7APWH 1-11

IN THE MAORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20050015527

UNDER	Section 58, Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Wainui 2F4D
BETWEEN	WAIMA TARE CRAIG Appellant
AND	HIRINI KIRA AND HETA HETA Respondents

Hearing: 9 February 2006
(Heard at Whangarei)

Court: Chief Judge J V Williams (Presiding)
Deputy Chief Judge W W Isaac
Judge L R Harvey

Appearances: S M Henderson and Mr Ensor (for the Appellant)
Respondents (in person)

Judgment: 2 November 2006

DECISION OF THE COURT

The application

[1] On 18 January 2002 Waima Tare Craig applied to the Māori Land Court for an order changing the status of the land known as Wainui 2F4D from Māori freehold land to General land. Her counsel candidly advised the Court below that Mrs Craig's intent is to subdivide and sell the majority of the block. It is expected that the subdivided lots will realise higher prices sold as General land. On 12 August 2005 the Māori Land Court dismissed the application. The Court concluded that a status change was not necessary to manage or utilise the land. What the applicant required

was a partition in order to sell or lease off a portion of the block to fund development on the remainder.

[2] Mrs Craig is the sole owner of this block. She is ninety three. She was adopted in accordance with tikanga Māori in 1913 when she was only three months old. On 1 June 1940 (71 Northern MB 272) Mrs Craig's whāngai parents Waaka Hona Wiremu and Rongo Parani, gifted their shares in Wainui 2F4 block to her. Over the succeeding nine years Mrs Craig acquired other interests in the block. In 1949 all of her interests were consolidated and partitioned into Wainui 2F4D, the land the subject of this appeal. As far as we were able to ascertain, Mrs Craig is not by whakapapa a member of the landowning hapū. Thus she derives all of her interests in the land by virtue of her status as a tamaiti whāngai of Waaka Wiremu and Rongo Parani or by gift or purchase from others who were members of the landowning hapū.

[3] The land comprises a total area of 15.8886 hectares. It is very close to the coast but does not adjoin it. We were advised by counsel for the appellant that the land could, under the current local authority subdivisional rules, be lawfully subdivided into between 19 and 30 separate lots. The lower number as a controlled activity and the higher number as a discretionary activity. On this basis the block is of considerable potential value to Mrs Craig. She wishes to subdivide in order to sell part of the block while retaining at least one lot for herself.

[4] A group of other owners within the Wainui 2 blocks together with other hapū members, who are not owners, opposed the application. They seek return of the land now vested in the appellant to the whānau from whom the interests came.

[5] Mrs Craig now appeals the decision of the Court below. In a fully particularised notice of appeal, the appellant argued that the Court below had erred in failing to give proper weight to the particular circumstances of the appellant, in failing to adopt an option which would promote management and utilisation of the land, in reaching conclusions that were internally contradictory and in failing to apply a subjective test to the appellant's ability to effectively manage or utilise her land.

Fresh evidence

[6] Counsel for the appellant made an interlocutory application to admit fresh evidence on appeal. We accepted the evidence *de bene esse*, reserving the question until this decision. Having now reviewed this material we consider the new evidence to be of a background nature only. That is, it was useful information for us in considering the appeal but was not in any way decisive. Since therefore, the answer to the appeal does not turn on the contents of the evidence sought to be admitted, we see no difficulty in admitting it.

The issues on appeal

[7] By the terms of section 135 of Te Ture Whenua Māori Act 1993 a change of status from Māori freehold land to General land is to be made by status order. In this case because the land is solely owned by the appellant, the specific requirements of section 136 must be met. To paraphrase this section those requirements are as follows:

a) There must be fewer than 10 owners;

b) There must be no trust in respect of the land;

c) There must be a land transfer title or the land must be capable of producing such a title;

d) The land can be managed or utilised more effectively as General land; and

e) The owners have had a sufficient opportunity to consider the change and a sufficient number of them agree to it.

[8] The requirements are cumulative. It is clear that all but the fourth requirement are satisfied. It is necessary therefore for this Court to focus on that requirement. In addition, section 136 provides that the Court *may* make a status order if these requirements are met. This introduces an element of discretion even

where the five requirements have been satisfied (see *Cleave* (1995) 4 Whangārei ACMB 95). The Court must exercise this discretion in accordance with the principles of the Act contained in the Preamble and ss2 and 17.

[9] Thus there are two broad issues to be addressed in this appeal. They are:

a) Can the land be managed or utilised more effectively as General land? and, if the answer to that question is yes;

b) Is a change of status to General land consistent with the principles of the Act?

We will address each issue in turn.

Effective management and utilisation

[10] Those seeking a status change under s136 must show, using detailed evidence, that the land can be more effectively managed or utilised as General land. The applicant must prove that there is some specific option or proposal being considered with respect to the land. The applicant must demonstrate that the option or proposal can be better achieved if the land has the status of General land.

[11] In this case the proposal is subdivision and sale of most of the land. The advantage of status change is said to be better market-ability and higher values on sale. The appellant argues that unless the land can be subdivided and part of it sold, there is no prospect of it being utilised at all. This is because the appellant is too old, and her income too low, to raise debt finance in the ordinary way. She intends to utilise the proceeds from sale of some of the subdivided lots to fund the building of her own home according to the evidence. The applicant had no evidence on valuation of the land as Māori or General land in the Court below and offered no figures showing how the proceeds of sale would be expended on development. For present purposes we are prepared to infer at least that the subdivided lots will indeed fetch higher prices as General land, but we cannot say how much higher. Given that the land is currently unoccupied and un-utilised and given the particular circumstances of the applicant we are prepared to accept that Mrs Craig is better able

to utilise and manage at least that part of the land which she proposes to retain if the status of the land is changed.

The principles of the Act

[12] In order to consider the principles of the Act applicable to this appeal, it is necessary to examine the relevant provisions in some detail.

[13] The Preamble of the Act, s2 and 17 set out in some detail the principles or kaupapa of the Act. The relevant part of s2 provides:

> (1) "It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that furthers the principles set out in the Preamble to this Act.
>
> (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants [, and that protects wāhi tapu]."

[14] The relevant part of the preamble in Māori is as follows:

> "…ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, [a ki te whakangungu i ngā wāhi tapu] nei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki…"
>
> And in English:
>
> "…And whereas it is desirable that the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū [, and to protect wāhi tapu]: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū…"

[15] The relevant parts of s17 are as follows:

(1) "In exercising its jurisdiction and powers under this Act, the primary objective of the Court shall be to promote and assist in -

(a) The retention of Māori land and General land owned by Māori in the hands of the owners; and

(b) The effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori.

(2) In applying subsection (1) of this section, the Court shall seek to achieve the following further objectives:

(a) To ascertain and give effect to the wishes of the owners of any land to which the proceedings relate..."

[16] From these provisions three principles can be drawn of relevance in this case. They are:

a) Those with rights or interests in the land go beyond the beneficial owners themselves to whānau, hapū and descendants of the owners;

b) Land is a taonga tuku iho and should be retained within the kin group if possible; and

c) Owners should as far as possible be empowered to develop, manage, utilise and control their own lands.

[17] It can be seen that there are potential tensions between these principles. The kaupapa of retention can limit the choices available to Māori owners. Likewise the introduction in the Act of right holders outside the owners themselves must involve some intrusion on the choices available to owners in respect of their land. Because of these tensions, a proposal for sale (as this is), necessarily involves a balancing exercise. The starting point is that alienation of Māori land is possible under the 1993 Act but it is more difficult than was the case in the past (*Valuer General v Mangatu Inc* [1997] 3 NZLR 641 at p650 (CA)) The requirements are:

a) 75% of the beneficial ownership must agree (s150C);

b) The sale must be confirmed by the Court (s152);

c) Land does not lose its status as Māori land on sale to a non-Māori (s130); and

d) While it has that status, the preferred class of alienees as defined in s4 (the PCA) are entitled to a first right of refusal in any and every transfer of the land by sale or gift. The PCA include the whānau and hapū of the alienating owners (s147A).

[18] In 2002 certain of the overriding confirmation powers of the Court in respect of alienations contained in s153 and 154 were removed (2002 No 16 s58). This took away some of the more paternalistic powers of the Court in respect of alienation, but the constraints on sale and the retention of residual PCA rights contained in the Act are still real and formidable.

[19] The most significant effect of status change in this case would be to remove the perpetual statutory right of first refusal reserved to PCA members. The principles as set out in the preamble and ss2 and 17 make it clear that this right is of the greatest importance. In a sense the social contract implicit in the Act's principles is an acceptance that sales by Māori landowners can continue but only on condition that a right of reacquisition by whānau, hapū and descendants is also acknowledged. In this way the property rights of landowners and the collective interests of the kin group are reconciled. Put another way, the introduction by the legislature, of a first right of refusal, strikes a balance between landowner control or tino rangatiratanga on the one hand and hapū interest in a collective taonga tuku iho on the other.

[20] In our view the removal of that protection should only be allowed where the application is in some material way outside the ordinary run of cases. That must be so, because to adopt any other approach would be to undermine the very careful balance between owners and the wider kin group to which we have referred.

[21] For example, in the decision of this Court in *White and Maketu A2A* (1998) 1 Waiariki ACMB 116, a change of status was granted because the intention of the applicant was to amalgamate two smaller titles - one Māori freehold land, the other General land - in order for the appellant to make a single section to build a dwelling.

There is an element of unusualness about this case which avoids conflict with the relevant principles of the Act.

[22] In *Cleave* (*supra* at p102), the Court took the view that an application to change status should be granted only in 'exceptional' cases if there is opposition from the PCA. Ronald Young J took the view in the High Court in *Bruce v Edwards* that this approach was too rigid (see the decision of the Court of Appeal at [2003] 1 NZLR 515). We agree that a blanket exceptions rule does not meet the test in the Act. The essential question is whether the change of status conflicts with the balance struck in the Act. There must clearly be something sufficiently distinctive about the case to lead the Court to conclude that this balance is not undermined on the facts and that granting a status change would not create pressure for status changes in later cases that are not distinctive enough to avoid conflict with the balance in the Act.

[23] In this case the appellant raised a number of possible factors in support of status change. They were:

a) A change of status would bring better prices;

b) She is the sole owner of the block and not a member of the landowning hapū;

c) The PCA have not offered to purchase the block from her;

d) The land has been un-utilised for 60 years while the appellant met the rates and other outgoings for the land over that period; and

e) The appellant was old and she could not develop the land by any method other than through sale of a portion of it.

We turn to address these factors now.

[24] The argument that a change of status produces better prices, while often true, is no reason to change status. That would be the case on every proposal to alienate Māori land. If price were a valid argument, the effect would be to remove the interest of the wider kin group so carefully protected in the Act in the ordinary run of

cases. In any event, as we have said, there was no hard evidence on the question in the Court below.

[25] Similarly the fact that the appellant is the sole owner of the block cannot be a reason to change status since a key principle in the Act requires a balancing between the interests of the wider kin group and the landowner. In fact sole ownership would tend to strengthen the claim of the hapū to a right of repurchase in our view. Nor can the fact that the appellant is a whāngai and not by blood a member of the original landowning hapū take the appellant's case any further. First, as a matter of tikanga, she is by adoption a member of the hapū even if not by blood. Second, her standing as a whāngai makes it all the more important to protect PCA rights.

[26] Counsel argued in addition that the hapū had made no offer to purchase the land and, given its value, were unlikely to do so in the near future. While we can see the appellant's concern at being beholden to a group who cannot afford to buy her out, the Act establishes a perpetual right of first refusal. In this sense, the whānau and hapū referred to in the preamble and s2 are entities whose existence is indefinite in time. The financial means of the current generation of PCA cannot be determinative.

[27] That brings us to the combined effect of the appellant's age and the fact that the land has been un-utilised for a long time and is likely to remain so at least for the lifetime of the appellant without some change in the status of the land.

[28] In our view, this combined circumstance is distinctive and does take the application outside the ordinary run of cases. We accept that, due to the appellant's age, finance to develop and utilise the land is effectively unobtainable. The appellant must be entitled to benefit from the land and if the effect of maintaining the entire title as Māori freehold land is to prevent that outcome, then some relief is warranted. We do not consider however that the circumstances of this case justify a change of status over the whole block. As we have said, the removal of the PCA's first right of refusal is not to be granted lightly. It follows that if a change is to be granted it must be strictly proportionate to the allowable objective. In this case the sale as General land, of a portion of the block sufficient to fund development on the

remainder may perhaps be justified, but a subdivision of the entire land into 30 lots with the retention of only one lot calls into question the credibility of the argument that sale is absolutely necessary to enable utilisation on the remainder. In fact it may tend to demonstrate that the real motive for sale is to maximise the cash return. It would invite the conclusion that retention of a small piece, if it occurred at all, was nothing more than a ruse to achieve that. While maximising cash return is perfectly justifiable as a commercial objective, it is clearly not a purpose capable of justifying the removal of the PCA's rights.

[29] We are prepared therefore to allow the appeal to a limited extent. That is to allow the appellant to remit the application back to the Court below in an amended form. That is in a form which reflects the purpose of the change of status as alleged by the applicant. It will be for the applicant to seek partition of sufficient land, the sale of which can fund appropriate development on the remainder together with an amended application to change status of that land accordingly. It will be for the lower Court to determine how the balance is to be struck in the partition application but regard should be had to the need to minimise the acreage affected by the removal of the PCA's rights, while allowing the owner to achieve some benefit from the land.

[30] While we have accepted that the appellant in this case is entitled to some relief, we are mindful of the fact that the interests she acquired and then partitioned in the 1940s, were acquired either by virtue of her family relationship (by customary adoption) with members of the landowning hapū or at the usual reduced rates that the acquisition of Māori land interests commanded in a small closed market, by comparison to the market in European land as it then was. Properly contextualised, the limited relief granted the appellant in this case is in our view an appropriate balance between her right to benefit from the land and the rights of the PCA from whose tupuna she acquired it.

[31] Costs are to lie where they fall.

J V Williams	W W Isaac	L R Harvey
CHIEF JUDGE	**DEPUTY CHIEF JUDGE**	**JUDGE**
(Presiding)		

2/11/2006.