IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20140001655
A20140009526

	UNDER	Section 135, Te Ture Whenua Māori Act 1993
	IN THE MATTER OF	Waotu South C No 6B Block
		JUNE ROSALIE SWANSON AND ZENA ADRIENNE LOWTHER Applicants
Hearing:	8 October 2014 (Heard at Rotorua)	
Appearances:	Mr C Bidois, for the applicants	
Judgment:	22 December 2014	

RESERVED JUDGMENT OF JUDGE C T COXHEAD

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Introduction

[1] This decision concerns an application pursuant to ss 135 and 136 of Te Ture Whenua Māori Act 1993 ("the Act") to change the status of the Māori freehold land known as Waotu South C No 6B ("the block") to general land. The application was filed by June Swanson and Zena Lowther ("the applicants") on 23 January 2014 alongside an application to terminate the ahu whenua trust over the block.

[2] Both applications were initially heard before Judge Savage on 4 April 2014. In light of the fact that the applicants are the only two owners in the block and that they both consented to the termination of the trust Judge Savage granted the order for termination as sought and revested the block in the applicants. The change of status application was adjourned sine die.[1]

[3] The change of status application was recalled at the request of counsel for the applicants and a further hearing was held before me on 8 October 2014.[2] The block is now the subject of a sale and purchase agreement between the applicants and the trustees of the DS & RBE Graham Family Trust Partnership ("the Grahams"). The sale and purchase agreement is conditional upon the status of the block being changed from Māori freehold land to general land.

Issue

[4] The issue to be determined in this case is whether to grant the change of status as requested by the applicants.

Background

[5] Waotu South C No 6B Block is Māori freehold land comprising 5.6655 hectares in area. The block was created by partition order on 7 August 1912[3] and has a current Computer Freehold Register title - SA59B/687. Upon partition the block was vested in Wi Taumaihi as the sole owner. The applicants are both descendants of Wi Taumaihi (who is

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1 94 Waiariki MB 32 (94 WAR 32)
2 107 Waiariki MB 39-53 (107 WAR 39-53)
3 17 Mercer MB 149 (17 M 149)

their great grandfather). Wi Taumaihi was succeeded to by his sons Charles Henry Walter George Swanson and William Archibald Swanson on 13 November 1928.[4]

[6] Charles Henry Walter George Swanson subsequently left his interests in the block to his children William Turimanu Swanson and Zena Mere Hull. As William Turimanu Swanson predeceased Charles Swanson his interests in the block were vested in his children Charles William Swanson and June Rosalie Swanson.[5]

[7] William Archibald Swanson's interests were vested in Zena Mere Hull for a life interest as to a half share with remainder to her daughter Zena Adrienne Lowther. The children of William Turimanu Swanson (Charles and June Swanson) both received a quarter share interest.[6]

[8] Charles William Swanson has since gifted his shares to his sister June Swanson in 2012.[7] As a result, June Swanson now holds a 0.5 share in the block. Zena Mere Hull was succeeded to by her daughter Zena Lowther in 2013[8] as a result of which Zena Lowther now also holds a 0.5 share in the block.

Applicant's submissions

[9] Counsel for the applicants submits that:

(a) The block was previously included in a scheme for collaboratively managed composite farms that was administered by the Māori Trustee; who leased the block to a neighbouring landowner (Mr Riley) to be utilised as part of their farm operation;

(b) That lease expired in 2012 and Mr Riley has since sold his property to the Grahams. The Grahams have declined to take up the option to lease the block

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4 15 Auckland MB 203 (15 AK 203)
5 76 Waikato MB 55 (76 W 55) note that the initial succession provided for a life interest to Edith Swanson
6 8 Registrars MB 18, 23 (8 RGWM 18,23), 78 Waikato MB 158 (78 W 158) and 81 Waikato Maniapoto 243 (81 WMN 243)
7 63 Waiariki MB 4 (63 WAR 4)
8 65 Taitokerau MB 50-53 (65 TTK 50-53)

but have entered into a sale and purchase agreement with the applicants conditional upon the status of the land being changed to general land;

(c) The land is now in a vacant state and no income has been received for the block;

(d) The applicants have satisfied the prerequisites set out in ss 136(a)-(c), (e) of the Act;

(e) In terms of s 136(d) of the Act the applicants are currently prevented from utilising the land either commercially or personally for want of access; previous attempts to lease the land to those that have access have been unsuccessful; and a change of status will allow the land to be sold to one of the adjoining land owners who is in a position to manage and utilise the land productively as grazing land;

(f) The applicants are elderly and do not reside near the land. Neither are in a position to actively farm the property personally even if legal access could be obtained;

(g) The circumstances in the present case are outside the ordinary run of cases: The land is landlocked and unutilised; the owners do not have the expertise or ability to utilise the land themselves; the owners have agreed to the change of status unanimously; notice has been given twice to the preferred class of alienees ("the PCA") and no response or objections have been received; and the refusal to grant a change of status would leave the owners with no income from the land and no economically viable way to escape that position; and

(h) There is a specific plan for the land and there is evidence that the status of the land is a hindrance to sale. The objective of the status change is not to maximise the sale price, as without the status change there will be no sale.

Evidence of David Graham

[10] Mr David Graham filed an affidavit in support of the application and appeared before the Court at the last hearing. In his evidence he confirms that he has been utilising the block on an informal basis since he purchased the neighbouring property from Mr Riley. He has been grazing the property and has applied fertilizer to the block. Mr Graham explained the potential cost involved in purchasing the Māori freehold land block and incorporating it into his farming operation and noted that the block currently has no power or water.

[11] Mr Graham openly confirmed that the block is valuable to him and that he does not wish to be subject to the restrictions of Māori freehold land he further adds that if the block is amalgamated with his farm property the new title would become Māori land and the value of the property would be reduced by approximately 15 per cent.

[12] Mr Graham provided additional evidence to the Court on the reasoning behind his reluctance to lease the land. He says his reluctance stems from a previous experience with leasing land from the Māori Trustee and issues surrounding compensation for improvements. He also indicated that he did not wish to enter a lease given that there would be increased costs involved in surveying the land and erecting boundary fencing.

Law

[13] Sections 135 and 136 of the Act read as follows:

> **135 Change from Maori land to General land by status order**
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> (1) The Maori Land Court shall have jurisdiction to make, in accordance with section 136 or section 137 of this Act, a status order declaring that any land shall cease to be Maori customary land or Maori freehold land and shall become General land.
>
> (2) The Court shall not make a status order under subsection (1) of this section unless it is satisfied that the order may be made in accordance with section 136 or section 137 of this Act.
>
> (3) A status order under subsection (1) of this section may be made conditional upon the registration of any instrument, order, or notice effecting a conveyance of the fee simple estate in the land to any person or persons specified in the order.
>
> **136 Power to change status of Maori land owned by not more than 10 persons**

> The Maori Land Court may make a status order under section 135… of this Act where it is satisfied that—
>
> (a) The land is beneficially owned by not more than 10 persons as tenants in common; and
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> (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
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> (c) The title to the land is registered under the Land Transfer Act 1952 or is capable of being so registered; and
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> (d) The land can be managed or utilised more effectively as General land; and
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> (e) The owners have had adequate opportunity to consider the proposed change of status and a sufficient proportion of the owners agree to it.

[14] In *Apaapa – Te Pura A No 17* Judge Clark summarised the applicable principles:[9]

> [40] The general principles applicable to a change of status have developed over time. There are a number of decisions of the Māori Land Court, Māori Appellate Court, High Court and Court of Appeal which are of relevance.
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> …
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> [41] In a recent decision, *Te Whata – Waiwhatawhata 1A2B6 Lot 1 DP 168554* (2008) 125 Whangarei MB 294 (125 WH 294), Judge Ambler comprehensively identified the relevant legal principles. I summarise those principles as follows:
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> a) The PCA are entitled to be given formal notice of the application and hearing;
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> b) The application is considered in two steps. First the Court must assess whether each of the five statutory preconditions set out in s 136 of TTWMA have been met. Once an applicant has satisfied the Court that those threshold requirements can be met, the Court must then consider whether to exercise its discretion in favour of the change of status. In doing so the Court will measure the application against the principles of TTWMA, in particular the Preamble, ss 2, 17, and the removal of the statutory right of first refusal reserved to the PCA;
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> c) Applications must be supported by full and cogent evidence. An applicant must demonstrate that specific plans for the land can be more effectively achieved if the land were general land;
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> d) Each application should be considered on its own merits. The Court must measure the personal situation and desire of the applicant in assessing the application;

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[9] *Apaapa – Te Pura A No 17* (2010) 6 Waikato Maniapoto MB 1 (6 WMN 1). The cited authorities are *Cleave – Orokawa 3B* (1995) 4 Taitokerau Appellate MB 95 (4 APWH 95); *White – Maketu A2A Lot 4 DPS 63036* (1999) 1 Waiariki Appellate MB 116 (1 AP 116); *Hoko – Papamoa 2A1* (2003) 20 Waikato-Maniapoto Appellate MB 167 (20 APWM 167); *Regeling – Orokawa 3B Lot 4 DP 41892* (2004) 6 Taitokerau Appellate MB 157 (6 APWH 157); *Craig v Kira – Wainui 2F4D* (2006) 7 Taitokerau Appellate MB 1 (7 APWH 1); *Property Ventures Ltd v Parata – Ngarara West B3B* (2007) 16 Aotea Appellate MB 1 (16 WGAP 1); *Edwards v Māori Land Court of New Zealand* HC Wellington CP 78/01, 11 December 2001; *Bruce v Edwards* [2003] 1 NZLR 515 (CA) and *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA).

e) The opposition or lack of opposition of the PCA is a factor to be taken into account. The financial ability or lack of it, of the current generation of PCA to exercise the right of first refusal will not be determinative;

f) A mortgagee sale of the land does not result in an automatic change of status of Māori freehold land by operation of law.

Discretion

[42] In exercising its discretion the Court must take into account the kaupapa of TTWMA as expressed in the Preamble, ss 2 and 17. In particular:

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

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

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

d) A change of status is possible but only in a limited range of situations in which the application is in some material way outside the ordinary run of cases or that it is sufficiently distinctive;

e) An application for status change where the sole purpose is to sell the land or to achieve a better sale price will be difficult to achieve particularly when assessed against the kaupapa of TTWMA. In terms of the two-step process, although a change of status for the sole purpose of sale may satisfy s 136(d) of TTWMA, the major hurdle is the Court's discretion. The Court must exercise its discretion as far as possible having regard to the kaupapa of TTWMA. The primary objective of TTWMA is the retention of Māori land, sale of land is not an objective.

[43] The development of the case law outlined above reflects the fact that since the advent of TTWMA, change of status applications have provided some of the more controversial cases encountered in the Māori Land Court. These cases also reflect the tension between what land owners might desire and the underlying philosophies/kaupapa of TTWMA.

[15] In the Māori Appellate Court decisions of *Craig v Kira – Wainui 2F 4D*[10] and *Property Ventures Ltd v Parata – Ngarara West B3B* [11] the Māori Appellate Court set out the approach to take when considering change of status applications. First the Court must consider the five specific requirements set out in s 136 of the Act. Once an applicant has overcome those threshold requirements the Court must then measure the application against the Preamble, sections 2 and 17 and the removal of the statutory right of first refusal reserved to the PCA. A change of status application should only be allowed where the application is in some material way outside the ordinary run of cases.[12]

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10 *Craig v Kira – Wainui 2F 4D* (2006) 7 Taitokerau Appellate MB 1 (7 APWH 1)

11 *Property Ventures Ltd v Parata – Ngarara West B3B* (2007) 16 Aotea Appellate MB 1 (16 WGAP 1)

12 *Gibbs – Te Reti A22* (2008) 92 Tauranga MB 182 (92 T 182)

Section 136 preconditions

[16] The applicants meet the preconditions set out in s136(a)-(c) and (e) of the Act. The remaining issue is whether the applicants meet the requirement of s 136(d) of the Act which requires that the land be managed or utilised more effectively as general land.

[17] In *Craig v Kira – Wainui 2F 4D* the Māori Appellate Court considered that:[13]

> those seeking a change under s 136 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.

[18] In *Property Ventures Ltd v Parata – Ngarara West B3B* the Māori Appellate Court indicated that the test whether the land can be more effectively managed as general land ought to be a relatively straightforward preliminary matter.[14] If an applicant can demonstrate that specific plans for the land can be more easily or effectively achieved if it were general land, then the threshold requirement is made out.

[19] Counsel for the applicants argued that the owners are presently prevented from utilising the block themselves either personally or commercially for want of access. Although it is noted that Mr Graham does use the land on an informal arrangement. He submits that previous attempts to lease the block to those who are able to access the block have been unsuccessful. I note that Ms Kingham for the Māori Trustee confirmed at the hearing that whilst under the administration of the Māori Trustee the block had been continuously leased for 34 years to Mr Riley the previous owner of the neighbouring property[15] now owned by Mr Graham.

[20] Counsel for the applicant contends that a change of status will allow the block to be sold to an adjoining owner who is in a position to manage and utilise the block productively as grazing land, after further investment to improve fencing, water reticulation and pasture quality. He argues that the objective of better management or utilisation of the land can be achieved via the proposed status change and sale. Counsel relies on *Property Ventures Ltd v Parata – Ngarara West B3B* as authority for the

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13 *Craig v Kira – Wainui 2F 4D* (2006) 7 Taitokerau Appellate MB 1 (7 APWH 1)
14 *Property Ventures Ltd v Parata – Ngarara West B3B* (2007) 16 Aotea Appellate MB 1 (16 WGAP 1)
15 107 Waiariki MB 39 (107 WAR 39) at MB 46

proposition that the Court does not have to be satisfied that there is no other option but status change rather it is enough that the objective of the project can be more easily and effectively achieved that way. He says that the applicants are not required to show that there is no other way but status change but simply that the block would be better utilised or managed as general land and other options such as leasing the block as Māori freehold land are not strictly speaking relevant to the question of whether or not it can be more effectively managed as general land. Mr Bidois further added that in this case the block is landlocked and significant costs would be incurred in developing the block and establishing access to the block which the applicants are not in a position to meet.

Decision

[21] The Court has issued a number of decisions in relation to the precondition set out in 136(d) of the Act. The applicants rely upon a number of factors in support of their change of status application namely:

(a) The applicants are elderly and do not reside near the land and neither are in a position to actively farm the property personally;

(b) The land is landlocked and unutilised as such previous attempts to lease the land to those that have access have been unsuccessful; and

(c) A change of status will allow the land to be sold to one of the adjoining land owners who is in a position to manage and utilise the land productively

(d) The owners have agreed to the change of status unanimously;

(e) There have been no objections from PCA

Applicants are elderly

[22] The Court has dealt with a number of cases where the applicants' are elderly and seek a change of status of the block.

[23] In *Manunui v Church - Lot 37-49 DP 34051*[16] it was argued that the applicants had no intention to develop the land, largely due to their age. The only intention the Court could discern was the intention to hold any profit from the sales in trust. The Court declined to change the status of the land as there was no suggestion that any of the proceeds of a sale of the land will be used to purchase Māori freehold land and nor was there any proposal to use the proceeds of sale to develop existing Māori freehold land.

[24] In *Taura - Ngapakihi 2D3A1A*[17] the applicants were an elderly couple who wished to sell the land in order to finance the building of a home on another property and none of their family wished to reside on the block. In that case no offers to purchase the land had been made and in the circumstances the Court held that the grounds argued did not dispose of the tests set out in s 316 satisfactorily.

[25] In *Manning — Kirikiri Pawhaoa B2A1*[18] the Māori Appellate Court granted a change of status where an elderly widower with a life interest in a remote holiday property had, with the agreement of the remaindermen, agreed to sell the land. The widower no longer had the energy or financial resources to keep the land and improvements in good order and the remaindermen did not have the ability or wish to maintain and use the property. A sale had been arranged conditional upon a change of status of the land and the creation of a reservation over part of the block. The Court determined that a distinctive feature in this case was the fact that part of the land was to be set aside as a Māori reservation.

[26] In *Craig v Kira – Wainui 2F 4D*[19] the Māori Appellate Court granted the change of status application where the applicant sought to subdivide and sell a large portion of the block and retain a smaller portion of the block as Māori freehold land. The Māori Appellate Court took into account the applicants age and the fact that the land had been unutilised for a long time and was likely to remain that way. The Māori Appellate Court considered that a change of status of a portion of the block was conceivable as long as it

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16 *Manunui v Church - Lot 37-49 DP 34051* (2013) 313 Aotea MB 260 (313 AOT 260)
17 *Taura - Ngapakihi 2D3A1A* (2012) 294 Aotea MB 106 (294 AOT 106)
18 *Manning - Kirikiri Pawhaoa B2A1* [2011] Māori Appellate Court MB 271 (2011 APPEAL 271).
19 *Craig v Kira – Wainui 2F 4D* (2006) 7 Taitokerau Appellate MB 1 (7 APWH 1)

remained in proportion to the proposal for the development whilst minimising the acreage affected by the removal of the PCA's rights.

[27] The cases outlined above can be distinguished from the present application. Whilst it has been argued that the applicants are elderly and do not reside near the land and are not in a position to actively farm the block there is no indication that the applicants wish to retain a part of the block as Māori freehold land or that the proceeds of the sale will be used to purchase Māori freehold land as was the case in the decisions outlined above. Further from Mr Graham's evidence it is clear that the land is being used, albeit on an informal basis, and one would presume the income from the informal lease is flowing to the applicants.

Access to the block

[28] As to the issue of access to the block, in the decision of *O'Leary – Waitahanui 6*[20] Judge Reeves dealt with a similar application where the applicant a non Māori wished to change the status of the land to general land.

[29] The applicant sought a status change on the basis that he had farmed the block since 1984, the block was landlocked by general land blocks, and he could better manage and utilise the block as part of the rest of his farm. The applicant contended that the block has been a separate and largely undeveloped part of the farm and he wanted to develop the land and incorporate it into his main farming operation. The applicant further contended that he wanted to spend money on improving the water supply, new fencing, shelter belt planting and improved drainage but was is reluctant to do so while the block was Māori freehold land.

[30] Judge Reeves held that the applicant described the plans he has for development of his land in general terms only, there is no detailed evidence of any specific development plan or proposal, including any evidence as to the level of expenditure required, proposed timeframes, and whether development would require third party investment. Nothing he proposed was out of the ordinary course of improvements a farmer would make to his property. The applicant had also failed to demonstrate how the development of the land he

[20] (2011) 262 Aotea MB 95 (262 AOT 95).

proposed is impeded by its status, other than by stating that he is unwilling to invest in the block while it remains Māori land.

[31] In her assessment Judge Reeves considered that the evidence fell short of the standard required to establish more effective management as set out in the appellate authorities above. The applicant plans to continue farming the block as he has done since 1984. The block has always been utilised as part of the farm and there is no proposal for that to change. The convenience of being able to sell the farm including the block in question as general land, at some undefined point in the future, is not a matter which is sufficiently specific or certain to meet the requirement of section 136(d).

[32] Likewise, in *Tahuparae – Ngapakihi 1T*[21] the applicant sought to sell the block to his neighbours who wished to use the block for equestrian events. While the Court accepted that there were distinctive features of the application namely the fact that the land is landlocked, there is no top soil on the block and the relatively small area of the block in the context of commercial use those features were not sufficiently distinctive to warrant departure from an orthodox approach to a change of status application. Judge Harvey did not agree that the link between the land and the PCA ought to be severed simply because the prospective purchasers desired to purchase general land. The sale could proceed if the land remained Māori land because the only imposition would be the obligation to offer a first right of refusal.

[33] The applicants argue that *O'Leary* should be distinguished from the present situation on the basis that in that in that case Mr O'Leary had been farming the land for a long period and could continue to do so if the land remained Māori freehold land, he had not made any attempts to sell the land and the status of the block would not impede his proposed developments for the land.

[34] With respect, I find that many of elements of the applicants' evidence are similar to those set out in the *O'Leary* decision. Despite the fact Mr Graham has not farmed the land for a long period it is clear from the evidence that the block has been utilised as part of the farming operation of the previous owner of Mr Grahams property for a long period and Mr

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21 *Tahuparae – Ngapakihi 1T* (2008) 198 Aotea MB 201 (198 AOT 201)

Graham himself has admitted to continuing to use the block as part of his existing farming operation, albeit on an informal arrangement.

[35] Mr Graham has provided evidence of his plans for development of the block and estimates of proposed expenditure required to incorporate the block into the farming operation including fencing, fertilising, regressing and running power and water connections to the block. Mr Graham estimates that this work would be completed in approximately 6 months. I find however that this proposal is not out of the ordinary course of improvements a farmer would make to his property.

[36] In this case the only attempt to sell has been to Mr Graham, a change of status would not impede the proposed development of the land. Mr Graham has acknowledged that his reluctance to lease the land on a formal basis is based on a previous experience with the Māori Trustee and his reluctance to expend monies in relation to a lease arrangement. This however has not prevented Mr Graham from utilising the land on an informal basis. Mr Graham further said that if the block was incorporated into his farming operation upon sale the lands would be all classed as Māori freehold land and have a lower valuation.

[37] It is still open to the parties to enter into a lease agreement on terms favourable to all. As Judge Reeves determined the convenience of being able to sell the farm including the block in question as general land, at some undefined point in the future, is not a matter which is sufficiently specific or certain to meet the requirement of s 136(d).

Outcome

[38] I find that the requirements of s 136(d) have not been met and a status change is not necessary to manage or utilise the land.

[39] Given my finding in respect of the threshold requirements of s 136, I am not required to consider whether to exercise the Court's discretion in favour of a change of status.[22]

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[22] *Cleave – Orokawa 3B* (1995) 4 Taitokerau Appellate MB 95 (4 APWH 95)

[40] The application for a status order pursuant to section 135 changing the status of the land from Māori freehold land to general land is declined.

Discretion

[41] Even if the applicants could satisfy the Court that the land could be managed or used more effectively as general land, I am not prepared to exercise my discretion to change the status. The Court must exercise its discretion as far as possible having regard to the kaupapa of the Act and the primary objective of the Act namely the retention of Māori land.

[42] In *Hoko — Papamoa 2A1* the Court said:[23]

> While an intention to sell is not fatal to an application, a real question arises as to whether it could in fact form the basis for an application. In a nutshell, then, if it is enough for owners of Maori freehold land to say the land will be easier to sell as General land, then the kaupapa of the Act is subverted. The very term taonga tuku iho connotes something that is handed down from earlier generations, and the scheme of the Act envisages that wider kin groups will have some say, and generations to come may have some expectations.

[43] Counsel submits that the purpose of the application is not to maximise the sale price, as without the status change there will be no sale. It is further submitted that there has been no objection from the PCA to the change of status.

[44] There is a line of Court authorities that support the view that the Court would only consider granting a change of status to enable the sale of ancestral land in extraordinary circumstances as such an outcome runs clearly against the kaupapa of the Act.[24] The applicants have not established any such extraordinary circumstances. It remains open to the applicants to sell the block as Māori freehold land.

Pronounced in open Court at 3.30 pm in Rotorua on this 22nd day of December 2014

C T Coxhead
JUDGE

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[23] *Hoko – Papamoa 2A1* (2003) 20 Waikato Maniapoto Appellate MB 167 (20 APWM 167)
[24] *Te Whata – Waiwhatawhata 1A2B6 Lot 1 DP 168554* (2008) 125 Whangarei MB 294 (125 WH 294)