Appeal 1992/10

In the Maori Appellate Court
of New Zealand
Waiariki District

IN THE MATTER of the Maori freehold land known as **Part Kaikoura No 4 Block**

AND

IN THE MATTER of an appeal by **George William Roberts** from a provisional or preliminary determination of the Court made on the 4th of June 1992 dismissing an application for partition of **Kaikoura No 4 Block** pursuant to Section 173 of the Maori Affairs Act 1953

APPELLANT: George William Roberts, represented by counsel Mr P J Savage

RESPONDENTS: Matekoraha Eruera on behalf of the Eruera Whanau, Mihi Epiha, Joe Roa on behalf of James Henry Eruera, all represented by counsel Mr J Grant.

HEARING: At Rotorua on 17 November 1992

CORAM: Judge A D Spencer presiding
Judge G D Carter
Judge J L Rota

Background

The appeal is against a determination of the Maori Land Court made at Rotorua on the 4th of June 1992 at 67 Opotiki Minute Book 149-154 dismissing an application by the Appellant for partition of his interest in the above block under Section 173/53. The facts which form the background to the appeal are relatively simple and straightforward.

Part Kaikoura 4 Block is an area comprising 6.6252 hectares situated at Waihou Bay which is basically flat pastoral land. 1.25 hectares of this area is divided off by State Highway 35. Part of the land fronts onto a lagoon divided by a spit of sand from the Pacific Ocean and there is also a small part of the land which has a stream as its boundary.

The Appellant owns 1.12382 shares out of a total of 2.00000 shares in the block. These shares were acquired by purchase in about 1973. The objectors were all members of the Eruera Family and those who made their objection formally known to the Court held shares comprising 0.55951 shares. The remaining shares comprising 0.31667 were also held by other members of the Eruera Family who took no active part in the proceedings.

The Appellant, Mr Roberts', shareholding equated with 56% of the total shares in the block and he sought to partition out his interests. A scheme plan was prepared and the consent of the Opotiki District Council obtained. A report from the surveyors was filed with the application, as was a valuation report by Valuation New Zealand. The proposition was that 0.73 hectares were to be set aside as reserve under Section 439 in the names of the remaining owners so as to avoid vesting this area in the local authority, 3.3978 hectares was to be vested in the Appellant in satisfaction of his share and the residue of 2.2000 hectares was to be vested in the remaining owners. A condition of the local body consent was that the applicant's award would be combined in title with land which he owned adjacent to the block.

It was not contended that the matter should be dealt with by way of hapu partition as the Appellant had bought into the block and although a Maori and although it was established that he had other lands in the vicinity and was from the same iwi as the remaining owners, he was not of their hapu.

The objection of the respondents to the partition was on the grounds of the special significance of the land to them as family land and the fact that the effect of partition would be the loss of rights of occupation and use of a considerable proportion of land which they presently held as tenants in common. There is no dispute by the respondents over the valuation or the proposed partition on a valuation basis.

In the Lower Court decision the learned Judge summarises the arguments of the applicant in favour of partition and then those of the respondents against partition. At 67 Opotiki Minute Book 152 he states:

> "In weighing up the various arguments placed before me I have no hesitation in finding that the Eruera Family properly claim Kaikoura No 4 as their pito, their Turangawaewae, the old family home is on the block, their whanau have had occupation and title from the Court since the early partitions and determinations by the Maori Land Court."

Further at 67 Opotiki Minute Book 154 the Court states:

> "Weighing all these matters up I am of the view that though it may be expedient in the interests of Mr Roberts to partition, it is inexpedient in the interests of the other owners in the block and partition is refused."

Grounds of Appeal

The grounds of appeal stated in the Notice of Appeal filed under Section 42/53 are:

> "1. The findings of fact of the learned District Court Judge were wrong, contrary and contradictory of the evidence and without foundation in it.
>
> 2. So far as decisions of law were made, those decisions were wrong.
>
> 3. So far as the decision represents the exercise of a discretion, that discretion was exercised in a wrong and erroneous way and upon irrelevant matters."

Arguments of Counsel for the Parties

Counsel for the Appellant argued that in refusing the application the Court

misconstrued the provisions of Section 174/53 which gives to the Court power to refuse to exercise its discretion to partition. As a corollary to that argument, counsel further submitted that the Court had in fact failed to consider whether or not to exercise its discretion. The second argument put forward by counsel for the Appellant was over the interpretation of the Court on certain factual situations affecting the Appellant and the possible consequence of the Court's views on those matters. In particular counsel referred to the Court's assessment of the Appellant's rights as an owner as opposed to the rights of the other owners and the Court's assessment of the fact that the Appellant as an owner as tenant in common had occupied the land for approximately 18 years. The Court will look at these arguments in more detail later.

On the other hand, counsel for the respondents stressed the fact that the Court's jurisdiction over partition was discretionary, reviewed the authorities on the exercise of judicial discretion and contended that the Court in exercising its discretion had done so in a fair and reasonable manner and in accord with the provisions of Section 174 and that were therefore no grounds for the Appellate Court to interfere with the exercise of that discretion.

Both counsel seemed in complete agreement as to the application of the appropriate authorities relative to this Court's power to interfere in an exercise of discretion by the Lower Court. Where they differed was on the question as to whether that discretion had been properly exercised and in particular as to the interpretation and construction of Section 174 of the Maori Affairs Act 1953. It is therefore appropriate that before this Court examines in more detail counsels' arguments, it sets out briefly, firstly its view of the law relative to this Court's power to interfere in an exercise of discretion, and, secondly, the principles applying on the exercise of discretion whether or not to allow an application for partition.

The Law

The Appellants claim that the Lower Court erred in refusing to exercise its discretionary jurisdiction to partition. Whether to exercise or refuse to exercise

the jurisdiction is of course a discretionary matter for the Judge and it is the exercise of that discretion in the Lower Court in these proceedings that is now complained of. This Court is asked to interfere with that exercise of the discretion.

The attitude of the Appellate Court to a request that it should interfere in an exercise of discretion by the Lower Court has often been stated but is particularly clear in the In Re Tarawera C6 (1982) 9 Takitimu ACMB 286 case. Referred to there is the burden assumed by an appellant attacking exercise of discretion of a Lower Court Judge. It states that an Appellant Tribunal can interfere with the exercise of judicial discretion only in certain circumstances. Cited are the leading authorities which say that the Court should start with the presumption that the Lower Court Judge has rightly exercised his discretion, and to interfere, it must be satisfied that the exercise was wrong; to be so satisfied, it must be shown that the Lower Court exercised its discretion:

i) upon a wrong principle, or took into account an irrelevant consideration: (In Re Kairakau 2C5B, Kapiti Farm v August 10 Takitimu ACMB 64 at 10 per Judge Russell).

ii) gave no weight or no sufficient weight to relevant considerations which were important, and

iii) that injustice may be done if the Appellate Court does not interfere.

Principles

Sections 173 and 174 of the Maori Affairs Act 1953 set out the discretionary jurisdiction relating to partition and the matters to be considered in the exercise of that jurisdiction. Section 174 states that:

> "The Court may refuse to exercise that jurisdiction in any case in which it is of the opinion that partitioning would be inexpedient in the public interest or in the interest of the owners or other persons interested in the land".

The discretion afforded by the legislation to determine inexpediency and therefore refuse to exercise jurisdiction, is said to be a broad overview discretion (In Re Tarawera C6 9 Takitimu ACMB 286, and, In Re Motukawa (1981) 13 Wanganui ACMB 20). It is not a discretion confined to the three classes of inexpediency mentioned in Section 174 (In Re Manawatu-Kukutauaki (1981) 13 Wanganui ACMB 76). The Court should consider all matters which might, in the circumstances of the case, create inexpediency to the classes of persons mentioned in Section 174 and indeed, any other form of inexpediency. The legislation clearly intends that the Court should seek an overview by bringing into account all matters that ought reasonably to be considered (In Re Motukawa).

The wording of Section 174 is clear and unequivocal. If the Court finds that the proposed partition is inexpedient:

(a) In the public interest, or
(b) In the interest of the owners, or
(c) In the interest of the other persons interested in the land

it may exercise its discretion to refuse jurisdiction to partition. Those classes of interest are expressed in the alternative and the Court agrees with the observation of Chief Judge Durie in the Motukawa case that the provisions of Section 174 should be read disjunctively. This means that if the Court finds that partition is inexpedient in any of the above alternatives it may exercise its discretion to refuse jurisdiction.

Overview

A series of decisions of the Maori Appellate Court refer to the Court taking a broad overview in considering the discretion whether or not to refuse to exercise jurisdiction under Section 174. These decisions in the Tarawera, Motukawa and Manawatu-Kukutauaki cases referred to earlier, all use the reference "overview" to extend the matters which the Court can consider in exercising its discretion to refuse jurisdiction beyond those inexpediencies mentioned in Section 174. They are not authority as Counsel for the Appellant seems to suggest for the proposition that an "overview" requires the Court to

balance any expediencies found under one or more classes referred to in Section 174 against any inexpediencies found in another class, e.g. expediencies found in the public interest as against inexpediencies in the interests of the owners.

Determinations

1. Decision process

Mr Savage, as Counsel for the Appellant, submitted that the Court in its consideration of the provisions of Section 174 should -

(i) decide the facts

(ii) decide if inexpediency is shown in terms of Section 174

(iii) decide whether a discretion to refuse should be exercised

In his submission counsel then suggests that steps two and three have been combined and that there was in fact a failure to consider the exercise of the discretion. In other words, on the finding of inexpediency the Court automatically, and without considering its discretion, dismissed the application.

The Lower Court Judge expressed specifically that he found inexpediency to other owners and following that, said "and partition is refused". Implicit in the refusal is a determination to refuse on the basis of knowledge or belief that he has the discretion and jurisdiction to refuse. The learned Judge refused partition in the exercise of his discretion. There is nothing in his decision to suggest otherwise.

2. Hearing Flavour

In his submissions Counsel for the Appellant stated that there was an inescapable flavour in the hearing of the matter and in the evidence suggesting that the Appellant was regarded by the Lower Court as having less rights than the Eruera family. He pointed, inter alia, to:

(i) The suggestion by the Lower Court Judge that the Appellant consider sale of his shares to the Eruera Family.

(ii) Examination and comment over the Appellant's occupation of the land.

(iii) The feeling that having bought into the land by purchase of shares, the Appellant had less rights than the original owners.

The Maori Land Court has an inquisitorial function and to obtain an overview in partition applications it is often necessary to exercise that function. This Court sees the examination of the Appellant in the Lower Court as nothing more than the exercise of that function. The Court observes:

(i) As to sale of Appellant's shares

During the hearing the objectors indicated that they were prepared to buy out the Appellant. A sale would have resolved the dispute over partition. The Appellant, by virtue of his application, wanted out of common ownership and the Court's suggestion that he consider sale was merely the exploration of a possible means of settlement.

(ii) Past use by Appellant

Past use of the land by the Appellant was raised as an issue. It seems to this Court that the examination of that issue established that occupation by the Appellant was generally accepted by the other owners, and had benefits to both the Appellant and the other owners. Indeed the evidence and examination seems to establish that there were mutual benefits. There is nothing in the Judgment of the Lower Court which would suggest that the Court itself promoted or relied on any view otherwise, nor is there any suggestion that the Appellant derived any unfair benefit at the expense of the owners, or, that such a suggestion was believed by the Court and relied upon as influencing its decision.

(iii) Appellant's ownership rights

The Appellant purchased his shares in about 1973. He is not of the same family as the residue owners. As a tenant in common he has the same rights as other owners. He is entitled to apply for partition but has no certainty of partition.

While a stranger who is a tenant in common has the same rights as the other owners, it must be accepted that he is often at a disadvantage in his dealings with the other owners. These differences arise from dissimilar tribal or hapu connections, different length of history with the land therefore often different regard for or expectation of the land. In short, the stranger can often have little or nothing in common with the other owners. While his rights are the same as the other owners he is often at a disadvantage in trying to obtain agreement or consensus with the other owners over proposed use of the land. This is a difficulty which should be anticipated when a stranger buys into land and is not, of itself, a ground for partition.

This Court does not agree with the suggestion by Counsel for the appellant that the Appellant was regarded by the Lower Court as having less rights than the other owners. Full consideration was given to the application for partition and it was declined on the grounds of inexpediency in terms of Section 174 of the Act. There is no evidence that any other considerations played a part in the decision.

3. Exercise of discretion

Mr Savage for the Appellant has pointed to two statements by the Lower Court Judge as evidence of a misconstruction by him of the provisions of Section 174 of the Maori Affairs Act 1953. The first is at 67 Opotiki Minute Book 150:

> "Section 174 of the Maori Affairs Act 1953 confers upon the Maori Land Court a discretion empowering it to refuse partition if it is of the opinion that partition would be inexpedient in the public interest

> or in the interest of the owners or other persons interested in the land; in this matter I am obliged to consider in terms of this provision whether in my opinion it is in the interest of the owners that I exercise my discretion in favour of partition".

This Court agrees with Counsel that the test stated by the Lower Court that partition "is in the interest of the owners" is not that contained in Section 174. The test in Section 174 is that of inexpediency. Inexpediency is a factor promoted by the proposal to partition which causes the owners to be left by the partition at a disadvantage. It is in that regard against the interests of the owners whichever owners are affected. A neutral finding or one of beneficial impact would not be inexpedient and would not upon the wording of the legislation, entitle the Court to refuse to exercise jurisdiction.

Notwithstanding the above statement it appears that the Lower Court proceeded to interpret Section 174 on the basis of inexpediency. The second statement cited by Counsel for the Appellant is at 67 Opotiki Minute Book 154:

> "Weighing all these matters up I am of the view that though it may be expedient in the interest of Mr Roberts to partition, it is inexpedient in the interests of the other owners in the block and partition is refused".

The gratuitous reference to expediency does not affect the finding of inexpediency. Each are exclusive of the other.

Section 174 refers to inexpediency "in the interest of the owners" as a ground to refuse jurisdiction. As we have said this involves an overview weighing up the benefits and disadvantages of partition from the point of view of all the owners.

The Lower Court has done this and has found that there is still inexpediency to the residue owners, that is, the owners other than the applicant.

Prior to making that statement the Learned Judge reviewed the evidence and the arguments of both parties and then proceeded to come to his decision. It seems to this Court that he was endeavouring to come to an overview on which to base his decision. Nevertheless, the grounds of his decision are clearly stated as:

> "It is inexpedient in the interests of the other owners in the block and partition is refused".

Counsel for the Appellant has suggested that while the Lower Court has found inexpediency in "the interests of the other owners" that itself does not constitute a finding of inexpediency in "the interest of the owners" under Section 174. This Court does not agree. "In the interest of the owners" is not all the owners but any or all the owners. It would render the section a nonsense if each and every one of the owners had to be disadvantaged in order to allow refusal of the proposal to partition.

If one views the object of partition as arriving at a settlement that is just and equitable to all owners then it follows that any proposal that is found to be inexpedient in the interest of some owners, or even one owner, must be held to be inexpedient in the overall interest of the owners. The Lower Court has found partition inexpedient in the interest of the other owners and is entitled to rely on this to find that there is inexpediency in the interest of the owners and to dismiss the application.

Having regard to criteria (i), (ii) and (iii) listed on page 5 above, this Court is unable to find that it should interfere with the exercise of Lower Court discretion to refuse partition.

4. Review - Lower Court findings

Having so found, the Court is not bound to review any further the Lower Court findings. However, for the sake of completeness and having regard to Counsel for the Appellants comments as to the flavour of the Lower Court hearing, it is appropriate that we make some observations on the merits of the application for partition.

The Appellant sought partition to enable him to include the area to be partitioned as part of his farmland. He proposed that partition would leave the residue owners able to deal with the balance land as they saw fit without conflict with the major owner.

There are many factors which can determine the impact of partition. These include the size of the block, the area to be partitioned, location, historical, ancestral, or other special significance, and consensus of owners. These vary from case to case.

The Respondents objected to partition on the grounds that the land has special significance to them. The evidence was that it is ancestral family land and the only land the family can relate to. Their pito is buried on it, it is their Turangawaewae; the old family home is there; it is only a small block and partition would result in a substantial loss of their land and their mana whenua. There was an old pa site on the land.

Other factors to be considered were:

(i) The land is not an economic unit so economically partition has little effect on the owners in that regard.

(ii) It is a small area of land and easily subdivided.

(iii) Maori Reserves are to be created of the foreshores in the names of the residue owners to avoid vesting in the local authority.

(iv) The parties have different views on future use of the land.

On an overview of all factors, this Court accepts that there could be considerable inexpediency in the interests of the other owners to allow partition. It also sees no great benefit to the owners but a possible detriment in the forced change in status to a Maori Reserve for the area on the foreshore. Partition would leave these owners with but a remnant of their original holdings.

For the Appellant, partition would afford him considerable relief. As a major owner, his land would become comprised in a separate title and he would be able to deal with it unfettered by the existing restrictions of common ownership. This situation must be contrasted with the position of the residue owners who would remain in common ownership in the residue land. This Court applies the principle that while partition is a form of relief, where inexpediency exists, the Court has a discretion to refuse to grant relief by way of partition.

It has been suggested that because of the diverging views and aspirations of the Appellant and the residue owners a trust would not be appropriate to manage this land. We do not necessarily agree. If a trust is to be formed, the Appellant as a substantial owner is entitled to the consideration of his rights. It seems that there is room for agreement under a standard Trust Order to provide for part of the land to be set aside for papakainga housing and the balance for lease to the Appellant, thus providing an opportunity for the parties to pursue their differing views and aspirations for the land.

In the Motukawa and Manawatu-Kukutauaki cases referred to earlier, there is considerable reference to the importance of ancestral land and the desirability of allowing Maori to maintain their association with it. This Court sees those comments appropriate and applicable in this case and had it been required to review the decision of the Lower Court on the merits, it would have been in agreement with the findings of the Lower Court that notwithstanding that there may be some benefit in partition, the loss of ancestral land to the residue owners would be such that in the interest of the owners, partition is inexpedient. This fact of inexpediency alone, despite the overview of all considerations, would then be enough for this Court, to decide in the circumstances of this case to refuse to exercise the discretion to partition.

5. Decision:

The appeal is dismissed under Section 45(1)(g) of the Maori Affairs Act 1953 on the basis that there is no ground to interfere with the exercise of the discretion by the Lower Court.

The Respondent is entitled to costs and an award of $500.00 would seem appropriate. The Registrar is directed to apply the sum of $400.00 towards the costs of preparation of the record and the balance of the security held, namely $500.00 is to be paid to the Respondent's solicitor in satisfaction of the award of costs.

Dated at Hastings this 3rd. day of June 1993

A D Spencer
Presiding Judge

G D Carter
Judge

J L Rota
Judge