

CHAPTER 9

THE VALIDATION COURT

Note: This chapter draws on research of Ms Aroha Waetford prepared for an LLM degree but derived from the Rangahaua Whanui programme of research topics and on a report written for the Crown Forestry Rental Trust by Ms Katherine Orr-Nimmo on the East Coast Maori Trust.

9.1 The Problem Emerges

The ‘validation’ of imperfect titles, and the creation of a special court for the process, arose out of the confusion of laws relating to Maori land that had developed since 1862

In many cases, settlers seeking to purchase Maori land, had entered into transactions but failed to observe one or more of the requirements of the law. Some of these requirements were little more than technicalities but others involved mechanisms, such as restrictions on title, put in place to protect Maori from inequitable, hasty or excessive land alienation. The failure to complete a purchase correctly might not mean that actual fraud was attempted (although it could mean that), but rather that the protection mechanism had been side-stepped or overridden in some way.

A series of cases in the superior courts resulted in attempted purchases being found to be void, if not illegal. The most important of these cases was *Poaka v Ward* in 1890. This concerned the purchase of undivided interests in a block granted under the Native Land Act 1873, without partitioning out of the interests of the non-selling minority, the failure of the purchaser to get a certificate from a trust commissioner under the Native Lands Frauds Prevention Act 1881, and an argument that it was not necessary to do so in terms of sections 24 and 25 of the Native Land Administration Act 1886. On appeal by the Maori owners the Court of Appeal found that the intention of the 1886 Act was to further restrict dealings with Maori land, not open them wider, and ruled the transaction invalid. The case threatened to overturn a great many purchases of this nature around the country and intensified a growing outcry from settlers whose titles were threatened.¹

1. Aroha Waetford, ‘The Validation Court of New Zealand’, draft LLM thesis, Wellington, Victoria University of Wellington, 1997, ch 3

9.2 The Edwards–Ormsby Commission, 1890–91

The legislative response was the appointment under the Native Land Court Amendment Act 1889 of a commission of inquiry, comprising W B Edwards, a lawyer, and John Ormsby, a prominent mixed-race leader of the Kawhia district. The commission was empowered to inquire into all circumstances of alleged alienations or acquisitions of land made before July 1887 which would ‘otherwise be barred or invalidated by any law now or previously in force’. Section 27 of the Act empowered the commissioners to validate transactions ‘entered into in good faith and not contrary to equity and good conscience’.

Fourteen claims were submitted to the commission in the Gisborne district. Only one case, Whatatutu no 1, was reported on fully. It was found that the purchase money had been paid and there were no Maori objections. But it was also discovered that, when executed, the purchase deeds had blank spaces for particulars of the parties involved, and of the purchase money. The commission therefore found that, although non-observance of legal formalities might not injure the Maori parties ‘it was the duty of the commissioners to administer the law as it stood, and not strain it in order to cover cases of real or supposed hardship’.² The commission did not validate the Whatatutu purchase.

In reporting, Edwards commented that it was highly unlikely that the *Gazette* notices of the hearings would have reached all interested Maori. He also proposed wider powers for the commissioners to settle claims equitably.³ However the Edwards–Ormsby commission was abruptly wound up in 1891 by the Ballance Government.

9.3 The Native Land (Validation of Titles) Act 1892

The growing outcry from settlers with incomplete titles, and a recommendation from W L Rees (of the Rees–Carroll commission of 1891), led to the establishment of a special tribunal to be called the Validation Court, although it would be staffed by Native Land Court Judges. The Act empowered the court to consider any transaction to that date, and validate if it was judged to be ‘fair and reasonable’, ‘not contrary to equity and good conscience’, and not injurious to the Maori parties. Irregularity or doubt caused by misapprehension of the law need not prevent validation of a transaction. Partitions of the block concerned could be ordered.

The Bill was opposed by the Maori member Taipua (Western Maori) because it clearly served settler interests but appeared to do little for Maori. He noted that it concerned land under restricted title. Kapa (Southern Maori) thought it was a bill designed ‘to deprive Natives of their land’. Both members proposed that the cases be considered by a joint Maori-settler committee.⁴ H K Taiaroa sought to delay the

2. Judgement report, AJHR, 1891, h-13, pp 64ff

3. Waetford, pp 21–23

4. NZPD, 1892, pp 516–517

Bill in the Legislative Council, but most members of Parliament supported it, seeking ‘finality’ in land transactions. The judges’ recommendations, however, were to be laid before parliament for final approval.

The Act as finally passed authorised the court to excuse a whole range of irregularities in respect of the powers of the Native Land Court when it made orders, including the removal of restrictions on alienation (s 9). The validations could not occur if there was evidence of fraud or malfeasance, or of intention to evade the law (an impossible category to prove), or if the transaction was contrary to equity or good conscience or ‘injurious to the true interests of the [Maori] owners of the land’ (s 10). Presumably the judge would determine what was in the Maori owners’ true interests.

9.4 Judge Barton in Gisborne

George Barton, the first Validation Court judge appointed to the Gisborne district, took a very broad view of his jurisdiction; ‘the chief object of the legislature in passing validating statutes has been the validation of all honest and straight forward purchases, whether they are legal or illegal in their inceptions’. The ‘uncertainties and insecurities’ of the Native Land Acts:

forced men into making illegal purchases . . . it was not in human nature to expect that men so situated should sit still while others bought over their heads the fruits of their industry and capital. The day when the first illegal purchase was allowed to pass through the Land Transfer Office inaugurated the scramble of illegal purchases which necessitates these validations.⁵

Although he would not gloss over fraud or dealings not in good faith, Barton considered it the duty of the courts to ‘uphold men’s rights and not to sacrifice them to worthless technicalities’. If the Validation Court’s recommendations went beyond the distinct letter of the statute, Parliament could nevertheless act on the recommendation of the judge if they thought fit. The 1892 statute was unique. If illegal transactions were ‘honest and straight-forward in themselves . . . it is our duty to bend its provisions to meet the circumstances of such transactions’.⁶ These somewhat dubious propositions caused Sian Daly, writing on Poverty Bay, to wonder if the rights of Maori would be upheld also.⁷

In Gisborne the settler John Tiffen submitted 35 applications before Judge Barton in respect of the Puhatikotiko blocks. Messers Rees and Day, counsel for Maori owners, objected on the basis of the findings in *Poaka v Ward* arguing that the Validation Act 1892 could not validate illegal transactions. Barton dismissed the objection, saying that the legislature, if it chose to accept his recommendation, could override the findings in *Poaka v Ward*. Barton also considered it might be

5. Barton memorandum, AJHR, 1893, g-3, pp 6–7

6. Ibid

7. Sian Daly, *Poverty Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1997, sec 6.22

appropriate to overlook the fact (which Day demonstrated) that the deeds had been tampered with after the event. However improper or illegal it was to tamper with the deeds, if the ‘transaction of sale and purchase’ was ‘honest’ it could be still be validated, wrote Barton.⁸

But, having recommended Tiffen’s claims for validation, Barton discovered that the 1892 statute did not bear the construction he had tried to put upon it. In introducing the Bill, the Native Minister had stated expressly that he intended to give no relief to powerful people who had broken the law openly and knowingly, ‘trusting their influence or some change of Government would put the matter right’.⁹ Despite this, Barton tried to defend his decision and Tiffen’s claim for special consideration. He argued for a much wider discretion for the Validation Court judges than the statute allowed. James Carroll, visiting Gisborne, considered his approach ‘judicious’.¹⁰

The exchange suggested that the whole validation process was a very slippery slope, and that the Government was willing to walk on it. This is further indicated by the fact that, notwithstanding the extraordinary features of Tiffen’s case, that case (along with eight others heard by Native Land Court judges in other districts) were confirmed by Parliament under the Native Land Court Certificates Confirmation Act 1893.¹¹ One of these was a case heard in Auckland concerning Moehau number one, also known as the Waikawau reserve, of 5823 acres. The Kauri Timber Company had bought the interests of some of the owners. Judge Gudgeon considered it was unlikely that the purchaser would get the signatures of the others, who were ‘rabid kingites’.¹² Gudgeon had ordered validation of the deed and partition of the block.

Waetford has analysed seven other cases in Auckland, Wanganui and Wellington districts. In each case the judge recommended validation, notwithstanding the irregular and incomplete nature of the purchases. In one case, (Waiakake) a sale was validated when the title at the time of the transaction was restricted to a 21-year lease.¹³ It seemed as though where money had been paid and accepted, by some of their owners at least, short of actual fraud purchasers would get most transactions validated.

9.5 The Native Land (Validation Of Titles) Act 1893

The principal features distinguishing this Act from its predecessor were that the Validation Court was made distinct from the Native Land Court, and that its orders were to be final and conclusive. The Act gave the Validation Court a very wide discretion. It was empowered to validate any deed, agreement or contract between

8. Barton’s memo, AJHR, 1893, g-3, p 9

9. NZPD, 29 September 1892, p 503 (Cadman)

10. AJHR, 1893, g-3, p 19

11. See list in Waetford, ch 5, p 1, footnote 2

12. AJHR, 1893, g-3, pp 2–3 (cited in Waetford, ch 5, p 28)

13. Waetford, pp 28–32

European and Maori, or Maori and Maori, relating to land, 'that would otherwise be unenforceable because it did not comply with, or was forbidden by, a repealed statute. This was provided that the agreement or contract would have been binding on the Supreme Court if it were made between Europeans, was not contrary to equity and good conscious the land was fully understood at the time it was entered into by the parties involved, and provided that the land was exchanged for a sufficient and lawful consideration.

Section 10 of the Act said the court may (not 'shall') refuse the title if the agreement was not 'fair and reasonable' or if it was 'tainted with actual fraud or improper dealing'. Voluntary agreements that met the criteria of the Act could be confirmed by the court. The court was vested with the powers of both the Supreme Court and the Native Land Court. By section 16 the court was required to lay its decision before parliament but they would stand unless Parliament expressly negated them.

In debate Seddon claimed that the 1893 Bill had even stronger safeguards than the 1892 Act against transactions 'in the inception of which there has been absolute wrong doing and illegality'.¹⁴ However, in debate on an amendment to the Act in 1894, Seddon stated that the important question was 'whether the dealings had been fair and honest between the parties', but that the judge 'had to act where there had been a violation of the law; otherwise if the transaction was legal, there would no judge of a validation court required at all'.¹⁵ Despite the confusion of the minister, it was clear that illegal transactions were to be validated if, in the opinion of the judge, they were 'fair and honest'.

Barton was reappointed under the 1893 Act as judge in Gisborne, with Atanatiu Kairangi as assessor. In 1894, 37 more applications were submitted in the Gisborne district relating to 85,361 acres. All of them were validated by Barton. Some of the orders involved partitions dividing blocks between Maori sellers and non-sellers, many resulted from voluntary agreements between the parties, assisted by the court. As Waetford remarks:

the burden of proof weighed heavily upon Maori objectors if they wished to disprove the validity of any contracts that were allegedly made between settler applicants and Maori owners. If Maori did not appear before the Court to raise their objections, then their absence was regarded as an indication that the transaction had been *bona fide*.¹⁶

It is likely that many owners would not have seen *Gazette* notices of the hearings, or were deterred by the heavy fees (about which the Gisborne legal profession complained on behalf of Maori).

A Validation Court was established in Auckland in 1895, with George Davy as judge and John Ormsby as assessor. Only seven applications were filed that year in Auckland district, but applications continued to pour into the Gisborne court, many to do with the activities of the former New Zealand Native Land Settlement

14. NZPD, 1893, vol 81, p 565 (cited in Waetford, ch 5, p 10)

15. NZPD, 1894, vol 86, p 939 (cited in Waetford, p 6)

16. Waetford, p 17

Company of Rees and Wi Pere (see vol iii, ch 5). Barton validated most of these applications. Nevertheless, petitions began to reach Parliament from Maori owners of blocks which were brought into the Carroll Wi Pere Trust (the successor of the Native Land Settlement Company) to support its mortgage to the Bank of New Zealand. Some of the petitions received favourable consideration from the Native Affairs Committee and two of the Poverty Bay cases were eventually referred to the Native Appellate Court, created in 1894. There was clearly concern at what was happening in Gisborne.¹⁷

Nevertheless, Barton's successor in Poverty Bay, Thomas Gudgeon, validated an increasing number of transactions. Between 1895 and 1897 he allowed 152,000 more acres to be brought into the mortgages of the Carroll Wi Pere trust, compared with Barton's 34,000 acres. (Mortgages were formally brought within the scope of the Validation Court by section 23 of the Native Land Laws Amendment Act 1896). Catherine Orr-Nimmo's research indicates that Gudgeon's court was a little more than a rubber stamp for the arrangements being made by Carroll, Wi Pere and solicitor W L Rees.¹⁸ At their suggestion, for example, additional Maori trustees and block committees were dispensed with by Gudgeon in respect of blocks coming into the trust.

In 1896 Maori petitioners from the East Coast telegraphed parliament opposing Wi Pere's activities: 'all Validation Court's work has been most irregular', they stated.¹⁹ Their opinion seems to have been shared by Judge Batham, who succeeded Gudgeon in Gisborne in 1897. He wrote in 1907, 'the intended scope of the Validation Act has been far exceeded' by the court in respect of the Carroll–Wi Pere trust lands.²⁰ Batham accepted the arguments of the young Maori lawyer, Apirana Ngata, who objected to the Ngamoe block, and a number of Ngati Porou blocks still under customary title, being brought into the Carroll–Wi Pere Trust. Batham accepted Ngata's argument that the Validation Court powers did not extend to land that had not passed through the Native Land Court, and the flow of blocks to support the Bank of New Zealand mortgage to the Carroll–Wi Pere Trust ceased.²¹

9.6 The Later Years of the Validation Court

By December 1897, perhaps as a result of Batham's stance, the politicians James Carroll and Wi Pere, seem to have changed their views about the Validation Court. Whereas they had previously been using the court to validate early transactions of the New Zealand Native Land Settlement Company, and more recent agreements reached with block owners, they now complained of the court meddling in the Trust's affairs. The Native Affairs Committee of Parliament, considering the 1897

17. AJHR, 1896, i-3, p 21 (petitions regarding Mangaheia and Mangapoike)

18. Katherine Orr-Nimmo, 'Report for the Crown Forestry Rental Trust on the East Coast Maori Trust', (draft report), December 1996, pp 96–102

19. NZPD, 1896, vol 94, p 279

20. Batham, confidential memo, ma series 1, 1907/816, 8th para (cited in Orr-Nimmo, p 19)

21. Orr-Nimmo, p 59

petition of Wiremu Pokiha and hundreds of Ngati Porou signatures, were concerned at the authority of the court for other reasons – the bringing in of so many blocks into the trust.²² Meanwhile, Batham continued to raise doubts in his judgements as to whether his predecessors had correctly interpreted the 1893 Act. In 1899, with regard to Mangapoike and Tahora blocks he doubted that any liability existed over the block when the Validation Court had ordered them in to support the Carroll-Wi Pere Trust's mortgage.²³ Finally, in 1901, when asked by the trustees, at the court's behest, to remove a caveat from Tahora 2c3, Batham denied that the 1893 Act created 'an arrangement for retaining for all time, the Validation Court to supervise and control . . . a number of minor Trust Estates or of a gigantic amalgamated Trust'.²⁴ The Government ratified the decisions of the court in section 21 of the Native Land Claims Adjustment and Laws Amendment Act 1901, but Batham had signalled that the court had no jurisdiction other than to validate prior transactions, according to statutory guidelines. By this time the Liberal government had been strengthening the powers of the Native Land Court and Native Appellate Court. Once again, from 1894, the Validation Court judges were chosen from the Native Land Court bench.

The court was considered useful still in sorting out the mess of the East Coast, but after 1902 in more of an ancillary role to the East Coast Native Trust Board set up by an Act of Parliament in that year to take over the Carroll-Wi Pere Trust lands. By means of further sales of land the board extinguished the debt to the Bank of New Zealand in 1905 and then embarked upon a long exercise (completed in 1954) of distributing the internal debts of the East Coast Trust (as it now became), between various blocks. This complicated task was ratified by the Validation Court in 1907.

Maori petitioners in the Tahora 2A block, affected by the Carroll-Wi Pere Trust's operations, were given some relief when a royal commission appointed under the Maori Land Claims Adjustment and Laws Amendment Act 1904 acknowledged that the owners would not have received adequate notice of the Validation Court's partition of that block, and therefore annulled the partition.

Meanwhile, Validation Courts had been set up in the Auckland, Thames, Taranaki, and Wellington districts. The extent of their business seems to have been much less than that of the Gisborne court, though no doubt of equal importance to the parties concerned.²⁵

9.7 The Demise of the Validation Court

The Native Land Act 1909 consolidated some 69 statutes affecting Maori land passed between 1871 and 1908, and greatly simplified the law. Among the statutes

22. Waetford, p 110

23. Orr-Nimmo, p 130

24. Validation Court mb 7, p 300 (cited in Orr-Nimmo, p 131)

25. Waetford, p 121

repealed were the Native Land (Validation of Titles) Acts and their amendments. Section 437 of the 1909 Act transferred the former powers and jurisdiction of the Validation Court to the Native Land Court. Since the personnel of the two courts had been integrated since 1894, the change caused little comment.

There are still some mysteries about the sudden rise and even more sudden demise of the Validation Court. The thousands of cases which W L Rees in 1892 had expected would come before the Validation Court simply did not eventuate. To a large extent the reason is that the Native Land Court itself was given increased powers in the 1890s to make adjustments to titles.

The process of validating transactions which were void or illegal, by reason of non-compliance with the law in force at the time of the contract is a very dubious proceeding, especially as the section of the law that were evaded (restrictions on alienation, requirements to be met before the granting of partition orders) were put in place to protect Maori owners from hasty or excessive alienation. In terms of the original intentions of the legislature, it was not enough that actual fraud was not involved; the law had been seeking to go beyond that. Whether the Maori parties concurred in the original transaction or its subsequent validations is also somewhat beside the point, if the intention was to guard against Maori landlessness. Moreover, the comments of Judge Batham and the Native Affairs Committee on the Maori petitions, suggest that, under judges such as Gudgeon, the Validation Court exceeded its already considerable powers.

But the court had been created in an era when the Liberal governments were none too scrupulous in shaping the law and administrative machinery to remove impediments to white settlement. It was of a kind with other legislation of that era streamlining the land purchase system. Whether flawed transactions were validated by the special Validation Court or by the Native Land Court was left largely to the sense of equity and fairness of the judges concerned. How far that had regard to the then and future interests of Maori would probably have varied widely between the individuals concerned.