IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20140010464

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal against an order of the Māori Land Court made on 2 August 2010 at 253 Aotea MB 250-274 and confirmed on 6 August 2014 at 323 Aotea MB 191-192 in respect of the Māori land interests of Graham Ngahina Matthews
BETWEEN	DUNCAN MATUTAERA MATTHEWS Appellant
AND	GEORGE MATTHEWS, LESLEY PEDDIE AND STEPHEN COMRIE AND BARBARA JACKI CLARK Respondents

Hearing:	10 February 2015 at 2015 Māori Appellate Court MB 16-56 (Heard at Whanganui)
Court:	Judge C T Coxhead (Presiding) Chief Judge W W Isaac Judge M J Doogan
Appearances:	Mr Richard Laurenson and Mr John Porter, counsel for the appellant Mr Leo Watson, counsel for the respondents Mr John Unsworth, counsel for the estate of Graham Ngahina Matthews
Judgment:	29 September 2015

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] By Deed of Transfer dated 19 August 2008, Graham Ngahina Matthews gifted a significant proportion of his Māori land interests to his son, Duncan Matthews. He retained for himself a life interest. The affected lands comprise a farming operation. Graham had other Māori land interests that were not subject to this arrangement which he intended to distribute to his other children by will.

[2] Graham's application to vest these interests came before Judge Harvey in 2008 and 2009. Faced with opposition from three of Duncan's siblings who considered the vesting would deprive them of interests in ancestral land, Judge Harvey ordered a "compromise solution." Rather than simply grant or decline the application Judge Harvey granted Duncan a life interest only with details of the remainder interest to be finalised in due course.[1]

[3] From that decision, Duncan appeals saying that the Court did not have the power to do this. None of the parties had advocated for it and the Court did not call for submissions on it.

[4] Three of Duncan's siblings oppose the appeal on the basis that the appeal is out of time and that there is no reasonable basis for this Court to interfere with the exercise of discretion in the lower Court.

Issue on appeal

[5] The issue on appeal is whether Judge Harvey had the power to alter the terms of the vesting order from those in the Deed of Transfer.

Procedural history

[6] The substantive hearing took place on 12 May 2009. Graham Ngahina Matthews died on 6 July 2010 before Judge Harvey had issued his decision.

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[1] *Matthews v Matthews – Estate of Graham Ngahina Matthews* (2010) 253 Aotea MB 250 (253 AOT 250).

[7] Judge Harvey concluded his decision noting that: [2]

> "Counsel may wish to make submissions on the remainder interest within 21 days."

[8] No submissions as to the remainder interest were filed. On 1 October 2010 a notice of appeal was filed on behalf of Duncan Matthews. The notice sought to preserve his ability to appeal pending the outcome of any further decision in relation to the remainder interests.

[9] The Māori Appellate Court issued a minute dated 29 October 2010 confirming that the notice of appeal was accepted but that no formal steps would be taken to constitute a coram or to set the appeal down for hearing.

[10] The Chief Judge on behalf of the Māori Appellate Court referred the matter back to the lower Court to finalise the issue of the remainder interest. Once finalised, counsel were then granted leave to file an amended notice of appeal or to request the Māori Appellate Court to proceed on the notice of appeal dated 1 October 2010.[3]

[11] On 8 March 2012 counsel for Duncan Matthews withdrew the appeal conditional on retaining the right to pursue a further appeal once the substantive hearing was complete.

[12] The late Graham Ngahina Matthews made detailed provisions in his will consistent with his intention to transfer to Duncan the Māori land interests the subject of the August 2008 deed of transfer. Provision was made for forgiveness of debt in relation to those interests. An application to vest interests in the executors of the estate of Graham Ngahina Matthews came before Judge Harvey in November 2013. That matter could not proceed due to uncertainty over the status of the 2010 decision granting a life interest to Duncan Matthews.

[13] After hearing from the parties Judge Harvey issued a further decision on 6 August 2014: [4]

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[2] At [72].
[3] (2010) Māori Appellate Court MB 508-509 (2010 APPEAL 508-509).
[4] *Matthews v Matthews – Estate of Graham Ngahina Matthews* (2014) 323 Aotea MB 191 (323 AOT 191) at

> The short point is that all counsel are agreed that there should either be a further hearing before me on, inter alia, the issue of determining the remainder persons, or in the alternative, that I should simply confirm that my judgment of 2 August 2010 is now a final determination. That would then enable counsel to reactivate the appeal.
>
> Having considered the submissions of the parties I confirm that my decision of 2 August 2010 is now a final determination. I also consider that in the circumstances, and in the absence of detailed submissions from all of the parties, the remainder persons should be the children of the deceased with substitution of issue where and when appropriate.

[14] An appeal dated 30 September 2014 was then filed on behalf of Duncan Matthews.

Has the application been filed out of time?

[15] Mr Watson for the respondent parties argued that the appeal was out of time. We dealt with this as a preliminary issue at the commencement of the hearing on 10 February 2015. On behalf of the Court, Chief Judge Isaac delivered the following oral decision: [5]

> Firstly in relation to the late filing of the appeal. We consider that the correct summation of the situation was set out in the decision of Judge Harvey dated 6 august 2014 and in that summation he essentially said that his decision of 2 August 2010, where he determined that Duncan Matthews was entitled to a life interest and called for further submissions did not conclude the matter.
>
> Following the receipt of that decision the appellants filed a notice of appeal dated 1 October 2010 which was clearly within time but pending the outcome of a further determination by the Court on 26 October 2010.
>
> As Chief Judge I accepted the appeal and at that time the appeal was essentially put on hold pending the determination by the Court.
>
> On 8 March 2012 the appeal was withdrawn but it was withdrawn subject to retaining the right to appeal after the substantive hearing had been completed. Counsel at that time had agreed to either a hearing before Judge Harvey or Judge Harvey confirming his decision of 2 August 2010, which in Judge Harvey's words, 'would enable counsel to reactivate the appeal'. And on 6 August 2014 Judge Harvey confirmed his decision and determined the remaindermen.
>
> In our view we consider that this set of circumstances clearly enables the appellant to lodge a further appeal to the decision of 2 October 2010 and that essentially a holding pattern was developed pending the final determination which was made by Judge Harvey on 6 August 2014. Only with that confirmation from Judge Harvey did the parties finally know what the final outcome of this decision was.

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[5] – [6].

[5] [2015] Māori Appellate Court MB 16-56 (2015 APPEAL 16-56) at 25 – 26.

> As a result of that we consider that the further notice of appeal dated 24 October 2014, which referred to the decision of 6 August 2014, was late. However in the circumstances surrounding this appeal and with the application to grant leave for this to be filed late we consider that in all these circumstances lead us to the decision that this appeal should be accepted and should be heard today.

Background

The Deed of Transfer

[16] The land interests that are the subject of the Deed of Transfer are Graham Matthews' shares in Kapakapa 6B No.2, Kumuiti 2A, Kumuiti 2B and Kumuiti 2C, Kumuiti No. 1 A, Matatera No. 2D, Te Kumuiti No. 3, and Kumuiti No.4.

[17] The Deed of Transfer was prepared by solicitors on Graham's instructions. The following points are drawn from the outline contained in Judge Harvey's decision:

(a) Graham acquired the subject interests from his mother, Kapua Maraea which were vested in Graham during her lifetime. There was a covenant between Graham and his mother. He had been selected from her children as being the person with the closest connection to the land, and who held the cultural and spiritual values important to her;

(b) the land would never be sold out of Māori ownership;

(c) the land would not be fragmented by multiple ownership succession;

(d) the land would be held by Graham and passed by him to a selected child of his family with the same cultural values and connection to the land upon the same covenants;

(e) Graham has determined that Duncan shall be the person in whom the lands will be vested during his lifetime subject to the latter's retaining an interest for the rest of his life.

[18] The land is flat land adjoining the Whangaehu River and was severely affected by river flooding in 2004. It remained unproductive for the two seasons of 2005 and 2006.

Since then Duncan has been occupying the block and has put it back into grass and into productive use. Duncan is reluctant to commit to the long term farming of the lands until he secures a reversionary interest in the land.

[19] Graham has made known his desires and decision in respect of the Kumuiti interests and the covenant held from Kapua Maraea to his family. They are aware of his decision to proceed with the vesting.

[20] Graham has other interests in Māori land and intends that those interests in the land will be distributed to his children and grandchildren by his will. They do not form part of the special covenant provisions agreed with Kapua Maraea.

[21] Duncan will enter into an acknowledgment of debt for a sale price determined by valuation in favour of Graham. The debt will be interest free and repayable on demand for his reversionary interest.

[22] Graham by his last will and testament will gift to Duncan absolutely the amount owing to him. Pursuant to the acknowledgement of debt Duncan will receive the land free of any debt or obligation to Graham's estate.

[23] Judge Harvey also sets out a derivation table which shows that the majority of these land interests were acquired by Graham by purchase from other owners or the Māori Trustee. Only a small proportion were in fact received from his mother.

Case for the Appellant

[24] Mr Laurenson for the appellant (Duncan Matthews) argued:

(a) The appeal is against the exercise of discretion under section 164 Te Ture Whenua Māori Act (to grant or decline a vesting order for transfer of Māori Freehold land).

(b) The criteria for a successful appeal against exercise of discretion are:[6]

[6] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

(i) error of law or principle;

(ii) taking account of irrelevant consideration;

(iii) failing to take account of relevant consideration; or

(iv) the decision is plainly wrong.

(c) In this case that the lower Court erred in the following respects:

(i) By substituting a term of vesting different from that applied for, the Judge was acting outside his powers and was plainly wrong or acted in error of law.

(ii) As a result the Judge made no ruling on the application for a vesting order in the terms applied for. The Appellate Court is therefore able to make its own ruling on the application unfettered by the exercise of the judge's discretion in the lower Court.

(iii) In the circumstances of this case the proper exercise of discretion under s 164 is to grant the application on the terms applied for.

[25] Mr Laurenson submitted that the Court had no power to vary the terms of the vesting application other than in accordance with s 152(2) which provides the Court with power to vary the terms of an instrument of alienation with the consent of the parties.

[26] The instrument of alienation, or its equivalent in this case was the Deed of Transfer dated 9 August 2008. It is the consent of the parties to that deed that is required for any variation and the record clearly shows that they did not agree to the variation imposed by the lower Court. There being no other power to vary the terms of the application, the substituted vesting order is of no effect.

[27] Mr Laurenson notes that where one of the parties has died, the Court may make a vesting order if satisfied that a proper agreement had been reached before the death of that

party (s 164(7)). Graham never agreed to the terms of the vesting order devised by the Judge in the Court below. That order must therefore be quashed.

[28] The arrangements provided for in the deed of transfer are entirely consistent with the provisions of ss 148 and 147 as a transfer within the preferred class. Mr Laurenson relies on the following statement of principle from the Māori Appellate Court in the *Phillips v Ashby* case:[7]

> While we accept that it is common place for many iwi and hapu to observe a process of consultation where the transfer of interests is to move outside of the kin group, we can find no evidence or authority for the proposition that vesting between closely related whanau, in this case siblings, requires the consent of hapu. Nor does the Act provide support for the Appellant's position. On the contrary, we consider transfers of shares between siblings and close family members are, except in the rarest of circumstances, a private matter between those individuals and their immediate family members only.

[29] Mr Laurenson argues that this Court should exercise the s 164 discretion de novo. Mr Laurenson relies on the Court's powers on appeal under ss 55 and 56 of the Act.

[30] As to the exercise of discretion Mr Laurenson submits that the major part of the provisions of ss 152, 158 and 164 are machinery provisions. The ambit of the discretion is by reasons of ss 2 and 17.

[31] As to factors which favour the exercise of discretion to grant the vesting application Mr Laurenson says:

(a) The objects and wishes of Graham meet all the objects and principles of s 2(2) and ss 17(1)(a) and (b). There is no good reason to prevent those objects and wishes from being carried out.

(b) Graham had set about recovering and securing various Māori land interests. While not necessarily traditional interests to him personally his object was to restore and keep the land as Māori freehold land. This included returning some of the land to Māori freehold land status.

[7] *Phillips v Ashby – Oromahoe 17B2* (2006) 6 Taitokerau Appellate MB 271 (6 APWH 271) at [16].

(c) In order to maintain these interests Graham decided to vest them in his son Duncan whom he considered from amongst his children as the person who could best manage and respect the stewardship he had begun.

[32] Graham decided on this after discussions with his children and after another of his children Mr George Matthews had earlier tried to farm and occupy these lands.

[33] The vesting of these interests in one person has the benefit of avoiding fragmentation – a tendency which Graham opposed and saw as a cause of loss of land from Māori ownership.

[34] Vesting in Duncan permits him to continue to farm the lands. This has the benefit of providing him with an incentive to best manage the lands whilst carrying out the stewardship passed on to him by his father.

[35] By declining to grant the vesting order and substituting different terms of vesting the Court below erred by:

(a) Failing to recognise that sole ownership in Duncan does in fact promote the retention, use and development and control of Māori land as taonga tuku iho by Māori owners, their whānau and hapu (as set out in s 2(2)); and

(b) Seeking to impose a practical solution when there existed the much more compelling fact of Graham's wishes and objectives and the course of action adopted by him. The issue arising does not relate to the use or management of land but conflict over the idea that the land could be owned by one person only within the whānau.

[36] Mr Laurenson submits that by his application to vest these interests in Duncan, Graham sought to achieve the very objects set out in the Act. The vesting order should therefore be granted on the terms originally applied for.

Case for the Respondents

[37] Mr Watson for the respondent parties argues that the appellant is wrong to assert that there was no jurisdiction available to the lower Court to vary the terms of the application without the consent of the parties. Mr Watson submits that:

(a) Section 152 and 158 are relevant to s 164 vesting orders but only insofar as they are applicable and with any necessary modifications" (per s 164(3)).

(b) Mr Watson argues that provisions relating to vesting orders for the transfer of land differ in important respects to provisions relating to confirmation of alienation. In particular:

(i) Vesting orders are discretionary, whereas discretion surrounding confirmation of alienation instruments has been removed; and

(ii) Unlike the scheme for confirmation of alienation there is no requirement for an "instrument of alienation" in applications for vesting orders. An application for a vesting order need not be a contract and as such, s 152(2) is not directly applicable.

[38] Mr Watson says that even if he is wrong and s 152(2) did apply to an application for a vesting order then the Court below did in any event impliedly obtain the consent of the parties. This is because Judge Harvey's decision was issued with a 21 day timeframe within which parties could make submissions as to the remaindermen. No submissions were filed including none in opposition to the proposal.

[39] Mr Watson further argues that the requirement for the consent of the parties under s 152(2) cannot override the Courts general discretion under s 71 to amend of its own motion any defects or errors in the proceedings. Mr Watson points to Judge Harvey's finding that the result of granting the application would be to permanently disinherit the respondents and their issue from important and valuable family lands, an outcome the Court does not confirm lightly. Mr Watson submits that this indicates that Judge Harvey considered the application defective and while there is no express reference in the

judgment to s 71, there was jurisdiction available under that provision to vary the application.

[40] In oral argument, and in response to questions from the bench, Mr Watson also placed reliance on s 37(3) which provides the court with jurisdiction to exercise any other part of its jurisdiction the Court considers necessary or desirable.

[41] As to exercise of discretion Mr Watson submits that the appellants have not established that:

(a) There was an error of law or principle. Mr Watson submits that the Māori Land Court applied the correct provisions of the Act.

(b) That the Court took into account an irrelevant consideration or failed to take into account a relevant consideration. Mr Watson says the Court below heard in depth from all relevant parties and referred to their views in its decision. There are no considerations overlooked or erroneously included.

(c) That the decision was plainly wrong. Mr Watson submits that the decision was not plainly wrong and that it was a determination that balanced competing interests consistent with the principles and objectives of the Act. The decision was within the scope of the Court's exercise of discretion.

[42] Nonetheless, if this Court considers that it is appropriate to exercise the discretion on a de novo basis, then the respondents argue against granting the application. The approach of the Court below was correct and should be upheld. It is the option that best furthers the principles and the Preamble of the Act and is most consistent with the objectives in ss 2 and 17 of the Act.

[43] In terms of factual matters relevant to exercise of discretion, Mr Watson submits:

(a) The rationale for the transfer includes reference to a covenant said to exist between the late Graham Matthews and his mother. Mr Watson said that there is no documentary evidence of such a covenant. There is only an affidavit from Graham Matthews dated 20 February 2009 which at most

establishes that the land was not to be fragmented and was to be held by him for life. It also refers to keeping the land together under one kaitiaki but the evidence does not establish that this kaitiaki has to be the owner to the exclusion of the other descendants.

(b) The application was not supported by evidence suggesting that Duncan Matthews was more suitable to be kaitiaki than the other children or that the respondents lacked the necessary skills, mana or whakaaro.

(c) In any event those considerations are irrelevant to the application except to the extent the Court is mindful of the wishes of the owner. However that in itself does not justify disenfranchisement or acting inconsistently with the principle of retention of Māori land within the whānau.

(d) The fact that most of the land was acquired by purchase rather than inheritance is not relevant because the land is Māori land and acquires the protections of the Act regardless of its derivative history. The interests in the land derive from the late Graham Ngahina Matthews' mother, Kapua Maraea, and is whānau ancestral land. While additional interests in those blocks were acquired by purchase, this was to consolidate Graham's interests in relation to those ancestral lands. They were not investments devoid of any ancestral context. Furthermore, the land contains wāhi tapu including urupā and other significant features.

(e) The Kumuiti shares represent the sole link to the ancestral lands owned by the appellant's mother the paternal grandmother of the respondents. This heightens the ancestral significance of the whenua to those opposing the application.

(f) Mr Watson points to evidence concerning the establishment of the Mahina trust. That trust did not eventuate but in 2004 Graham Matthews proposed to place all his Māori land and interests in a trust for the benefit of the whānau. There is no reference at that time to any 'covenant' requiring the transfer of the Kumuiti land to just one son.

[44] As to the legal principles applicable to the exercise of discretion, Mr Watson submits:

(a) The Court is required to act in a manner that best furthers the principle of retention set out in the Preamble and s 2(2).

(b) The respondents do not claim they have a veto right which would prevent the Court from exercising discretion in favour of the application for vesting. The respondents have a right to be heard (s 164(8)). The respondents raise genuine competing interests which need to be considered in a manner consistent with the Act.

(c) The issue is not simply whether the intention of the applicant will result in retention of land in Māori ownership. While granting the application would retain the land in the ownership of Duncan Matthews, it would disinherit the other children. The issue is what best furthers the retention principle. The Court was right to conclude that granting the application would not best further retention of Māori land as:

(i) taonga tuku iho

(ii) by Māori owners, their whānau, their hapu and their descendants, and

(iii) in a manner that protects waahi tapu.

(d) The emphasis placed in the Act on the collective and the retention principle extends to whānau as a whole and descendants as a whole. Picking a winner amongst five children runs contrary to the principle of retention in the collective. Fragmentation concerns can be addressed through management structures such a trust.

(e) The respondents disagree that removing sole ownership of the land interests would prejudicially affect use, management and development of the land. The decision of the Court below to grant a life interest to Duncan was to ensure security of planning and income with the reversionary interest to all

of the children. The respondents support Duncan maintaining the lease on the farm, residing on the land, and making his living from the land. The remainder interest would not therefore affect the use, management and development aspirations that Duncan may have for the land.

(f) Whilst the Court must consider the wishes of the applicant as owner of the lands, that objective is only one of a range of objectives the Court must consider. All are subservient to the principle of retention in the Preamble.

(g) In any event, Graham's wishes are to a significant degree met by the decision of the lower Court. Prevention of fragmentation and continuation of economic viability of the farm blocks are all addressed by the Court's decision to grant a life interest to Duncan with the remainder interest to the children equally.

(h) The Court below found a pragmatic solution to the problem as required under s 17(2)(f) and there is no basis to disturb that decision.

The law

[45] The application was for a vesting order pursuant to s 164 of the Act. Section 164 provides:

> **164 Transfer of land or undivided interest by Court vesting orders**
>
> (1) The court may, in accordance with this section, make a vesting order for the transfer of any Maori freehold land or any undivided interest in any such land to and in favour of any person or persons to whom that land or interest may be alienated in accordance with the provisions of Part 7 of this Act.
>
> (2) An application for a vesting order may be made by—
>
> (a) A party to a contract or arrangement relating to the proposed transfer; or
>
> (b) A donor of the land or interest; or
>
> (c) A trustee for a person entitled to the land or interest.
>
> (3) The provisions of sections 152 and 158 of this Act, so far as they are applicable and with any necessary modifications, shall apply to an application for a vesting order as if it were an application for confirmation of an instrument of alienation.

(4) Every contract or arrangement entered into for the purposes of this section shall be executed and attested, and proven in writing, in accordance with the rules of court, but shall not be enforceable as a contract.

(5) Where any money is payable by way of consideration for the proposed transfer, the court shall not sign or seal a vesting order unless and until it is satisfied that the money has been paid to the Maori Trustee or the court appointed agent or trustees appointed under this Act, or to the alienor.

(6) Where a vesting order is sought to effect a gift of any land or share having a value in excess of $2,000, the court may decline to make the order without evidence in support of the application from the alienor, either in person or in any other manner authorised by the rules of court.

(7) Where a vesting order is sought to give effect to a proposed transfer and one of the parties to the transfer has died, the court may make the order if it is satisfied that proper agreement had been reached before the death of that party.

(8) A person who is entitled to a beneficial interest in the land, or who will be entitled to such an interest if the order is made, shall be entitled to appear and be heard on an application for a vesting order, whether or not that person is a party to any contract or arrangement to which the application relates.

(9) This section shall be read subject to section 165 of this Act, section 4A of the Maori Vested Lands Administration Act 1954, and section 10 of the Maori Reserved Land Act 1955.

[46] Section 164(3) imports the provisions of ss 152 and 158. Section 158 requires provision of a special valuation. This is not an issue in the appeal. However, s 152 is relevant. It provides:

152 Court to grant confirmation if satisfied of certain matters

(1) The court must grant confirmation of an alienation of Maori freehold land if it is satisfied—

(a) that,—

(i) in the case of an instrument of alienation, the instrument has been executed and attested in the manner required by the rules of court; or

(ii) in the case of a resolution of assembled owners, the resolution was passed in accordance with this Act or regulations made under this Act; and

(b) that the alienation is not in breach of any trust to which the land is subject; and

(c) that the value of all buildings, all fixtures attached to the land, all things growing on the land, all minerals in the land, and all other assets or funds relating to the land, has been properly taken into account in assessing the consideration payable; and

> (d) that, having regard to the relationship (if any) of the parties and to any other special circumstances of the case, the consideration (if any) is adequate; and
>
> (e) that the purchase money (if any) has been paid to, or secured to the satisfaction of, the Maori Trustee or court appointed agent or trustees in accordance with section 159; and
>
> (f) that, if section 147A applies to the alienation, the alienating owners have discharged the obligation in that section.
>
> (2) Before granting confirmation, the court may, with the consent of the parties, vary the terms of the instrument of alienation or resolution.
>
> (3) The Maori Land Court may confirm an alienation to a person of any Maori freehold land that is, or is part of, an overseas investment in sensitive land within the meaning of the Overseas Investment Act 2005 only if consent to that investment has been obtained, or an exemption from consent applies, under that Act.

The 2002 amendments

[47] In 2002, significant amendments were made to Part 7 of the Act including substitution of a new s 152.[8]

[48] When considering the interplay of these sections and the scope of the discretion, it is important to appreciate the extent to which the discretion previously available to the Court was reduced by amendment in 2002.

[49] There is an important shift in the provisions of s 152(1) from a requirement that the Court must not grant confirmation of an alienation to a mandatory requirement to grant confirmation if satisfied of certain matters. Before the 2002 amendments, s 152(1) commenced as follows:

> (1) The court shall not grant confirmation of an alienation of Māori freehold land unless it is satisfied –
>
> …

[50] Pursuant to amendments introduced in 2002 s 152(1) now commences as follows:

> The Court must grant confirmation of an alienation of Māori freehold land if it is satisfied –

[8] Te Ture Whenua Maori Amendment Act 2002/Maori Land Amendment Act 2002, s 25.

[51] Prior to 2002, the Court was required to apply its s 152 jurisdiction with regard to the provisions of ss 153 and 154, both of which were repealed in 2002. Those provisions provided:

> **153 Court's general discretion**
>
> (1) Subject to section 152 of this Act, on an application for confirmation made under section 151 of this Act, the court may in its discretion, after taking into consideration the matters specified in section 154 of this Act, –
>
> (a) In any case, grant or refuse confirmation; or
>
> (b) In the case of a resolution of the assembled owners, decline to determine the application and direct the recalling of the meeting of owners at which the resolution was passed.
>
> (2) Where the court grants confirmation, it may do so on such terms and subject to such conditions as it thinks fit.
>
> (3) Before granting confirmation, the court may, with the consent of the parties, vary the terms of the instrument of alienation or resolution.
>
> (4) No appeal to the Maori Appellate court shall lie from a direction for the recall of a meeting given by the court under subsection (1)(b) of this section.
>
> **154 Grounds on which Court may refuse confirmation**
>
> Without limiting the general discretion conferred by section 153 of this Act, the court may decline an application for confirmation if the court is satisfied that the alienation would not be consistent with the objects of this Act, having regard to the following matters:
>
> (a) In all cases:
>
> (i) The historical importance of the land to the alienating owners or any of them, and their historical connection with it:
>
> (ii) The nature of the land, including its location and zoning, and its suitability for utilisation by the owners or any of them:
>
> (iii) The question of whether or not the owners have had an adequate opportunity to give the proposed alienation proper consideration:
>
> (iv) The question of whether or not the owners have demonstrated a proper assessment and understanding of the present value and the future potential value of the land:
>
> (v) The application by the owners of the principles of ahi ka:

> (b) In the case of an alienation that is opposed by some of the owners:
>
> (i) The respective interests of the supporting and opposing owners:
>
> (ii) The size of the aggregate share of the land owned by the opposing owners compared to the size of the aggregate share owned by the supporting owners:
>
> (iii) The number of opposing owners compared to the number of supporting owners.

[52] At the time those provisions were repealed s 164(3) was also amended to remove a reference to ss 153 and 154. There was no change to the discretionary terms of s 164(1). There was also no change to the provisions of s 152(2) which provides:

> Before granting confirmation, the Court may, with the consent of the parties, vary the terms of the instrument of alienation or resolution.

[53] The repeal of ss 153 and 154 is significant. Those provisions provided detailed guidance as to the exercise of discretion to grant or decline confirmation of an alienation. Whilst the Court, pursuant to s 153(2), was given jurisdiction to grant confirmation on such terms and subject to such conditions as it thought fit, its ability to vary the terms of an instrument of alienation was limited by s 153(3), to cases where the parties consented.

[54] It is also important to note that the grounds on which the Court could refuse confirmation under s 154 were directed to the interests of owners. Those who are not owners but are potentially entitled to take or succeed to an interest in Māori freehold land were not specifically provided for otherwise than by the right of first refusal.

[55] The effect of those amendments was to greatly reduce the extent of the Court's discretionary jurisdiction over alienations. The clear legislative intent was to limit the extent of the Court's supervisory jurisdiction in favour of owner autonomy over dispositions of their whenua.

Discussion

The discretion under s 164

[56] The appeal is from the exercise of a discretion under s 164. We agree with Mr Laurenson that the criteria for a successful appeal against exercise of a discretion are those noted by the Supreme Court in *Kacem v Bashir*:[9]

a) Error of law or principle;

b) Taking account of an irrelevant consideration;

c) Failing to take account of a relevant consideration; or

d) The decision that is plainly wrong.

[57] At issue in this case are the clearly formulated wishes of an owner set against the views of some of his immediate whānau who say they would be deprived of an interest in ancestral land if the vesting order was made. How the Court below dealt with this conflict calls into question the scope of the discretion available to the Court under s 164.

[58] We first turn to s 164(3) which applies to a vesting order (so far as applicable) the provisions for confirmation of an alienation.

[59] We then address the scope of the discretion under s 164 and its application in the circumstances of this case.

Section 164(3)

[60] Section 164(3) provides:

> The provisions of sections 152 and 158, so far as they are applicable and with any necessary modifications, shall apply to an application for a vesting order as if it were an application for confirmation of an instrument of alienation.

[9] *Kacem v Bashir*, above n 6, at [19]. These criteria have previously been approved by the Māori Appellate Court in *Taueki – Horowhenua X1B41 North A3A and 3B1* (2008) 16 Whanganui Appellate MB 30 (16 WGAP 30), and *Phillips v Ashby – Oromahoe 17B2* (2006) 6 Taitokerau Appellate MB 271 (6 APWH 271), both referring to *Harris v McIntosh* [2001] 3 NZLR 721 (CA).

[61] The Court is required to apply ss 152 and 158 so far as they are applicable. This raises a question as to what distinguishes an application for a vesting order from an application for confirmation of an alienation. It also raises a question as to how to reconcile the mandatory terms of s 152 with the discretionary terms of s 164.

[62] Part 7 of the Act addresses alienation of Māori land and Part 8, the duties and powers of the Court in relation to alienations of Māori freehold land. Part 8 is divided into provisions relating to confirmation (ss 151-163) and provisions relating to vesting orders (ss 164-168).

[63] Part 7 contains a code concerning the capacity to alienate interests in Māori freehold land. A distinction is drawn between alienation of a whole or part of a block of Māori freehold land and alienation of undivided interests (shares) in Māori freehold land. In the case of the whole or part of a block of Māori freehold land, a sole owner has capacity to alienate. So too do joint tenants, owners in common, trustees and a Māori incorporation. That right is subject to an obligation to offer a right of first refusal of the preferred class (s 147A).

[64] An application for confirmation of an alienation of any interest in Māori land may be made by or on behalf of any party to the instrument of alienation. (Section 151). The Court must grant confirmation of an alienation provided it is satisfied of the various matters set out at s 152(1)(a)-(f).

[65] On the other hand, the owner of an undivided interest in any Māori freehold land may only alienate that interest to a person who belongs to one or more of the preferred class of alienees. (Sections 147 and 148).

[66] No undivided interest may be alienated otherwise than by a vesting order of the Court under Part 8 (s 150(1)).

[67] Section 164(3) makes mandatory the application of ss 152 and 158 to applications for a vesting order as if it were an application for confirmation of an instrument of alienation.

[68] The qualifying words "so far as they are applicable and with any necessary modifications" requires the Court to have regard to the particular circumstances of the alienation. There may be no instrument of alienation or comparable document before the Court in the case of an application to transfer undivided interests by way of a vesting order. Nonetheless, depending upon whether the arrangement is separately documented, or is a gift or a sale, various of the provisions of s 152(1)(a)-(f) may be applicable.

[69] Where a vesting application is based upon a detailed Deed of Transfer, drawn up by solicitors, as was the case here, the application of s 152 appears relatively straightforward. A vesting application of this kind is very similar in manner and form to an application for confirmation of alienation.

[70] Two questions remain. If the Court is satisfied of the various matters set out at s 152(1)(a)-(f), is it obliged to grant the vesting order by reason of the mandatory nature of s 152(1)? Secondly, does s 152(3) mean the Court has no power to vary a deed without the consent of the parties? These are the issues we now turn to in the context of the facts of this case.

Scope of the s 164 discretion and application to the current facts

[71] Judge Harvey concluded that taking into account the Preamble, ss 2 and 17, s 164 did not provide the respondents with a right of veto where a parent seeks to gift shares between children. Judge Harvey noted that counsel accepted that the Act does not say that on gifting, the donor must always make a gift of shares in equal proportions to all the donor's children.[10] We concur.

[72] Judge Harvey went on to conclude:[11]

> [58] While it will often be highly desirable that such an outcome is achieved where this is possible, there is no express requirement in the Act making this mandatory. The short point is that, where an applicant is determined to make a gift of shares to one of several children only, then, in the exercise of the Court's discretion, there would need to be a compelling reason to ignore the ascertaining

[10] *Matthews v Matthews*, above n 1, at [57].
[11] At [58].

> and giving effect to an owner's wishes. That said, while the Court is not bound to refuse an application simply because of objections, where it is considered that those objections have merit then it is within the Court's discretion to decline a transfer, in whole or in part.

[73] On this basis Judge Harvey identified five options available to the Court. They were:[12]

(a) grant the application and confirm the vesting by way of gift;

(b) dismiss the application;

(c) grant a life interest only to Duncan Matthews;

(d) vest the interests in a whānau trust with Duncan Matthews as sole beneficiary and responsible trustee, with a right to lease the lands;

(e) vest the interests in a whānau trust for the benefit of all Mr Matthews' issue with either Duncan Matthews as sole trustee or with trustees elected by the whole family.

[74] Section 152(2) makes it clear that the Court's power to vary the terms of the instrument of alienation is conditional upon the consent of the parties.

[75] Section 152(1) provides that it is mandatory for the Court to grant confirmation of an instrument of alienation if it is satisfied of various specified matters. They include factors such as proper execution of the instrument, compliance with the terms of any trust, whether appropriate consideration has been calculated and paid, and whether a right of first refusal has been offered to the preferred class. The Court's jurisdiction is limited and protective in nature. If not satisfied of those matters the Court can refuse confirmation, otherwise it must grant it.

[76] Counsel for the respondents Mr Watson, placed emphasis on the fact that s 152 was expressed in mandatory terms whereas s 164 is expressed in discretionary terms. Whilst it is true that pursuant to s 164(1) the Court "may" make a vesting order, that discretion is qualified by the words "in accordance with this section." The provisions of ss 164(4), (5) and (6) overlap to a certain extent with some of the matters about which the Court is required to be satisfied pursuant to s 152(1)(a)-(f). However, reading the two sections together and considering in particular s 164(3) which provides that s 152 shall apply (so far as applicable and with any necessary modifications), we conclude that whilst the Court's

[12] At [60].

jurisdiction under s 164 is discretionary, it does not extend so far as to allow the Court to unilaterally vary the terms of the vesting order without the consent of the parties to the contract or arrangement giving effect to the proposed transfer.

[77] While we have some sympathy for the reasoning which led Judge Harvey to decide to grant a life interest only to Duncan, we conclude that it was not an available option unless Graham and Duncan consented to it.

[78] Mr Watson relies upon Judge Ambler's decision in the *Barnes* case, in support of an argument for a broad discretion under s 164. In that case Judge Ambler outlined the following principles in relation to the exercise of discretion under s 164:[13]

> 1) The discretion is a general one.
>
> 2) The exercise of discretion is to be carried out having regard to the directions contained in the Preamble, section 2 and section 17 of the Act. In essence, the Court is to balance the wishes of the alienor with the occasionally competing objectives of retention and utilisation of land by its Māori owners, their whanau, their hapu and their descendants.
>
> 3) The extent to which the Court gives weight to the views of objectors will be affected in part by the proximity of the relationship between the alienor, the alienee and the objectors.
>
> 4) The purpose of the transfer will have some influence on the exercise of the Court's discretion. This goes to the heart of the twin objectives of retention and utilisation of Māori land that are sometimes in conflict. For example, if there are good practical reasons for the transfer (such as to enable another owner to have sufficient shares to obtain an occupation order in order to build on the land), the Court may disregard the objections of those closely related to the alienor. However, if the purpose is little more than to relieve the alienor of the perceived burden of the land interests but will deprive future generations of an inheritance, the Court may decline the transfer on the basis that the principle of retention prevails as the transfer will not promote any utilisation of the land.

[13] *Barnes – Te Horo 2B2B2B Residue* (2008) 125 Whangarei MB 11 (125 WH 11) at [31].

[79] Judge Ambler revisited those principles in the *Epere* case and considered whether the Court may in fact no longer have a discretion under s 164(1) as a result of the 2002 amendments. Judge Ambler reconsidered his views in the *Barnes* case and confirmed his view that the Court retains a discretion under s 164(1) notwithstanding the 2002 amendments. His reasons can be summarised as follows:[14]

(a) The 2002 amended Act did not purport to amend s 164. The discretionary wording in s 164(1) remains and if the discretion was to be removed then an express amendment to that provision would be expected.

(b) The 2002 amendments to s 152(1) was aimed at removing the Court's discretion to confirm alienation of whole blocks of land. In contrast, s 164 is primarily concerned with transfer of undivided interest or shares in Māori land which can only be alienated to members of the preferred class. Therefore s 164 relates to rearrangements of ownership amongst whānau and not the sale of whole blocks of land. It is therefore consistent with the kaupapa of the Act expressed in the preamble and ss 2 and 17 that the Court retain a discretion in relation to such ownership arrangements. The principle that land is taonga tuku iho of significance to owners, their whānau and hapū and descendants is most apposite.

(c) Section 164(3) does not have the effect of imposing the mandatory jurisdiction of s 152(1) on the plainly discretionary jurisdiction of s 164(1). Section 152(1) is clearly secondary to s 164. Section 164(3) provides that ss 152 and 158, so far as they are applicable and with any necessary modifications, shall apply to an application under s 164. Therefore any conflict between the mandatory "must" in s 152(1) and the discretionary "may" in s 164(1) is resolved by disregarding the mandatory element in s 152(1).

[80] We agree with Judge Ambler that in the event of direct conflict between the discretionary terms of s 164 and the mandatory terms of s 152(1), conflict should be resolved in favour of the discretionary terms of s 164(1). We do not attempt to provide a

[14] *Epere – Waima A12B and 2 others and Taheke 25 and 1 other* (2012) 35 Taitokerau MB 131 (35 TTK 131) at [34] – [36].

definitive statement as to the extent of the discretion available under s 164. What this case demonstrates is that questions as to the extent of jurisdiction are largely fact specific.

[81] We are not however convinced that the statutory distinction between confirmation of alienation and vesting orders turns upon a legislative intention that owners of whole blocks of land have greater relative autonomy to alienate than is the case of owners of undivided interests or shares. As we see it, the legislative scheme since 2002 has significantly reduced the Court's discretion for both confirmation of alienation and vesting orders under Part 8. In general terms, there is a consistent regime with respect to alienation whether by way of confirmation or vesting order. The residual discretion under s 164 remains as it is necessary to address the range of ways by which undivided interests may be transferred, rather than because undivided interests of themselves give rise to different policy considerations requiring greater protection or oversight by the Court. Any alienation whether of a whole block or a share in it, gives rise to the same core issues when viewed in light of the Preamble and ss 2 and 17.

[82] In both cases the interests of the preferred class are provided for. The general effect of the 2002 amendments means that provided the Court is satisfied of the various matters set out at s 152(1)(a)-(f) and in s 164, then the extent of its discretion to decline an application for a vesting order is relatively limited. We do not go so far as to say that there is no actual discretion.

[83] In this case the application was based on a detailed Deed of Transfer prepared by solicitors. Mr Watson was right to point out that there is no requirement for an instrument of alienation in applications for a vesting order. But in this case there was such an instrument.

[84] Most of the land interests that are the subject of the Deed of Transfer are undivided interests in Māori freehold land and pursuant to s 150(1), Graham was required to apply for a vesting order under s 164. The Deed of Transfer would also constitute an instrument of alienation with respect to the Kumuiti 2A block he owned solely. He would have been entitled to apply pursuant to s 151 for confirmation of alienation with respect to that block, based in the Deed of Transfer.

[85] By virtue of s 152(2) it is clear that the Court would not have been entitled to vary the terms of the instrument of alienation (the Deed of Transfer), without the consent of Graham and Duncan. If that is so with respect to the solely owned Kumuiti 2A block, on what basis would the Court have a broader discretion with respect to the undivided interests also subject to the Deed of Transfer and for which a vesting order under s 164 was required? We see no reason why the provisions of s 152(2) would not apply to all of the interests included in the Deed of Transfer.

[86] It is clear from the minutes of the substantive hearing and from the judgment itself that the possibility that the application or the Deed of Transfer might be amended so as to provide a life interest only to Duncan was not raised with the parties and consent to such a variation was not sought or obtained. We are not persuaded by Mr Watson's argument that consent can be implied by the failure to raise objection within the period allowed by Judge Harvey for submissions on the question of remaindermen. The clear position of Mr Graham Matthews during the hearing and the prompt lodging of an appeal by Duncan leave no room for a finding of implied consent.

[87] Neither are we persuaded that Judge Harvey used the powers available under s 71 of the Act to amend defects or errors in the proceedings. There is nothing in the record to suggest that Judge Harvey took such an approach or even turned his mind to it. Even if that were arguable we cannot see any material defect or error in the underlying application which would trigger jurisdiction under this provision. Neither is there anything to suggest that Judge Harvey purported to rely on s 37(3) in order to exercise some other part of the Court's jurisdiction aside from the Parts 7 and 8 jurisdiction over alienation.

[88] Pursuant to s 164(7) the Court may make a vesting order where one of the parties has died if it is satisfied that proper agreement had been reached before the death of that party. The threshold is satisfaction that a proper agreement had been reached and the discretion is to grant a vesting order on that basis. There is no suggestion in this case that the 2008 Deed of Transfer was not a proper agreement. The fact that Graham had died after the hearing but before issue of the judgment meant that the Court was left with a discretion to either grant or decline the application.

[89] As we see it, wider questions as to the application of the Preamble, ss 2 and 17 do not arise on the facts of this case. Graham Ngahina Matthews had the legal capacity to alienate these Māori freehold land interests to his son Duncan. He did so with the benefit of legal advice and upon clearly defined terms. In our view and reading s 164 in conjunction with s 152, the Court below was effectively required to grant the vesting order unless there was a relevant legal impediment in terms of the matters set out at s 152(1)(a)-(f) or in s 164 itself. No such issue was identified and by virtue of s 152(2), the Court could only vary the terms of the Deed of Transfer with the consent of Graham and Duncan Matthews. There was no power to unilaterally vary that instrument.

[90] We conclude that Judge Harvey has made an error of law by failing to have regard to the provisions of s 152(2) and in so doing, has misdirected himself as to the scope of the discretion available under s 164.

[91] For completeness, we note that Graham would be entitled to dispose of these land interests to Duncan by way of his will. While we have not seen a copy of his will, we understand that it makes provision consistent with the terms of the Deed of Transfer. The Part 4 (administration of estates) provisions do not grant the Court power to intervene and set aside or vary a testamentary disposition of the kind made in the Deed of Transfer (if properly made in accordance with the requirements for a valid will). In terms of a purposive reading of the legislative policy it would be consistent that an owner would have similar capacity to transfer or alienate under Parts 7 and 8 of the Act.

[92] The central conclusion in this case is that where an application for a vesting order under s 164 is supported by a detailed instrument of alienation, the application of s 152(2) means that the Court has no power to unilaterally vary the terms of that instrument otherwise than by consent of the parties.

[93] We need not go further than this to decide this case. We think it better that the application of the discretion under s 164 is left to be decided on a case by case basis.

[94] Finally, we register a concern that the process by which the Court below came to its decision may not have been procedurally fair to the parties. In our view, if the Court considers that it might dispose of the application in a way not anticipated by the parties, it

should first give an indication of that possibility to the parties and call for submissions upon it.

[95] The High Court states the general principle in these terms:[15]

> If an important new approach to the case emerges which will influence the judgment, it is not only wise in the interest of caution to refer the matter back to counsel before giving judgment, but also… proper to do so in the interest of justice.

[96] In different circumstances we would have considered sending the matter back to the lower Court. However, in light of the fact that Graham has died, the considerable evidence before the Court, and in view of the conclusions we have reached on the application of ss 152(2) and 164(7), we conclude that the appeal is best disposed of by revoking the order of the Court below and substituting an order granting the original application.

Decision

[97] The appeal is granted.

[98] Accordingly, there is an order pursuant to s 56(1)(b):

a) Revoking the order made by Judge Harvey on 2 August 2010 at 253 Aotea MB 250-274 at 274 and substituting the following;

b) The application by the late Graham Ngahina Matthews to vest his shares in Kapakapa 6B No.2, Kumuiti 2A, Kumuiti 2B and Kumuiti 2C, Kumuiti No. 1 A, Matatera No. 2D, Te Kumuiti No. 3, and Kumuiti No.4 in his son, Duncan Matutaera Matthews, by way of gift pursuant to Deed of Transfer dated 19 August 2008 is granted.

[99] Both parties were represented by counsel and we see no reason to depart from the principle that costs should follow the event. Counsel for the appellant may submit a

[15] *Minister of Energy v Broken Hill Pty Co Ltd* (1986) 11 NZTPA 198 (HC) at 210 per Bisson J.

memorandum within 15 working days of receipt of this judgment. Counsel for the respondents may reply within 15 working days from that date.

This judgment will be pronounced in open court at the next sitting of the Māori Appellate Court.

C T Coxhead **JUDGE** (Presiding)	W W Isaac **CHIEF JUDGE**	M J Doogan **JUDGE**