

**IN THE MAORI LAND COURT
TAITOKERAU DISTRICT**

IN THE MATTER of applications by MANUKA PERE
Pursuant to s.18(1)(a) & s.19(1)(b)
Te Ture Whenua Maori Act 1993

& IN THE MATTER of a licence to occupy granted to
BEN PAPA PERE by the MATAURI
X INCORPORATION on 7 June 1994

DECISION

These applications were heard on 25 June 2004 and adjourned to Chambers for submissions to be filed by the parties. The Court has received:

- 1 A submission from the applicants, Manuka Pere (on behalf of the Mane me Ngarimu Kaitiaki Whanau Trust) under cover of a letter dated 19 July 2004.
- 2 A submission from the Respondent Ben Papa Pere under cover of his counsel David Shanahan's letter of 28 July 2004.

The injunction application (an interim order was granted on 5 February 2004) hinges on the application by Manuka Pere pursuant to s.18(1)(a)/93.

It is unnecessary to give a detailed background to the application as this was provided at the hearing on 25 June 2004. The issue is whether Ben Papa Pere, who was granted a licence to occupy by the Matauri X Incorporation for a term of 30 years from 7 June 1994 of an area of 650m², may assign his interest in that licence to another shareholder in the Incorporation, Dixon McIver. Ben Papa Pere has erected a dwelling on the land. It is not disputed that he has offered to sell his interest to others of his immediate whanau. On account of his residing in Australia, he has let the property to whanau members.

The applicants claim that the area granted to their brother Ben by the Incorporation was not exclusively his on account of there having previously been a whare there where they were all brought up. They have described their improvements to the land (tree planting etc.) and places of significance which are specific to their whanau. Uncles and aunts of the applicant (and Respondent) attended the hearing on 25 June 2004 to tautoko what Manuka Pere said about that area being their whanau's place.

A.

Applicant's submission

In their submissions filed after the hearing the applicants make the following points. The Courts comments' follow each point:

- (a) The licence to occupy filed in the Court differs from the original dated 07/06/94 held by the Incorporation.

The Court finds that there is no material difference. The licensee was only required to file a copy in the Court and not the original. A copy does not include the actual signatures of the parties, as, if it did, it would then be an original.

- (b) That they believed their father Mane held a licence to occupy in his name.

There is no record in the Court of a licence having been granted to Mane Pere and no evidence has been adduced from the Incorporation's records that any formal agreement had been entered into with Mane.

- (c) They claim that Ben's affidavit is incorrect when he says he is the sole licensee. Although his former wife may have assigned her interest to him, this has not been noted. They rely upon her interest still being on the Court's Memorial Schedule.

A deed of assignment dated 18/08/03 has been produced to the Court. It is correct that it has not been noted in the Court's records. There is no reason why it should not be so noted – perhaps noting was withheld due to the interim injunction granted on 5 February 2004.

The deed of assignment has been executed by the interim administrator of the Incorporation and it should now be noted in the Court's records, Mr Registrar, please attend to this pursuant to s.37(3)/93 and s.161/93 waiving the fee and acting upon the Court's direction.

- (d) The applicant alleges that Ben is in breach of the terms of his licence both in the size of dwelling and that it is not a single accommodation unit. They say there are grounds for terminating the licence.

The terms of the licence are not for the Court to enforce without an application from the Incorporation. They have not found a breach. Had there been a breach they would not have agreed to the assignment referred to in paragraph (c) above.

- (e) They ask that evidence by Ben as to the condition of their parents' whare and the Incorporation's resolution at a meeting on 05/12/71 that it be removed, be removed from the Court's record.

The evidence is relevant to the application and is not misleading. It is substantiated by the Incorporation's record. It is not a matter that should be expurgated from the record as it would be improper for the Court to censor facts relevant to the application.

- (f) The applicants challenge the arrangement for providing accommodation for their father as conferring a right of occupation upon Ben.

Had the applicants intended the dwelling to be for their father, and a whanau papakainga, they would have contributed to its construction. It is not enough to put that responsibility upon their tuakana alone. The licence granted by the Incorporation to Ben and Margaret (not Mane) was recorded in the Court at the time.



The applicants do not contest their brother's evidence that he erected the dwelling at his own expense.

- (g) The applicants challenge Ben's evidence as to their father's occupation of the land and suggest that he is unaware of the whakapapa.

The evidence only relates to their father's moving from Roto (where they previously lived) to Putataua on account of the original dwelling having been left vacant and was more convenient for their father's occupation as a fisherman.

The Court accepts that Mane and Ngarimu brought up their family at Putataua. It does not, however, exclude Ben's relationship with that area and his father's agreement for him and his wife to have sole right of occupation (by removing the previous whare and building another).

- (h) The applicants say that Ben had assured them he would always maintain their connection to the land.

There is merit in this claim. On the other hand, circumstances change. Ben has offered the house and right of occupation to his whanau before seeking a purchaser from among other shareholders.

- (i) The applicants argue that Ben should remove the dwelling and recover his costs by selling it. They say that the price he has been asking exceeds the value of the dwelling. They refer to the cost of the building as disclosed to the local authority in Ben's obtaining a building permit at the time of its construction. They say that implicitly the price he is asking includes the value of the land or his interest in the licence to occupy. As they have an interest in the land, this additional value should have been deducted from the price at which Ben offered the dwelling to them.

Again, there is merit in this argument. But, as Mr Shanahan pointed out at the hearing on 25 June 2004.

"The status of the licence is a contractual relationship between Ben Pere and the Incorporation as prescribed in Te Ture Whenua Maori Act"

In its minute of 5 February 2004 (99 WH 16-17) when considering the ex parte injunction application, the Court briefly discussed the status of licences in the general law and whether they are capable of assignment. The Court did not decide the issue. If this licence specifically is capable of assignment it is a legal interest in land such that a property right is created with a "value" (or perhaps it may be described as "goodwill") attaching to it. In that case, Ben has not only a house to sell but also a right personally, to the section he occupies.

It should not be assumed that Ben enjoys a windfall ie benefits financially from the mere fact of having been granted a licence to occupy. There may have been costs in his originally getting it (eg meeting conditions imposed by the Incorporation, contributing to costs of access etc) and there may have been costs in maintaining it (ground rental etc.)

The Court will consider this argument further after consideration of Mr Shanahan's submissions.

- (j) The applicants allege that they had insufficient time to purchase the dwelling. The Court does not accept that argument.



From the evidence at the hearing on 25 June 2004 the Court is satisfied Ben Papa Pere did give his whanau sufficient opportunity to purchase but they were unable to agree upon a price. This included extensive negotiations with nieces which is acknowledged by the applicants.

Respondent's Submissions'

The Court did not refer to the submissions by the Respondent in reply to the applicants submissions prior to making its comments set out above. As the Court's observations and Counsel's submissions are substantially in agreement, it is unnecessary to comment upon the Respondent's submissions in any detail. At paragraphs 7 and 9, however, Mr Shanahan objects to an exhibit in the applicant's submission on the grounds of privilege, either his client's or by its being a document produced to the Family Court.

This Court cannot make the direction sought as it may be that the document in question may have been made available to the Interim Administrator to obtain the assignment of the licence (dated 18/08/03). If that is the case, the parties to the exhibited document may have waived privilege.

Conclusion

The Court set out its "thinking" during the hearing on 25 June 2004 in its minute at 35 KH 43. To answer those queries the Court finds that Mane Pere's interest in the site (although only an informal interest) was relinquished in favour of his son Ben when he agreed to Ben building on the land and obtaining a licence to occupy from the Incorporation. The whanau should have been aware at that time of that arrangement. They should have challenged the Incorporation's granting the licence then.

It is clear that the cost of construction etc has been at Ben's expense without contribution from others of the whanau.

The Court is satisfied that Ben Papa Pere did offer it to others of his whanau before offering to sell to another shareholder such that a subsequent assignment would not offend the "first right of refusal" principle which applies to the alienation of interests in Maori land.

Mr Shanahan at paragraphs 17 – 21 of his submissions to the Court on 25 June 2004 says that the Incorporation has sole authority to grant licences to occupy and approve their assignment. The application we have before us, however, gives the Court a wide jurisdiction:

"s.18(1)(a): To hear and determine any claim, whether at law or in equity, to ownership or possession of Maori freehold land..."

By s.260/93, shares in Maori Incorporations are " for all purposes" deemed " to be undivided interests in Maori freehold land". Given that a licence to occupy attaches to shares, then, at law or in equity, they are interests in Maori freehold land, which may be subject to an application pursuant to s.18 (1)(a)/93. Furthermore, also by s.260/93, "all the provisions ...relating to the alienation of or succession to interests in Maori freehold land shall apply to the alienation of or succession to interests in such shares."

Accordingly, although the Incorporation's Committee of Management (at this time by its Interim Administrator) has the powers as outlined by Mr Shanahan, there are nevertheless restraints upon the exercise of those powers which are subject to the review of this Court.



In its minute of 05/02/04 (99 WH 16-17), the Court drew attention to whether a licence may be a legal interest in land. Mr Shanahan says it is a contract the benefit of which may be assigned with the consent of the parties.

If it is an interest in land, however, which attaches to the ownership of shares, then, even if there is no alienation of shares, is not the assignment of a licence to occupy an alienation for the purposes of s.4/93? It is unnecessary for the Court to answer that question because it finds that the applicants have no interest in the licence to occupy granted to Ben Papa Pere (and at that time, his wife) either at law or in equity for the purposes of s.18 (1)(a)/93. The Court further finds that in terms of an alienation of an interest in Maori freehold land, Ben Papa Pere has complied with the prerequisite to alienating, by first offering the dwelling and benefit of the licence to occupy to his brothers and sisters and their families. There is no deficiency in process but rather lack of agreement as to price. Further, in terms of the issue raised in (i) above, because they have no interest in the dwelling or the licence to occupy, the applicants have no claim to a discount by reason of their having a share in the value or goodwill of the land. Their only priority is in being given first right to purchase.

Finally, the applicants claim personal significance of the land in the observance of traditions attaching to what may be described as whenua tapu to them. As mentioned previously, this is not disputed. Their father, however, gave his blessing to Ben's sole right of occupation. The Court cannot find any conditions limiting that right of occupation. In these circumstances the cultural tradition has not created an interest that the Court is able to protect.

The Interim Injunction granted on 5 February 2004 is now terminated and the application pursuant to s.18 (1)(a)/93 dismissed. Orders accordingly.

Mr Shanahan seeks an Order for costs in the sum of \$3000. The Court requires further particulars, without too much detail, and invites him to file a memorandum in the Court with a copy to Manuka Pere, by 8 December 2004. Mr Pere will have until Wednesday 22 December 2004 to file a memorandum in reply.

Adjourned to Chambers accordingly.

Dated at Whangarei this *30th* day of *March* 2004



A D Spencer, Judge