IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150005261

UNDER	Section 135, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Otara 5D1
BETWEEN	JOSEPH PAIKEA AND JEANETTE ROONEY Applicants

Hearing: 22 September 2016
(Heard at Whangarei)

Judgment: 08 November 2016

JUDGMENT OF JUDGE M P ARMSTRONG

Introduction

[1] Joseph Paikea and Jeanette Rooney have applied to change the status of Otara 5D1 from Māori freehold land to General land per s 135 of Te Ture Whenua Māori Act 1993 ("the Act").

[2] The issue in this case is whether an order changing the status of the block should be granted.

Background

[3] Otara 5D1 ("the block") is 4.0485 hectares of Māori freehold land. This block is located on the shores of the Kaipara Harbour west of Topuni. The applicants are the sole owners of this block holding equal shares as tenants in common. The applicants are living in a house on the block. There is no administration structure constituted over the block.

[4] This block was previously owned by Esther Gray and Phillip Gray. Mrs Gray is Mr Paikea's sister. On or around 2 October 2006, Mr and Mrs Gray took out a loan with the Bank of New Zealand ("BNZ") which was secured by a mortgage against the block.[1] Mr and Mrs Gray defaulted on that loan and BNZ proceeded to exercise its power of mortgagee sale.

[5] On or around 29 October 2014, the applicants purchased the block from BNZ by way of mortgagee sale. A new mortgage was registered against the block in favour of BNZ as mortgagee, and the applicants as mortgagors.[2]

[6] This application was heard on 22 September 2016.[3] Mr Paikea and Ms Rooney appeared in person. Notices of intention to appear in opposition to the application were filed by Esther Gray, Te Aroha Marshall, Harry Paikea, Fiona Paikea, Benjamin Paikea, Samuel Paikea and T Paikea. Mrs Gray and Mrs Marshall also presented oral submissions opposing the application.

[7] After hearing from the parties I reserved my decision.

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1 15 Title Notices MB 299 (15 TNTOK 299).
2 15 Title Notices MB 853 (15 TNTOK 853) and 90 Taitokerau MB 17 (90 TTK 853).
3 139 Taitokerau MB 208-221 (139 TTK 208-221).

[8] On 27 October 2016, Ms Rooney contacted the Registrar by email seeking an urgent decision on this application. The request for an urgent decision was referred to me on 1 November 2016.

[9] Ms Rooney filed material in support of her request seeking an urgent decision. That supporting material raised new issues which were not referred to at the hearing on 22 September 2016. On the face it, that new material may support the substantive application, and in particular, whether this block can be managed or utilised more effectively as General land.

[10] As such, I directed the Registrar to contact the applicants to inquire whether they are seeking that this new material be taken into account in determining the substantive application, or whether it was only provided in support of their request seeking an urgent decision. The Registrar has advised that, due to its sensitive nature, the applicants do not want the content of that new material referred to in this judgment.

[11] I consider that there is a proper basis to issue an urgent decision on this application. Had the applicants sought to do so, I would have been sympathetic to an application to adduce this new material as further evidence in support of the substantive application.[4] At the request of the applicants, I have not taken this new material into account, and I have not referred to it, in determining the substantive application below.

Submissions for the applicant

[12] The applicants argued that they are seeking to change the status of the block from Māori freehold land to General land in order to subdivide the block into six sections. They advised that they may sell or lease one or two of those sections in order to raise capital which can be used to develop the remaining sections. In particular they are interested in establishing apiary and / or agricultural operations on the land. The applicants also advised that they may transfer some of the sections to their children.

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[4] I note that if the applicants did seek to adduce this new material as further evidence, copies would have to be made available to those in opposition, with an opportunity for them to reply, and the content of that material would have been referred to in this judgment.

[13] The applicants argued that the block can be managed or utilised more effectively as General land as this will enable them to complete the subdivision as proposed. They further argued that a change in status will allow them to sell or lease one or two of those sections, if they decided to proceed with that option, which will raise capital. The applicants contend that the proposed subdivision will increase their ability to obtain further finance which can be secured against the subdivided sections. The applicants also argued that it is easier to obtain finance generally if the block is General land, as opposed to Māori freehold land.

[14] The applicants have filed a letter from BNZ confirming that they consent to the proposed change in status. The applicants have also filed letters in support from some of their children and from A M Treadway.

Submissions in opposition to the application

[15] Mrs Gray is a trustee of the Kite Moana Whānau Trust, which owns the neighbouring Otara 5D2 block. Mrs Gray advised that there is a restricted roadway laid out over Otara 5D2 which provides access to this block. Mrs Gray is concerned that if the applicants proceed with their proposal, and sell or lease some of the subdivided sections, this will increase the amount of traffic over the restricted roadway causing a nuisance to the owners of Otara 5D2.

[16] Mrs Gray further advised that their whānau connections to this block go back nine generations and can be traced to 1822. Mrs Gray argued that if the applicants are going to sell some of the sections, the whānau who associate with the land should have an opportunity to purchase those sections.

[17] Mrs Marshall is also one of Mr Paikea's sisters and is a trustee on the Kite Moana Whānau Trust. Mrs Marshall advised that she is not opposed to the applicants utilising or developing the block, however, she is opposed to any potential sale. Mrs Marshall is concerned that the land may be sold outside of the whānau and that they will have no control over who can purchase the land or utilise the restricted roadway. Mrs Marshall considers that the land is a taonga and should never be sold.

[18] The other notices of intention to appear in opposition to the application repeat these concerns.

The Law

[19] Sections 135 and 136 of the Act state:

> **135 Change from Maori land to General land by status order**
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> (1) The Maori Land Court shall have jurisdiction to make, in accordance with section 136 or section 137 of this Act, a status order declaring that any land shall cease to be Maori customary land or Maori freehold land and shall become General land.
>
> (2) The Court shall not make a status order under subsection (1) of this section unless it is satisfied that the order may be made in accordance with section 136 or section 137 of this Act.
>
> (3) A status order under subsection (1) of this section may be made conditional upon the registration of any instrument, order, or notice effecting a conveyance of the fee simple estate in the land to any person or persons specified in the order.
>
> **136 Power to change status of Maori land owned by not more than 10 persons**
>
> The Maori Land Court may make a status order under section 135 of this Act where it is satisfied that—
>
> (a) The land is beneficially owned by not more than 10 persons as tenants in common; and
>
> (b) Neither the land nor any interest is subject to any trust (other than a trust imposed by section 250(4) of this Act); and
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> (c) The title to the land is registered under the Land Transfer Act 1952 or is capable of being so registered; and
>
> (d) The land can be managed or utilised more effectively as General land; and
>
> (e) The owners have had adequate opportunity to consider the proposed change of status and a sufficient proportion of the owners agree to it.

[20] In *Apaapa – Te Pura A No 17,*Judge Clark summarised the relevant principles concerning an application to change the status per s 135 of the Act: [5]

> [40] The general principles applicable to a change of status have developed over time. There are a number of decisions of the Māori Land Court, Māori Appellate Court, High Court and Court of Appeal which are of relevance. They are *Cleave* –

[5] *Apaapa – Te Pura A No 17* (2010) 6 Waikato Maniapoto MB 1 (6 WMN 1).

Orokawa 3B (1995) 4 Taitokerau Appellate MB 95 (4 APWH 95); *White – Maketu A2A Lot 4 DPS 63036* (1999) 1 Waiariki Appellate MB 116 (1 AP 116); *Hoko – Papamoa 2A1* (2003) 20 Waikato-Maniapoto Appellate MB 167 (20 APWM 167); *Regeling – Orokawa 3B Lot 4 DP 41892* (2004) 6 Taitokerau Appellate MB 157 (6 APWH 157); *Craig v Kira – Wainui 2F4D* (2006) 7 Taitokerau Appellate MB 1 (7 APWH 1); *Property Ventures Ltd v Parata – Ngarara West B3B* (2007) 16 Aotea Appellate MB 1 (16 WGAP 1); *Edwards v Māori Land Court of New Zealand* HC Wellington CP 78/01, 11 December 2001; *Bruce v Edwards* [2003] 1 NZLR 515 (CA) and *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA).

[41] In a recent decision, *Te Whata – Waiwhatawhata 1A2B6 Lot 1 DP 168554* (2008) 125 Whangarei MB 294 (125 WH 294), Judge Ambler comprehensively identified the relevant legal principles. I summarise those principles as follows:

a) The PCA are entitled to be given formal notice of the application and hearing;

b) The application is considered in two steps. First the Court must assess whether each of the five statutory preconditions set out in s 136 of TTWMA have been met. Once an applicant has satisfied the Court that those threshold requirements can be met, the Court must then consider whether to exercise its discretion in favour of the change of status. In doing so the Court will measure the application against the principles of TTWMA, in particular the Preamble, ss 2, 17, and the removal of the statutory right of first refusal reserved to the PCA;

c) Applications must be supported by full and cogent evidence. An applicant must demonstrate that specific plans for the land can be more effectively achieved if the land were [G]eneral land;

d) Each application should be considered on its own merits. The Court must measure the personal situation and desire of the applicant in assessing the application;

e) The opposition or lack of opposition of the PCA is a factor to be taken into account. The financial ability, or lack of it, of the current generation of PCA to exercise the right of first refusal will not be determinative;

f) A mortgagee sale of the land does not result in an automatic change of status of Māori freehold land by operation of law.

Discretion

[42] In exercising its discretion the Court must take into account the kaupapa of TTWMA as expressed in the Preamble, ss 2 and 17. In particular:

a) Those with rights or interests in the land go beyond the beneficial owners themselves to whānau, hapū and descendants of the owners;

b) Māori land is a taonga tuku iho and should be retained within the kin group if possible;

c) Owners should as far as possible be empowered to develop, manage and utilise and control their own land;

d) A change of status is possible but only in a limited range of situations in which the application is in some material way outside the ordinary run of cases or that it is sufficiently distinctive;

e) An application for status change where the sole purpose is to sell the land or to achieve a better sale price will be difficult to achieve particularly when assessed against the kaupapa of TTWMA. In terms of the two-step process, although a change of status for the sole purpose of sale may satisfy s 136(d) of TTWMA, the major hurdle is the Court's discretion. The Court must exercise its discretion as far as possible having regard to the kaupapa of TTWMA. The primary objective of TTWMA is the retention of Māori land, sale of land is not an objective.

[43] The development of the case law outlined above reflects the fact that since the advent of TTWMA, change of status applications have provided some of the more controversial cases encountered in the Māori Land Court. These cases also reflect the tension between what land owners might desire and the underlying philosophies/kaupapa of TTWMA.

[21] I adopt those principles in this case.

Issues

[22] Section 136(a) to (c) and (e) of the Act are satisfied.

[23] The issues in this case are:

(a) Have the preferred class of alienees received sufficient notice of the application?

(b) Can this block be managed or utilised more effectively as General land per s 136(d) of the Act? and

(c) Should I exercise my discretion to grant a change in status?

Have the preferred class of alienees received sufficient notice of the application?

[24] On 6 July 2016, I directed the applicants to notify members of the preferred class of alienees by publishing a notice on at least two occasions, in the Northern Advocate newspaper, not less than 14 days before the hearing.

[25] The applicants published notices in the Northern Advocate on 10 and 17 September 2016, adopting the prescribed form. The application was heard on 22 September 2016. As such, while the notices complied with the form requirements set out in my directions, both notices were published less than 14 days before the hearing.

[26] The preferred class of alienees are entitled to be given formal notice of the application and the hearing. The failure of the applicants to properly comply with my directions as to notice provides a sufficient basis to dismiss the application per r 6.28(1)(c) of the Māori Land Court Rules 2011.

[27] Despite the late publishing of the notices, a large number of the preferred class appeared in opposition to the application. None of those who appeared, or who filed notices in opposition to the application, argued that the notice provided was insufficient. As such, while the applicants did not properly comply with my directions, for the purposes of this application, I am willing to accept that the preferred class of alienees has received sufficient notice.

Can the block be managed or utilised more effectively as General land?

[28] As noted, applications must be supported by full and cogent evidence. An applicant must demonstrate that specific plans for the land can be more effectively achieved if the land were General land.

[29] There is no such full and cogent evidence in this case. The plans of the applicants to subdivide this block are general in nature. Those plans are not supported by any objective evidence other than the submissions presented by the applicants.

[30] Ms Rooney advised that a survey plan has been prepared identifying the sections for the proposed subdivision. That survey plan was not filed. Ms Rooney further advised that, other than the plan, they have only taken preliminary steps with respect to the proposed subdivision.

[31] The applicants have not presented any firm proposal as to what they will do with the sections if a subdivision is granted. They have advised that they *may* sell or lease one or two sections and *may* transfer sections to their children. The nature of their evidence

indicates that they only have very general plans as to how they might utilise the various sections if a subdivision was obtained.

[32] There is no evidence before me which indicates whether the proposed subdivision could be effected or whether the necessary consents would be obtained. As such, there is no proper basis to indicate whether the applicants will be able to undertake the subdivision if the change in status is granted.

[33] In addition, no valuation has been filed, and there is no evidence from BNZ, or any other lender, which demonstrates that the change in status, and/or the subsequent subdivision, will increase the value of the land, or that it will increase the ability of the applicants to raise finance. Arguments that a change in status will increase the ability of the owner to raise finance are often raised in applications such as this, and in some cases, this may be correct. However, there is no cogent evidence before me to demonstrate that this will occur in the present case.

[34] I also note that there is an existing mortgage registered against this block in favour of BNZ. This demonstrates that BNZ were willing to grant finance to the applicants to be secured by mortgage against this block despite its current status as Māori freehold land.

[35] It is also significant that there is no evidence, or proper explanation, as to why a change in status is required to give effect to the applicants' plans.

[36] The Court has jurisdiction to grant a partition of Māori freehold land per Part 14 of the Act. There is no evidence which demonstrates that the applicants' plans can be achieved more effectively by a subdivision of the block as General land, rather than by a partition of the block as Māori freehold land.

[37] The applicants advised that they inquired about a partition, but were told that if a partition was granted, they could not sell or lease a partitioned block to anyone outside of the preferred class of alienees. That is not correct.

[38] The applicants are the sole owners of this block as tenants in common in equal shares. If they wanted to sell the block, they would have to offer the right of first refusal to

the preferred class of alienees. However, if that right of first refusal was not exercised, they could proceed to sell that block to any person who did not come within the preferred class.[6]

[39] Even if the block was partitioned, the same process would apply. Ms Rooney does not have ancestral connections to this land. Any partition of the block would not be a hapū partition and so the restrictions per s 304 of the Act would not apply.

[40] That is not to say that a partition would automatically be granted with respect to this block. There is no application for partition before me, and no evidence has been presented addressing such an application. Equally, however, there is no evidence before me to demonstrate that a subdivision would be granted if the status of the block was changed from Māori freehold land to General land.

[41] The obligation is on the applicants to present full and cogent evidence supporting their application and to demonstrate that specific plans for the land can be more effectively achieved if the land were General land. The applicants have not done so.

[42] I note that a similar application was considered in *Craig v Kira – Wainui 2F4D*.[7] In that case, Mrs Craig was the sole owner of Wainui 2F4D. She was 93 years of age at the time of the application. Mrs Craig sought a change in status to subdivide the block and then sell the majority of those subdivided sections. The Māori Land Court dismissed the application. On appeal, the Māori Appellate Court held:

> [27] That brings us to the combined effect of the appellant's age and the fact that the land has been un-utilised for a long time and is likely to remain so at least for the lifetime of the appellant without some change in the status of the land.
>
> [28] In our view, this combined circumstance is distinctive and does take the application outside the ordinary run of cases. We accept that, due to the appellant's age, finance to develop and utilise the land is effectively unobtainable. The appellant must be entitled to benefit from the land and if the effect of maintaining the entire title as Māori freehold land is to prevent that outcome, then some relief is warranted. We do not consider however that the circumstances of this case justify a change of status over the whole block. As we have said, the removal of the PCA's first right of refusal is not to be granted lightly. It follows that if a change is to be granted it must be strictly proportionate to the allowable objective. In this case the sale as General land, of a portion of the block sufficient to fund development on the

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6 See Te Ture Whenua Māori Act 1993, ss 146, 147, 147A, 150C, 151 and 152.

7 *Craig v Kira – Wainui 2F4D* (2006) 7 Whangarei Appellate MB 1 (7 APWH 1).

> remainder may perhaps be justified, but a subdivision of the entire land into 30 lots with the retention of only one lot calls into question the credibility of the argument that sale is absolutely necessary to enable utilisation on the remainder…
>
> [29] We are prepared therefore to allow the appeal to a limited extent. That is to allow the appellant to remit the application back to the Court below in an amended form. That is in a form which reflects the purpose of the change of status as alleged by the applicant. It will be for the applicant to seek partition of sufficient land, the sale of which can fund appropriate development on the remainder together with an amended application to change status of that land accordingly. It will be for the lower Court to determine how the balance is to be struck in the partition application but regard should be had to the need to minimise the acreage affected by the removal of the PCA's rights, while allowing the owner to achieve some benefit from the land.

[43] According to the Registrar, Mrs Craig did not proceed with an amended application as provided for by the Māori Appellate Court.

[44] There are similarities between the plans in the present case with that in *Craig v Kira*. However, in *Craig v Kira* the Māori Appellate Court placed significant weight on Mrs Kira's age, and that at 93, she was too old and her income was too low to raise finance in the ordinary way. This does not apply in the present case and so the decision in *Craig v Kira* can be distinguished.

[45] I also note that in *Craig v Kira,* the Māori Appellate Court did not grant a change in status over the whole block. Rather, the Māori Appellate Court allowed the appellant to remit the application back to the Māori Land Court in an amended form to consider whether a partition should be granted, and if so, whether one or more of the partitioned blocks should then be changed from Māori freehold land to General land.

[46] At the hearing on 22 September 2016, Mr Paikea initially advised that he was seeking a change in status over six, out of ten, acres in the block. I raised with Mr Paikea that in order to do so he would first have to obtain a partition and then seek a change in status over one or more of the partitioned blocks:[8]

> **Court:** Mr Paikea, this is an application to change Otara 5D1 from Māori freehold land to General land.
>
> **J Paikea:** Six acres of Otara 5D1. There is 10 acres there.
>
> **…**

[8] 139 Taitokerau MB 209 (139 TTK 209).

> **Court:** The difficulty with that is I cannot grant an order to change the status of part of a block. Either the whole block is Māori land or the whole block is General land. You cannot have part Māori and part General. If what you are seeking to do is to only change part of it there would have to be first an application for partition or something like that to carve out a smaller piece and then change that piece to General land. So I am in your hands as to how you wish to proceed but in relation to the orders I can grant I can only change the whole of the block not part of it.
>
> **J Paikea:** We'll have to go for the 10 then.

[47] As such, I raised with Mr Paikea the option of first seeking a partition of the block, and then seeking a change in status over one or more of the partitioned blocks. Mr Paikea advised that he did not wish to take that approach and instead sought to proceed with the current application to change the status of the whole block. I note that if Mr Paikea now wishes to proceed with an application for partition in light of this decision, he is entitled to do so.

[48] One final matter requires comment. Ms Rooney has raised a concern that if something was to happen to her or Mr Paikea, her children may be left in a vulnerable position. The exact nature of this concern is not clear. It appears that Ms Rooney is concerned that if she and Mr Paikea were to pass away, her children may be alienated from the block as they do not have ancestral connections to the land.

[49] This is not the case. As Ms Rooney is an owner in the block as to a half share as a tenant in common, her children would be entitled to succeed to her interests by will or on intestacy.[9] The current status of the block does not place her children in a vulnerable position. I also note that Mrs Marshall advised that her whānau would never seek to alienate Ms Rooney's children from the block.

[50] For these reasons, the applicants have failed to demonstrate that the land can be managed or utilised more effectively as General land. Given this finding, there is no need to consider whether I should exercise my discretion to grant the change in status.

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[9] See Te Ture Whenua Māori Act 1993, ss 108 and 109.

Decision

[51] The applicants have failed to satisfy that this block can be managed or utilised more effectively as General land per s 136(d) of the Act.

[52] The application is dismissed.

Pronounced in open Court in Whangarei at 4.15pm this 8th day of November 2016.

M P Armstrong
JUDGE