IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT

A20150001488
APPEAL 2015/6

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Wairau Block XII Section 6C2C
BETWEEN	PHILLIP MACDONALD Appellant
AND	BRIGHAM MACDONALD Respondent

Hearing:	19 May 2015 (Heard at Blenheim)
Court:	Chief Judge Isaac (Presiding) Judge Savage Judge Doogan
Appearances:	L Radich for the appellant M Hardy-Jones for the respondent
Judgment:	07 June 2016

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] Phillip MacDonald (Phillip) appeals a decision of the Māori Land Court made on 15 October 2014 in which the Court dismissed his application for a partition of Wairau Block XII Section 6C2C (the land).[1] The land is jointly owned by Phillip and his brother, Brigham MacDonald (Brigham). Brigham opposes the partition.

Background

[2] Wairau Block XII Section 6C2C is Māori freehold land situated on Wairau Bar Road on the northern side of the Wairau River near Blenheim. The block is a narrow piece of land comprising 9.1852 ha, 1100 m long and 90 m wide. Phillip and Brigham each own 11.35 shares of a total 22.70 shares in the land.

[3] Around two thirds of the land is planted in sauvignon blanc grapes and the rest is bare land. The portion of the land in grapes is farmed in conjunction with a surrounding vineyard known as Tini's Block. Tini's Block is owned and operated by Brigham. The land is separated into two parts by a drainage ditch, over which there is no vehicular access. The rear portion of the land furthest from Wairau Bar Rd has no separate road access.

[4] Phillip and Brigham, and their 19 other siblings, succeeded to their father's significant land holdings in the Marlborough region when he died in 1980. The two brothers bought out the interests of their siblings and farmed their shared land interests together for a number of years. Their relationship subsequently became strained to the point where in about 2007 they decided to separate their interests entirely. In October 2007, a formal arbitration was held. On 28 November 2008, the parties executed a Deed confirming the division of the majority of their co-owned land, shares and other assets.

[5] However, the agreement did not address Wairau Block XII Section 6C2C. The parties were unable to agree on an outcome for the land and a second arbitration was held in July 2009. The Second Interim Award of the arbitrator did refer to the land, but did not make any determinations in relation to it other than recording that Brigham had agreed to

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1 *MacDonald v MacDonald* (2014) 27 Waipounamu MB 68 (27 TWP 68).

take it over at valuation. The parties were subsequently unable to agree on the valuation of the land, and the negotiations between them in relation to the land broke down.

[6] Phillip filed an application for partition proposing to divide the land at its narrowest point, with the front half comprising two-thirds of the vineyard and the road frontage to Wairau Bar Rd, and the rear portion comprising the remaining one-third of the vineyard and the bare land at the rear with no road access, which is also transected by the drainage ditch. The lower Court noted that Phillip proposed that he would have the front section and Brigham the rear.

[7] Phillip's application for partition was made on the grounds that the parties' falling-out was over a long-running series of disputes and it was inconceivable that they could repair relations such that they could properly farm the land together. Phillip stated that a partition would benefit the land as it would allow him and his brother to farm their portions of the land independently. Phillip also provided a letter from the Marlborough District Council dated 17 July 2013, which stated that the Council was of the view that the proposed partition would be inconsistent with the current Wairau/Awatere Resource Management Plan, as the new blocks would be less than 8 ha. The Council further stated that the rear block would become landlocked and there was no guarantee that access would be available over adjoining land, particularly if that adjoining land was sold separately.

[8] Brigham opposed the partition application on the basis that he paid for the vineyard development on the land and that if it was partitioned, the value of the vineyard would be destroyed as some vines would have to be removed. Brigham stated that the basis of the arbitration and continuing negotiations between him and Phillip was that he would end up with the land because it was adjacent to Tini's Block; it is close to his house and therefore convenient; and his dairy operation requires bare land. Brigham wished to purchase his brother's share in the land, but was also prepared to pay rental at the market rate for his occupation of the land, including back-rental.

[9] The lower Court dismissed the partition application. While Judge Reeves was satisfied that there was sufficient notice of the partition application, and sufficient opportunity for the owners to discuss and consider the issues, she held that where support and opposition is evenly split between the two owners, she could not find sufficiency of

support for the partition proposal in the circumstances. Judge Reeves did not accept that the partition was a practical solution to the failure to agree, nor that the partition was necessary to facilitate the effective operation, development, and utilisation of the land. Judge Reeves stated that "necessary" means reasonably necessary and is closer to essential than simply desirable or expedient, and Phillip MacDonald did not demonstrate why the proposed partition was essential rather than simply desirable or expedient. Further reasons for declining the partition were that it would not comply with the district plan, the rear part of the land would effectively become landlocked, and there were reasonable alternatives to partition.

[10] Phillip now appeals Judge Reeves' decision.

Appellant's submissions

[11] Phillip submits that the partition application was filed after four years of failed negotiations with Brigham in relation to the land. During this time, he says, Brigham continued to occupy the land, excluding him from any occupation or use. He further submits that he has been alienated from the land in all tangible ways. He has offered to buy Brigham's interest in the land for around double of what Brigham is willing to pay him, but Brigham refuses to sell. Phillip submits that Brigham's position is effectively that he should be permitted to retain indefinite sole occupation of the land to the exclusion of Phillip.

[12] Phillip argues that the lower Court exercised its discretion wrongly in dismissing his application for partition. He refers to the Māori Appellate Court decisions of *Cottrell v Roberts – Tarawera C6*, which sets out the broad principles governing the circumstances in which the Appellate Court should interfere with a discretion exercised by a lower Court; and *Taueki – Horowhenua XIB41 North A3A and 3B1*, which discusses the approach the Appellate Court should take when considering whether to overturn an exercise of judicial discretion.[2]

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[2] *Cottrell v Roberts – Tarawera C6* (1982) 9 Takitimu Appellate MB 286 (9 APT 286); and *Taueki – Horowhenua XIB41 North A3A and 3B1* 16 Whanganui Appellate MB 30 (16 WGAP 30), at [46].

[13] Phillip says that the purpose of Part 14 of the Te Ture Whenua Māori Act 1993 (the Act), which governs applications for partition, needs to be kept in mind; in particular that applications for partition are part of a regime designed to facilitate the use of the land by its owners, not to thwart it with unduly narrow and rigid interpretations.

[14] Phillip further submits that s 289 of the Act is informed by s 288(2) of the Act. Applying the test in *Brown v Māori Appellate Court*,[3] the appellant argues that in the present case there is no issue as to sufficiency of notice and opportunity for owners to discuss the partition proposal. He says there are only two owners, both of whom have taken an active role from the outset. In relation to the sufficiency of support and necessity requirements, the appellant submits that the Māori Land Court did not have sufficient regard to s 17(2) of the Act, particularly subsections (c), (e) and (f) which provide for the settlement of disputes and other matters among the owners of any land; fairness in dealings with the owners of any land in multiple ownership; and the promotion of practical solutions to problems arising in the use or management of any land.

[15] In terms of sufficiency of support Phillip submits that, as set out in *Brown*, the Act does not require that there has to be unanimous support for a partition, and it is not possible to identify a percentage that will be considered sufficient in all cases; what is sufficient in each case depends on the facts as illustrated in a number of Māori Land Court and Māori Appellate Court authorities.[4] In some cases a clear majority of support will not be sufficient, while in others less than ten per cent support can be sufficient. Phillip cites the Māori Appellate Court decision of *Whaanga v Niania – Anewa Block* in support of this latter contention.[5]

[16] In addition Phillip submits that in this instance the ownership of the land is much simpler than in most cases. There are two tenants, each owning 100 per cent of the land as joint tenants. While the Court has previously stated in *Tohiariki* that it did not know of a

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3 *Brown v Māori Appellate Court* [2001] 1 NZLR 87.

4 *Taniora – Te Koutu Mourea Māori Reservation* (2014) 91 Waiariki MB 173 (19 WAR 173); *Tohiariki – Section 1F No 2 Parish of Katikati* (2013) 54 Waikato-Maniapoto MB 31 (54 WMN 31); *Matchitt – Te Kaha 65* (2012) 65 Waiariki MB 120 (65 WAR 120); *Te Puni – Ngawhakatutu A11A1* (2012) 20 Tairawhiti MB 232 (20 TRW 232); and *Te Puni – Ngawhakatutu A11A1* (2012) 20 Tairawhiti MB 232 (20 TRW 232).

5 *Whaanga v Niania – Anewa Block* [2011] Māori Appellate Court MB 428 (2011 APPEAL 428).

single successful application that was supported by only one owner,[6] it could just as easily be said that there does not seem to have been a single case where sufficiency of support has failed because of the opposition of a single owner. Phillip further says that it is unhelpful to consider the matter of sufficiency of support in terms of percentages of ownership in situations where, as in this instance, there are only a small number of owners.

[17] Phillip submits that when addressing the question of sufficiency of support, it is important to refer to the general objectives of the Act as set out in s 17. He refers to the Māori Land Court decision of *Bhana v Paniora*,[7] where the Court considered s 17(2)(d) in particular detail. Phillip submits that although that case dealt with an occupation order, not a partition application, the Court's observations are relevant because the wording is the same in both sections of the statute with regard to sufficiency of support.[8] In that case the Court found that the majority shareholder was acting oppressively. Phillip submits that in the present case, although there is no oppressive majority, there is an oppressive joint owner who is dealing with the land in the same way that the Court in *Bhana* sought to avoid.

[18] Phillip submits that Brigham is acting oppressively by denying him access to or use of the land; that Brigham farms the land as if it were his own; the Brigham has never shared the profits from the land with Phillip; and that when Phillip engaged a surveyor to survey the land for potential partition, Brigham (or his family members) removed the survey pegs, which is not denied in Brigham's evidence. He submits that in the lower Court, this issue was dealt with very briefly and without discussion, with Judge Reeves discussing the requirements of s 17 of the Act regarding fairness in dealings between owners and the need to promote practical solutions and finding that she did "not accept that a partition in these circumstances is necessarily a practical solution to the failure to agree".[9] Phillip submits that the difficulty with this approach is that it allows a single owner of Māori land to stifle an application based solely on self-interest. Brigham has a significant financial interest in maintaining the status quo. He is currently farming 100 per cent of the land in which he is only a part-owner.

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6 *Tohiariki – Section 1F No 2 Parish of Katikati* (2013) 54 Waikato-Maniapoto MB 31 (54 WMN 31) at [23] to [24].

7 *Bhana v Paniora – Wairau North 1B2C* (2013) 69 Taitokerau MB 139 (69 TTK 139).

8 Te Ture Whenua Māori Act 1993, ss 288(2)(b) and 329(2)(aa)(ii).

9 *MacDonald v MacDonald*, above n 1, at [20].

[19] Phillip submits that for the partition application to be blocked on the basis of Brigham's sole opposition is also contrary to the objective of promoting fairness between owners set out in s 17 of the Act. He submits that the Court was therefore wrong to find that there was insufficient support for the partition.

[20] As regards the issue of necessity, Phillip refers to *Brown v Māori Appellate Court*, where the High Court stated that necessity was to be construed as "reasonably necessary" and "closer to that which is essential than that which is simply desirable or expedient".[10] Phillip also cites *Hammond – Whangawehi 1B3H1*, where the Māori Appellate Court also considered the issue of necessity.[11]

[21] Phillip submits that an appropriately broad interpretation of the word "effectively" needs to be applied in order to give effect to the purpose and objectives of the Act in these circumstances. Section 2(2) of the Act states that it is intended to promote the use and control of Māori land by its owners. Further, s 17(1)(b) of the Act reinforces s 2(2) by stating that the primary objective of the Court shall be to promote and assist in "the effective use, management, and development, by or on behalf of the owners, of Māori land". Phillip says that he is presently being completely excluded from the use or control of the land, contrary to these principles.

[22] In addition, Phillip submits that it is plainly Parliament's intention that all owners are entitled to play a part in the furthering the use, management and development of the land. The Court needs to give effect to this purpose when considering what is "necessary" in the current circumstances.

[23] Phillip argues that in the lower Court, Judge Reeves found that there was not sufficient necessity for three main reasons: that partition was not necessary because "the best overall use and development of the land is for horticultural purposes, specifically grape growing, and the block is already effectively utilised as one block in this way"; the "partition would not comply with the district plan and is unlikely to gain regulatory approval, and the rear portion of the block would effectively become technically

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10 *Brown v Māori Appellate Court*, above n 3, at [51].

11 *Hammond – Whangawehi 1B3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185). The appellant also cites *Pure – Ahipara 1B2B* (2013) 69 Taitokerau MB 109 (69 TTK 109); *Tohiariki – Section 1F No 2 Parish of Katikati*, above n 4; and *Matchitt – Te Kaha 65*, above n 4.

landlocked"; and "there are reasonable alternatives to partition", including payment of rent from Brigham to Phillip, formation of an ahu whenua trust, use of the rear portion of the block by Phillip, an exchange of land between the parties, a formal lease of the land or the previously discussed arrangement for Brigham to purchase Phillip's share in the block.[12]

[24] Phillip submits that Judge Reeves misapplied the law by neglecting the statutory goal of fairness between owners when interpreting the meaning of 'effective' in her consideration of the phrase "effective utilisation of the land". He submits that the land is not being used effectively if it is being done for the sole benefit of one owner and to the exclusion of the other. The phrase "effective utilisation" he says should not be restricted to the methodologies by which the land is being farmed. Phillip would most likely farm the land in the same way, and therefore it is wrong and unfair to refuse a partition application on this basis. The Act is to promote both the effective use of the land and fairness between owners and, in Phillip's submission, Judge Reeves did not give an explanation of how the outcome was fair between the owners.

[25] Phillip also argues that there was no evidence that the partition would be unlikely to gain regulatory approval, as non-compliance with a district plan does not mean it is unlikely to gain regulatory approval. The fact that the district plan does not provide for subdivision of blocks this small is not an insurmountable hurdle. Further, Phillip proposed that if the Court granted the application it should be subject to the necessary resource consents being granted.

[26] As to the issue of creating a landlocked block, Phillip's proposal was for him to take the front portion of the land which has road access. Brigham owns land adjoining 6C2C and therefore access would not be an issue. If this was not an accepted option, Phillip proposed that the land could be partitioned lengthways so that no area would be technically or practically landlocked. These points, Phillip says, were raised in the lower Court, but not addressed in the judgment.

[27] Phillip further submits that the reasonable alternatives suggested by the lower Court would either see him remain alienated from the land, or have already been ruled out by Brigham. Brigham has indicated that he is willing to pay rent to Phillip for the use of the

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12 *MacDonald v MacDonald*, above n 1, at [22]-[24].

land; however, it is evident that this would necessitate the ongoing exclusion of Phillip from use or occupation of the land. The cheque tendered by Brigham prior to the lower Court hearing, ostensibly in payment of rent for previous years, was not subject to any discussion and was based on a disputed valuation which Phillip does not accept. This was the first time Brigham had offered make any payment towards his use of the land, and until that point Phillip had also been paying rates for the land. In the year since the lower Court hearing, Brigham has not paid anything more by way of rent. Phillip submits that this payment was a thinly-veiled attempt to appear reasonable to the Court. He adds that there is no reason to think the rent payments might resume.

[28] As to the other suggested alternatives, Phillip submits that Brigham has stated that he would only consider the formation of an ahu whenua trust if he continued to have exclusive use of the land. The suggestion that Phillip use the rear portion of the land cannot, in his submission, be reasonably suggested to be a fair outcome. The rear portion of the land is only one third of the total block, is of lesser quality and has a ditch running through it. Brigham has ruled out any exchange of land. Brigham has also ruled out leasing the land to Phillip and Phillip submits that he does not wish to lease the land to Brigham.

[29] Further, Phillip says he does not wish to sell his interest in the land, and it is contrary to the objectives of the Act to compel him to sell by refusing his partition application on the basis that such a sale is a reasonable alternative to partition. Phillip asks why he should be compelled to sell the land to Brigham and not the other way around, noting that he has offered twice the amount that Brigham is prepared to pay to purchase Brigham's share.

[30] In summary, Phillip submits that he has been extremely patient and tolerated many years of alienation from access to and use of the land. He did not take the decision to apply for a partition lightly; it came after years of attempts to achieve some degree of use and control of the land. The Court has a statutory duty to facilitate the resolution of disputes in a fair way as established by ss 2(2) and 17(2)(c) of the Act. Faced with a genuine, long-running dispute between owners, the Court should not simply decline the application and leave the ongoing dispute for the parties to resolve, particularly when one party already has exclusive use of the land and therefore has no motivation to change the

status quo. In finding that there were reasonable alternatives to partition, the Court overlooked the fact that those alternatives all require the willingness of Brigham, or the ongoing alienation of Phillip from the land. Phillip is entitled to look to assistance from the Court to resolve the situation and have his application for a partition granted.

Respondent's submissions

[31] Brigham submits that the negotiations and arbitration show that it was the parties' intention that he have use of the land, and later negotiations show that Phillip was prepared to transfer the land to him. However, it appears that Phillip has now changed his mind.

[32] Brigham highlights the purpose of Part 14 of the Act, and notes that the High Court in *Brown v Māori Appellate Court* set out an overview of the relevant sections of the Act.[13] He submits that not only does the Court need to determine whether to make a partition under Part 14 of the Act, it must also consider whether a partition is in the spirit of the whole purpose and principles of the Act.

[33] Further, in response to Phillip's submission that the lower Court failed to exercise its duties to resolve conflict and ensure fairness between the parties, Brigham submits that the only option considering s 17(2)(c) in the circumstances was to dismiss the partition application. If the land had been partitioned, Brigham would have appealed the order on the same ground; that Judge Reeves did not facilitate the settlement of the owners' dispute.

[34] Brigham argues that a partition would create a greater conflict between the parties, particularly after he has paid $432,000 for improvements to the land as a part of the arbitration award between them. There was some dispute in the lower Court as to the value of the improvements, and whether they were on the land or on Tini's Block, but Brigham submits that evidence makes it clear that the value is attached to the land in question. The parties still have a number of options to come to a workable resolution, such as a lease, trust, exchange of land, or access arrangements. A partition, Brigham says, would extinguish all these options. He submits that the lower Court was correct to find that there are other alternatives that can be pursued and the appellant is not able to reject other options because he does not like them or that he prefers a partition.

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13 *Brown v Māori Appellate Court*, above n 3, at [35]-[40].

[35] Brigham submits that Judge Reeves turned her mind to how Phillip would benefit in these arrangements and adds that Judge Reeves was restricted in how much further she could facilitate this dispute.

[36] In addition, Brigham submits that the s 17(2)(c) requirement that the Court determine or facilitate the settlement of disputes must be read in light of s 17(2)(e) that the Court must ensure fairness in dealings with owners. He submits that Phillip has not demonstrated any particular affinity to the land that would justify the Court overturning the arbitrator's award and taking away from Brigham part of the benefit he received under the award. Brigham argues that Phillip has the benefit of the other land he received in the arbitration and he will continue to have this into the future, whereas Brigham would be forced to give up his investment in the improvements if a partition order was granted. In addition, if the partition is granted, the opportunity for future generations to use the land as a single block would be lost. Brigham submits that a partition in these circumstances is not in the overall spirit of the Act.

[37] Brigham states that the statutory requirements must be met before the Court can exercise its discretion to grant a partition. This discretion, he says, citing *Hammond – Whangawehi 1B3H1*, is to be exercised in three steps: the application must meet the statutory criteria per ss 288(2) and (4); the Court must then address the mandatory considerations under s 288(1); and finally, in exercising its discretion, the Court must be mindful that it may refuse a partition if it would not achieve the principle purposes of the Act, which are to facilitate the use and occupation by owners of Māori land.[14]

[38] Brigham points out that Phillip has only taken issue with the criteria in ss 288(2)(b) and 288(4) of the Act, and submits that the lower Court Judge correctly assessed these criteria before dismissing the application. He submits that while the Court of Appeal in *Whaanga v Smith* largely focussed on the facts,[15] the Court endorsed all the points stated in *Brown v Māori Appellate Court*, and reiterated the three key points that Part 14 is not a code, but an integral part of the scheme of the Act as a whole; that the key principles are

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14 *Hammond – Whangawehi 1B3H1*, above n 11.
15 *Whaanga v Smith* [2015] NZCA 121.

the retention of land and the facilitation of its occupation, development and utilisation; and that Part 14 is concerned principally with the second of these objectives.[16]

[39] Brigham submits that the lower Court did not err in the assessment of the requirement for sufficiency of support. The Court cannot make a partition where there is not sufficient support amongst owners. Here there are only two owners and one does not support the partition. Brigham submits that the correct response to the application based solely on this part of the Act would be to decline the application for partition as there is as much opposition to the application as there is support, and cites a number of authorities in support of this position.[17] He submits that the Court should be extremely cautious in accepting *Whaanga v Niania* as an authority that support can come from a small minority of owners, submitting that this should only occur "where there are extraordinary circumstances".[18] He submits that in this appeal, the Court has the benefit of knowing the views of all the land owners. With one of the two owners opposing, the Court is in a position where it must decline the application.

[40] Brigham submits that *Bhana* should not be used as an authority to support a partition in this case, as in this application he cannot be said to be acting oppressively or unreasonably towards Phillip. He has reasons to show reluctance to the partition given the arbitration award and his investment in the improvements on the land. There is also the possibility that Phillip could use the rear part of the land where Brigham does not have any grapes planted. Brigham submits that another difference between *Bhana* and this case is that occupation orders are inherently different in nature from partitions as an occupation order focuses on the person making the application and only exists for the lifetime of the occupant.

[41] In response to Phillip's submission that he has not shared the profits of the land, Brigham submits that this is unrealistic. He submits that he took the improvements to the land as part of the arbitration award, and in exchange the appellant received a fair award of the shared assets that were being divided. If the Court was to make Brigham account for

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16 At [26].

17 *Brown v Māori Appellate Court*, above n 3; *Henderson v Trustees of Wharekahika A47 – Wharekahika A47* (2009) 88 Ruatoria MB 1 (88 RUA 1); *Marsh – Karu o Te Whenua B2B5B1 Block* (1996) 19 Waikato Maniapoto Appeal MB 40 (19 APWM 40); *George – Matauri 2F2B* (2006) 38 Kaikohe MB 257 (35 KH 253).

18 *Whaanga v Niania – Anewa Block*, above n 5, at [38].

any profit from these improvements it would mean Phillip is receiving profits from Brigham's award.

[42] In the absence of other judicial authority in a case for partition where there are only two owners, Brigham submits that the dictionary definition of 'sufficient' and 'support' should be considered. Sufficiency requires support to be 'adequate' or 'enough'. He submits that 'sufficient' in an ordinary meaning does not mean 50 per cent in support of the partition when 50 per cent of the ownership is opposing.

[43] In terms of necessity, Brigham submits that lower Court was correct in its assessment of the threshold for necessity as a high threshold that is "essential in these circumstances rather than simply desirable or expedient".[19] He submits that the focus is not on the necessity of the partition for an individual land owner, but for the utilisation of the land itself; and on the partition's necessity for the greater whānau of the owners.

[44] Whilst Brigham accepts that under s 2(2) the Act is to be interpreted in a manner which "facilities and promotes the retention, use, development and control of Māori land as taonga tuku iho by Māori owners", it is submitted that this cannot take precedence over the wording of s 288(4)(a) where a partition cannot be made unless it "is necessary to facilitate the effective operation, development and utilisation of the land".

[45] Brigham argues that *Brown* recognises that retention concerns more than just the current owners and includes whānau, hapū, and descendants. The proposed partition would exclude the Phillip and Brigham's descendants from the use and development of the land as a whole as opposed to a less efficient divided block of land. Brigham submits that this cannot be the right outcome.

[46] Brigham argues that, although s 17(1)(b) promotes effective use, management and development of land, this is on behalf of all owners. There is no requirement for Phillip to have exclusive possession of one half of the land. Brigham submits that s 2 does not require all owners to have physical occupation in order for the purpose of the Act to be met. He believes that there is still opportunity for Phillip to develop, benefit from or have control of some of the land by utilising the rear of the block. He submits that Phillip does

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19 *MacDonald v MacDonald*, above n 1, at [22].

not demonstrate the same necessity as in *Pure* and *Matchitt*, and that Phillip's wish to farm the land in the current manner is only a desire rather than meeting the high threshold of necessity.

[47] Brigham submits that if the Court were to order partition then Phillip would have a small parcel of land sharing a boundary with Brigham. This could further escalate the tension between the parties. Where there is strong opposition as there is in this case, he submits that the Court should not make the partition.

[48] Brigham also argues that a partition of the land would be contrary to the Resource Management Act 1991. Under the Wairau/Awatere Resource Management Plan, a subdivision of less than 8 hectares is a non-complying activity in relation to this block. Brigham submits that the lower Court had evidence, based on these submissions, to reach the conclusion that a partition would unlikely to gain regulatory approval. While he accepts that the Court can make an order for partition where the partition would not have otherwise complied with the Resource Management Act 1991, Brigham submits that in this instance where partition is sought as the result of a breakdown in a sibling relationship it is not in the spirit of the Act to allow the Resource Management Act to be bypassed. In addition he submits that, even if the Court were to order a partition, there would be other constraints of the Resource Management Act which cannot be bypassed such as the use of water per house or vineyard per day. He submits that this will mean that the land will not be able to be put to its best use. Therefore, Brigham submits that Judge Reeves was entitled to make the findings that she did in relation to the Resource Management Act and the district plan.

[49] Brigham further submits that, if the partition was spilt into front/back blocks, the rear block will be technically landlocked. If the rear part of the land went to Brigham without a right of way then there is no guarantee that in future all the land he owns (including the land adjacent to Wairau Block XII Section 6C2C) will stay together.

[50] In conclusion, Brigham submits that the lower Court was correct in find the requirements for partition under the Act had not been met. He submits that if the Court were to make the partition order based on the grounds that Phillip relies on, he would face

greater unfairness as he would lose the use of the improvements that he received under the arbitration award.

The Law

[51] The Māori Land Court has exclusive jurisdiction to grant partition orders in relation to Māori freehold land, in accordance with Part 14 of the Act. In hearing an application for partition the Court must have regard to those matters set out in s 288 of the Act, which provides:

> **288 Matters to be considered**
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> (1) In addition to the requirements of subsections (2) to (4), in deciding whether or not to exercise its jurisdiction to make any partition order, amalgamation order, or aggregation order, the court shall have regard to—
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> (a) the opinion of the owners or shareholders as a whole; and
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> (b) the effect of the proposal on the interests of the owners of the land or the shareholders of the incorporation, as the case may be; and
>
> (c) the best overall use and development of the land.
>
> (2) The Court shall not make any partition order, amalgamation order, or aggregation order affecting any land, other than land vested in a Māori incorporation, unless it is satisfied—
>
> (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
>
> (b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.
>
> (3) The Court shall not make any partition order, amalgamation order, or aggregation order affecting any land vested in a Māori incorporation unless it is satisfied—
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> (a) that the shareholders of the incorporation to which the application relates have been given express notice of the application; and
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> (b) that the shareholders have passed a special resolution supporting the application.
>
> (4) The Court must not make a partition order unless it is satisfied that the partition order—
>
> (a) is necessary to facilitate the effective operation, development, and utilisation of the land; or

(b) effects an alienation of land, by gift, to a member of the donor's whanau, being a member who is within the preferred classes of alienees.

[52] In *Hammond – Whangawehi 1B3H1* the Māori Appellate Court discussed the partition jurisdiction as follows:[20]

> [15] The Court has exclusive jurisdiction to grant partition orders in relation to Māori freehold land in accordance with Part 14 of the Act. That jurisdiction is discretionary. The Act directs the Court to exercise its discretion in three steps.
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> [16] First, the statutory prerequisites must be satisfied. The Court is expressly prohibited from granting partition if these prerequisites are not satisfied. There are, in essence, three (we do not look at the situation where the land is vested in an Incorporation):
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> > Section 288(2)(a): The Court must be satisfied that the owners have had "sufficient notice of the application and sufficient opportunity to discuss and consider it."
> >
> > Section 288(2)(b): the Court must be satisfied that there is a "sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter."
> >
> > Section 288(4)(a) and (b): The Court must be satisfied that the partition is "necessary to facilitate the effective operation, development, and utilisation of the land"; or, "effects an alienation of land, by gift, to a member of the donor's whānau, being a member who is within the preferred classes of alienees."
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> [17] In *Brown v Māori Appellate Court* [2001] 1 NZLR 87 (HC) the High Court clarified at [51] that "necessary" in s 288(4)(a) is properly to be constructed as "reasonably necessary" and that it is "closer to that which is essential than that which is simply desirable or expedient."
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> [18] Second, if the statutory prerequisites are satisfied, the Court must then address the mandatory consideration in section 288(1)). That section requires the Court to have regard to the opinion of the owners as a whole, the effect of the proposal on the interests of the owners, and the best overall use and development of the land.
>
> [19] Third, the Court is to exercise its general discretion mindful that it may refuse to exercise that jurisdiction if it would not achieve the principle purpose of Part 14 of the Act: section 287(2). The principal purpose is expressed in section 286(1) to be "to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional; or improved access to the land."

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[20] *Hammond – Whangawehi 1B3H1*, above n 11.

> [20] At all times the Court must have regard to the principles set out in the preamble to the Act, section 2 and section 17: *Brown v Māori Appellate Court* at [66].
>
> ...
>
> [23] When the Court is considering section 288(4)(a) it must assess whether there are reasonable alternatives to partition, whether they are contained in the Act or elsewhere. This was made clear by this Court in *Reid v Trustees of Kaiwaitau 1* (2006) 34 Gisborne Appellate MB 168 (34 APGS 168). (paragraphs 13 and 15) where we went on to explain the gravity of the partition order:
>
> > "The test in this case must therefore be whether there exists any reasonable alternative to partition in terms of achieving the effective operation, development and utilisation of the land...
> >
> > "It can be seen at once that partition is treated under the Act as of being the utmost gravity – akin in some ways to alienation. This sea change in attitude from the Māori Affairs Act 1953 to Te Ture Whenua Māori Act 1993 reflects an acceptance by the legislature that title fragmentation through partition is contrary to Māori economic and cultural interests and should not now be encouraged if there are reasonable alternatives to it. The bar has been set intentionally high."
>
> [24] Alternatives to partition may include agreement between the owners, leasing, a trust with a trust order defining areas of use and occupation, occupation orders, subdivision and so forth. This is not intended to be an exhaustive list and the alternatives (if any) will depend on the circumstances of the land and its owners. Importantly, applicants or owners cannot simply reject those alternatives as they do not like them, or perceive them to be inferior when they are not, or simply prefer partition. The corollary of a partition being required to be "reasonably necessary" for the operation, development and utilisation of the land is that reasonable alternatives are not available to achieve the same outcome. The owners cannot unreasonably reject reasonable alternatives.

[53] In addition, the Court must at all times have regard to the principles set out in the Preamble to the Act and ss 2 and 17.

Discussion

[54] The issues for us to determine are as follows:

(a) Was the lower court correct in finding that there is insufficient support for the partition in terms of s 288(2)(b) of the Act?;

(b) Was the lower court correct in finding that the partition is not necessary to facilitate the effective operation, development and utilisation of the land in terms of s 288(4) of the Act?; and

(c) In terms of the Act's guiding principles, in particular ss 2(2) and 17(2)(c), is the partition a practical solution to the dispute between Phillip and Brigham?

Sufficiency of support

[55] Section 288(2)(b) of the Act provides that the Court shall not make any partition order unless it is satisfied that there is a sufficient degree of support for the partition among the owners, having regard to the nature and importance of the matter.

[56] Phillip submits that the case law shows that the test for sufficiency of support is dependent on the facts and context of each case, noting that in some instances a majority of support has been found be insufficient in the context of the case, and in others (citing *Whaanga v Niania*[21]) less than 10% support can be sufficient. In this instance, where there are only two owners of the land, with one supporting and one opposing the partition, Phillip submits that the Court should have regard to his position that Brigham is acting oppressively by denying him access to or use of the land. He further submits that it is unhelpful, where there are only a small amount of owners, to consider the matter in terms of percentages for and against the partition; and that a sole owner should not be able stifle an application for partition "based solely on self-interest". The Court should, in his submission, have regard to the objectives set out in s 17 of the Act in promoting fairness between owners in assessing the sufficiency of support for partition in this instance.

[57] Brigham agrees that the case law shows that sufficiency of support should be judged on a case-by-case basis, but submits that *Marsh* and *George* provide that, in general, support will need to outweigh opposition to a partition before it can be said to be 'sufficient'.[22] He also notes the decision in *Henderson v Trustees of Wharekahika A47* as an example of a situation where support and opposition to a partition was roughly equal,

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21 *Whaanga v Niania – Anewa Block*, above n 5.
22 *Marsh – Karu o Te Whenua B2B5B1 Block*, above n 17; *George – Matauri 2F2B*, above n 17.

and that in that decision the Court found that such an equal balance between support and opposition did not constitute sufficient support for the partition.[23] He submits that the exact split between himself and Phillip in support and opposition to the partition is akin to *Henderson*, and on the same basis as in that decision the Court should find that there is insufficient support for the partition.

[58] Both parties are correct in their submission that sufficiency of support for a partition must be assessed having regard to all of the circumstances of the owners and the land in question. However, Brigham is correct to note support for the partition will normally need to outweigh opposition before it can be said to be 'sufficient'.

[59] As noted by Brigham, in its judgment in *Marsh – Karu o Te Whenua B2B5B1 Block*, the Māori Appellate Court found that "if there is opposition to the partition proposal, the Court must carefully balance the competing views and generally support would need to outweigh the opposition before the proposal can proceed."[24]

[60] The Appellate Court in *Reid v Trustees of Kaiwatau 1* subsequently set out the position as follows:[25]

> Just what amounts to 'sufficient' support is in the end a matter for case by case analysis (see *Brown* at p97). In some cases, partition may be the only means of overcoming intractable differences between owners and their whānau even though those in support of the partition are only in the minority in number or shareholding. In other cases a clear majority in support will be required.

[61] Citing this statement in *Ngatai v Charmaine – Matakana 1A7A Block*, the Māori Appellate Court noted that "sufficiency depends upon what the applicant is trying to achieve and what problems the overall land-owning community are seeking to solve." Considering the circumstances of the parties in that case, the Court found that "while there are significant differences [between the parties], they are far from intractable. In those circumstances, sufficient support should amount to a clear majority by shareholding in favour of the application and, "preferably" a majority by poll vote as well."[26]

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23 *Henderson v Trustees of Wharekahika A47 – Wharekahika A47*, above n 17, at [29].

24 *Marsh – Karu o Te Whenua B2B5B1 Block* , above n 17, at 46.

25 *Reid v The Trustees of Kaiwaitau 1 Trust – Kaiwaitau 1* (2006) 34 Gisborne Appellate MB 168 (34 APGS 168) at 172.

26 *Ngatai v Charmaine – Matakana 1A7A Block* (2007) 21 Waikato Maniapoto Appellate MB 147 (21 APWM 147) at [10]-[11].

[62] As these judgments show, in most circumstances where an application for partition is opposed the support for the application will need to outweigh the opposition before there can be said to be 'sufficient support' for the partition in terms of s 288(2)(b). The principal circumstances where support might still be found to be sufficient despite those in support of the partition holding a smaller shareholding or being lesser in number to those opposed to it are where there are intractable differences between owners and a partition is the only means by which these differences might be overcome.

[63] We pause to note that Phillip's reference to the Māori Appellate Court's 2011 decision in *Whaanga v Niania* is unhelpful in the circumstances of this case. Phillip referred to this case as supporting the proposition that support of less than 10% of owners can still be found to be 'sufficient' for partition in particular circumstances. His submission implies that in that case 90% of the owners that expressed an opinion on the partition were opposed to it, and the support for the partition was nonetheless found to be sufficient. This is incorrect. The *Whaanga* decision concerned a situation where owners holding 9.97% of the shares in a land block supported an application for partition, which was opposed by two of the trustees of the Trust which administered the land.[27] The Court found, taking into account a range of factors, that there was sufficient support for this partition. This was accordingly not a circumstance where opposition to the partition outweighed support, but instead one where a minority group of owners (who, in addition to holding less than 10% of the shareholding, collectively represented less than 3% of the owners) supported a partition while the majority of owners were silent. In the case of Phillip and Brigham, where 100% of the ownership have expressed an opinion on the partition, it is hard to see the relevance of the very different circumstances considered in *Whaanga*. The comments of the Court in *Whaanga* that the circumstances of that case were "particularly unique" should also be borne in mind,[28] as well as the comments of the Māori Appellate Court in a later appeal in those proceedings that the support of less than 3% of owners "is, in the ordinary run of circumstances, not sufficient support for a partition".[29]

[64] Considering the situation of Phillip and Brigham, the fact that there is an equal split in support and opposition to the partition means that, in normal circumstances, there is

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27 *Whaanga v Niania – Anewa Block*, above n 5, at [1].
28 At [72].
29 *Whaanga v Smith – Anewa Block* [2013] Māori Appellate Court MB 45 (2013 APPEAL 45) at [38].

insufficient support amongst the owners for partition. As stated in *Marsh*, in general support for a partition must outweigh opposition before it can be said to be 'sufficient'.

[65] We must then ask whether there are any additional factors in this case which mean that the 50% support for the partition might be sufficient support, having regards to all of the circumstances of the parties. Phillip submits that such circumstances do exist, pointing in particular to Brigham's exclusive use of the block and consequent denial of his ability to access or use the land. Brigham responds that his use of two-thirds of the block as a part of his vineyard operation is reasonable as a result of the arbitration award reached between the parties granting him the improvements made to the block, notes that the remaining unused portion of the block could potentially be utilised by Phillip, and that the payment of rent to Phillip would also recognise his joint ownership in the absence of other arrangements.

[66] Considering the positions of the parties, we are not convinced that circumstances exist such that the general rule that support for a partition must outweigh opposition in order for there to be 'sufficient support' should be displaced in this instance. In particular, while there is disagreement between Phillip and Brigham as to use of the land, it is far from intractable. As noted above, the second arbitration award issued concerning the division of their interests recorded the parties' agreement that Brigham would purchase Phillip's share of the land at valuation price. While this agreement has broken down over the question of the correct valuation of the land, it demonstrates that the dispute between the parties as to the use of the land is not irresolvable, and certainly has not reached the point where equally split support and opposition to a partition can meet the test of sufficient support. Even should the sale of his share in the land to Brigham no longer be a resolution that Phillip wishes to pursue, there are other alternatives available to the parties to resolve their differences, including the payment of rent to Phillip and/or arrangements for Phillip to utilise the portion of the block that is not presently part of the vineyard operation. While these may not be Phillip's preferred options, in the absence of majority support for the partition they are reasonable ones for the parties to pursue, and indicate that the disagreement between the parties has not reached the stage where it could be said to be intractable and a partition the only means of overcoming their differences.

[67] We accordingly agree with Judge Reeves that there is not sufficient support for the partition among the owners in terms of s 288(2)(b) of the Act.

Necessity

[68] Section 288(4)(a) provides that the Court must not make a partition order unless it is satisfied that the partition is necessary to facilitate the effective operation, development and utilisation of the land in question.

[69] Phillip submits that with regards to this requirement *effective* utilisation of land should be read broadly in light of the principles of the Act, and in particular that effective utilisation should allow all owners to play a part in the use, management and development of the land. In the present situation he submits that Brigham's vineyard operation leaves him completely excluded from use and control of the land, and that all alternatives to partition which had been raised would either continue his exclusion from use and control of the block or have been ruled out by Brigham.

[70] Brigham submits in response that under s 288(4)(a) the Court is required to consider the necessity of the partition for the utilisation of the land itself, and for the ownership as a whole (including the wider whānau, hapū and descendents of the owners), not for an individual owner. He submits that Judge Reeves' reasons for finding that the partition was not necessary for the effective utilisation of the land were correct, in particular her findings that the land is currently effectively utilised for its optimal purpose as one block and that the partition would be unlikely to gain regulatory approval. Brigham further submits that Judge Reeves was correct to find that there were reasonable alternatives to partition available to the parties, and that Phillip is not able to reject these alternatives simply because he prefers a partition.

[71] As noted above, the Māori Appellate Court in *Hammond* set out that "[w]hen the Court is considering section 288(4)(a) it must assess whether there are reasonable alternatives to partition, whether they are contained in the Act or elsewhere.... Alternatives to partition may include agreement between the owners, leasing, a trust with a trust order defining areas of use and occupation, occupation orders, subdivision and so forth. This is not intended to be an exhaustive list and the alternatives (if any) will depend on the

circumstances of the land and its owners. Importantly, applicants or owners cannot simply reject those alternatives as they do not like them, or perceive them to be inferior when they are not, or simply prefer partition. The corollary of a partition being required to be "reasonably necessary" for the operation, development and utilisation of the land is that reasonable alternatives are not available to achieve the same outcome."[30]

[72] In her decision Judge Reeves noted that there were a range of alternatives available to the parties to facilitate effective utilisation of the land, including payment of rent from Brigham to Phillip for his use of the land; formation of an ahu whenua trust to manage the land; access to and use of the rear portion of the block by Phillip; an exchange of land between the parties; and a formal lease arrangement between the parties. We agree that these are reasonable alternatives for the parties to consider in order to continue the present effective utilisation of the land and address the concerns that have lead Phillip to seek the partition of the land.

[73] Phillip's position is that none of these options are reasonable alternatives to partition, as none will give him use and control of the land equal to that of his co-owner. This approach misconstrues the meaning of 'effective utilisation of land' under s 288(4)(a). The requirements of this section are, as Brigham notes, directed to the effective utilisation of the land itself, and to utilisation by the collective ownership. Effective utilisation does not require that each individual owner have an equal and separate right to access and use a portion of the land commensurate to their ownership interest. If this were the case, any owner in a multiply-owned block that is leased to a particular owner or group of owners, or to an external party, could demand a partition of their interest in the land on the basis that such a partition is necessary for their individual interest to be recognised. Such a position would be contrary to the plain intention of legislature, namely to discourage fragmentation of Māori land title by setting a high bar for granting of partition, as noted in *Reid v Trustees of Kaiwaitau 1*.[31] It is also not required to be read into the meaning of s 288(4)(a) by the principles of the Act.

[74] This is not to say that Phillip is not entitled, as a co-owner, to be a part of the decision-making as to the effective utilisation of the land, and to share in the benefits of

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30 *Hammond – Whangawehi 1B3H1*, above n 11, at [24]-[25].

31 *Reid v The Trustees of Kaiwaitau 1 Trust – Kaiwaitau* 1, above n 25, at [15].

that utilisation. But he can do this through the various alternatives to partition noted by Judge Reeves. The fact that he may not have access to and control of half of the land under these alternative arrangements (although we note that under at least one of the options he would retain access to and control of a third of the block) does not mean that his interests as a co-owner will not be recognised, and that the land will not be effectively utilised.

[75] The partition sought by Phillip would, in fact, have a detrimental impact on the effective utilisation of the land, as noted by Judge Reeves. There is persuasive evidence that a partition (whether across the narrowest part of the block or, as proposed in the alternative by Phillip, lengthways) would limit the ability of the owners to continue its present utilisation as a vineyard. The likelihood that the partition would not comply with the district plan is an additional factor weighing against its necessity for the effective utilisation of the land.

[76] We accordingly agree with Judge Reeves that the partition is not necessary for the effective utilisation of the land.

Practical solutions

[77] Given that we have found that the application for partition does not meet the statutory requirements of sufficiency of support or necessity, we do not need to go on to consider the argument put to us by Phillip that the partition should be preferred as a practical solution to the dispute between him and his brother, in terms of the objectives of the Act set out at ss 2(2) and 17(2). We do, however, make some brief comments on this point.

[78] In simple terms, while the partition may seem a practical solution to Phillip, we consider that it would in fact create further animosity between these two brothers and their families. The evidence before us is that the partition would pose difficulties for the ongoing effective utilisation of the land, and would affect the improvements to the land awarded to Brigham as a part of the arbitration between the brothers. Granting the partition in this context would not be a practical resolution to the disagreement between the parties.

[79] In making this statement we cannot ignore the arbitration award made to the brothers. The November 2009 Second Interim Award, filed in evidence in the lower court, did not make any conclusive finding regarding the land in question, as was noted in the parties' submissions. It did however detail the provisional agreement between the brothers as to the purchase of Phillip's share in the land by Brigham, subject to agreement on valuation, and made the following note with regards to next steps:

> The parties initially requested time to negotiate a resolution, on the basis that, if they were unable to reach agreement I should decide the value [of the land]. They have recently requested me to reserve this issue for further consideration, in case it is necessary to determine a value. It is possible that this land will be sold or partitioned rather than transferred to Brigham.
>
> I accordingly reserve this issue for later determination if needed.

[80] We note that Phillip and Brigham have been able to resolve issues over the allocation of substantial shared assets through the arbitration process. Having regard to this, we consider that a practical way forward for the parties would be to take up the leave to return to arbitration reserved in the award quoted above to address this residual issue.

Decision

[81] For the reasons given above, the appeal is dismissed.

[82] We note that no submissions have been made as to costs. We are inclined to think that costs should lie where they fall. However, if the respondent seeks costs, Mr Hardy-Jones is to file a memorandum within 14 days of receipt of this judgment, with Mr Radich to file a response within 7 days thereafter.

W W Isaac (Presiding)	P J Savage	M J Doogan
CHIEF JUDGE	**JUDGE**	**JUDGE**