**I TE KOOTI PĪRA MĀORI O AOTEAROA**
**I TE ROHE O TE TAITOKERAU**
*In the Māori Appellate Court of New Zealand*
*Taitokerau District*

**A20190007602**
**APPEAL 2019/12**

| | |
|---|---|
| WĀHANGA<br>*Under* | Section 58 of Te Ture Whenua Māori Act 1993 |
| MŌ TE TAKE<br>*In the matter of* | Te Tii Mangonui A3 and a judgment made at 192 Taitokerau MB 170 |
| | HOROMONA AND EREHI HEREWINI on behalf of the RAPINE AND RANGIMARIE HEREWINI WHĀNAU TRUST<br>Ngā kaitono<br>*Appellants* |

| | |
|---|---|
| Nohoanga:<br>*Hearing* | 17 February 2020<br>(Heard at Whangārei) |
| Kooti:<br>*Court* | Judge S R Clark (Presiding)<br>Judge C T Coxhead<br>Judge D H Stone |
| Kanohi kitea:<br>*Appearances* | K Dixon and A Castle for the appellants |
| Whakataunga:<br>*Judgment date* | 28 February 2020 |

---

**TE WHAKATAUNGA Ā TE KOOTI**
*Reserved Judgment of the Court*

---

Copies to:
Kelly Dixon, Dixon & Co Lawyers, P O Box 11359, Ellerslie, Auckland 1542,
kelly@dixonandcolawyers.com

## Hei tīmatanga korero - Introduction

[1] Rapine and Rangimarie Herewini built a house on the Te Tii Mangonui A3 block. It has stood there for over 30 years. The question before us now is who owns it?

*Background*

[2] Rapine and Rangimarie decided in the mid-1980s to build the house. Rapine passed away before construction could begin, but the house was built. The first stage of the house was completed in the mid-1980s, and extensions were added in 1992 and 1993. It is accepted that the house belonged to Rangimarie.

[3] Rangimarie spent her final years in the house. She passed away on 9 June 1996. She left a will dated 30 May 1996, 10 days before her passing. It included a provision dealing with her residual estate, including her Māori land interests. On 15 April 1998, the Māori Land Court made orders determining the persons entitled to succeed to those Māori land interests.[1] The Court then vested those interests in the trustees of the Rapine and Rangimarie Herewini Whānau Trust (the "whānau trust").[2] Unfortunately, not all of Rangimarie's Māori land interests were identified at this stage.

[4] Then, in 2004, the Māori Land Court was asked to amend the trust order for the whānau trust to include some interests in the Te Tii Mangonui A3 block that one of Rangimarie's children, Horomona, had received directly from his grandfather. The Court approved this variation.[3] At this stage, Court staff had identified some additional Māori land interests that were still held in Rangimarie's name. In the process of varying the trust order to include Horomona's own shares in Te Tii Mangonui A3, the Court made further amendments to include the additional interests that were identified as still held by Rangimarie. These additional interests included Rangimarie's own shares in the Te Tii Mangonui 3A block.

---

[1] 2 Kaikohe (Succession) MB 372-373 (2 KH(S) 372-373).

[2] The Whānau Trust was established on 31 January 1997 at 2 Kaikohe (Succession) MB 277 (2 KH(S) 277), which was after Rangimarie had passed but before the application to succeed to her Māori land interests was determined.

[3] 30 Auckland MB 248-249 (30 AT 248-249).

[5] Some 15 years later, the issue of the house and Rangimarie's Māori land interests came back before the Māori Land Court. An application was filed under s 18(1)(a) of Te Ture Whenua Māori Act 1993 to determine ownership of the house.[4] Judge Wara determined that the additional interests in the Te Tii Mangonui A3 block vested in the whānau trust in 2004 were not vested by way of a succession process. Instead, she found that they were "simply vested into the whānau trust on 15 June 2004 by way of a variation of trust".[5] As succession to these interests had not occurred, she reached the view that s 99(2) of the Act could not be invoked. Accordingly, the lower Court held that the house remains in Rangimarie's estate.[6]

[6] A majority of the current trustees of the whānau trust now appeal the decision of the lower Court. They contend that the additional interests were vested in the whānau trust in 2004 by virtue of, and in reliance on, the earlier succession to Rangimarie's Māori land interests. They say that s 99(2) therefore applies, meaning that the house was succeeded to as part of the succession to Rangimarie's Māori land interests and is therefore owned by the trustees of the whānau trust.

*Issue*

[7] The key issue in this appeal is whether the additional interests of Rangimarie Herewini identified by the Court in 2004 were included in the whānau trust by way of a variation under s 244 of the Act or whether they were included by way of succession to further interests.

**Ngā kōrero a te Kaipira – Submissions of the Appellant**

[8] Ms Dixon and Ms Castle appeared as counsel for the appellants, being Horomona and Erehi Herewini. They are two of the three executors of the estate of the late Rangimarie Herewini. They are also two of the seven trustees of the whānau trust. At the hearing counsel confirmed that a majority, four, of the trustees of the whānau trust supported the appellants' position.

---

[4] A20190001151.
[5] *Herewini – Te Tii Mangonui A3* (2019) 192 Taitokerau MB 170 (192 TTK 170) at [17].
[6] At [19].

[9] In summary, Ms Castle submitted that:

(a) It was the clear intention of Rangimarie that all her Māori land interests should be dealt with in the same manner, as per her will. She did not contemplate that some of her interests would be dealt with differently from others.

(b) Rangimarie's will also recorded her very strong belief that no one child of hers has a greater right than any other family member to reside in the house. This intention would be best given effect to if the house were owned by the trustees of the whānau trust.

(c) When succession to Rangimarie occurred in 1998, it was the clear intention of the whānau that all her Māori land interests should have been vested in the whānau trust. Although some specific Māori land interests were recorded in the succession application, it was always intended for a search under Part IV of the Act to be completed to identify *all* of Rangimarie's Māori land interests.

(d) All parties relied on the Court's Part IV search that was undertaken in 1998 to identify Rangimarie's Māori land interests. Unfortunately, that search was not comprehensive, and failed to identify interests that should have been identified.[7]

(e) The application made in 2004 to vary the trust order for the whānau trust related to the inclusion of Horomona Herewini's shares in Te Tii Mangonui A3.[8] Horomona is Rangimarie's son, but he inherited these shares directly from his grandfather. Horomona had agreed to vest his shares into the whānau trust, and this was achieved by a simple variation of the trust order. This

[7] Rangimarie held interests in Te Tii Mangonui A3 that were not identified in the 1998 Part IV search. These interests were held under the names "Rangimarie Herewini" and "Rangimarie Parangi". These were the precise names listed in the 1998 application to succeed to Rangimarie's Māori land interests. Therefore, these interests should have been identified by the Part IV search conducted in 1998 and expressly succeeded to in 1998.

[8] Horomona Herewini held 26.727 shares in Te Tii Mangonui in his own name. He wished for 23.727 shares to vest in the whānau trust, meaning he would retain 3.000 shares.

application did not seek to include any other Māori land interests into the whānau trust.

(f) At the 2004 variation of trust hearing, the Court identified additional interests that were still in Rangimarie's name. These interests were added to the whānau trust at the same time as Horomona's own shares in Te Tii Mangonui A3 were added. However, these interests were not and could not have been added by simply varying the trust order. They were instead added to the whānau trust because they were additional interests that should properly have been succeeded to in 1998.

(g) As a result, Rangimarie's own interests in Te Tii Mangonui A3 have been succeeded to. Because section 99(2) provides that a beneficial interest in Māori freehold land is deemed to include the interests of the freehold owner in all buildings and other fixtures attached to the land, the house therefore follows the shares. Because the trustees of the whānau trust hold Rangimarie's shares in Te Tii Mangonui A3, they must also hold and own the house.

[10] Several the members of the Herewini whānau appeared in support of the position of the appellants.[9]

[11] Although he did not participate as a true respondent, Ringapoto Herewini appeared and presented his position at the hearing. Ringapoto is one of Rangimarie's sons. He and his whānau have occupied the house since 2002. Ringapoto is also one of three executors of the estate of the late Rangimarie Herewini and a trustee of the whānau trust. He opposed the appellants' position. However, following questioning from the bench, he agreed that Rangimarie had owned the house and that she wished for all her Māori land interests to be vested in the whānau trust. He also confirmed that he did not have any issue with the house being owned by the trustees of the whānau trust.

[9] Notices of intention to appear were filed by Tynaya Katariha Herwini Mane, Rangimarie Zenith Herewini and Paula Edds, Dwain Anthony Marcus Reuben, Stewart Philip Herewini. All of these parties supported the position of the appellants.

**Te Ture - The law**

[12] The issue on appeal primarily engages ss 18(1)(a), 99(2) and 244 of the Act.

[13] Section 18(1)(a) enables this Court to declare who owns the house. There is no issue that the house previously belonged to Rangimarie. The issue is who owns it now.

[14] Section 99(2) of the Act is relevant to succession to buildings and other fixtures attached to land. It provides:

> For the purposes of this Part, a beneficial interest in Māori freehold land shall be deemed to include the interest of the freehold owner in all buildings and other fixtures attached to the land, and all things growing on the land.

[15] How a house may be succeeded to was considered by the late Judge Ambler in *Stock v Morris*.[10] After discussing the various authorities, Judge Ambler observed that a house could be succeeded to by either a fresh order under s 18(1)(a) declaring the successors as the equitable owners, or by operation of s 99(2). He put it this way:[11]

> Notwithstanding the different approaches, I respectfully suggest that they are more matters of mechanics than substance. That is, following the *Tohu* approach the successors are expected to apply for a s 18(1)(a) order. Whereas, following the *Bidois* approach the house passes by succession as part of the ss 113 and 117/118 process, though a further s 18(1)(a) order may be appropriate. In both approaches the end result is that the successors to the deceased owner are entitled to ownership of the house.

[16] In the instance where no s 18(1)(a) order has been made as to the ownership of a house, Judge Ambler further observed that, per s 99(2), those who succeed to the interests in the land automatically succeed to all improvements on the land.[12]

[17] We adopt this approach to the application of s 99(2) of the Act.

[18] Section 244 of the Act is relevant because the lower Court determined that Rangimarie's shares in Te Tii Mangonui A3 were vested in the whānau trust by way of a variation of trust. Relevantly, under s 244(3), the Court may not exercise its powers to vary a trust order unless it is satisfied that:

---

[10] *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).
[11] At [57].
[12] At [58].

(a) the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and sufficient opportunity to discuss and consider it; and

(b) there is a sufficient degree of support for the variation among the beneficiaries.

**Kōrerorero - Discussion**

[19] The issue before us is relatively discrete. How did Rangimarie's interests in Te Tii Mangonui A3 end up in the whānau trust? The answer turns on the effect of Judge Spencer's 2004 order, which varied the whānau trust by including Rangimarie's Te Tii Mangonui A3 shares.

[20] Judge Wara concluded that Rangimarie's interests in Te Tii Mangonui A3 were simply vested in the trustees of the whānau trust by way of a variation of trust. As Judge Spencer's 2004 decision was made under s 244, we can understand why she reached that conclusion.

[21] We have had the benefit of further information, particularly in relation to the Part IV search that was conducted in 1998. On our assessment, the true intent of the 2004 decision was to vest Rangimarie's additional Māori land interests in the whānau trust by amending the 1998 order to include these additional interests. We hold this view for several reasons:

(a) Rangimarie herself wanted all of her Māori land interests to be dealt with in the same way. These interests formed part of her residual estate. She did not leave instructions in her will that some of her interests should be succeeded to in one way, and some in other ways.

(b) Even before the application to succeed to Rangimarie's Māori land interests was determined, her whānau expressed a clear wish that all her Māori land interests should be vested into the whānau trust. This intent was expressed at the Court hearing at which the whānau trust was established. The application to succeed to Rangimarie's Māori land interests was filed before a Part IV

search of her interests had been undertaken. Although the application named certain land blocks, it was likely anticipated that the Part IV search would identify all of Rangimarie's interests.

(c) The application to succeed to Rangimarie's Māori land interests gave two names for Rangimarie: Rangimarie Herewini and Rangimarie Parangi. Rangimarie's interests in Te Tii Mangonui A3 were held under both names. These interests should have been identified in the Part IV search conducted in 1998. They were not. Had they been identified then, they would have been expressly included in the 1998 succession orders.

(d) The application in 2004 related only to Horomona's own shares in Te Tii Mangonui A3. It did not relate to Rangimarie's additional interests.

(e) Rangimarie's additional interests were referred to by Judge Spencer when he considered the application to vary the whānau trust to include Horomona's Te Tii Mangonui A3 shares. When this application was heard, the minute records him saying:[13]

> Mrs Registrar, there has been a mistake in the correction of the Order (originally made on 31/01/97) on 15/04/98 (2 KH(S) 372-373) – the correction includes the mistake!

As a result, the Court orders:[14]

> The application is varied to vest 23.727 shares being vested in the Trust – the Order is varied accordingly by including this additional interest. Order accordingly.

(f) This entry is ambiguous and could be read in several ways. It could be read as saying that the order to vary the whānau trust is itself varied to include the additional interests, such that the additional interests are vested in the whānau trust simply by varying the trust order. This is the interpretation taken by Judge Wara. It could also be read as saying the original 1998 succession order

[13] 30 Auckland MB 248 (30 AT 248). The order made on 31/01/97 is the order establishing the whānau trust, and the order made on 14/04/98 is the order relating to succession for Rangimarie.

[14] Above n 13. This amends the original application by Horomona so that he retains 3.000 Te Tii Mangonui shares in his own name.

for Rangimarie is varied by including the additional interests. This is the interpretation we prefer.

(g) Our interpretation is supported when considering whether the Court could have included Rangimarie's additional interests in the whānau trust by varying the trust. Section 244 requires the Court to be satisfied that the beneficiaries of the whānau trust had sufficient notice of the variation and sufficient opportunity to discuss it.[15] The Court must also be satisfied that there is a sufficient degree of support for the variation among the beneficiaries.[16] The information before us indicates that no notice was given to anyone before Rangimarie's additional interests were included in the whānau trust. Certainly, the beneficiaries of the whānau trust were not asked if they supported such an approach. The Court, therefore, could not have included Rangimarie's additional interests by varying the trust. The statutory tests had not been satisfied. The Court could only have included those interests by varying the original 1998 succession order.

[22] We therefore consider that the 2004 Court order intended to vest Rangimarie's additional Māori land interests (including her Te Tii Mangonui A3 shares) in the whānau trust by noting and correcting the earlier 1998 orders. Although Judge Spencer did not expressly refer to either s 118(6) or s 86, we are satisfied that was his intention. He had noted the initial error and subsequent attempt at a correction, neither of which had the intended effect of vesting all of Rangimarie's interest in the whānau trust. It is also telling that Rangimarie's additional interests then formed part of the additional interests referred to in the sealed order. For the reasons stated above they could not have been included through a variation of trust path, but by Judge Spencer correcting earlier errors made by the Court.

[23] We note that the appellants also made submissions on whether the lower Court's decision was consistent with the objectives and kaupapa of the Act, as contained in the Preamble and ss 2 and 17. Given our conclusion, we need not address these submissions.

---

[15] Section 244(3)(a).
[16] Section 244(3)(b).

**Ko te rongoā - Remedy**

[24] We have reached the view that the 2004 order was intended in part to correct earlier errors. Unfortunately, this was not clearly expressed on the face on the orders. Something should be done about it.

[25] We have considered whether to invoke s 86 to amend the 2004 order to the extent necessary to give effect to the true intention of the decision. Before we do so, we must consider the effect of s 77, because the 2004 order is over 10 years old.

[26] Section 86 provides:

> **86 Amendment of orders, warrants, etc**
>
> (1) The court or any Judge of the court may at any time make or authorise to be made in any order, warrant, record, or other document made, issued, or kept by the court all such amendments as are considered necessary to give effect to the true intention of any decision or determination of the court, or to record the actual course and nature of any proceedings in the court.
>
> (2) Every such amendment shall take effect as of the date of commencement of the order, warrant, record, or other document so amended.
>
> (3) Without limiting the foregoing provisions of this section, the court may at any time during any proceedings direct the Registrar to make any amendment of any entry in the records of the court that the Registrar is authorised to make under section 87.

[27] Section 77(1) provides:

> **77 Orders affecting Maori land conclusive after 10 years**
>
> (1) No order made by the court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.

[28] Importantly, s 77(1) only prevents orders over 10 years old from being *annulled* or *quashed* or declared or held to be *invalid.* We do not seek to annul, quash, declare or hold invalid, the 2004 order. We simply seek to amend it to reflect the true intention of the Court. In our view, s 77 does not apply to this situation.

[29] We are supported in our view by the recent Māori Appellate Court decision in *Clarke – Maketu A Section 39 Block and Lot 2 Deposited Plan South Auckland 25586 (formerly Maketu A42C Block)*.[17] In that case, this Court invoked s 86 to amend an error made by the Deputy Register approximately 25 years prior. This Court then refused to invalidate subsequent succession orders that relied on the earlier error, because those succession orders were over 10 years old. This case highlights the distinction between amending an order (which can be done "at any time") and annulling, quashing or invalidating an order (which cannot be done after 10 years).

[30] In the present case, there are no orders subsequent to the 2004 order that need to be dealt with. In fact, because the 2004 order ultimately resulted in Rangimarie's additional Māori land interests being vested in the whānau trust, invoking s 86 to amend the 2004 order simply confirms how those interests ended up in the whānau trust. It necessarily follows that, for the purposes of s 88(1), our proposed amendments to the 2004 order do not take away or affect any right or interest acquired in good faith and for value before the making of the amendment. Since 2004, Rangimarie's additional interests have been held in the whānau trust, and our proposed amendment to the 2004 order does not change that fact.

[31] Correcting the 2004 order in the manner proposed means that s 99(2) of the Act is engaged. As observed in *Stock v Morris*, s 99(2) is to be interpreted so that those who succeed to an interest in the land automatically succeed to all improvements on the land.[18] Through succession, the trustees of the whānau trust now hold the land interests to which the house relates. It therefore follows that the trustees of the whānau trust own the house previously owned by Rangimarie.

[32] This case illustrates, however, the difficulties that can arise if orders of the Court are not clear. Although it is possible to rely on the operation of s 99(2) to confirm that the trustees of the whānau trust own the house, there is no harm in avoiding doubt. We therefore consider it prudent to grant an order under s 18(1)(a) confirming that the house is owned by the trustees of the whānau trust.

---

[17] [2019] Māori Appellate Court MB 696 (2019 APPEAL 696).
[18] Above n 10 at [58].

**Kupu whakatau - Decision**

[33] Pursuant to s 56(1)(f) of the Act, we invoke s 86(1) of the Act to amend the order of the Court at 30 Auckland MB 248-249 to give effect to the true intention of the associated decision, by confirming that the further interests of Rangimarie Herewini (also known by other names) were vested in the trustees of the Rapine and Rangimarie Herewini Whānau Trust by way of an amendment to the order at 2 Kaikohe (Succession) MB 372-373 to include those interests.

[34] Pursuant to s 56(1)(a) we:

(a) Annul the s 18(1)(a) order made by Judge Wara at 192 Taitokerau MB 175 at [20]; and

(b) Make an order pursuant to s 18(1)(a) of the Act, declaring that the whānau house located on Te Tii Mangonui A3 is owned by the trustees of the Rapine and Rangimarie Herewini Whānau Trust.

I whakapuaki i te 5:00 pm i te 28 o ngā rā o Huitangaru te tau 2020

| | | |
|---|---|---|
| S R Clark | C T Coxhead | D H Stone |
| **JUDGE** | **JUDGE** | **JUDGE** |