IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20120010047

UNDER	Section 289, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Ahipara 1B2B
BETWEEN	Jonnie Pure Applicant

Hearing: 22 January 2013
13 July 2013
(Heard at Kaitaia)

Appearances: Ms K Taurau for Annie Lidgard

Judgment: 28 November 2013

RESERVED JUDGMENT OF JUDGE D J AMBLER

Introduction

[1] This judgment addresses an application by Mrs Jonnie Pure to partition Ahipara 1B2B ("the land"). Jonnie and her siblings own the land. The application is opposed by some of her siblings.

Background

[2] The land is situated on Foreshore Road, Ahipara. It comprises 17.4798 hectares. It is an irregular shaped block of land: the road frontage at the northern end of the block is approximately 75 metres wide, and the land spreads out considerably as it slopes steeply towards the south. The land is primarily north-facing pasture and scrub overlooking Ahipara Bay.

[3] There are two homes on the land: the original homestead, which is no longer occupied, and a house built by Jonnie's brother, Ronald Berghan, which was later sold to their sister, Annie Lidgard. Annie's interests are now held in the Heeni Parikena Lidgard Whānau Trust.

[4] In addition to the two homes, in 2007 I granted Jonnie an occupation order for an area of 2000m^2. She has yet to build on that site, and indeed the boundaries of the site have been the cause of a dispute and some animosity between Jonnie and Annie's sons, Zane and Walter Lidgard. That dispute is the primary reason for the application for partition.

[5] Apart from the two houses and the occupation order site, the rest of the land is either in scrub or used to graze horses.

[6] The land is effectively owned by seven siblings. According to the Court record, the shareholding is as follows:

David Berghan	496.6194
Edward Berghan	62.0775
Heeni Parikena Lidgard Whānau Trust	496.6184
Janet Berghan Matthews	496.6194
Jonnie Matthews (Pure)	496.6184
Ronald Berghan	62.0775
William Berghan	496.6194
Total Shares	2607.2500

[7] Interestingly, the land was one of three case studies the subject of a paper prepared for the New Zealand Surveyor Journal.[1] One of the authors of that paper, James Berghan, is the grandson of Edward Berghan. I will return to the paper later in this judgment.

The application

[8] As noted, the primary reason for the partition is the dispute between Jonnie and her two nephews. The grounds for partition are expressed in the application as follows:

- Delineate boundaries to build homes
- Continued aggression by family members
- Future development so the property produces an income
- Hindrance to occupation order
- Wish to not encumber future generations with this raruraru so they could live on the land unhindered
- Each family can do what they will without the antagonism and opposition of others
- There is not one domineering group, preventing others from enjoying their rights to land.

[9] Jonnie filed several documents in support of the application. These relate primarily to the dispute with her nephews. In short, following the Court granting the occupation order in 2007, Jonnie arranged for the boundaries of the site to be fenced. However, her nephews considered that she had effectively doubled the area she was entitled to, and cut or removed the fence posts. Jonnie brought a claim in the Disputes Tribunal. This was dismissed on 13 June 2011 due to perceived uncertainty over the boundaries of the occupation order.

[10] The application for partition followed shortly after the Disputes Tribunal hearing and was filed on 1 August 2012. The application sought a partition of Jonnie's shares only by way of a very irregular L-shaped section. The proposed section consisted of a strip that followed half the western boundary of the land and then traversed the block to the east. The effect of this partition would be to sever the residue title into two severances.

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[1] New Zealand Surveryor Journal (2013) 302 NZSJ 4.

[11] The application first came before me on 22 January 2013. According to Jonnie, her siblings Janet, Ronald and William supported the application. Edward attended the hearing and supported partition if all seven siblings' interests were partitioned. Jonnie had yet to hear from David, who lives in Australia. Annie appeared and opposed the partition. There had in fact not been a meeting of owners to discuss the partition proposal and so I adjourned the application for six months for that meeting to take place.

[12] The application came before me again on 3 July 2013. A meeting of owners was held on 29 June 2013. Annie complained about the short notice of the meeting. Nevertheless, she had attended the meeting though her fellow trustees of her whānau trust were told that they could not attend as the meeting was only for the siblings. This was plainly wrong, as Annie's fellow trustees were clearly entitled to attend as trustees of the whānau trust. Jonnie, Edward and Ronald also attended the meeting in person, while William attended by phone from Australia.

[13] At the meeting Jonnie presented a revised partition plan which provided for nine 2000m^2 sections adjacent to Foreshore Road, and for the back of the block to be divided into five sections (without any indication of size) with a central access way. The plan suffers from the fact that Jonnie has not had any professional assistance. Indeed, at the first hearing on 22 January 2013 Jonnie acknowledged that the valuer she approached was not prepared to assist as he had looked at the block on several occasions in the past.

[14] At the meeting William supported the partition and said that Janet (who also lives in Australia) and David also support the partition. Ronald supported the partition but questioned the layout of the sections. Edward now opposed the partition as he felt that the occupation order was sufficient for Jonnie's purposes. Annie strenuously opposed the partition.

[15] At the second hearing Jonnie produced written consents from David and William. However, those consents were signed in January 2013 and predated the meeting and Jonnie's latest partition plan. Jonnie did not present any further grounds for partition and relied primarily on the dispute with her nephews.

[16] Ms Taurau, appearing for Annie, submitted that the application should not be granted. She pointed out that her client's fellow trustees had not been able to attend the meeting. Further, her client was only informed of the meeting at the last minute and she had limited opportunity to consider the revised partition plan. The plan itself has difficulties. The proposed access way is impractical as it cuts through an area of swamp (Jonnie acknowledged it would be expensive to build an access way). Ms Taurau doubted whether the siblings in Australia had seen the partition plan. It was also unclear from the plan how the smaller owners, Ronald and Edward, were to be accommodated. Ms Taurau suggested that some form of management plan might be appropriate for the land, but that partition was not necessary. She rejected Jonnie's version of the dispute with her client's sons, and pointed out that Jonnie had in fact encroached on the rest of the land by erecting the fence. Finally, Ms Taurau says that the occupation order is sufficient for Jonnie's purposes.

[17] Edward Berghan repeated his point of view that the occupation order is sufficient for Jonnie's purposes and that a partition is not needed.

[18] We discussed briefly the case study that James Berghan had completed on Ahipara 1B2B. The interesting thing about the case study is that it proposes a cartographic technique to identify areas of cultural or productive value on the land, which would thereby enable owners to manage the land accordingly. Importantly, it does not require partition. Although the study did not purport to have the endorsement of the owners, it is clearly an alternative option to the partition proposed by Jonnie.

[19] Finally, I raised with the parties whether better defining the occupation order site might address the underlying dispute within the whānau. Some of those present agreed it would.

The law

[20] The application is brought under s 289 of Te Ture Whenua Māori Act 1993 ("the Act"). Section 288 sets out the matters that are to be considered by the Court in relation to a partition application:

(1) In addition to the requirements of subsections (2) to (4) of this section, in deciding whether or not to exercise its jurisdiction to make any partition order, amalgamation order, or aggregation order, the Court shall have regard to—
   (a) The opinion of the owners or shareholders as a whole; and
   (b) The effect of the proposal on the interests of the owners of the land or the shareholders of the incorporation, as the case may be; and
   (c) The best overall use and development of the land.

(2) The Court shall not make any partition order, amalgamation order, or aggregation order affecting any land, other than land vested in a Maori incorporation, unless it is satisfied—
   (a) That the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
   (b) That there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

(3) The Court shall not make any partition order, amalgamation order, or aggregation order affecting any land vested in a Maori incorporation unless it is satisfied—
   (a) That the shareholders of the incorporation to which the application relates have been given express notice of the application; and
   (b) That the shareholders have passed a special resolution supporting the application.

(4) The Court must not make a partition order unless it is satisfied that the partition order—
   (a) is necessary to facilitate the effective operation, development, and utilisation of the land; or
   (b) effects an alienation of land, by gift, to a member of the donor's whanau, being a member who is within the preferred classes of alienees.

[21] In *Hammond – Whangawehi 1B3H1*[2] the Māori Appellate Court discussed the partition jurisdiction:

> [15] The Court has exclusive jurisdiction to grant partition orders in relation to Maori freehold land in accordance with Part 14 of the Act. That jurisdiction is discretionary. The Act directs the Court to exercise its discretion in three steps.

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[2] *Hammond – Whangawehi 1B3H 1* (2007) 34 Gisborne Appellate MB 185 (43 APGS 185).

[16] First, the statutory prerequisites must be satisfied. The Court is expressly prohibited from granting partition if these prerequisites are not satisfied. There are, in essence, three (we do not look at the situation where the land is vested in an Incorporation):

> Section 288(2)(a): The Court must be satisfied that the owners have had "sufficient notice of the application and sufficient opportunity to discuss and consider it."
>
> Section 288(2)(b): the Court must be satisfied that there is a "sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter."
>
> Section 288(4)(a) and (b): The Court must be satisfied that the partition is "necessary to facilitate the effective operation, development, and utilisation of the land;" or, "effects an alienation of land, by gift, to a member of the donor's whanau, being a member who is within the preferred classes of alienees."

[17] In *Brown v Maori Appellate Court* the High Court clarified (para 51) that "necessary" in section 288(4)(a) is properly to be constructed as "reasonably necessary" and that it is "closer to that which is essential than that which is simply desirable or expedient."

[18] Second, if the statutory prerequisites are satisfied, the Court must then address the mandatory consideration in section 288(1). That section requires the Court to have regard to the opinion of the owners as a whole, the effect of the proposal on the interests of the owners, and the best overall use and development of the land.

[19] Third, the Court is to exercise its general discretion mindful that it may refuse to exercise that jurisdiction if it would not achieve the principle purpose of Part 14 of the Act: section 287(2). The principal purpose is expressed in section 286(1) to be "to facilitate the use and occupation by the owners of land owned by Maori by rationalising particular landholdings and providing access or additional; or improved access to the land."

[20] At all times the Court must have regard to the principles set out in the preamble to the Act, section 2 and section 17: *Brown v Maori Appellate Court* (para 66).

...

> [23] When the Court is considering section 288(4)(a) it must assess whether there are reasonable alternatives to partition, whether they are contained in the Act or elsewhere. This was made clear by this Court in *Re Kaiwaitau 1* (paragraphs 13 and 15) where we went on to explain the gravity of partition order:
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> > "The test in this case must therefore be whether there exists any reasonable alternative to partition in terms of achieving the effective operation, development and utilisation of the land...
> >
> > It can be seen at once that partition is treated under the Act as of being the utmost gravity – akin in some ways to alienation. This sea change in attitude from Maori Affairs Act 1953 to Te Ture Whenua Maori Act 1993 reflects an acceptance by the legislature that title fragmentation through partition is contrary to Maori economic and cultural interests and should not now be encouraged if there are reasonable alternatives to it. The bar has been set intentionally high."
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> [24] Alternatives to partition may include agreement between the owners, leasing, a trust with a trust order defining areas of use and occupation, occupation orders, subdivision and so forth. This is not intended to be an exhaustive list and the alternatives (if any) will depend on the circumstances of the land and its owners. Importantly, applicants or owners cannot simply reject those alternatives as they do not like them, or perceive them to be inferior when they are not, or simply prefer partition. The corollary of a partition being required to be "reasonably necessary" for the operation, development and utilisation of the land is that reasonable alternatives are not available to achieve the same outcome. The owners cannot unreasonably reject reasonable alternatives.

[22] Accordingly, owners do not have an automatic right to partition their interests and the Court must be satisfied of several matters before it can grant a partition. The Court must exercise its discretion in accordance with the three step process. In *Whaanga v Niania – Anewa Block*[3] the Māori Appellate Court observed that the three steps overlap in terms of the evidence that applies to each:

> [38] Clearly, the Court must tackle each of the three steps separately. However, the steps overlap in terms of the evidence that applies to each. For example, the evidence of the "degree of support" is largely the same evidence that goes to the assessment of "the opinion of the owners". Importantly, the evidence that goes to "the nature and importance of the matter" for the purpose of s 288(2)(b) must, by definition, include the various evidence that

[3] *Whaanga v Niania – Anewa Block* [2011] Māori Appellate Court MB 428 (2011 APPEAL 428).

> relates to the application: that is, the evidence that goes to whether the partition is "necessary to facilitate the effective operation, development, and utilisation of the land"; "the effect of the proposal on the interests of the owners"; "the best overall use and development of the land"; and the Court's ultimate exercise of discretion. Our point is that the assessment under s 288(2)(b) requires the Court to consider the evidence in its entirety.

[23] The Court also went on to discuss what amounts to a sufficient degree of support for the purposes of partition (s 288(2)(b)). The Court noted that the Act does not stipulate a particular percentage of support for partition. The leading authorities emphasise that sufficiency of support must be assessed on a case by case basis having regard to all the relevant facts. In short, "to set the sufficiency of support in context." The key to the assessment of sufficiency of support is the proper assessment of the "nature and importance" of the partition proposal per s 288(2)(b) of the Act.

Discussion

Statutory prerequisites – section 288(2) and (4)

[24] There are immediate problems for Jonnie in satisfying these statutory prerequisites.

[25] First, I cannot be satisfied that the owners have had "sufficient notice of the application and sufficient opportunity to discuss and consider it." The meeting on 29 June 2013 was held at short notice. Annie's co-trustees were not allowed to participate in the meeting. While their views may well have simply reflected Annie's views, their non-participation represents a major flaw in the process adopted by Jonnie. It is also not clear whether all who attended the meeting had seen the revised partition plan. There is certainly doubt about whether William, David and Janet, who are based in Australia, had seen the plan. Section 288(2)(a) is not satisfied.

[26] Second, given the flawed consultation process with the owners it is not possible to conclude that there is sufficient support for partition as there has not been a proper discussion. I am left in considerable doubt whether William, David or Janet understand exactly what is proposed by way of partition. It seems to me that they have sided with their sister, Jonnie, and simply support whatever she proposes, regardless of the practicalities or whether there are alternative options.

[27] Third, the evidence does not demonstrate that partition is reasonably necessary to facilitate the effective operation, development and utilisation of the land. Jonnie already has an occupation order which will enable her to build on the land. The dispute with her nephews relates to the boundaries of that occupation order. If the boundary issue is tidied away, there is nothing to suggest that the tension will continue.

[28] But even if there is some ongoing tension, there are far less terminal solutions than partition that could be employed. For example, more extensive occupation orders could be granted or an ahu whenua trust could be put in place with agreed areas for occupation. Thus, the draft land-use plan prepared by James Berghan and others (or something similar) could be adopted to assist the owners in how they manage and utilise the land.

[29] In summary, there are reasonable alternatives to partition and this is not a situation where the relationship between the owners has broken down so far that complete separation of their land interests is necessary.

Mandatory considerations – section 288(1)

[30] I have regard to the factors in s 288(1). The opinion of the bulk of the owners is in favour of Jonnie's general proposal to partition. But that opinion has arisen from a flawed consultation process. Importantly, the proposal itself has not been worked through in any considered way to promote the practical use of the land. The division at the front of the land into nine 2000m^2 sections divides up a lot of what I understand to be productive land that was previously used for gardening. It is not clear whether that area would be fairly divided. The access way purports to head in a straight line through the swamp, which is impractical. It is not clear how Ronald and Edward, who have much smaller interests, would be accommodated by the partition. Also, there is nothing to say how the configuration of the five sections at the rear has been arrived at. The partition plan is too simplistic and appears ill-considered in terms of the qualities of the land.

General discretion – section 287

[31] I do not believe this partition proposal is intended to promote the principal purpose of Part 14 of the Act as contained in s 286(1). In reality, partition is sought because of an

acrimonious dispute between Jonnie and her nephews. But that issue can be resolved by the provision of a better plan to support the occupation order.

Outcome

[32] Jonnie has failed to satisfy the criteria for partition and the application must therefore be dismissed.

[33] However, as noted, the solution for the dispute would appear to be clarification of the area of Jonnie's occupation order. Jonnie indicated her surveyor could attend to this. If Jonnie files an application under s 330 of the Act to amend the occupation order within six months the filing fee is to be waived. If an application is not filed by 31 May 2014 then in my view the Registrar should of his own volition bring a s 330 application as it is in the interest of all the parties to clarify the boundaries of the occupation order.

Pronounced at pm in Whangārei on Thursday this 28th day of November 2013.

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D J Ambler
JUDGE