I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TĀKITIMU
In the Māori Appellate Court of New Zealand
Tākitimu District

A20220005362 & A20220005502
APPEAL 2022/3 & 2022/4

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Patangata 2F Section 2B Block
I WAENGA I A *Between*	AMBER LOGAN Kaitono pīra *Appellant*
ME *And*	SANDRA ERENA MAKIANA LOGAN Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	29 April 2022, 2022 Māori Appellate Court MB 104-139 (Heard at Wellington via AVL)
Kooti: *Court*	Judge S F Reeves (Presiding) Judge M P Armstrong Judge T K T A R Williams
Kanohi kitea: *Appearances*	L Thornton for the appellant L Watson for the repondent
Whakataunga: *Judgment date*	3 August 2022

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

Copies to:
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Hei tīmatanga kōrero
Introduction

[1] Sandra Logan entered into an agreement to sell Patangata 2F Section 2B, and other adjoining blocks, to Ashley and McKayla Dixon. Sandra sought confirmation from the lower court as Patangata 2F Section 2B is Māori freehold land. On 25 March 2022, Judge Stone confirmed the sale per ss 151 and 152 of Te Ture Whenua Māori Act 1993.

[2] Amber Logan appealed Judge Stone's decision (the appeal). She also sought a stay of the proceeding, to halt the sale, pending her appeal. Judge Stone declined to grant a stay. Amber appealed that decision as well (the stay appeal).

[3] We heard both appeals on 29 April 2022 by Zoom.[1] We dismissed both appeals with reasons to follow. This judgment sets out our reasons.

Background

[4] Sandra was the sole owner of four blocks of land in Ōtāne, Hawke's Bay. One block Patangata 2F Section 2B (the land) is Māori freehold land, the others are general land. Sandra farmed these blocks as a single unit. Sandra entered into an agreement to sell all four blocks to the Dixons for $3,300,000.00 plus GST. The Dixons are not members of the preferred class of alienee (PCA). The agreement was conditional on the Dixon's obtaining finance, and the lower court confirming the sale. By the time the matter went before the lower court, finance had been obtained and so the only remaining condition was to confirm the sale.

[5] Amber is a member of the PCA. She sought to exercise the right of first refusal to purchase the land. After various interlocutory steps she submitted a tender to purchase the land, subject to finance, for a price of $3,301,000.00. Sandra rejected Amber's tender and sought confirmation of the sale to the Dixons.

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1 2022 Māori Appellate Court MB 104-139 (2022 APPEAL 104-139).

What happened to the stay appeal?

[6] Amber sought a stay to prevent the sale completing before her appeal was heard. Although the stay was declined, Sandra took a responsible approach and chose not to proceed with the sale pending the appeal. Given Sandra's position, the stay appeal became redundant.

[7] After some prompting at the hearing, Amber's counsel, Ms Thornton, eventually withdrew the stay appeal. We dismissed it by consent.[2]

What are the remaining issues for determination?

[8] Although Amber was represented by Ms Thornton, it was difficult to identify the specific grounds of appeal. Mr Watson, counsel for Sandra, argued we have no jurisdiction to hear the appeal given the lack of particulars. We have identified the following issues:

(a) Do we have jurisdiction to hear the appeal?

(b) Did the notice to the PCA meet the requirements of s 147A of the Act and rr 11.5, 11.6 and 11.7 of the Māori Land Court Rules 2011?

(c) Was Amber given a reasonable amount of time and opportunity to exercise the right of first refusal?

(d) Did Judge Stone properly exercise his discretion confirming the sale?

Do we have jurisdiction to hear the appeal?

[9] Mr Watson argues that:

(a) The notice of appeal does not set out with sufficient detail the grounds of appeal;

(b) The appeal does not properly identify which of the recognised grounds for an appeal against an exercise of discretion apply here; and

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[2] 2022 Māori Appellate Court MB 104-139 (2022 APPEAL 104-139) at 106.

(c) The arguments advanced by Ms Thornton are outside the scope of the notice of appeal.

[10] Mr Watson contends that, on this basis, we have no jurisdiction to hear the appeal.

[11] Section 58(3) of the Act provides that every appeal is commenced by notice of appeal in the form and manner prescribed by the Māori Land Court Rules 2011. Rule 8.8 of the Rules provides that the notice of appeal, or an accompanying statement, must set out full details of the grounds of appeal and the relief sought in sufficient detail to inform the Court and any other party of the basis of the appeal. When doing so, what is sufficient will depend on the nature of the appeal.

[12] On a general appeal, the appellant is entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In other words, the appellate court must come to its own view on the merits.[3] However, on appeal against an exercise of discretion, the criteria for a successful appeal are stricter. It is not the role of the appellate court to consider the case afresh and arrive at its own decision. Rather, an appellate court can only intervene if satisfied that the lower court:[4]

(a) Acted on an error of law or a wrong principle;

(b) Failed to take into account a relevant consideration;

(c) Took into account an irrelevant consideration; or

(d) Was plainly wrong.

[13] An application to confirm an alienation is made per s 151 of the Act. The court must grant confirmation if satisfied of the matters set out in s 152(1) of the Act.[5] The court has

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3 *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, *Taueki – Horowhenua XIB 41 North A3A and 3B1* (2008) 16 Whanganui Appellate Court MB 30.

4 *Kacem v Bashir* [2010] NZSC 112; *Nikora v Te Uru Taumatua* [2020] Māori Appellate Court MB 248 (2020 APPEAL 248); *Peihopa v Peihopa* [2021] Māori Appellate Court MB 180 (2021 APPEAL 180).

5 The court also has a discretion to vary the terms of the alienation, or to approve the sale of Māori freehold land subject to the Overseas Investment Act 2005 which does not apply here. See s 152(2) and (3) of the Act.

no discretion over whether to confirm the alienation. However, the court does have a certain element of discretion when assessing whether some of the matters in s 152(1) of the Act are satisfied. For example, per s 147A(5), the notice to the PCA to exercise the right of first refusal must specify a deadline for receiving tenders or expressions of interest that is reasonable, and no less than 15 working days after the date on which the first notice is published. What is reasonable will depend on the circumstances. Assessing what is reasonable involves an exercise of discretion.[6]

[14] As such, an appeal against a decision confirming a sale could involve a general appeal, or an appeal against an exercise of discretion, depending on the grounds of appeal.

[15] In this case the notice of appeal sets out the grounds of appeal as:

> The trial court abused its discretion in confirming the alienation by sale of a farm that included a block of Maori land (Patangata 2F2B) despite appellant making an offer of a favourable price, subject to a condition of obtaining finance. This appeal involves the application of ss 152 and 147A, Te Ture Whenua Maori Act 1993, and the purposes of the Act ("to promote the retention of that land in the hands of its owners, their whanau, and their hapu") and the application of Rules 11.5, 11.6 and 11.7 of Maori Land Court Rules 2011.

[16] These grounds are very general. The notice does not set out the specific parts of Judge Stone's decision that are under appeal. It alleges an abuse of discretion without specifying one or more of the recognised grounds for challenging an exercise of discretion on appeal. It does not refer to the specific parts of the test, per the Act or the Rules, that are under appeal other than to refer to the relevant provisions in a very general way. The notice does not set out the grounds of the appeal in sufficient detail to inform the Court and any other party of the basis of the appeal. However, we do not agree with Mr Watson that this means we do not have jurisdiction to hear the appeal.

[17] A lack of jurisdiction means that we do not have the power to hear and determine the appeal.[7] The Māori Appellate Court has jurisdiction to hear and determine any appeal from a final order of the Māori Land Court.[8] In this case, the notice of appeal does not comply with r 8.8 of the Rules. As such, we can set aside the proceeding for non-compliance per r 2.4(4)(a) of the Rules. Whether to do so is at our discretion. We are not compelled to do so,

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6 This is a central issue in this appeal.
7 See *Nakhla v McCarthy* [1978] 1 NZLR 291.
8 Section 58(1) of the Act.

nor does failure to comply with a rule affect our overall jurisdiction to hear the appeal. There are a number of other options available including:

(a) Excusing compliance with r 8.8;[9]

(b) Granting leave to amend the grounds of appeal;[10] or

(c) Make any other appropriate order for addressing non-compliance.[11]

[18] In this case, we consider the appeal should be set aside for non-compliance.

[19] The requirement in r 8.8 to provide sufficient detail of the basis of the appeal is founded on the fundamental premise that the court, and affected parties, should understand the nature of the proceeding in advance. This allows an affected party to prepare their response in advance rather than being ambushed at the hearing. The importance of advance notice is also recognised in the principles of natural justice.

[20] There may be circumstances where it is appropriate to excuse compliance with r 8.8 of the Rules. This could include an appeal being advanced in person by a lay litigant who is not familiar with legal principles or procedure. That does not apply here.

[21] Amber has legal representation. Ms Thornton prepared and filed the notice of appeal on her behalf. There would have to be very compelling reasons to excuse compliance with r 8.8 where the notice has been prepared by a solicitor. There are no such reasons here.

[22] Amber, and her counsel, were also on notice of the defects in the notice of appeal. Mr Watson argued the notice of appeal was defective when Judge Stone heard the application seeking a stay pending the appeal. Judge Stone commented that:[12]

> …I accept the argument that to the extent that the appeal questions the exercise of discretion, the grounds of appeal are limited as per *Kacem v Bashir* and subsequent Maori Appellate Court decisions confirming the limited grounds for an appeal of a discretion.

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9 Rule 2.4(2).
10 Rule 8.17(2)(c)
11 Rule 2.4(4)(b).
12 95 Takitimu MB 211-228 (95 TKT 211-228) at 226, para [20].

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> I simply note that the notice of appeal does not clearly set out how the exercise of discretion is specifically challenged. I am also mindful that the notice of appeal and the grounds of appeal can only be amended with leave of the Māori Appellate Court pursuant to rule 8.21(2) of the Rules. So, it is not a certainty that the notice of appeal will be amended successfully.

[23] Mr Watson raised this again in his submissions opposing the appeal. Despite this, Ms Thornton did not seek leave to amend the grounds of appeal.[13]

[24] Finally, r 8.21(2) of the Rules provides that an appellant cannot rely on a ground of appeal unless it is set out in the notice of appeal, except with leave from this court. In this case, the grounds in the notice of appeal are so wide that Ms Thornton's submissions come within its scope. It could be argued that as the notice of appeal does not set out sufficient particulars, Ms Thornton cannot now rely on those particulars to advance the appeal. Ultimately it is not necessary to decide this as we are going to set aside the appeal for the more fundamental failure to comply with r 8.8 of the Rules.

[25] For these reasons, per r 2.4(4)(a) of the Rules, we set aside the appeal for non-compliance with r 8.8.

[26] We recognise that the Act promotes the retention of Māori land in the hands of the owners, their whānau and hapū. Judge Stone confirmed a sale of Māori freehold land to someone outside of the PCA. While the Act also allows this to occur, given the importance of the principle of retention, we proceed to consider the remaining issues on appeal even though it is not necessary to do so.

Did the notice to the PCA meet the requirements of s 147A of the Act and rr 11.5, 11.6 and 11.7 of the Rules?

[27] Section 147A of the Act provides that a person who seeks to sell or gift Māori freehold land must give the right of first refusal to those who belong to the PCA ahead of those who do not.

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13 Ms Thornton filed a memorandum supporting the stay appeal, which addressed the grounds of the main appeal. That did not amend the grounds of appeal, did not seek leave to do so and no such leave was granted.

[28] Section 147A(2) – (7) of the Act and rr 11.5, 11.6 and 11.7 of the Rules set out how notice is to be given to the PCA and how the PCA can exercise the right of first refusal.

What does the evidence say?

[29] When Sandra applied to confirm the sale, she filed draft public notices to the PCA with the lower court for approval. Judge Stone indicated he was comfortable with the proposed advertisements. Those notices were advertised in the Hawke's Bay Today and New Zealand Herald between 18 and 24 December 2021 (the first public notices).

[30] Sandra also gave private notice to her brother and her son. They provided letters supporting the application. At that early stage, Sandra did not give private notice to Amber, even though she had her email address.

[31] In late December 2021, Amber learnt of the sale and sought more information from Sandra. On 12 January 2022, Mr Watson sent to Amber copies of the agreement with the Dixons, the application to confirm the alienation, the valuation for the land and the newspaper advertisement. On 13 January 2022, Amber sent a letter to the lower court indicating she wanted to purchase the land.

[32] Amber appeared at the first hearing on 25 January 2022. She sought more time to exercise the right of first refusal. Judge Stone agreed and issued directions setting down a process for Amber to exercise the right of first refusal. On 7 February 2022, Amber made a conditional offer, by email, to purchase the land. Sandra rejected the offer for lack of certainty.

[33] The application was heard again on 18 February 2022. At this hearing Amber was represented by Ms Thornton. Judge Stone indicated he was inclined to grant the order with reasons to follow. However, as he was preparing his decision, Judge Stone identified inconsistencies between the requirements in s 147A of the Act and rr 11.5 to 11.7 of the Rules. On 21 February 2021, Judge Stone issued a minute raising this and convened a conference with the parties later that day. On 23 February 2022, Ms Thornton and Mr Watson filed a joint memorandum which attached a further draft notice to the PCA. They

sought an urgent direction confirming the content of the draft notice. On 24 February 2022, Judge Stone approved the draft notice with minor amendments.[14]

[34] On 26 February and 5 March 2022, Sandra published further notices in the Hawke's Bay Today and on a local marae website, per Judge Stone's directions (the second public notices). She also gave direct private notice to 15 other members of the PCA including Amber.

[35] On 21 March 2022, Amber submitted a tender to purchase the land. This offered a purchase price $1000.00 higher than the agreement with the Dixons and was conditional on finance. Sandra rejected this tender.

Was the notice sufficient?

[36] Ms Thornton filed written submissions in support of the appeal. She expanded on these at the hearing of the appeal. Despite the time she took in writing, and orally, to address us, it is very difficult to identify why she says the notice to the PCA was defective. Her arguments were verbose, circular and ambiguous.

[37] Ms Thornton appears to argue that the notice was insufficient as:

(a) The first public notices were defective;

(b) Amber was not given direct notice; and

(c) The requirements in s 147A of the Act and rr 11.5 to 11.7 of the Rules are inconsistent.

[38] Following the hearing on 18 February 2022, Judge Stone identified a number of inconsistencies between the requirements in s 147A of the Act and rr 11.5 to 11.7 of the Rules. This occurred as s 147A of the Act was amended in 2020 but the Rules have not been updated to reflect those changes. Neither Ms Thornton nor Mr Watson raised this at the 18 February hearing. Judge Stone issued a minute raising these anomalies and expressed a

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[14] The direction is erroneously dated 24 February 2021.

concern that the required steps to notify the PCA may not have been met. Judge Stone convened a conference to hear from the parties. Ms Thornton and Mr Watson indicated they would file a joint memorandum on how to address the anomalies. They did so and Judge Stone issued further directions which Sandra complied with.

[39] In his decision, Judge Stone set out how he addressed these anomalies:

(a) Where there was an inconsistency between the Act and the Rules, the Act prevailed.

(b) If it was reasonable to comply with the Rules despite any inconsistency with the Act, he required compliance with the Rules; and

(c) If it was oppressive or otherwise inappropriate to comply with the Rules, he excused compliance per r 2.4(2).

[40] Judge Stone then carefully assessed whether the requirements in s 147A of the Act and rr 11.5 – 11.7 of the Rules had been met. He found it had.

[41] We agree with the approach Judge Stone took and with his assessment. To the extent the first public notices were defective this was cured by the second public notices.

[42] We also consider that Amber was given direct notice. Although she was not given direct notice at the time of the first public notices, following a request for further information, Mr Watson sent to her a copy of the agreement, the valuation, and the newspaper notice. Amber attended both hearings and at the latter was represented by Ms Thornton. Ms Thornton attended the February conference on Amber's behalf and prepared a joint memorandum with Mr Watson on how to address the anomalies. At the time of the second public notices, Amber and others, received direct notice by email. It is difficult to see what further direct notice Amber could have received.

[43] Ms Thornton also argued that Amber did not have a reasonable timeframe to submit her tender. This is part of the notice requirements in s 147A(5) of the Act. We consider this below.

Was Amber given a reasonable amount of time and opportunity to exercise the right of first refusal?

[44] Section 147A(5) of the Act provides that the notice to the PCA must specify a deadline for receiving tenders or expressions of interest that is reasonable and is not less than 15 working days after the day on which the notice is first published.

[45] The second public notices required tenders to be submitted within 15 working days. Ms Thornton argues that:

(a) The 15 working day requirement in s 147A(5)(b) is a minimum requirement;

(b) In order to comply with s 147A(5)(a) that period must also be reasonable.

(c) What is reasonable must be assessed in the circumstances. This may require a longer period than 15 working days;

(d) In this case, Amber had to submit a tender seeking to purchase 4 large blocks of land that had been operated as a farm. This was a complex undertaking and 15 working days was not reasonable in these circumstances.

[46] When assessing whether this was reasonable, Judge Stone took into account that the first public notices were published in late December 2022. He found that, in effect, the timeframe for members of the PCA to exercise the right of first refusal had been over three months.

[47] Ms Thornton argues this was in error. She submits Judge Stone should not have taken the first public notices into account and could only determine whether the timeframe was reasonable based on the second public notices. She relies on the decision of this court in *Taueki*.[15]

[48] We do not agree. The purpose of giving notice to the PCA is to advise them of the intended sale, their right of first refusal, and to provide them with reasonable time and

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15 *Taueki – Horowhenua XIB 41 North A3A and 3B1* (2008) 16 Whanganui Appellate Court MB 30 (16 WGAP 30).

opportunity to exercise that right. Section 147A(5) provides that the notice must specify a deadline for receiving tenders that is reasonable. What is reasonable must be assessed in all the circumstances of the case.

[49] In this case, Sandra had given prior notice to the PCA. Judge Stone was entitled to take that into account when assessing what was a reasonable deadline for submitting tenders following the second public notices. This was a relevant consideration.

[50] The decision in *Taueki* does not support Ms Thornton's argument. In *Taueki* the Hanita Incorporation argued that the PCA first received notice, and could have exercised the right of first refusal, when it called for tenders from the public. This court rejected that argument and found that the public tender process was not an offer of the right of first refusal. Rather, the PCA are entitled to separate and specific notice about their right to purchase the land ahead of those who are not PCA. This can be distinguished from the present case. Here the first public notices were not calling for public tenders. Those notices were to the PCA advising them of their right of first refusal.

[51] Judge Stone was well aware of the principles in the *Taueki* decision. He correctly referred to and applied those principles in his decision and found that this was not a hasty treatment of the right of first refusal.

[52] Amber submitted a tender which was subject to finance. Sandra rejected the tender as the existing agreement was, by that time, unconditional other than requiring confirmation from the lower court. Judge Stone found that the finance condition made a material difference and Amber's tender was not on terms at least equivalent to the terms of the Dixon purchase. Ms Thornton argues that the 15 working day timeframe was not reasonable to allow Amber to put forward a comparative tender in particular to arrange finance. Once again, Ms Thornton ignores the previous notice, and knowledge, that Amber had.

[53] On 12 January 2022, Mr Watson sent to Amber the Dixon agreement and the valuation for the land. On 13 January 2022, Amber wrote to the lower court indicating she wanted to purchase the land. She must have known at that stage that she would need to finance the purchase. She did not learn that she would need to raise finance following the

second public notices. Ms Thornton accepts that Amber knew from the outset that finance was an issue.

[54] The second public notices did little more to Amber than provide more time and clarify that offers had to be made by tender. The provision of more time is beneficial, not prejudicial. Requiring a tender did not prejudice Amber. By that time, she had instructed counsel who could assist with preparing the tender. Amber submitted a valid tender within the deadline. The issue with her tender was not its form, but the finance condition. Ms Thornton's argument that Amber only had 15 working days to arrange finance ignores the reality of her situation.

[55] It is also significant that Ms Thornton agreed to the 15 working day timeframe that was applied in the second public notices. At the conference on 21 February 2022, Judge Stone raised that s 147A(5) requires a reasonable timeframe for receiving the tenders. Judge Stone invited Ms Thornton and Mr Watson to file a joint memorandum addressing this and other notice requirements. Both counsel agreed.[16]

[56] The joint memorandum was signed by Ms Thornton and Mr Watson. It attached a draft notice to comply with s 147A of the Act. That draft notice provided a 15 working day timeframe for receiving the tenders. This timeframe was then adopted by Judge Stone when he approved the notice,[17] and was included in the second public notices that Sandra published.

[57] When we put this to Ms Thornton, she argued that she had not agreed to the 15 working day timeframe. She offered no credible or cogent argument to support this. In light of Judge Stone's invitation for counsel to confer and file a joint memorandum, and a joint memorandum then being filed, which was signed by Ms Thornton, and which proposed a notice with a 15 working day timeframe, we cannot understand how Ms Thornton can now maintain she did not agree to this. Her attempt to distance herself from this clear agreement is misguided.

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16 95 Takitimu MB 1-14 (95 TKT 1-14) at 12-14.

17 Judge Stone did make minor amendments to the proposed notice but not to the timeframe for receiving tenders.

[58] As Ms Thornton agreed to the 15 working day timeframe, on Amber's behalf, she is now estopped from arguing that the 15 working day timeframe is unreasonable.

Did Judge Stone properly exercise his discretion confirming the sale?

[59] As discussed, confirming a sale per s 152 of the Act does not involve an exercise of discretion. The court must grant confirmation if satisfied of the matters set out in s 152(1). Determining whether some of those matters have been satisfied does require an exercise of discretion. The distinction is finely balanced but is important for the purpose of this appeal.

[60] Ms Thornton has failed to grasp this distinction in the notice of appeal, her written submissions and her oral submissions. She argues the lower court 'abused its discretion' confirming the sale without specifying what aspect of the discretion was exercised in a manner that gives rise to a recognised ground of appeal.

[61] The closest Ms Thornton gets is her argument that Judge Stone should not have taken into account the first public notices to the PCA. While Ms Thornton did not couch her argument in these terms, in effect, she submits that Judge Stone took into account an irrelevant matter. We have already rejected that argument. We cannot discern any other argument that raises a recognised challenge to an exercise of discretion.

[62] Ms Thornton has not demonstrated that Judge Stone took into account an irrelevant matter, failed to take into account a relevant matter, acted on an error of law or a wrong principle or was plainly wrong.

Kupu whakatau
Decision

[63] For these reasons, both appeals were dismissed.

Te utu
Costs

[64] Sandra seeks costs. We issue the following directions:

(a) Mr Watson is to file and serve submissions on costs, and any supporting documents, within 3 weeks of this decision;

(b) Ms Thornton is to file and serve any submissions in response within a further 3 weeks;

(c) We will decide costs on the papers.

I whakapuaki i te 11:30am i Whangārei, te tuatoru o ngā ra o Hereturikōkā i te tau 2022
Pronounced at 11:30am in Whangarei on the 3rd day of August 2022.

S F Reeves	M P Armstrong	T T R Williams
JUDGE	**JUDGE**	**JUDGE**