IN THE MAORI LAND COURT
TAITOKERAU DISTRICT

IN THE MATTER of an application by WAIMA TARE CRAIG pursuant to Section 135 Te Ture Whenua Maori Act 1993 to change the status of WAINUI 2F4D to General land

DECISION

1 The Application

Waima Tare Craig seeks to change the status of Wainui 2F4D from Maori freehold land to General land upon the following grounds:

(1) That the requirements of s.136(1)(a) and (C)/93 are satisfied, and

(2) The land can be better utilised as General land (s.136(1)(d)/93)

As to her specific circumstances as grounds for the application, Mrs Craig says:

"*(3) The land attracts rates, with a widow's pension. I am having difficulty in meeting these quarterly payments.*

*(4) I have approached my family with a view to gifting them shares or giving them an area/piece of land to partition out.*"

2 Hearings

(a) 18 September 2002 (32 KH 209-210) The Applicant attended and relied upon the grounds set out in her application. Haki Herewini, a descendant of an original owner, attended to object on the grounds that the Applicant was a whangai to the original owners, not blood-related to the land and that its change of status would result in the land passing out of Maori ownership.

The Court explained that the application as presented to the Court had little prospect of success.

(b) 23 January 2003 (33 KH 31-32) The Applicant, following assistance given by R D Fuller MBE (who had filed a letter dated 02/01/03 in the Court on 13/01/03), asked that the application be varied so that the land would vest jointly in herself and her daughter (her only child). The application was again opposed by Haki Herewini who said that the land would still remain in the ownership of those who were not descendants of the original owner.

The Court varied the application to a whanau trust application (s.214/93).

(c) 7 March 2003 (33 KH 95-96) The Court received a submission dated 3 March 2003 from the Applicant's solicitor that the application revert to a change of status application on the grounds that they had found case law (Bruce & Ors v Edwards) supporting their client's application.

Although the Court had received a copy of a letter dated 02/03/03 written by Mr Fuller to the Applicant providing a comprehensive discussion of the Court's draft whanau trust order (including land administration provisions), the Court granted the variation of the application and adjournment for 3 months, as sought by the Applicant's solicitors.

(d) 19 June 2003 (33 KH 194-195) The Applicant was represented by counsel Alan McLeod of Kerikeri who provided a background leading to her ownership of the shares and their partition in 1949. She now proposed subdividing the land, selling part and retaining the balance in her family's ownership. A plan prepared by a surveyor was produced in support. That objective would be better achieved if the status were changed to General land.

Numerous descendants of the original owner attended in opposition. They produced minutes of a hui held on 17 May 2003 at Ngatiruamahue Marae, Wainui, which opposed the application. The Court accepted that those within the preferred class of alienees had notice of the application.

(e) 11 November 2003 (34 KH 79-86) The Applicant was again represented by Mr McLeod. The Court provided a summary at the commencement of the hearing of the issues and arguments raised previously. Mr McLeod filed further submissions. The Court enquired of those objecting to the application as to whether they were within the preferred class of alienees. It was accepted by Applicant's counsel that they had standing to object. Hori Heta Himiona filed a summary of their objections.

The application was adjourned to Chambers for submissions to be filed.

On 25 November 2003, the Court was advised that the objectors were now represented by counsel, Leon Penney of Palmer Macauley, solicitors, Kerikeri who filed submissions in opposition to the application on 8 December 2003. Mr McLeod filed submissions in reply on 19 December 2003.

By minute dated 24/03/04 (99 WH 100), the Court advised the parties that it was awaiting a decision of the Maori Appellate Court which would address legal issues arising in the present application. That Court delivered its decision on 30 June 2004 (Dovey Regeling – 6 APWH 157). It found that the Lower Court had neither sufficient evidence of the personal circumstances of the Appellant for it to make a decision in respect of the grounds in the application and nor had the Court given sufficient weight to what little evidence had been adduced. The Appellate Court directed a re-hearing of the application and accordingly did not make a final determination beyond the question of the weight to be given to the personal circumstances of the Applicant.

3 Background to the Applicant's ownership of Wainui 2F4D

Waima Tare Craig is the sole owner of the block, following its partition on 18 March 1949 (77 NMB 239). Because the objectors invoke tikanga Maori in opposing the application, it is important to provide a background to the Applicant's ownership.

Mrs Craig acknowledges that she does not whakapapa to the land (para.5 counsel's submissions filed 19 December 2003). Her counsel relies upon her rights as owner which are not shares with (or by) those within the preferred class of alienees irrespective of tikanga issues raised by the objectors.

Both the Court minutes at the time when Mrs Craig (then Waima Tare Williams) first became an owner in the Wainui blocks and the evidence filed by her counsel at the hearing on 19 June 2003, provide an important explanation of her ownership. At a hearing on 1 June 1940 (71 NMB 272), the minute records:

"*Waaka Hona Wiremu (sworn)*
*Rongo Waaka (sworn)*

*We have the following interests:*

| | | |
|---|---|---|
| *Wainui 2F4* | *Waaka* | *12 8/21 sh = £18/16/4* |
| | *Rongo* | *19 8/21 sh = £29/9/2* |

**[other interests listed]**

*We wish to gift all these interests to Waima Tare Williams, whom we adopted according to Maori custom when she was three months old. She is now 26 years old. We have no children of our own and have always regarded Waima as our own child.*

*She and her husband and their child are living with us in our home on 2F4.*

*We wish to retain a life interest in our home and garden. Waima is to be free to have and use the rest of the land free of our life interest.*"

A short time later, the Court was undertaking a consolidation scheme in the Wainui area pursuant to s.163 Native Land Act 1931. The Applicant engaged an agent, Lou Parore, to represent her in the Court. She has kept Mr Parore's notes and report of a sitting held in the Native Land Court on 30 July 1942 at the Wainui Hall before Judge Acheson. There is reference to a dispute between Mrs Craig (then Mrs Williams) and a Mrs Shepherd over occupation rights (apparently a cultivation area). It was decided, however, that this dispute be deferred until after the consolidation scheme had been resolved.

In the course of considering the consolidation scheme there was opposition to Waima Williams being included in some of the interests:

> "Weti Haare: *Waima Williams is not a Hona. Waima has a right under gift from Waaka Hona but she has no right to include the rights of other members of the Hona family. ...The shares came through the side of the Honas and therefore should not be in the list of Mrs Williams."*

The Consolidation Officer, P Taua, said that Waaka Hona had included her when he spoke to him at Waima's house before he died. He went on to say that "*Waaka Hona was the group leader for the Hona family. Mrs Williams had nothing to do with the preparation or submission of the list.*"

Mr Parore made submissions to the Court recommending that a partition order in favour of his client Waima Williams be made for an area he described, relating to her dwelling and its environs. The Court made the following observation:

> "*Court has before it the proceedings in MB 71 folios 272-274 re gift by Waaka Hona Wiremu and his wife Rongo Parani alias Rerepeti Haare to their adopted daughter (not legally adopted) Waima Tare Williams. Court remembers the case, and holds that the interest so gifted is vested in Waima, and is available for partition.*"

At p.16 of Mr Parore's report to Mrs Craig dated 30 September 1942, he advised:

> "*48(2.4) To safeguard the future of yourself and Bertha, I will make an application to a higher Court under section 257 of the Native Land Act 1931, for all your lands to be declared European land. Then the land will ever remain in the name of your family, and will not be subject to the Native Land laws, whereunder the land could revert back again to the Waka family in the case of certain eventualities.*"

Mrs Craig subsequently acquired further interests in Wainui 2F4 as follows:

(a) On 10/07/45 (75 NMB 88) from Weera Tangaroa and Waipa Pereka Tupe.

(b) On 11/07/45 (75 NMB 99) from Nau Tupe.

(c) On 20/02/46 (75 NMB 182) additional interests from her mother Rongo (Rerepeti) Haare Weka.

This last gift was made in conjunction with exchanges of shares recorded at 75 NMB 180-181 on the same day.

(d) On 25/02/47 (76 NMB 18) from the successors to Katerina Kii deceased (on their behalf by Rena Wiremu Haare).

In conjunction with the consolidation scheme, these interests were brought together in Wainui 2F4D by the partition order made in favour of Waima Craig on 18 March 1949.

Contrary to Mr Parore's advice in his report of 30/09/42, the land remained Maori freehold land because the partition order made on 18/03/49 could not release until the block had been surveyed. The order issued on 18 November 1988 following survey (ML 15692) and is described in the Land Titles Office at CT 82C/15.

At the first hearing of the application on 18 September 2002, Mrs Craig informed the Court that she had assumed that the land would become General land once it had been surveyed. One can appreciate her misunderstanding. Doubtless she had been told she was unable to have General land status until she had the land surveyed. She clearly had not understood that once the plan had been approved on 18/11/88 she would have to apply to the Court to change the land's status. The provisions of the 1993 Act now apply.

4 Applicant's submissions

In her 60 years of ownership, Mrs Craig has suffered harassment in her attempts to occupy the land. It is now unoccupied. No one within the hapu has approached her about purchasing it.

The principal issue is whether the land may be better utilised as General land (s.136(1)(d)/93). For it to be utilised would require capital; to raise capital requires a subdivision for the sale of part to fund the development of the balance; that would be best achieved by changing its status to General land.

The Applicant has prepared a plan of subdivision (on the assumption the land was General land) with a view to satisfying District Plan requirements. It proposed subdividing the property into 4 lots enabling some flexibility to sell either 2 sections each with an area of approximately $4000m^2$ or 2 large areas of 8.6793ha and 5.9800ha or retain whichever in family ownership. The overall intention was accordingly two-fold:

(a) transfer a part of the land to daughter Bertha, with the Applicant retaining the balance, and

(b) each to sell a part in order to build or develop the balance each retained.

In support, the Applicant relies upon the Maori Appellate Court decision Re White (Appeal 1998/18) and the Court of Appeal decision Bruce & Ors v Edward & Ors [2002] CA 19/02. Applicant's counsel argues that, in determining effective management and utilisation of land, the Court must not only take an objective view but, in giving effect to the wishes of the owner (s.17(2)(a)/93), must apply a subjective test as to her ability to effectively manage or utilise the land.

In hearing and taking into account objections from the preferred class of alienees, these must not be allowed to overrule the wishes of the owner. Moreover, no argument has been made by the preferred class of alienees to answer the Applicant's evidence that the land can be more effectively utilised as General land. Their opposition is rather to her ever having owned the land. It is for this reason that they have harassed the Applicant when she has attempted to utilise the land.

In terms of the Preamble to the Act, the interests of the "owner" (and her whanau and hapu) are of primary importance. Those opposing the application assert that the Applicant is not of their whanau and hapu, and accordingly the Act does not impose a duty upon her to consider them in her utilisation and management of the land. Although being within the preferred class of alienee, by Bruce v Edwards, a right of first refusal to purchase does not confer an interest in the land.

As to the weight to be given to those objecting, there is a "hierarchy" of interest in the definition of "preferred class of alienees" in a descending order. That prioritised list anticipates a lesser voice for those within the preferred class who are not of immediate blood relationship to the owner and are not themselves owners. This is illustrated by the process in an alienation application and sale to someone outside the preferred class of alienees. Accordingly, the preferred class of alienees do not have a right of veto.

The objective in bringing the application and subdividing the land, with the sale of a part, is to finance the erection of a dwelling on the balance.

If they were themselves serious in securing the land in their whakapapa, the objectors would have offered to purchase, given especially the Applicant's disclosure of her intentions and the time that these applications have been before the Court. There has been no such approach.

Re Cleave (1995) 3 NZ Conv C192 does not override Parliament's intention that the status of Maori freehold land may be changed to General land. If that had been Parliament's intention, it would have provided that statutory prohibition.

Re White put the criteria taken from Re Cleave into context – that the directions in s.2 and s.17/93 may assist the Court in interpreting s.136(1)(a)–(e)/93. In doing so, the ability of the Applicant must be taken into account. For Mrs Craig to obtain capital (aged, now, over 90), she will need to sell a part of the land to fund her utilisation and enjoyment of the balance. By doing so it will enhance the turangawaewae of her whanau.

The status quo – unable to utilise through lack of capital – creates a burden to the Applicant by her liability to pay local body rates. That burden can only be relieved by utilisation of the land. The status quo does not achieve one of the principal objectives of the Act.

5 Objectors' Submissions

The minutes of Te Whanau a Weka hui held on 17 May 2003 express dismay at the application rather than anger. The opposition to the Applicant and her daughter's ownership is not as apparent as it was when the application first came to Court. There is no question that the owners of the parent block, Wainui 2F4, prior to its partition in 1949, were well represented by their descendants at the hui. They passed a resolution opposing the application.

Concerning the allegation that Mrs Craig had been harassed in her utilisation of her land, counsel for the objectors say those events happened a long time ago. The Court notes that there does not appear to be any personal animosity among those who are objecting.

As to the weight to be given to the objections of those within the preferred class of alienees, counsel referred to Re Cleave, where the Court said:

> *"We consider that where there is objection to a status change by preferred class, there must be compelling reasons established before the Court, after consideration of the wider matter mentioned above (ss.2 and 17 of the Act), before the Court would make an order changing status"*

The principal ground in opposition is that the Applicant has failed to prove that the land could be more effectively utilised as General land. They put forward lengthy proposals for utilisation under a whanau trust (with land administration provisions) for the descendants of Wiremu Weka, retaining the old dwelling for the Applicant under an occupation order. They say that if the status is changed to General land, the opportunity of forming such a trust would be lost.

Most importantly, counsel for the objectors say that the Applicant has not provided any evidence of how the proceeds of sale will be applied in the development of the land.

In answer to Applicant counsel's reliance upon Re White as authority to change status, Mr Penney for the objectors distinguished that decision on its facts. The Applicants in that case owned adjacent parcels of land, one in General land title and the other Maori land. In order to build on both, the Council required both blocks to have the same status. In those circumstances changing the status to General land enabled the owners to better utilise the land.

Finally, the objectors repeat that the Applicant has failed to adduce any evidence in support of her contention that the change of status – and sale – would enable the land to be more effectively utilised.

## 6 Applying the law

Counsel for both the Applicant and the objectors have confined themselves to essentially 3 decisions: Re Cleave, Re White and Bruce v Edwards. There have, of course, been numerous other decisions on the matters in issue, the most recent being in the Maori Appellate Court, Re Davies, Orokawa 3B Lot 14 CJ 2004/10 (11/04/05). The precedents provided by counsel, however, are sufficient to illuminate the issues in this case.

Very briefly, Cleave set the benchmark and Bruce v Edwards defined the locus standi, so to speak, of those within the preferred class of alienees. They must have the opportunity to be heard rather than be given a right of veto. The submissions and evidence of the Applicant and objectors together are considered in applying the law.

The Court accepts the objectors' counsel's interpretation of Re White as it relates to this application. There is not a statutory prohibition on change of status of Maori freehold land as circumstances do arise when this is necessary eg a small Maori land block in the middle of a farm which is otherwise in General land title or a boundary adjustment between neighbours etc. Given the objectives of the Act there must be compelling reasons to justify a change of status to General land.

The main thrust of the objectors' submission, however, that those within the preferred class could expect to be beneficiaries of a whanau trust in the name of their tupuna (and the land to return to its traditional uses) is wishful thinking. First, there is the reality of Mrs Craig's ownership. Secondly, given that Mrs Craig (and her descendants) is not of their tupuna's whakapapa, she would be denied any rights at all in the land under such a trust. In answer to the argument that as General land the opportunity for a whanau trust under Te Ture Whenua Maori Act would be lost, that would only be the case if the land passed out of Mrs Craig's family's ownership. If they continued to own it as General land it would remain within the Court's jurisdiction for the purposes of forming a whanau trust by its being General land owned by Maori.

Finally, the Applicant's personal circumstances are an important issue. As previously mentioned, the Maori Appellate Court considered this issue in Dovey Regeling (6 APWH 157) and whilst it did not deliver a final decision, it did adopt the following statement in Re White :

> *"While an objective view may set a benchmark against which to consider the application, the application involves a consideration of the future use of the land in the hands of its owners. It is the owners who seek to change the status of the land so that they can utilise, manage or develop it more effectively and therefore it is their personal situation and desires that have to be measured."*

It is important not to take this statement out of context. The criteria set down in Cleave prevail over personal circumstances. Nevertheless, personal circumstances must be taken into account.

All the arguments then, from both counsel, come down to s.136(1)(d)/93 – whether the land can be managed or utilised more effectively as General land. Re White would suggest that the words " by its owners" are implicit in the provision.

The objectors say that the Applicant has failed to prove the point and has not produced any evidence in support.

There is evidence in support. Mrs Craig produced at the outset a letter dated 26 October 1999 (and a fully surveyed subdivisional plan attached) from the late Barrie von Sturmer, a registered surveyor. The letter evinces an intention to transfer a part of the land to Bertha and a recommendation that other parts be retained to secure borrowing.

But does this evidence demonstrate that changing the status of the land will result in its being more effectively utilised? There is no doubt that the subdivision of the land would result in the land being more effectively utilised given the personal circumstances of the Applicant.

Conclusion

Throughout its consideration of this application, the Court has been aware of the personal circumstances of the Applicant. It felt churlish in resisting a request of the owner of this land for over 60 years, now in her 90's (and very sprightly!) and her daughter (in her mid-70's), to achieve long-term objectives for their whanau. For all this time they have paid local body rates and periodically encountered antagonism to their ownership. They could have sold out long ago when the law was more amenable. Many who strongly assert whakapapa have succumbed to market temptations. The bona fides of their intentions cannot be doubted.

As the law presently stands, however, the Court is not satisfied that the land would be more effectively utilised (by the owner) as General land. Indeed, it could be argued that it may be better utilised as Maori freehold land, as a partition application minimal cost would provide separate titles to give security for borrowing etc. Although, again, it could be argued that the applicant would be unable to service that borrowing, a long-term lease of another part (with separate title) may provide an income. At the bottom line there would be the option of selling one title under the alienation provisions of the Act. At that point, the right of first refusal of the preferred class of alienees kicks in: if they wish to keep that part the applicant wishes to sell, within their whakapapa, they would have to match an offer obtained in the market by the Applicant.

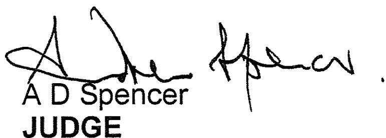
The Court is not in the business of giving advice but rather wishes to demonstrate that it is not the change of status which will result in the Applicant and her whanau more effectively utilising the land. The creation of separate titles, as discussed in Mr von Sturmer's letter, as Maori freehold land, would achieve the Applicant's objectives.

Finally, the option of a whanau trust for Mrs Craig and her descendants was considered by the Applicant at the outset of the application. Mr Fuller assisted by providing a comprehensive analysis of a draft order in his letter of 02 March 2003. Taken in conjunction with the partition option, there is plenty of scope for the Applicant to achieve her objectives with the land in its Maori freehold status.

Application dismissed accordingly.

This decision will be pronounced in open Court at Whangarei at 11.00am Friday 12 August 2005.

Dated this 12th. day of August. 2005



A D Spencer
**JUDGE**