IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20160004583
APPEAL 2016/6

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Determination against an order made at 123 Taitokerau MB 240-274 on 29 January 2016
BETWEEN	MARY BRATTON Appellant
AND	RONDA LE LIEVRE Respondent

Hearing:	10 November 2016 (Heard at Whāngārei)
Court:	Deputy Chief Judge C L Fox (Presiding) Judge L R Harvey Judge M J Doogan
Appearances:	J Kahukiwa for the Appellant P Hoskins for the Respondent
Judgment:	8 June 2017

JUDGMENT OF THE COURT

Copies to:

J Kahukiwa, Corban Revell Lawyers DX DP92558
P Hoskins, PO Box 42 Whangarei 0140, matters@perihoskins.com

Introduction

[1] In 2004, the Muriwhenua Incorporation granted Ronda Le Lievre a licence to occupy ("LTO") an area of 3,349m^2 at Te Hapua. Subsequently, Mary Bratton claimed that she had a prior right over 1,406m^2 of the same land.

[2] In 2012, the Incorporation applied for a determination as to who had the better claim to the disputed site. By decision dated 26 November 2016 Judge Ambler found that Ms Le Lievre was entitled to occupy the entire 3,349m^2 section in accordance with the licence granted by the incorporation in 2004.[1]

[3] In addition, the learned Judge made findings that:

(a) Ms Bratton did not have a prior right over 1,406m^2 of the same land;

(b) the LTO granted to Ms Le Lievre was a lease;

(c) there was insufficient evidence to determine whether the LTO complied with s 150B(1)(b) of the Act regarding the grant of a long term lease; and

(d) failure to comply with s 150B(1)(b) would not necessarily invalidate the LTO.

[4] Ms Bratton now appeals that decision on two grounds. First, that it was wrong to uphold Ms Le Lievre's LTO because there was a prior inconsistent right that had been granted to her. Second, the LTO was invalid because it was in fact a long term lease as defined under Te Ture Whenua Māori Act 1993.

Issues

[5] The issues for determination on this appeal are:

(a) Did Mary Bratton possess a prior right over part of the disputed site?

(b) Is the LTO a "long-term lease" under the Act?

(c) Did the incorporation comply s150B(1)(b) of the Act and if not what are the effects?

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1 *Le Lievre v Muriwhenua Inc*, 123 Taitokerau MB 240-274 (123 TTK 240-274)

(d) Is there sufficient evidence to make a finding, and if not, should the Court have called for evidence?

[6] The Incorporation took a partisan role in the earlier proceedings and its conduct was the subject of several adverse findings. Prudently, the Incorporation has taken no steps in the appeal and abides the decision of this Court.

Did Mary Bratton possess a prior right over part of the disputed site?

Appellant's position

[7] According to Ms Bratton her parents built a house on Te Hapua 42 in about 1977. That house and its curtilage lay south of a row of pine trees they had planted on the site.[2]

[8] Ms Bratton claimed that the Incorporation had granted her a residential lease over the disputed site in 1984 or 1985. The only evidence of that lease was a letter from the Incorporation dated 12 November 1984 recording that it had deferred dealing with Ms Bratton's application.

[9] In addition, Ms Bratton claimed that a residential lease was signed thereafter however she could not produce any such document or minute to support such a claim. No corroborating evidence was provided by the Incorporation.

[10] Ms Bratton accepts that she did not take any steps to survey the site. Aside from keeping a batch on the land until 1991 she also agreed that she did not undertake any improvements on this site between 1984 and 2009 when the dispute first arose.

[11] Following 1991 Ms Bratton did not purport to exercise any property rights over the disputed site, has never occupied the site and has never paid any rates or rent.[3]

Respondent's position

[12] Ms Le Lievre says that in 1987 she accompanied her mother and sister on a hīkoi to Te Hapua to rekindle their connection to the land and their whanaunga. Ms Le Lievre's

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2 *Le Lievre v Muriwhenua Incorporation – Muriwhenua Incorporation* (2016) 123 Taitokerau MB 240 (123 TTK 240)

3 Ibid at [12]-[14]

mother had been made a ward of state as an infant and had lived away from Te Hapua for most of her life.[4]

[13] During the visit the whānau met Ms Bratton's parents and were told that they could use the land to the north of the pine trees.[5] At the time of the 1987 visit Ms Bratton had a small batch like structure on the disputed site north of the pine trees. In 1991 she shifted that structure off the disputed site back on to her parent's property south of the pine trees.[6]

Discussion

[14] Ms Bratton first raised the suggestion that a lease had been executed in her favour in her third statement of evidence received in October 2014. As Judge Ambler noted if Ms Bratton had been granted such a lease in 1984 why did she need to apply for LTO in 2007 and why did her letter of 13 October 2008 to the Incorporation make no mention of an existing lease?[7]

[15] Moreover, it is not in dispute that the Incorporation required that a section had to be surveyed if approval in principle was given to a residential lease or LTO. As foreshadowed, Ms Bratton acknowledged that she had never arranged for a survey.[8]

[16] In addition to dismissing her claim to a lease, Judge Ambler also rejected any other equitable basis on which she could claim a prior interest in the disputed site. There was no evidence that Ms Bratton acted to her detriment in reliance upon her claimed right to the disputed site.[9]

[17] It is not surprising that Judge Ambler found Ms Bratton to be an unreliable witness who lacked credibility.[10] He concluded that the Incorporation granted Ms Le Lievre a valid LTO in 2004 in relation to the disputed site, and that there was no misunderstanding or mistake in relation to that grant and no other legal impediment to that LTO having affect.[11]

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4 Ibid at [7]
5 Ibid at [8] and [9]. The disputed site lies immediately to the north of the pine trees.
6 *Le Lievre v Muriwhenua Incorporation – Muriwhenua Incorporation* (2016) 123 Taitokerau MB 240 (123 TTK 240) at [10] and [11]
7 Ibid at [81]
8 Ibid at [76]
9 Ibid at [83]
10 Ibid at [80] and [84]
11 Ibid at [85]

[18] It follows then that the Incorporation could not have granted an LTO to Ms Bratton in either 2008 or 2010 in relation to the disputed site. The Incorporation by that time had *already* granted that land to Ms Le Lievre pursuant to her 2004 LTO.[12]

[19] None of the arguments advanced on appeal persuade us that the findings were based on any error of fact or law. Accordingly, we see no reason to disturb the conclusions of the Judge on this point.

Is the LTO a "long-term lease"?

[20] During closing submissions in the Court below Mr Kahukiwa raised a new argument that had not been pleaded earlier. He contended that Ms Le Lievre 's LTO amounted to a "long-term lease" that had not been approved by the Court or authorised by the shareholders in accordance with s 150B(1)(b) of the Act.

[21] This argument was rejected:[13]

> [97] First, Mr Kahukiwa did not raise this issue until closing submissions and there was no evidence presented as to whether or not the Incorporation met the requirements of s 150B(1)(b) of the Act. We simply do not know if there has been non-compliance. Obviously, if there is a problem with the 2004 LTO, then that problem may well apply to all other LTOs granted by the Incorporation. But in the circumstances of the present proceeding, where neither the Incorporation nor Mary Bratton presented any evidence to say what took place in this regard, I am unable to reach any factual conclusions as to noncompliance with s 150B(1)(b).
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> [98] Second, because of the wording of cl 14, it is not yet certain that Ronda Le Lievre's LTO will exceed the 52 year limit in the Act. That is because the current term of the LTO will only expire in 2033, and it is only if Ronda lives beyond 29 May 2055 that it will be known whether the LTO exceeds the 52 year limit. As such, the LTO is not necessarily a long-term lease; it all depends on the actual length of any renewal, which at present remains uncertain.
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> [99] Third, even if LTOs such as Ronda Le Lievre's LTO can potentially exceed the 52 year limit in the Act, I do not accept that the Incorporation's possible non-compliance with s 150B(1)(b) necessarily results in the LTO being invalidated. In my view, the more correct answer is that any such LTOs that have not been approved and authorised in terms of s 150B(1)(b) are by law limited to a maximum of 52 years. That is, the effect of s 150B(1)(b) is to put a 52 year cap on any such LTOs.

[22] Before us Mr Kahukiwa argued that the finding that the wording of cl 14 (the renewal clause) of the LTO was not yet certain and his interpretation as against s 150B(1)(b) of the Act are incorrect. Counsel maintains that the LTO comes within the definition of long-

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12 Ibid at [101]

13 *Le Lievre v Muriwhenua Incorporation – Muriwhenua Incorporation* (2016) 123 Taitokerau MB 240 (123 TTK 240) at [97] to [99]

term lease as it has the potential to run over 52 years with the exercise of the right of renewal.

[23] Mr Hoskins supported the findings of the Court below.

The Law

[24] Section 150B(1)(b) of the Act provides:

> A Maori incorporation must not alienate Maori freehold land vested in it –
> …
> (b) by long-term lease, unless the court, in its discretion, approves and the long-term lease is authorised by a resolution passed by shareholders holding 50% or more of the total shares in the incorporation.

[25] A long-term lease is defined in s 4 of the Act, as follows:

> 4 Interpretation
> In this Act, unless the context otherwise requires—
> …
> long-term lease means a lease—
> (a) for a term of more than 52 years; or
> (b) for a term that would be more than 52 years if 1 or more rights of renewal were exercised

Discussion

[26] Ms Le Lievre 's LTO was for a term of 30 years. Clause 1 of the LTO provided:

> TERM: Subject to the provisions of Clause 8 (relating to early termination) the term of the Licence shall be 30 years from the date of signature hereof and thereafter renewable pursuant to Clause 14 until the death of the Licensee or the survivor of them.

[27] Clause 14 provided for a renewal on the following terms;

> Upon expiry of the term of 30 years from the date hereof this Licence may be renewed for a further term not exceeding the date of death of the Licensee or the survivor of them as the case may be (whichever period is the shorter) as the parties hereto shall agree upon and otherwise upon the same terms and conditions herein contained PROVIDED that the Licensee shall have first given the Licensor not less than three (3) calendar months notice in writing of his her or their intention to see such renewal. [sic]

[28] We are not aware of any decisions of the Māori Land Court or this Court which address the effect of a renewal clause such as that contained in Ms Le Lievre's LTO.[14] The cases we are aware of concern leases that exceed 52 years.

[29] In any event, at common law an essential element of a lease is certainty of term. A lease must have a time of commencement and a time of expiry.[15] The Property Law Act 2007 provides that a lease is not invalid merely because it provides for its termination or notice of termination on the occurrence of a future event, so long as the event is sufficiently defined in the lease so that it can be identified when it occurs.[16]

[30] In *Sinclair v Connell*, it was held that a lease for the life of a tenant will be valid because the ultimate death of the tenant is inevitable.[17]

[31] The definition of a long-term lease over Māori land includes a lease that may exceed 52 years if one or more rights of renewal are exercised. It is necessary to consider whether the term of renewal is certain to ascertain the total term of the LTO.

[32] Clause 14 provides that the LTO may be renewed for a further term not exceeding the date of death of the Licensee (or survivor), whichever period is shorter. While this may seem uncertain due to the exact length of the renewal term only being ascertainable on the death of Ms Le Lievre (or survivor), the term is capable of being certain. Although cl 14 provides for two possible end dates of the renewal term, it provides that the maximum term is no longer than 30 years (being a "further term").

[33] The LTO therefore provides for an original term of 30 years and a renewal term of 30 years. If these terms were taken together, the maximum length of the term of the LTO is therefore 60 years and would *prima facie* mean the LTO was a long-term lease in terms of s 4 of the Act. However, consideration also needs to be given to the nature of the renewal right conferred by cl 14.

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14 *Awakeri Hot Springs (2002) Ltd v Trustees of the Pukaahu Domain Whānau Trust – Pukaahu Block* (2015) 130 Waiariki MB 140 (130 WAR 140) at [15] – [16]. *The Proprietors of Mangatawa Papamoa Block – Mangatawa Papamoa Block* (2007) 90 Tauranga MB 25 (90 T 25)

15 Bennion, T. et al *New Zealand Land Law* (2nd ed, Brookers Ltd, Wellington, 2009) at [8.2.03]

16 Property Law Act 2007, s 212. See *Chilcott v McLachlan* HC Auckland, CIV-2007-404-3263, 22 December 2009

17 [1968] NZLR 1186

[34] In *Tutanekai Tatahi Ltd v Matauri Bay Properties Ltd*, the High Court considered applications concerning the sale and purchase of leasehold land which was Māori freehold land.[18] An issue before the Court was whether the consent of the Māori Land Court was required for registration of the lease, and whether the lease was for a long or short term. The plaintiff in that case argued that the lease was a long-term lease by a right of renewal provision which extended the term of the lease beyond 52 years. The clause relied on was:

> The Lessor shall not less than three (3) years prior to the expiry date of the term of this lease give a written notice to the Lessee advising the Lessee as to whether or not the Lessor wishes and is able, subject to all approvals being obtained, to relet the land. If the Lessor is able to and wishes to relet the land, it shall grant a new lease to the Lessee on the same terms as are set out in this lease…

[35] The Court found that the right of renewal was a right of the lessor and not, as contemplated in the Act, a right of the lessee. In that case compliance by the lessee with the renewal clause did not create an obligation on the lessor to provide a renewal of the lease, as is usual in a right of renewal situation. The option available to the lessor does not by its terms create a long-term lease.

[36] That decision was appealed.[19] On the issue of whether the lease was a long-term lease, the Court of Appeal agreed with the findings of the High Court:[20]

> [27] … The Māori Land Court is charged with supervising particular kinds of alienation that could dilute control by Māori over their own land. That includes leases for prescribed, or effective, terms of more than 52 years.
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> [28] If a lease contains a right of renewal exercisable at the discretion only of the lessor, which (as in this case) is a Māori trust/incorporation, then there is no risk that the lessor will suffer loss of control over its own land. All the rights in respect of the lease and its renewal or non-renewal are conferred on it. In light of the Act's purpose, we consider Associate Judge Christiansen was correct to conclude that the lessor-only right of renewal in the contract between Tatahi and Matauri was not the kind of right contemplated by ss 4 and 150A of the Act.
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> [29] When a right of renewal is exercised it confers the grant of a new lease. It is not the same as a right to extend the lease which extends the term of the original contract. It is consistent with the requirement that the Māori Land Court must approve a long-term lease that approval may be required upon renewal of a lease if the renewed term were longer than 52 years: the Māori Land Court's jurisdiction is not forever excluded just because an initial lease term does not require its consideration or approval.

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18 HC Auckland, CIV-2008-404-2645, 16 September 2008

19 *Tatahi Ltd (Formerly known as Tutanekai Tatahi Ltd) v Matauri Bay Properties Ltd* [2009] 3 NZLR 367 (CA)

20 Ibid at [27] to [29]

[37] Clause 14 of Ms Le Lievre's LTO states that, upon expiry of the term of 30 years, the LTO "may be renewed" for a further term "as the parties hereto shall agree upon". The clause does not clearly confer the *right* to renew on either party solely. The use of the words "as the parties shall agree" implies that some form of negotiation is to take place before any renewal could be granted. The overall effect of the clause is not an automatic right of renewal in favour of Ms Le Lievre; rather, it provides an opportunity for the parties to negotiate an agreement for a further term, at the expiry of the original 30 year term.

[38] We conclude that the renewal clause in Ms Le Lievre 's LTO is not a right of renewal of the kind contemplated by s 4 of the Act. Clause 14 of Ms Le Lievre 's LTO confers an option to renew, but is not sufficiently certain so as to bring Ms Le Lievre 's LTO within the definition of a long term lease. Clause 14 allows the Incorporation to maintain control over the use of the land at the expiry of the 30 year term by stipulating its agreement to any renewal. Any renewal agreed at that stage would constitute a new lease.

[39] Accordingly, the original lease and the renewal term should not be read together. The LTO is for a term of 30 years and is therefore not a long-term lease.

[40] On this basis s 150B(1)(b) of the Act would not apply. However, for completeness and in the event we are wrong in taking that view, we consider the issues raised concerning compliance with s 150B(1)(b) of the Act.

Did the Incorporation comply with s 150B(1)(b) of the Act?

Appellant's submissions

[41] Mr Kahukiwa submits that the finding of the Court below that there was no evidence as to whether the Incorporation complied with the provisions of s 150B(1)(b) is difficult to accept as a matter of reality. Counsel contended that based on the voluminous material before the Court and the lack of reference in that material to the consideration of matters under s 150B(1)(b), it was "safe to assume" that there had been no meeting held with shareholders as required.

[42] Mr Kahukiwa further argued that the Court did not of its own motion make inquiry as to whether there was compliance with the provisions of s 150B(1)(b), as it is empowered to do under s 69(2) of the Act. This argument does not appear to have been raised by counsel with the Judge and is not addressed in his decision.

Respondent's submissions

[43] Mr Hoskins supported the findings of the Court below and further argued that the appellant was prevented from adducing additional evidence without the leave of this Court per s 55(2) of the Act.

Discussion

[44] The Court has broad powers under ss 66 and 69(2) of the Act to seek and receive evidence it considers relevant to deal effectively with a matter before it. It is empowered to make orders or give directions requiring further evidence if it considers it "reasonably necessary for the proper exercise of its jurisdiction".[21] Where this occurs, the parties must be given an opportunity to examine that evidence and make submissions in respect of it.[22]

[45] The nature of this power was considered in *Hammond – Whangawehi*:[23]

> [32] … The Act contemplates that the Court is to have an active role in hearings before it. Section 66 of the Act makes it clear that the Court has a broad discretion as to how it conducts its hearings, provided that they are "conducted in a proper manner." Section 69(2) of the Act gives the Court special powers to "… cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence…" as may assist the Court. That is, it has an inquisitorial role. In our view the Court is entitled to ask relevant questions of those who come before it. The nature of the Court's jurisdiction and the parties that come before it are such that the presiding Judge is often required to question witnesses where parties are not represented, or where there is no other party or where the issues before the Court simply require it. ...

[46] The parties here were represented by experienced counsel. While the Court has a broad discretion to seek and receive evidence, this does not diminish counsel's responsibility to put their client's case. The onus is on the party to prove the essential elements of its claim and it is not for the Court to remedy deficiencies in the case presented.[24]

[47] In any event, the calling of further evidence relating to compliance with s 150B(1)(b) was a matter of discretion for the Judge to consider (assuming it was even raised). If an Appellate Court wishes to overturn a decision made in the exercise of a discretion, it needs to be established that:

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21 Māori Land Court Rules 2011, r 6.18(1)
22 Māori Land Court Rules 2011, r 6.18(3)
23 *Hammond – Whangawehi* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185)
24 See *Far North District Council v Maihi – Maungakawakawa 5G* (2013) 52 Taitokerau MB 138 (52 TTK 138) and *Ratahi v The Māori Land Court* [2014] NZAR 723

(a) there was an error of law or principle;

(b) that the Court took account of irrelevant considerations,

(c) that the Court failed to take account of relevant considerations; or

(d) that the decision was plainly wrong.[25]

[48] We do not detect any such error in this case. We consider that the Judge was correct in finding that no factual conclusions could be made regarding compliance or otherwise with the provisions of s 150B(1)(b). The claim was not pleaded by either Mr Kahukiwa's client or the Incorporation and it appears that counsel did not seek leave to amend the pleadings to add the additional claim. No evidence on the issue was led, and no specific reference to the available evidence was made in support of the alleged non-compliance. In the circumstances, we are unable to accept counsel's argument that it was "safe to assume" that there was non-compliance.

What is the effect of non-compliance with the provisions of s 150B(1)(b)?

[49] Even if the LTO could potentially exceed the 52 year limit, the Judge found that non-compliance with the provisions of s 150B(1)(b) would not necessarily invalidate the LTO, as the operation of that provision would limit the term to 52 years.

[50] Mr Kahukiwa argued that this approach was wrong in law. The provisions in s 150B(1)(b) use the unequivocal "must not" which, he argued, is in the nature of a constitutional limitation as referred to in the decision of Cooke J in *Proprietors of Parininihi Ki Waitotara Block v Viking Mining Co Ltd*.[26] Counsel submitted that the Incorporation's non-compliance with s 150B(1)(b) renders their actions *void ab initio*.

[51] This is not an issue upon which we need express a final view. The appeal can be disposed of on the basis of our finding that the Court below was not in error in concluding that there was no evidential basis upon which it could make findings of fact in relation to compliance with s 150B(1)(b). That is determinative, and we see no reason to disturb that finding or to send the issue back for further inquiry.

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25 *Kacem v Bashir* [2011] 2 NZLR 1 at [32]
26 [1983] NZLR 405 (CA)

[52] We nonetheless record our provisional view that on this point Mr Kahukiwa may be correct. The mandatory terms of s 150B(1)(b) and the weight of authority suggests that any non-compliance with that provision would have the effect of making the lease invalid.[27]

Decision

[53] The appeal is dismissed.

[54] Both parties were represented by counsel and we see no reason to depart from the principle that costs should follow the event. Counsel have 1 month from the date of receipt of this judgment within which to exchange memoranda.

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

C L Fox (Presiding)	L R Harvey	M J Doogan
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**

[27] *The Proprietors of Mangatawa Papamoa Block – Mangatawa Papamoa Block* (2007) 90 Tauranga MB 25 (90 T 25); *Taueki – Horowhenua XIB 41 North A3A and 3B1* (2008) 16 Aotea Appellate MB 30 (16 WGAP 30); *Proprietors of Parininihi Ki Waitotara Block v Viking Mining Co Ltd* [1983] NZLR 405 (CA) at 408; *Churton v Trustees of Mangaporou Trust – Mangaporou Trust* (2009) 226 Aotea MB 82 (226 AOT 82); *Mangatawa Papamoa Incorporation – Lot 1 Deposited Plan South Auckland 65413* (2013) 52 Waikato Maniapoto MB 82 (52 WMN 82).