IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT

Place:	Wellington
Present:	C M Wainwright, Judge
	Claire Mason, Clerk of the Court
Date:	2 February 2005
Application No:	A20040001852
Subject:	Kaiapoi MR 873 Blk XI Sec 71B
Section:	135/93
Hearing:	17 August 2004
Applicant:	Epiha William Hills

RESERVED DECISION

Introduction

Epiha Hills has filed an application with the Court pursuant to section 135 of Te Ture Whenua Māori Act 1993 where he seeks a change in status of Kaiapoi MR 873 Blk XI Sec 71B ("Section 71B") from Māori freehold land to General land. Mr Hills is of the view that he can only effectively manage and utilise Section 71B if it is General land.

Background

Section 71B is a long, narrow, rural block with a total area of 3.0351 hectares. Mr Hills is the sole owner of Section 71B after succeeding to the land in 1998 on the death of his grandmother. There is a house on the land but it is no longer suitable for habitation.

Mr Hill has four grandchildren currently in the care of the Department of Children, Young Persons and their Families. Mr Hill and his wife, Christine, hope to build a new house on Section 71B, to provide a much needed whānau base for three of his grandchildren and a permanent home for his eldest granddaughter.

However, Mr Hills cannot build a new house on Section 71B without financial assistance. He has advised the Court that he will not seek finance from a lending institution because he cannot meet the required payments on his current income. As an alternative, Mrs Hill has agreed to contribute $200,000.00 towards building a new house. She will raise this amount from the sale of her current property.

However, she will only make this contribution if she is made a joint owner in Section 71B.

If Section 71B was General land, Mrs Hills could be recognised as a joint owner in the land. However, because Section 71B is Māori freehold land, the strict requirements of Te Ture Whenua Māori Act 1993 relating to the alienation of Māori land apply. Under the Act, an interest in Māori freehold land can only be transferred to a member of a preferred class of alienee. In this application, a preferred alienee would be a member of the hapū associated with Section 71B. Mrs Hills is not of Māori descent which means she does not have the required association with the land. Therefore, the court has no power to transfer a half-share in Section 71B to Mrs Hills.

It is for this reason that Mr and Mrs Hills want the status of Section 71B changed to General land. If Section 71B is General land, the restrictions outlined above will not apply. Instead, a half share of Section 71B can be transferred to Mrs Hills and she can enjoy all the rights of a joint owner: she would be entitled to half the proceeds from the sale of the house and the land; she could bequeath her interest in Section 71B as she wished. In contrast, if Section 71B remained Māori freehold land and Mrs Hills gave her husband the money to build a new house without an agreement that the house is her property, then Mr Hills would own the house solely and she would have no ownership rights to it. This is because Mr Hills, as the sole owner of Section 71B, owns all fixtures on his land, which includes any house built on the property. It is understandable then the Mrs Hills is cautious of investing in Section 71B if its status remains as Māori freehold land.

Discussion

The jurisdiction of the Māori Land Court to change the status of Māori freehold land to General land is contained in section 135/93. The Court has no power to exercise its jurisdiction under section 135/93 unless it is satisfied that the requirements under section 136/93 have been independently met.[1] Section 136/93 provides that:

> The Māori Land Court may make a status order under section 135(1) of this Act where it is satisfied that -
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> (a) The land is beneficially owned by not more than 10 persons as tenants in common; and
> (b) Neither the land nor any interest is subject to any trust (other than a trust imposed by section 250(4) of this Act); and
> (c) The title to the land is registered under the Land Transfer Act 1952 or is capable of being so registered; and
> (d) The land can be managed or utilised more effectively as General land; and
> (e) The owners have had adequate opportunity to consider the proposed change of status and a sufficient proportion of owners agree to it.

[1] *Re Loma Cleave* 4 APWH 95-103 (Appeal 1995/5, 22 May 1995), *Re Raetihi 2B 2C 2C 2A1* 128 Aotea MB (13 June 2003).

The Court's discretion under section 135/93 is restricted further, as it must also take into account the preamble and section 17/93 of the Act when determining a change of status application. As stated in *Re Loma Cleave*, these provisions in combination place a clear requirement on the Court to recognise that the retention of Māori land and its utilisation for the owners, their whānau and hapū are at all times primary matters to take into account.[2]

The above provisions are purposely restrictive. The loss to Māori of many hundreds of thousands of acres of Māori land due to past legislative policies, which facilitated alienation through partitioning and status change, is well documented. Te Ture Whenua Māori Act 1993 was enacted as a positive measure to stem this historical trend, and provisions such as section 136/93 were included to promote the retention of land in Māori hands. It was Parliament's intent that all powers, duties and discretion under the Act are exercised in a way that promotes this objective, and this Court operates accordingly.

Therefore, as stated in *Re Loma Cleave*, the Court treats an application that could endanger the continued relationship of Māori with their ancestral land with grave concern, and will allow a status change to happen only in the rare circumstances permitted by statute. The legislation allows this Court to act inconsistently with the kaupapa of the Act only if the Māori freehold status operates as a clear obstacle to the effective use of the land.

Accordingly, for me to grant Mr Hills' change of status application I must be satisfied that the current status of Section 71B impedes Mr Hills' effective management of his land and that he has provided the Court with evidence of this. In this case, I acknowledge that there are specific personal circumstances that merit special consideration when I make my determination under section 136/93.

(a) Consideration of section 136/93

Mr Hills has satisfied four of the five requirements of section 136/93, namely subsections (a)-(c) and (e). I will now turn to whether Mr Hills has satisfied the fifth requirement in section 136(d)/93: that Section 71B can be managed or utilised more effectively as General land.

As outlined above, Mr Hills plans to build on Section 71B and live there with his wife and grandchildren. However, Mr Hills has told the Court that his development plans will not be realised if the status of Section 71B remains as Māori freehold land. This is because he will not be able to raise the finance required to develop Section 71B.

An inability to raise finance is frequently argued as a ground for changing the status of Māori freehold land. Usually, the situation is one where a bank is reluctant to lend on the security of Māori land. Here, however, the situation is one where Mr Hills' spouse is reluctant to lend money because of her inability to participate in the ownership of the land. This arises because, in terms of Te Ture Whenua Māori Act, she is not a member of the preferred class of alienees. Her concern is twofold: firstly, she is conscious that, in the event of her marriage to Mr Hills foundering, the land will not be matrimonial property. This creates a difficulty

[2] *Re Loma Cleave* 4 APWH 95-103 (Appeal 1995/5, 22 May 1995).

when she has contributed significantly to the cost of the house to be erected there. Secondly, Mr and Mrs Hills each have offspring from other unions, and none in common. Mrs Hills wants to be in a situation where her son can inherit her property. This will be difficult if she invests in the development of Māori land in which her son will never be entitled to an interest.

So here, we have a situation that is both usual and unusual. It is usual in that the argument is raised that the status of the land is said to be a reason for the inability to raise funds to develop the land. It is unusual in that the potential lender is a spouse rather than a bank.

The inability to raise finance due to land status is not an argument that immediately satisfies section 136(d)/93. Applicants have to establish, by way of evidence, that an inability to raise finance because of their land's status impedes their effective use of the land.

As stated by the Māori Appellate Court in *Papamoa 2A1*,[3] full and cogent evidence is required to satisfy section 136(d)/93. Mr Hills must therefore provide convincing evidence that demonstrates that obtaining financial assistance from his wife will lead to the more effective use and management of his land, which would not be possible if the land remained Māori freehold land. The applicant in *Papamoa* simply stated that he wanted a change of status to access better finance and the court determined that this "provided almost nothing which would provide weight to his side of the scales."[4] The lower court determined that the applicant's wish to improve his ability to secure finance against the property was an "issue of convenience"[5] which did not outweigh the importance of the land to those connected to it or the kaupapa and the objectives of the Act. The Appellate Court confirmed this finding.[6] A lack of evidence as to how a change of status would create better terms for borrowing, which would lead to the more effective use and management of land, was also seen as fatal in *Re Orokawa 3B Lot 4*.[7]

Therefore, the court will not simply change the status because it is more convenient for the owner to deal with the land free of the restrictions. While sympathetic to the situation faced by Mrs Hills, I will not change the status of Section 71B unless I am of the view that Section 71B can be more effectively managed and utilised **only** if its status is changed.

I am of the view that Section 71B can be effectively managed and utilised without a change in status.

The main argument put forward by the Hills for a change of status is that any investment made by Mrs Hills in Section 71B will be unsecured because she can have no legal interest in Māori freehold land. It is true that a change of status may resolve these difficulties, but frankly I see problems for what Mr and Mrs Hills seek to achieve whether or not the land remains Māori freehold land. If their assets are pooled, and they become joint owners in the land and house, how will

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[3] 20 APWM 167-186 (Appeal 2002/03, 5 September 2003).
[4] 20 APWM 167 at 180.
[5] 20 APWM 167 at 182.
[6] 20 APWM 167 at 185.
[7] 6 APWH 157 at 162 (Appeal 2002/13, 30 June 2004).

Mrs Hills' son then obtain a half share on her death? The house cannot be cut in half.

There are alternative ways of overcoming the difficulty for Mr and Mrs Hills of this land's status as Māori freehold land. They could come to a legal arrangement where Mr Hills' property in the Māori land and Mrs Hills' property in the house remain separate so that, if they wish to when they are older, they can bequeath them separately. I can make an order under section 18 of Te Ture Whenua Māori Act declaring the house to be a chattel solely owned by Mrs Hills. Mrs Hills would then have a secure investment and if she separated from Mr Hills, she could move the house to another section or sell it if she wished.

Therefore, I am of the view that while the Hills believe it would be more convenient for them to own both the land and the house jointly, it is not necessarily the only way that this land can be managed or utilised so as to meet their particular objectives and concerns. Additionally, as I will discuss below, the Hills' preference does not outweigh the importance of retaining the land for those connected to it.

(b) Consideration of the kaupapa of the Act

When exercising my discretion under section 136/93, I must always be mindful of the objectives to be promoted by the Court when exercising its jurisdiction. These include the objectives of retention and giving effect to the wishes of the owners where possible.

The principle of retention, as the kaupapa of the Act, is the first and foremost objective to be followed by this court. Therefore, if the retention of Section 71B in whānau hands is undermined by the wishes of the owners, then the principle of retention will prevail.

It was argued that the Hills' situation is similar to the facts of *Re Maketu A2A Lot 4*.[8] In this case, the Māori Appellate Court found that giving effect to the wishes of the owner was not inconsistent with the kaupapa of the Act. The applicant, Mrs White, solely owned a section of Māori land that adjoined an area of General land jointly owned by herself and her husband. Mrs White wanted to build a home across the two properties to provide a base for her extended family. She applied for a change of status so that her husband could be a joint owner in her land and any house built over the two properties. She also wanted to raise finance to build the house, which she claimed could only be secured with a change of status. Her original application was denied. However, on appeal, the Māori Appellate Court granted Mrs White a change of status. The Appellate Court found that to grant Mrs White a change of status would not be inconsistent with kaupapa of the Act. The building of a house for her whānau allowed for better management of the land and would benefit both the applicant and her whānau, as their continued relationship with the land would be maintained. The Appellate Court also noted that Mrs White was not applying for a change of status to sell the land but to enable its development as a residential property for use by her whānau.

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[8] 1 Waiariki ACMB 116 (Appeal 1998/18, 11 May 1999).

Mr Hills, like Mrs White, does not intend on selling Section 71B if a change of status is granted. Instead he plans to build a home to create a stable environment for his grandchildren. I do not doubt that a change of status would enable Mr Hills to make effective use of the land, which would enhance the relationship between the whānau and their land.

However, I am of the view that to grant a change of status in this instance would be inconsistent with the kaupapa of the Act. Even though building a house on Section 71B may enhance the relationship of the whānau with their land, a change of status could equally endanger this relationship, as it would allow Section 71B to be sold out of whānau hands. Mrs Hills obviously regards as a serious possibility the breakdown of her relationship with Mr Hills, as her concerns drive this application. Moreover, the marriage broke down previously, leading to a matrimonial property settlement. Mrs Hills wants to be able to retrieve her property if this happens again. If the status of the land is changed, and Mr and Mrs Hills own both the house and land jointly, then the likely result on a marriage breakdown will be the sale of the property to realise a settlement of half each for Mr and Mrs Hills. The connection between the land and Mr Hills' Māori ancestors would then be severed forever.

Although Mr and Mrs Hills have resumed their relationship, and are committed to each other and the welfare of Mr Hills' grandchildren, I cannot close my eyes to the risk that the relationship could fail again, leading to a sale of Section 71B if its status changed to General land.

Therefore, I am of the view that to grant a change of status in this case would be to act inconsistently with the kaupapa of the Act.

I note, however, that should Mr and Mrs Hills wish to proceed with the construction of a house on Section 71B, I would be amenable to granting an order under section 18/93, declaring the house to be a chattel solely owned by Mrs Hills.

Decision

For the reasons outlined above, I am of the view that the status of Section 71B is not a clear obstacle to its more effective management and utilisation, as sought by the Hills. There are alternative means of meeting their concerns and objectives, which do not require a change of status. The special circumstances of this case and the preference of the Hills to own the land and any house built on it jointly do not outweigh the importance of retaining the land for those ancestrally connected to it, nor does it move me to act inconsistently with the kaupapa of the Act.

Accordingly, Mr Hills' application for a change of status is declined.

Dated at Wellington 2 February 2005

C M Wainwright
JUDGE