performance by trustees of their obligations. However, this is not to suggest that all groups of trustees administering Māori-owned land are performing less than optimally.

A fourth judgment about trustees of Māori Land (*Pukerua-Ōruawhata*) is from the Court of Appeal. That court identified that both the Māori Land and Appellate Courts had wrongly relied upon the common law doctrine of estoppel when *Te Ture Whenua Māori Act 1993* addressed the point at issue. The common law doctrine had been used by the lower courts to dismiss applications by the trustee owners of the land that had the effect of reopening earlier decisions of those courts that an independent professional trustee should be appointed to the ranks of the trustees.

## MĀORI LAND COURT & APPELLATE COURT

**Deputy Registrar v Faulkner—Allotment 5 Parish of Tahawai**

*A20080002949, Māori Land Court Waikato-Maniapoto, 17 November 2008, Judge Clark.*

This application for determination of status was part of the *Māori Freehold Land Registration Project* ("MFLRP"), a joint effort between the Māori Land Court and *Land Information New Zealand* ("LINZ"). The intention of the project was to identify and register all Māori Land under the *Land Transfer Act 1952*.

At the time of the application the land's status had become a matter of proceedings before the *Land Valuation Tribunal* ("LVT"). The trustees were involved in a dispute

over the **Western Bay of Plenty District Council's** ("WBOPDC") rating on the land. The trustees contended that the land was Māori freehold land while the WBOPDC argued that the land was general land. It was during proceedings in this matter that one of the trustees, Mr Faulkner, also submitted that the land had Māori customary land status.

In this application three arguments were advanced: Mr Faulkner argued that the land was Māori customary land; the trustees (apart from Mr Faulkner) argued that the land was Māori freehold land; and the council argued that the land was general land.

The court found that customary title had been extinguished by the Tauranga District Lands Act 1867, and furthermore that this had been considered by the High Court in *Faulkner v Tauranga District Council* ([1996] 1 NZLR 357) and in some depth by the Waitangi Tribunal when it sat at Tauranga between 1998 and 2002. The current decision turned on the definitions of the different statuses of land under TTWMA and other legislation preceding that Act. The court concluded:

- ◆ "...the status of the land immediately prior to the advent of the 1953 Act was "Native freehold land". Land in that category clearly falls within the definition of "Māori freehold land";
- ◆ The block does not fall within the definition of "Crown land", "Customary land" or "European land";
- ◆ The block does not fall within the definition of "European land owned by Māori". I agree with the submissions made by the trustees that land in that category incorporates land which was not originally granted or gifted to Māori from the Crown but subsequently became vested in them in any manner whatsoever, including purchase. In contrast the block was originally vested in Enoka Te Whanake by way of Crown Grant."

The court held that the status of the land was Māori freehold land, and had been so since the Native Land Act 1909 came into force.

#### **Mangākahia 2B2 No 2A1A Ahu Whenua Trust – application by Kevin Tito**

*A20080005603, Māori Land Court Taitokerau, 130 Whāngarei MB 134, 23 January 2009, Judge Ambler.*

Mr Tito initially applied both for an injunction to restrain the trust manager of the Mangākāhia 2B2 No 2A1A Ahu Whenua Trust and to enforce the obligations owed by the trustees of that trust under s 238(1) TTWMA. The injunction sought was refused in May 2008 and the proceeding changed in October 2008 when Mr Tito filed a further application to wind up the trust.

The current trust was established in 1998, and the forty-one hectare land block was leased on short-term leases to a neighbouring dairy farmer. The trustees were responsible for the lease, collecting the rent due every six months and distributing that income after deducting expenses. Mr Tito was dissatisfied with the trust's operations claiming that accounts had not been produced for many years and that no satisfactory explanations were given in response to queries from the trust manager.

The court identified three issues for decision:

- ◆ The alleged failure of the trustees to perform their duties;
- ◆ The alleged failure of the trustees to complete accurate financial statements; and
- ◆ Whether the trust should be terminated.

The trustees had never held an annual general meeting, as required by the trust order. The trustees were also in breach of the trust order by never having sought a review of the trust despite being obliged to do so every three years. The court concluded that the trustees had not been active in running the affairs of the trust and had left matters to the trust manager who was a legal executive at a law firm. The court stated:

"[13] While there is nothing wrong in using the services of a trust manager or professional secretary, the trustees cannot abdicate responsibility and leave the trust's affairs wholly in the control of the trust manager. As a consequence of the trustees' abdication of responsibility, beneficial owners' current accounts have been overdrawn, payments appear to have been made without the requisite authority and the financial statements disclose apparent errors."

In examining the trustees' accounts the court identified payments being made on a different basis for some beneficiaries but not others, suggesting inappropriate favouritism. There was also a question about how payments were authorised to a beneficiary of the trust after she had died. As a result of these and other discrepancies identified, the court directed an audit of the trust's accounts to take place, covering the period 2004–2008. He also asked the firm of accountants and the firm of lawyers acting for the trustees to consider whether the cost of that audit should be met from trust funds given that the court had identified that the professional service firms appeared to be responsible for errors in the accounts.

Mr Tito proposed that the trust should be wound up and the land managed by its majority owners. The court decided that trustees were still required, stating:

"[23] In my view a trust is necessary for this land given that it is leased and given that there is a significant disparity in shareholding in that three shareholders out of 20 hold over 86% shares in the land."

The question remaining was who should be the trustees. The existing trustees had not performed all their obligations as trustees. At least two of the trustees were now elderly and infirm and one had died in December 2004. Mr Tito was not prepared to be a trustee. The remaining active trustees did not hold sufficient ownership interests in the shares dividing up ownership of the land to satisfy the court that they should have effective control of the trust property.

The court indicated that before any decision could be made on the future trustees there should be an AGM of beneficial owners to discuss trusteeship and other issues. The court identified two options for consideration. Firstly, reduce the trustees to three to represent the owners. Under this option an independent professional trustee would represent the minority owners. Secondly, appoint the **Māori Trustee** as sole responsible trustee with advisory trustees.

The trustees were directed to obtain an audit of the accounts from 2004–2008, make that audit available to the

beneficial owners in advance of an AGM, convene that AGM before 30 June 2009 and submit a report to the court by 15 July 2009.

**Re: Witehira—Awarua A25**

*A20060027699, Māori Land Court, 128 Whāngarei MB 282, 2 December 2008, Judge Ambler.*

In this decision the court varied a trust instrument to bring the trustees' obligations up to date. The court also gave judgment on a number of related issues where trustees or beneficiaries had raised concerns about whether appropriate procedures were being followed in the operations of the trust. These included the issue of payments to trustees beyond reimbursement of expenses and alleged conflicts of interest.

During the course of the proceeding the court expressed some concerns at indications of continuing dysfunction among those responsible for the trust and rising expenditure on administration. The court directed that relevant information be filed so that the court could examine the issues in more detail at a later hearing.

Initially, the proceeding was an application to appoint trustees. It was amended during the course of hearings to become a review of the trust instrument under s231 TTWMA.

The proceedings took some time to progress to the point where final judgment could be given. After hearings in October 2007 and October 2008, the court issued a reserved decision on remaining issues in December 2008. Part of the delay was caused by time taken to produce information before the court. Even then, the court was faced with making final decisions on some issues with less information than it had requested.

Some of the issues discussed in the reserved judgment of the court are not reported here. Five issues of more general interest are. Those are:

- ◆ The differences between trustee decision making on ordinary and extraordinary matters;
- ◆ Identification and management of conflicts of interest;
- ◆ Trustee fees;
- ◆ Appointment of trustees; and
- ◆ Indemnities to trustees.

The court directed the trustees to formulate a clear policy on ordinary purchases, which may be authorised retrospectively, and extraordinary purchases, which require trustees' prior authorisation.

The court identified two possible conflicts of interest and highlighted to trustees the importance of dealing appropriately with these. The variation to the trust order made by the court expressly deals with conflicts of interest to assist the trustees in that regard in the future. One of the situations was found by the court to be a conflict of interest but no sanction was necessary. This was where a community grant of \$500 was made from trust funds to a body associated with one of the trustees. The trustee did not disclose her involvement with the recipient of the grant to her fellow trustees and wrote the cheque without trust conditions first being met. As there was no dispute that the amount was not large, the recipient group was deserving,

and no one sought repayment of the money, no sanction was ordered.

On examining financial statements the court discovered that trustees had been paid modest meeting fees for some years while the trust order only permitted reimbursement of their expenses. The court observed at [40] that over time the total amount paid to trustees had escalated to the point of being virtually in inverse proportion to the profitability of the trust, a farming operation. While the court found that trustees had brought trustee expenses under control since 2006, insufficient information was available for the court to decide whether earlier payments to trustees should be repaid. The court also noted that it would need to hear from the trustees on that issue before making a final decision.

As a result of the court's decisions on these related applications the number of trustees had been reduced to five and the amended trust instrument required rotation of trustees biennially with two trustees retiring every two years in order to give greater continuity to the trust. The court noted that for future appointments the court would assess skills closely stating:

“[45] The Court will not necessarily appoint people trustees who win an ‘election’ at an AGM. The Court is more interested in appointing people with the right skill set than people who are most popular.”

The chairperson of trustees had sought an indemnity for the period from when he was “elected” to be a trustee until his first meeting as a trustee. The court declined, pointing out that it is rare for trustees of ahu whenua trusts to be provided with indemnities unless a person is an independent professional trustee. In any event, the request overlooked the legal position which was that the chairperson was not made a trustee until he was appointed by the court. This was a period of just over 12 months after the election process.

**Ormsby v The Trustees of Whakarataimaiti 2B6 (Meeting House) Reservation**

*A20070012536, Māori Appellate Court, 12 Waiariki Appellate MB 167-185, 28 January 2009, Chief Judge Williams with Judges Spencer & Clark.*

The Māori Appellate Court dismissed an appeal against a decision of the Māori Land Court in 2007. The lower court had dismissed Ms Ormsby's claim that she owned a kaumatua flat she occupied that was situated on a Māori reservation.

The appellant had provided finance to the reservation trustees to enable the trustees to purchase from [Te Puni Kokiri](#) four kaumatua flats situated on the reservation. This occurred in 1994. The advance was documented by a loan agreement between the appellant and the trustees. The Māori Land Court had previously made orders empowering the trustees to enter into arrangements to secure this finance and to manage the tenancies of the kaumatua flats. The loan was to be repaid over six years.

The trustees did not make the scheduled repayments to Ms Ormsby. She was a tenant, occupying one of the flats; She took some steps to collect rent from some or all of the other tenants. Ms Ormsby did not pay rent herself and it

appears the trustees had not received any of the rent payments she had collected.

In 2005 the reservation trustees wrote to the appellant asserting ownership of the flats and demanding rent payments. This led to litigation where Ms Ormsby asserted she owned her flat.

After the Māori Land Court decided that she did not own the flat, Ms Ormsby appealed to the Māori Appellate Court.

The court dismissed the appeal and upheld the judgment of the lower court. The Māori Appellate Court found that the 1994 loan agreement was not supplemented by any oral term that ownership of the flats would pass to the tenants after the loan provided by Ms Ormsby was repaid. The decision on this issue included an assessment of conflicting evidence. Under the 1994 loan agreement the appellant was a lender only and the first instance judge had not failed to consider whether there was evidence to support the existence of an oral term. The Māori Appellate Court stated:

“[28] His finding and conclusion was that there was no credible evidence presented to support such a claim. We agree with him and on this point the appeal must fail.”

The lower court had not ruled on the issue of whether the flats were chattels or fixtures, having decided the case on the terms of the loan. The court concluded that the flats were fixtures and that the reservation trustees could not alienate the flats in a manner inconsistent with s338 TTWMA. Section 338 provides that a Māori reservation is inalienable except by lease or occupation licence which generally may be for up to seven years. The court concluded that neither a lease nor an occupation licence was granted over these flats [69].

The court rejected two further arguments by the appellant. The first was that in 2001 the reservation trustees had resolved to gift ownership of the flats to the tenants. The Māori Land Court had concluded that the trustees had no power to gift trust property, so if the 2001 resolution had been made it was ineffective. The court agreed that the resolution was made in clear conflict with the trustees' duties and went on to observe, without deciding, that a transfer from the trustees would be a voidable transaction that might be set aside because no consent was obtained from the Māori Land Court; the trust instrument contained no express power to allow this; no consent was obtained from all beneficiaries; a majority of trustees did not support the resolution; and two of the trustees were attempting to confer a benefit upon their mother.

Finally, the second argument for Ms Ormsby was that because the trustees had not repaid her loan, a resulting trust arose in her favour over the flat she was a tenant of. The court rejected this saying the arrangement between the appellant and the trustees was solely contractual and governed by the 1994 loan agreement document.

## OTHER COURTS

### **Taheke Paengaroa Trust v Western Bay of Plenty District Council and Landmass Technologies Ltd**

*LVP2/2005, Waikato No 4 Land Valuation Tribunal, 20 May 2008, TR Ingram (chairman).*

The hearing for this proceeding took place on 28 February 2008. In it, the trustees of the Taheke Paengaroa Trust objected to the valuation of their land for rating purposes. The [Western Bay of Plenty District Council](#) had assessed the land at \$4.9m as at 1 July 2005. The trustees objected and argued initially the land was valued at \$2.8m. Subsequently, valuation evidence led before the tribunal by the trustees valued the land at \$3.1m. The [Land Valuation Tribunal](#) determined the land was valued at \$3.7m.

The tribunal's decision is of interest for four reasons.

Firstly, the decision applies the Court of Appeal's *Mangatū* decision on valuation (*Valuer General v Mangatū Inc* [1997] 3 NZLR 641 reported—see [Māori LR Sep 1997 p2](#)). In the process of applying that guideline decision the tribunal made observations about the need to update the assumptions on which it is based, most importantly sales of Māori land.

Secondly, the tribunal confirmed and discussed that rating valuations of Māori land can be based on highest and best use of the land. In this case that meant valuing the land as a potential pastoral farm for dairy support rather than as the actual commercial forest it was.

The tribunal also noted that it had not been referred to any considered Māori Land Court or Māori Appellate Court judgment on how trade in transferable development rights occurred consistently with TTWMA. Such rights were a creature of the council's district scheme, and the tribunal was told they did not exist elsewhere in New Zealand.

Finally, climate change considerations under the [Kyoto Accord](#) made an impact on the valuation process.

#### *The land*

The Māori freehold land held by the trustees was located between Maketu and Rotorua. Much of the land, totalling 1276ha, was used for commercial forestry. Because of its topography and historical importance to its owners, other parts of the land were left in native bush. The land had never been used for any commercial purposes other than forestry.

The land was aggregated to its present size by consolidation after unsuccessful attempts in the twentieth century to develop the land for pastoral farming. It was vested in the [Māori Trustee](#) at that time and leased for forestry purposes for 99 years. That lease was replaced in 1989 with a forestry right when a new forestry company acquired the lease. In 1990 the trustees replaced the Māori Trustee. After reassessment of the rental under the forestry right in 2004, set by arbitration at \$1.6m, the forestry company sold the forestry right to the trustees.

There were approximately 2000 beneficial owners at the time. Contact details were available for less than half of these people. The tribunal noted it would be an expensive task for ownership records to be brought up to date.

### *Valuation evidence*

The second respondent, Landmass Technologies, was engaged by the council to value the land. Its valuer assessed the highest and best use of the land as a pastoral farm grazing unit to support a dairy farm. The valuer assessed that 943ha, out of 1276ha, could be converted to pastoral farming. His evidence was that purchasers would overcome barriers to the sale of Māori freehold land to achieve this. He valued the land at \$4.8m. A second valuation witness for the council supported the view that the highest and best use of the land was as a pastoral farm for dairy support.

The owners' valuer concluded that the constraints associated with the land being Māori freehold land along with the location, history and contour of the block all constrained ongoing use of the land to forestry. He valued the land at \$3.1m.

### *Highest and best use of the land*

The tribunal viewed the property and accepted valuation evidence that pastoral farming interests would, at that time, have overcome alienation restrictions in TTWMA and associated constraints such as the out-of-date roll of beneficial owners in order to acquire and develop the land for pastoral farming. The tribunal noted evidence that the price for forestry land at that time that was suitable for pastoral conversion was being driven by the prices paid by pastoral farmers to the exclusion of purchasers wishing to buy and hold land for forestry.

The council's evidence had been that a large-scale dairy farming operation could readily finance such a development without mortgaging the land. Even with costs totalling \$9m (50% for the land and 50% for development), a witness projected a gross return of 10%. It was said that changes in the economics of the dairy industry in 2003-2004 fundamentally altered the market for blocks of this kind. The tribunal noted there was considerable evidence of sales of forestry blocks for conversion to pastoral farming.

The owners had led evidence that a purchaser from beyond the preferred class of alienees under TTWMA would have been precluded in reality by the alienation restrictions affecting the land and the large number of beneficial owners. Their valuation witness also considered a potential purchaser would have recognised the connections between the owners and the land. Along with the restrictive approach taken by owners of Māori land, and the Māori Land Court in particular to alienation of Māori land, his view was that a sale to a hypothetical purchaser other than from within the preferred class of alienees would be practically impossible. He considered a purchasing consortium from within this class would not be forced to pay more than maximum value of the land for forestry purposes.

### *Climate change*

The valuer for the owners drew attention to the valuation impact of the Kyoto protocol on forestry land subject to change of use to high-greenhouse-gas-emitting uses. The tribunal observed that this view may have developed to some extent with hindsight since the valuation period at issue (1 July 2005). Since that period protocols were developed that meant a payment would be required in the order of \$13,000 per hectare for a change of use. While this

might now preclude change of use away from forestry for cost reasons the tribunal accepted that for this land the issue of paying for climate change charges would have had some impact as far back as 2005 given the unavoidable delays associated with gaining approval from the Māori Land Court and the relative difficulty of the conversion task. Later, in its concluding section, the tribunal observed that now the land is unlikely to be developed for pastoral use because of the Kyoto protocols levy and the cost of conversion. This is mentioned further below.

### *Transferable development rights*

The respondent council's district scheme allows the creation and sale of development rights by land owners who have land covered in native vegetation. The tribunal noted that:

“[33] Transferable development rights can be created by land owners who have land in native vegetation which meet specific criteria for designation and preservation in a natural state. If appropriately fenced off and appropriately designated, five hectares of tall native bush and 10 hectares of cut-over re-growth can entitle the owner to obtain a transferable development right which can be used to subdivide certain lands which might not otherwise be subdivisible as of right under the District Scheme. Such a development right has significant value, being sold in 2005 for some \$20,000.00 per transferable development right, or more latterly some \$25,000.00.

[34] The market in these rights has only recently grown up, and it has been recognised by enterprising owners, including Māori owners, of lands which are generally unsuitable for other development, that these rights are a way to realise a portion of the value of their lands without selling or otherwise alienating their freehold or Māori freehold title to the land. We acquired a brief transcript of certain Māori Land Court proceedings where approval appears to have been given to the sale of such transferable development rights.

[35] While it is entirely the business of the Māori Land Court to deal with such sales in relation to Māori land, a carefully considered decision analysing the impact of the Te Ture Whenua Māori Act 1993 upon such rights does not appear to have been delivered by that Court. Certainly no such decision has been produced for the consideration of this Tribunal. It is arguable that no estate or interest is being alienated on the sale of such rights, as they are purely a creature of the [Resource Management Act 1991](#), and as a consent they are not an estate or interest in the land. Conversely, once sold, the alienation of such rights will clearly have the effect of restricting the subdivision of the lands over which the rights have been granted, and such a restriction may well be inimical to the objects and purposes which lie at the heart of the Te Ture Whenua Māori Act 1993. Those are matters for the Māori Land Court to decide, and as none of the valuers giving evidence before us specifically included a value for such rights in their valuation of the Taheke Paengaroa block, it is not strictly necessary for us to determine any issue relating to them.”

The Tribunal concluded on this issue:

“[37] There was no evidence before us that there were any sales of such rights over Māori freehold land before

the valuation date of 1 July 2005. In our view the valuers' collective reluctance to assign a value to such rights in this case was proper in the absence of such evidence. Subsequent sales of such rights over Māori freehold land have occurred, and in future rating valuations may need to reflect the existence of this market, bearing in mind the need for caution until the Māori Land Court has fully considered the issues arising from such sales."

#### *Mangatū guidelines for valuing Māori land*

The tribunal took into account the restrictions identified by the owners and assessed these against the guidelines laid down by the series of decisions associated with the Court of Appeal's 1997 *Mangatū* decision. The Court of Appeal identified five relevant factors:

- ◆ Nature and size of the property;
- ◆ Historical connections between the owners and the land;
- ◆ Membership of the preferred class of alienees and their financial resources;
- ◆ The statutory role of the Māori Land Court; and
- ◆ The prospects of obtaining that Court's approval for a sale beyond the preferred class of alienees.

The valuers and the Land Valuation Tribunal subsequently applied those factors in light of guidelines prepared by the Valuer General. The guidelines have no force at law but have been used by valuers to give greater certainty to this area of valuation. The guidelines anticipated a maximum discount of 15% from the equivalent general freehold land value being applied to value Māori land.

The tribunal noted that under the [Rating Valuation Act](#) a sale was presumed for the valuation exercise. Difficulties in achieving a sale of Māori land were not taken into account at that first stage of the valuation exercise. Rather, in light of the *Mangatū* decisions and guidelines, a deduction was assessed from that unencumbered value of highest and best use in order to account for the alienation restrictions, both practical and legal. This lower value was then adopted.

The tribunal noted it had concerns about the comprehensiveness and continued validity of the assumptions underlying the *Mangatū* guidelines. In particular, it asked the valuers who gave evidence before it in this case whether a discount greater than a maximum of 15% was now appropriate given changes in market conditions affecting Māori land since the *Mangatū* decision.

The tribunal decided that a more robust approach was required to applying the *Mangatū* factors and guidelines than had been taken by witnesses in the proceeding. It decided that the Valuer General's guideline specifying a maximum discount of 15% had been applied too literally and too conservatively. It stated:

"[45] For any prospective purchaser of this land there would be substantial problems associated with locating the more than 2,000 owners, updating the Māori Land Court records, obtaining a quorum, and consent, and Māori Land Court approval. Such problems would be diminished for an on-sale, but they would likely still be significant, and become more significant as time passed. There is also the inevitability of additional delays and cost associated with obtaining the resource consents necessary for the physical development of an awkward site, the

associated practical difficulties of development, all coupled with the urgency (in 2005) of beating the Kyoto protocols deadline.

[46] In our view the accumulation of those difficulties, costs and delays upon those inherent in the process of obtaining Māori Land Court consent before any development work could be commenced, would be of real significance. The effect of those factors upon the price likely to be offered by a prospective purchaser cannot be precisely calculated, and a robust and pragmatic approach must be adopted. We consider that these factors have not been fully accounted for in any of the valuations presented in evidence. In our view these factors collectively would have caused a fully informed purchaser to offer and agree a price up to 20%, and not less than 15% below equivalent freehold value for this land in July 2005. We adopt the more conservative figure."

Therefore, although it applied what it described as the more conservative figure of a 15% discount, the tribunal presented this conclusion as falling within a larger range than the *Mangatū* guidelines suggest is appropriate. Such an approach may become widely adopted if the tribunal's subsequent observations are picked up. The tribunal said:

"[49] There is room for the view that a reappraisal by the Valuer General of the *Mangatū* guidelines is now overdue. There have been a number of developments affecting the alienation of Māori land since the decision of the Court of Appeal and the promulgation of the Valuer-General's guidelines. In particular there has been a general hardening of attitude both in the interpretation of the *Te Ture Whenua Māori Act 1993* and amongst Māori generally against the alienation of Māori lands. It is not possible to state with any precision exactly what that change in attitude has wrought, but it is notable that in this case there was an absence of comparable sales evidence involving any large block of Māori freehold land in the Bay of Plenty.

[50] It would seem that that absence of evidence is in fact evidence that sales of large blocks of Māori freehold land are now rare and perhaps, given the current attitudes of Māori owners generally, coupled with the provisions of the *Te Ture Whenua Māori Act 1993*, a thing of the past. Whilst an absence of evidence is not necessarily evidence of absence, none of the three experienced valuers who gave evidence could point to a single local sale of a comparable block of Māori land within any relevant time-frame. Mr Grinlinton, whose firm does the rating valuations for the Western Bay of Plenty District Council and the [Rotorua District Council](#), despite enquiry of the Māori Land Court Registry and his firm's extensive valuation database and broad current knowledge of local sales and valuation generally, could point to no sale of any reasonably comparable block of Māori freehold land in the preceding 5 years. In our view, that is at least some evidence of the absence of sales. Such was not the case at the time of the *Mangatū* decision a decade ago, as in that case substantial evidence was lead as to many sales recently approved by the Māori Land Court.

[51] A further factor that needs to be considered is the difficulty associated with financing sales or development of Māori freehold land. The difficulties experienced by

those financing the Matauri X Corporation are now well known and recorded in the law reports. The difficulties in obtaining finance using Māori freehold land as security appear to have increased over the period since the Mangatū decision was given, possibly because the availability of cost effective and practical enforcement mechanisms for mortgage lenders has not notably improved in the last decade, while the price of general land has gone up significantly. Such difficulties must restrict the number of available purchasers by largely excluding those who would need to borrow to fund the purchase, thereby limiting price competition for Māori freehold land. In the intervening period Māori protest action in relation to dealings with Māori land has also grown substantially.

[52] In 1998 the prospect of greenhouse gas restrictions, the emissions trading regime, and the Kyoto protocols were simply unthought-of. They are now relevant considerations for rating valuation, at least for future rural rating valuations. There is also room for the view that the relativities adopted by the Valuer-General for various relevant factors are no longer an accurate reflection of Māori landowners' perception of their rights and responsibilities in relation to Māori land generally.

[53] We are accordingly of the view that the Valuer-General's guidelines could usefully be the subject of a re-examination by the Valuer-General. Whilst we appreciate that they do not have the force of law, they appear to have been wholeheartedly adopted by the valuation profession, in a generally unquestioning fashion. We consider that this case provides a very good example of why those guidelines are, at best, only guidelines, to be flexibly applied in light of conditions now existing, and why some updating would now be worthwhile.

[54] This property has at all material times been in forestry use or native vegetation. The land has never actually been sold, and under the terms of the Kyoto protocols it is unlikely ever to be developed for pastoral farming because of the \$13,000 per hectare levy imposed under the Kyoto protocols plus the \$3-5,000 cost of physical conversion from a greenhouse gas friendly use (forestry) to a use which is said to produce higher greenhouse gas emissions (pastoral farming). Fully developed pasture land of the best contour on this block would only be worth at most \$12,000 per hectare on Mr Grinlinton's evidence, and there would be very little of it.

Economic development of pastureland on this block is clearly impossible for the foreseeable future on the basis of those constraints.

[55] By application of the present law, the owners are required to bear a rates burden calculated by reference to a land use which has never been adopted over any portion of the block at any time during its known history, and which for obvious financial reasons could not conceivably be commenced at any reasonably foreseeable future time. Whilst our statutory duty is clear, and we must reach our valuation on the specified statutory basis, the injustice of imposing a rates burden on an entirely hypothetical basis which bears no relation to the known reality must be remarked upon.

[56] The issue of rating Māori land has received recent attention by the [Local Government Rates Inquiry](#), which reported in August 2007. At paragraphs 13.6 and 13.7 of that report, the panel concluded that the Valuer General's guidelines do not recognise the full range of issues involved with the valuation of Māori land, and the panel further concluded that a 'market value' approach to rating is inappropriate for Māori land. We respectfully agree. In our view it is desirable for the legislature to give careful consideration to that report, and we would urge prompt legislative attention to the recommendations made. In this case the owners of a large block of Māori land are now effectively locked by the Kyoto protocols into a single use of their land, and yet they are to be rated on that land from July 2005 to July 2008 as if the land was to be used for another purpose. A more suitable case for legislative intervention and interim rates relief is difficult to imagine."

*Comment:* Since this decision, the same panel of the Land Valuation Tribunal issued a further decision highlighting the same issues. In *Ongare Trust Māori Land Block v Western Bay of Plenty District Council* (Waikato No 4 Land Valuation Tribunal (Judge T R Ingram (chairman), L T Green and D P Vane (members)) LVP1/2006 12 December 2008 and reported at [2009] NZAR 175) the tribunal allowed the appeal against the council's valuation on the basis that a greater discount was required to apply the Court of Appeal's Mangatū decision. The tribunal again cautioned against unquestioning acceptance and adherence to the specific percentages identified in the Valuer-General's guidelines in the light of changes in the market for Māori land since those guidelines were issued. The tribunal stressed that what is required is a genuinely flexible and informed approach to the valuation of each block by balancing the valuation guidelines in light of the Court of Appeal's Mangatū decision and present-day market conditions.—CL

#### **Pukerua-Ōruawhata Trust v Mitchell**

CA557/08 [2008] NZCA 518, *Court of Appeal*, 2 December 2008, Justices Baragwanath, Glazebrook & Robertson.

With the parties' consent the Court of Appeal sent this proceeding back to the Māori Land Court for further hearing. At issue was a dispute about whether an independent professional trustee should be appointed to the appellants trust, after considering applications for extension of time to appeal from two decisions of the Māori Appellate Court (*Pukeroa Oruanwhata Trustees v Te Kiri Whero Ewa Makareta Mitchell* 11 Waiariki MB 66, 27 April 2006; and *Re The Pukeroa Oruanwhata Trust* 12 Waiariki MB 1, 27 June 2008).

The 2006 decision relating to this ahu whenua trust included an order the court made on its own motion that a seventh independent professional trustee be appointed. In the same decision the court decided that the trust deed would be varied by introducing rotation of trustees.

Rather than implement that order or lodge an appeal, the trustees made a further application to the Māori Land Court to vary the trust deed again by asking the court to remove the requirement for an independent trustee. The Māori Land Court declined this application on 19 December 2007, stating:

"[16] But I do not accept that this Court can override the

Appellate Court judgment and delete clause 7(g) simply on the basis of an application for variation of trust. The Appellate Court orders are clear. The trustees have not taken steps to procure a nominee for the independent trustee position. They have not taken steps to appeal or seek a judicial review:

[17] Despite the argument of counsel, I am not persuaded that this Court is possessed of the necessary jurisdiction to grant the present applicant [sic] and vary the trust order to delete the very clause inserted by the Māori Appellate Court without the express leave of that court.”

The trustees appealed that decision by way of case stated to the Māori Appellate Court, and judgment was given in 2008.

The court stated:

“[26] It is quite clear from the transcript of the hearing in the lower court that the trustees were not happy with the decision of the Māori Appellate court to impose a seventh trustee and that they sought to circumvent the decision by making application to the lower court for a variation of the trust order which would remove the offending clause 7(g), once they had the support of the beneficial owners.

[27] However, it is our view that it is not open to the trustees to try and get around the Māori Appellate court decision in this way.

[28] Our reasons for this are based on the doctrine of *res judicata*. The principles relating to the doctrine are set out in Chapter 7 entitled “Legal Nature of Powers” in *Administrative Law* (9th edition) by H W R Wade and C F Forsyth (Oxford University Press 2004). *Res judicata* is discussed at page 243 and following. The definition of *res judicata* is given as follows:

“One special variety of estoppel is *res judicata*. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision” (at p 243).

[29] There is no doubt in our minds that this Court determined the issue of whether there should be a seventh trustee for the Pukeroa Oruawhata Trust in the decision of 27 April 2006. The trustees’ application for a variation of trust to remove the provision requiring a seventh trustee from the trust order is clearly an attempt to re-litigate that issue. Counsel for the trustees valiantly attempted to persuade us that a new situation presented itself to the court. The “newness” arose from the court now being apprised of the beneficial owners’ views as to the necessity of a seventh trustee. The difficulty we see with that argument is that the proper course to follow if a party is dissatisfied with the decision of the court is to appeal to a higher Court. Going to the lower court to revisit the question falls, in our opinion, fairly and squarely under the rubric of *res judicata*. If we allowed this kind of circularity of process there would be no end to the litigation.”

Therefore both the Māori Land Court and Māori Appellate Court both decided that it was not possible for the trustees to seek to reopen the issue of whether there should be a seventh trustee by simply making a fresh application to the Māori Land Court.

After the second Māori Appellate Court decision in 2008 the trustees sought to take the issue to the Court of Appeal by appealing both the 2006 and 2008 decisions. Because they filed their appeals outside the time limit they required leave from that court to bring the appeals. The court of Appeal convened a hearing in November 2008. At the hearing the Court of Appeal decided that reliance by the Māori Land and Appellate Courts on the doctrine of *res judicata* was mistaken as s 244 of ITWMA permits trustees to apply successively for variations of trust obligations. After the court indicated this view at the hearing the parties jointly asked the court to make orders dismissing the appeal from the 2006 Māori Appellate Court decision, allowing the appeal from the 2008 Māori Appellate Court decision (on the basis that the doctrine of *res judicata* was inapplicable) and returning the case to the Māori Land Court for further hearing of the trustees’ fresh application to vary the trust deed to remove the requirement to appoint an independent professional trustee.

Full text judgment: <http://bit.ly/3rxndw>