# LEASES/LICENCES OF MĀORI RESERVATION LAND

**Judge Stephanie Milroy**

One of the great advantages of establishing a marae, papakāinga, meeting place, recreational or sports ground, or wāhi tapu as a Māori reservation is that while the land is a Māori reservation it cannot be alienated. That provides a great deal of protection because the land cannot be sold or gifted away. Nor can the land be taken by way of an agreement under the Public Works Act 1981. Such protection makes a great deal of sense because marae, meeting places and wāhi tapu are places of special significance to Māori communities, and naturally we do not want to treat such places as if they were simply saleable commodities.

However, "alienation" is broadly defined in Te Ture Whenua Māori Act 1993. For instance, an alienation includes the making or grant of any lease, licence, easement, mortgage or charge or any kind of encumbrance or trust in respect of the land in the reservation. This means that there can be no borrowing against the reservation lands and leaves trustees with problems as to how to raise money to maintain and preserve buildings, services, and the grounds and other facilities on the reservation. Trustees and Māori communities must spend a considerable amount of time and effort fundraising, making applications for grants and donating their own time to working bees and the like to look after the reservation.

Some marae are lucky enough to be supported, at least in part, by ahu whenua land trusts which may make donations, in money or in kind, to keep the marae running.

A similarly difficult situation arises in relation to papakāinga. The intention of setting aside a papakāinga reservation is to provide housing near the marae, particularly for kaumātua and their families, to keep the marae as a living, vibrant centre of the community. But, if you cannot mortgage or charge a reservation there may be great difficulty in raising the capital needed to build papakāinga housing.

A further complication is that section 338(12) provides that the trustees of a Māori reservation may, with the consent of the Court, grant a lease or occupation licence of a reservation for a term not exceeding 14 years (including any term or terms of renewal). In the past the Housing Corporation, and its replacement Housing New Zealand, have been prepared to finance the building of dwellings on Māori land by taking security over the house, provided that the borrower can obtain a licence to occupy from the owners or trustees, where the land is held in trust, for a term of at least 21 years. If the borrower defaults the lender is entitled to remove the house from the land. Currently Housing New Zealand provides financing along similar lines through the kāinga whenua scheme. However, section 338(12) is a barrier to that form of financing on papakāinga reservations.

There are not many options for people wishing to build on papakāinga reservations but who need to borrow in order to do so.

However, it is possible to make application to the Court to have an area excluded from a reservation pursuant to section 338(5), and then to set up an ahu whenua trust in relation to the excluded area with the object of allowing housing development to take place. Trustees could then be appointed to administer it, and they would be able to grant leases or licences for the necessary term.

Te Ture Whenua Māori Act 1993 may also give some further flexibility so as to allow certain types of development to take place on a reservation. Section 338(14) provides that:

"Any lease granted pursuant to subsection (12) of this section for the purposes of education or health may, notwithstanding anything in that subsection, be for a term exceeding seven years

(including any term or terms of renewal) and may confer on the lessee or licencee a right of renewal for one or more terms."

Unfortunately there are no reported decisions of the Court on the operation of subsection 14 in relation to subsection 12 so my comments are speculative. That said, subsection 14 seems to contemplate the possibility that leases or licences for longer periods than 14 years may be needed for such developments as kohanga reo, health clinics or similar education- or health-related developments. That flexibility may also apply to situations where kaumatua are living in substandard conditions and need decent housing for the sake of their health. In such circumstances it may be worth applying to Court to see whether the trustees can grant leases or licences for a term exceeding seven years, with rights of renewal for one or more terms, which may exceed 14 years in total.

Until such an application is made there is no guarantee as to how the Court would view the matter and the success of any such application would depend on its own facts. Without doubt the Court would require clear and compelling evidence of any health needs, and persuasive submissions as to how the provisions should be interpreted. Nevertheless, subsection (14) may provide a solution in certain circumstances.

Finally, it may be that legislative reform could clarify the operation of these provisions so as to give clearer scope for financing options on papakāinga reservations.

**Judge S Milroy**