IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150002000

UNDER	Section 18(1)(a), Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Pakanae 2W1B
BETWEEN	LISA RATA Applicant

Hearing: 24 September 2015
(Heard at Kaikohe)

Judgment: 17 February 2016

RESERVED JUDGMENT OF JUDGE M P ARMSTRONG

Introduction

[1] Lisa Rata applies per s 18(1)(a) of Te Ture Whenua Māori Act 1993 ("the Act") to determine ownership of a dwelling located on Pakanae 2W1B.

Background

[2] Pakanae 2W1B ("the block") is a block of Māori freehold land. It is 2.4414 hectares in size and has 30 owners. On 2 May 1990 the block was vested in the Ngā Uri o Iehu Moetara Trust, an Ahu Whenua Trust ("the Ahu Whenua Trust").[1] The current trustees are Donna Washbrook, Dora Stevenson, Fiona Rakete, Hannah Rawlings, Karl Moetara, Peter Moetara, Robert Moetara and Sheena Ross.[2]

[3] Norma Harris holds 0.282 shares in the block. On 30 April 1991, Mrs Harris entered into a tripartite deed with the Housing Corporation of New Zealand ("HCNZ"), and the then trustees of the Ahu Whenua Trust, to build a house on the block. The deed provides that HCNZ would advance a loan to Mrs Harris to build the house. The schedule to the deed records that the trustees granted to Mrs Harris a license to occupy a site on the block for 30 years from 30 April 1991. Mrs Harris subsequently built the house on the block pursuant to the provisions of the deed.

[4] Mrs Rata argues that on or around 19 May 1998, her mother Kathleen Beatrice Belcher also known as Kathleen Beatrice Moetara or Kathy Hau, purchased the house from Mrs Harris. Mrs Rata contends that her mother took over the loan repayments to HCNZ and that the loan has now been repaid.

[5] Mrs Belcher held 3 shares in the block. She passed away on 8 March 2011. On 15 November 2013, Judge Ambler granted orders:[3]

(a) Determining that those entitled to succeed to Mrs Belcher's Māori land interests (including her shares in Pakanae 2W1B) were her children namely, Lisa Rata, Terry Sammons, Tracey Belcher, Anthony Belcher and Duane Belcher;

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1 69 Whangarei MB 158 (69 WH 158).
2 36 Taitokerau MB 253-258 (36 TTK 253-258).
3 70 Taitokerau MB 203-213 (70 TTK MB 203-213).

(b) Vesting those interests in her successors;

(c) Constituting the Ngā Uri o Kathleen Hau Whānau Trust ("the whānau trust"); and

(d) Vesting those interests in the whānau trust.

[6] At the hearing on 15 November 2013, Mrs Rata also sought further orders determining ownership of the house, and granting an occupation order with respect to the house site.[4] The proposed occupation order, and the ownership of the house, were discussed but no orders were made. Instead, the application was adjourned for Mrs Rata to convene a meeting of beneficial owners, and to seek consent from the trustees of the Ahu Whenua Trust, in relation to the proposed occupation order.[5]

[7] The application for determination of ownership of the house, and the grant of an occupation order, came back before the Court on 18 February 2014. Mrs Rata advised that she was no longer seeking an occupation order and that she was discussing with the trustees whether they would grant a license to occupy the house site. Due to the change in approach, the outstanding application to determine ownership of the house was not progressed and the application was dismissed by consent.[6]

[8] Despite further discussions, the parties have not yet reached agreement on the terms of the proposed license to occupy. Mrs Rata now seeks orders determining that her mother was the owner of the house, and that the house should be vested in the whānau trust.

The law

[9] Section 18(1)(a) of the Act states:

> **18 General jurisdiction of Court**
>
> (1) In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, the Court shall have the following jurisdiction:

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4 Application A20120010126.
5 70 Taitokerau MB 203-213 (70 TTK MB 203-213).
6 75 Taitokerau MB 135-138 (75 TTK MB 135-138).

> (a) To hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[10] In *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* Judge Milroy summarised the relevant authorities on determining ownership of a house on Māori freehold land:[7]

> [34] Case law makes it clear that the Court's jurisdiction is declaratory in nature - the Court may declare existing ownership rights at law or in equity but cannot create new ownership rights.[8] It follows from the wording of the section that the Court may also determine that a building is not part of the land and that the beneficial owners of the land as a group are not the owners of the building.
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> [35] Although common law provides that the owners of the land own any fixtures, s 18(1)(a) enables the Court to recognise that one or more of the owners may separately own a particular improvement. In determining these matters the Court has equitable jurisdiction and may recognise constructive trusts.[9]
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> [36] The Māori Appellate Court has expressed differing views as to the effect of a s 18(1)(a) order, in particular whether, on making the order, a house remains a fixture or becomes a chattel. There are also conflicting authorities on whether a s 18(1)(a) order can be made in favour of a non-owner and, if not, whether the Court can grant some other remedy in favour of a non-owner.
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> [37] The Maori Appellate Court in *Tohu - Te Horo 2B2B2B Residue* commented:[10]
>
>> [18] An order under section 18(1)(a)/93 appears to separate the house from the title to land and to treat it as a chattel. There is no ability to succeed to any such order, it not being an interest in land and the order is treated as being personal to the holder and lapsing on death. Anyone who wishes to sustain a further claim for the house needs to apply for another order.
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> [38] I note that the learned Judge in the decision *Stock v Morris- Wainui 2D2B*[11] took a different view of the law and considered that when the Court makes a s 18(1)(a) order the nature of the improvement as a fixture and the legal ownership of the land remains unchanged, although as a result of the Court's equitable jurisdiction the house may be owned separately by those specified in the order. As the learned Judge put it:[12]

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7 *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

8 *Williams v Williams -Matauri 2F2B* (1991) 3 Taitokerau Appellate MB 16 (3 APWH 16), *McCann - Waipuka 3B1B1 and 3BIB2B1C2A* (1993) 11 Takitimu Appellate MB 2 (11 ACTK 2) and *Paki – Matauri X Incorporation* (1996) 5 Taitokerau Appellate MB 16 (5 APWH 16).

9 *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 18I* (2003) 73 Tauranga MB 150 (73 T 150) and *Brokenshaw – Te Kaha B6X2* (2003) 81 Opotiki MB 18 (81 OPO 18).

10 (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34).

11 (2012) 41 Taitokerau MB 121 (41 TTK 121).

12 Ibid at [48].

> ... The Court is merely declaring the co-existence of legal and equitable interests in land. That is what s 18(1)(a) expressly empowers the Court to do. In my view, there is no need to conceptualize the house as a chattel.

[39] In the *Stock* decision the learned Judge set out the history of the preceding sections to s 18(1)(a) and came to the view that there is no restriction on who may apply for an order under s 18(l)(a) - the applicants are not restricted to the legal owners. In reaching that conclusion the Judge relied on the case of *Sadlier – The Proprietors of Anaura*[13] which considered s 30(1)(a) of the Maori Affairs Act 1953, the predecessor section to s 18(l)(a).

[40] I have also made as 18(1)(a) order in favour of a non-owner in the *Matenga v Bryan* case. I note however that in *Matenga* the decision was that on making the s 18(1)(a) order the house was treated as a chattel and able to be removed by the person in whose favour the order was made.

[41] The leading case in New Zealand on the question of whether an improvement is a fixture or not is *Auckland City Council v Ports of Auckland*[14], which adopted the approach set out by the House of Lords in *Elitestone Ltd v Morris and Anor*.[15] In *Elitestone* the House of Lords proposed a broader, common sense approach to the question of whether an improvement could properly be said to have become part and parcel of the land. The main indicators that an improvement is a fixture are the degree of annexation and the purpose of annexation.

Issues

[11] The following issues arise in this case:

(a) Is the house a chattel or a fixture?

(b) Who owns the house?

(c) Should the house be vested in the Whānau Trust?

Is the house a chattel or a fixture?

[12] In order to determine ownership of the house I must first consider whether the house is a chattel or a fixture. This is not only relevant to the issue of ownership, but it affects any subsequent orders that I am able to make including vesting the house in the whānau trust.

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13 (1987) 25 Ruatoria MB 61 (25 RUA 61).
14 [2000] 3 NZLR 614 (CA).
15 [1997] 1 WLR 687, [1997] 2 All ER 513.

[13] In *Lockwood Buildings Limited v Trustbank Canterbury Limited*,[16] the Court of Appeal found that an article fixed to the land, even slightly, is considered to be part of the land unless the circumstances show that it was intended all along to remain as a chattel.

[14] In the present case, the house is affixed to timber piles. Mrs Rata contends that the house is capable of removal. While that may be so, that on its own does not mean that the house is a chattel. Rather, on the orthodox approach the house is affixed and so is presumed to be a fixture. The issue is whether the circumstances of this case show that it was intended all along that the house remain a chattel. In this case the intentions of the parties are set out in the tripartite deed.

[15] In *Housing Corporation of New Zealand – Waimanoni 1B3B2A*,[17] Deputy Chief Judge Smith reviewed a tripartite deed between HCNZ, the trustees, and the beneficial owner in that case. Judge Smith found that those parties had treated the house as a chattel.

[16] In *Anderson – Te Raupo*,[18] Judge Ambler distinguished the decision in *Housing Corporation of New Zealand*. Judge Ambler considered that the terms of the tripartite deed before him did not expressly state that the house was to be regarded as a chattel. In particular, Judge Ambler referred to clause 21(b) of that deed which stated:[19]

> 21 THAT if the Lender shall elect pursuant to clause 20 hereof to sever and remove the House from the Site then the following provisions shall apply.
>
> …
>
> (b) **The House (excluding the Site) shall be valued at or about the time of the severance as a chattel personal by a Valuer** …

[17] Judge Ambler concluded that clause 21(b) only applied after default by the borrower and upon the lender electing to sever and remove the house. Judge Ambler determined that the house in that case remained a fixture unless or until the lender triggered the right to remove the house. It was only once those provisions were triggered that the house became a chattel. As such, Judge Ambler considered that the wording of the deed did not rebut the presumption that the house was a fixture. Judge Ambler also considered that such a finding did not defeat the lender's security under the deed.

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16 *Lockwood Buildings Limited v Trust Bank Canterbury Limited* [1995] 1 NZLR 22 (CA).
17 *Housing Corporation of New Zealand – Waimanoni 1B3B2A* [1996] 19 Kaitaia MB 227 (19 KT 227).
18 *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206).
19 Ibid at [50].

[18] In the present case, the tripartite deed is remarkably similar to that in *Anderson*. Although some provisions differ, the key provisions are largely identical. In particular, clause 22(2) provides:

> 22 THAT if the Lender shall elect pursuant to clause 21 hereof to sever and remove the House from the Site then the following provisions shall apply:
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> …
>
> (2) The House (excluding the site) shall be valued at or about the time of the severance as a chattel personal …

[19] As in *Anderson* this provision only applies if the borrower is in default and the lender exercises it's right to sever and remove the house. The loan to HCNZ has been repaid and so any such rights no longer apply. There are no other provisions in the deed which expressly state that the house is to be regarded as a chattel.

[20] I consider that the house in this case is sufficiently affixed to the land and is presumed to be a fixture. As in *Anderson*, the terms of the tripartite deed do not displace that presumption and so the house has remained a fixture.

Who owns the house?

[21] Conventional common law provides that a fixture belongs to all of the owners of the land according to their respective interests. However, there is a clear line of authority that in relation to Māori freehold land, even where a house is a fixture, this Court has equitable jurisdiction per s 18(1)(a) of the Act to determine ownership of a house as distinct to ownership of the underlying land.[20]

[22] In the present case it is clear from the tripartite deed that Mrs Harris was the original owner of the house. That ownership was subject to the security held by HCNZ, but that did not affect Mrs Harris' ownership except on default.[21]

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[20] See *Tohu – Te Horo 2B2B Residue* (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34), *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102), *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223), *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121), *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206).

[21] See clause 23 of the deed and *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206) at 212-213.

[23] Having made that finding, an issue arises as to the status of the house and whether I am able to grant the orders sought in this case.

[24] In *Tohu* the Māori Appellate Court commented that:[22]

> [18] An order under section 18(1)(a)/93 appears to separate the house from the title to land and to treat it as a chattel. There is no ability to succeed to any such order, it not being an interest in land and the order is treated as being personal to the holder and lapsing on death. Anyone who wishes to sustain a further claim for the house needs to apply for another order.

[25] While *Tohu* comments that successive orders per s 18(1)(a) of the Act can be granted with respect to a house, that approach has since been called into question.[23] If an order determining ownership does convert the house to a chattel, then no further order could be made per s 18(1)(a) of the Act as a chattel is not a right, title, estate or interest in the land.

[26] In *Bidois* the Māori Appellate Court treated a house that was the subject of a s 18(1)(a) order as an improvement and that it could be the subject of succession orders by reason of s 99(2) of the Act.[24]

[27] In *Insley v Insley – Awanui Haparapara 2B1B2,*[25] Judge Clark noted that the conflict between *Tohu* and *Bidois* should be resolved by the Māori Appellate Court at the first opportunity. I agree with those sentiments. Unfortunately that has not yet occurred and I must make a decision on this issue given that it affects whether I can grant the orders sought by Mrs Rata.

[28] In *Stock v Morris*, Judge Ambler considered the conflict between the two approaches in *Tohu* and *Bidois*:

> [42] I prefer the approach taken in *Bidois* that recognises that a house remains a fixture. That may be unsurprising given that I sat on the *Bidois* appeal. Nevertheless, as I hope to demonstrate below, I believe there are sound reasons why a house remains a fixture. I also see particular problems with what might be termed the "fixture-to-chattel theory".

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22 *Tohu – Te Horo 2B2B Residue* (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34).
23 See *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).
24 *Bidois– Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102).
25 (2009) 108 Opotiki MB 255 (108 OPO 255) at [31].

[43] First, we must start with s 18(1)(a) itself. The Court's jurisdiction relates to land and any "right, title, estate, or interest" in land. The Court has no jurisdiction in relation to chattels. It therefore seems incongruous, to say the least, for a section that only gives the Court jurisdiction if a house is a fixture, to then deem that house to be a chattel. More to the point, s 18(1)(a) and the rest of the Act do not say that that is the outcome.

[44] In fact, if the approach in *Faulkner*, *Tohu* and *Insley* is strictly applied, then the Court's jurisdiction under s 18(1)(a) is ousted as soon as the Court makes a s 18(1)(a) order. That seems a surprising outcome and must surely run contrary to the scheme of the Act which intends the Court to have extensive powers over Māori land and the improvements thereon.

[45] Furthermore, the Māori Appellate Court has emphasised that the Court's powers under s 18(1)(a) are declaratory only of existing property rights. An order does not create or change property rights. It merely recognises existing rights at law or in equity. In that context, it is difficult to see how a s 18(1)(a) order can change the nature of property such as a house.

[46] Second, in my view the fixture-to-chattel theory does not fit with the law that governs what is a fixture. The common law test of whether an item is a fixture is the degree and purpose of annexation. Applying that test, the item is either a fixture or a chattel. If it is a fixture, but the Court determines that someone other than the land owners own the fixture in equity, the nature of the property does not change. The Court is simply recognising equitable ownership of a fixture.

[47] Third, I disagree with basis on which *Faulkner*, *Tohu* and *Insley* have reasoned that the Court "separates" ownership of a house under s 18(1)(a). I certainly agree with the sentiment expressed in those decisions that a s 18(1)(a) order "separates" the ownership of the house from the ownership interests that run with the land. In *Sadlier* Judge Russell expressed the point in this way:

> Things fixed to the soil form part of the soil and I doubt very much whether ownership of a house can ever be separated from ownership of an interest in the land.
>
> Certainly, it cannot be separated before an order under s 30(1)(a)/53 has been made determining the ownership of the house.

[48] When the Court makes a s 18(1)(a) order in respect of a house, the legal ownership of the land remains unchanged but the Court determines that, in equity, the specified persons separately own the house. The Court is merely declaring the co-existence of legal and equitable interests in land. That is what s 18(1)(a) expressly empowers the Court to do. In my view, there is no need to conceptualize the house as a chattel.

[49] In *Kopa* Judge McHugh considered that a s 30(1)(a) order amounted to "an equitable charge". In *Sadlier* Judge Russell saw an order as "determining the right to possession of the house as against the other co-owners". Neither Judge suggested that the house was a chattel. It has to be emphasised that the effect of a s 18(1)(a) order always depends on its express terms. But I respectfully suggest that, normally, an order in respect of a house goes further than merely creating an equitable charge or a right to possession. At its essence, the order recognises *ownership* of the house in the fullest sense of the word. Thus, in *Matenga* the Court's order included the right to remove the house from the land (at which point in time it would certainly become a chattel).

> [50] Fourth, in my respectful view the fixture-to-chattel theory creates a problematic legal fiction. Three examples illustrate this. First, in *Insley* the Court ruled that following the 1976 order the house became a chattel, that there was no ability to succeed to the house and, importantly, that a fresh application under s 18(1)(a) would then need to be made in respect of the house. But if the house truly became a chattel then the Court lost its jurisdiction to deal with it by way of a further s 18(1)(a) order. Similarly, in *Faulkner*, if the actual effect of the 1991 orders was that the house became a chattel, then the Court had no jurisdiction to make replacement orders under s 18(1)(a) in 2006, as it did. Finally, there are the present circumstances. Can it possibly be correct that a cottage built on a concrete slab that cannot be moved without the cottage being destroyed will become a chattel as soon as a s 18(1)(a) order is made? For my part, I think not.
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> [51] None of these problems arise if a s 18(1)(a) order is simply recognised as determining the separate equitable ownership of a fixture from the legal ownership of the land.
>
> [52] Finally, these points do not apply to the cases where the Court expressly determines a house to be a chattel. For example, in *Housing Corporation* Deputy Chief Judge Smith determined that by reason of a contract the house remained a chattel. In those types of case the house was always a chattel in terms of the common law test. Section 18(1)(a) does not apply. Rather, s 18(1)(d) will often apply. I note that even the owner of a chattel may have an interest in land in the form of a right to access and remove the chattel.

[29] I agree with Judge Ambler. Recognising that a house remains a fixture is not only consistent with the provisions and the principles of the Act, but it allows this Court to address practical and common issues concerning ownership of, and succession to, houses on multiply owned Māori land. I consider that this approach is consistent with the overall objectives and kaupapa of the Act.

[30] In the present case there is clear evidence that Mrs Harris sold the house to Mrs Belcher.

[31] I have not been provided with a copy of the agreement for sale and purchase concerning the transaction. However, related documents concerning the sale have been filed. Letters from Geoffrey Joyce confirm that Mr Joyce was the solicitor acting for Mrs Belcher in the sale and that the transaction settled on 19 May 1998.

[32] The applicant has also filed a copy of a letter from HCNZ dated 19 May 1998 which refers to "SALE OF HARRIS TO BELCHER". The settlement statement from HCNZ accompanying that letter is titled:

SETTLEMENT STATEMENT

Sale by Housing Corporation in Exercise of Power of Sale

House situated at: Waiotemarama Gorge Road, Opononi

[33] The applicant has also filed a copy of a letter signed by Norma Harris dated 8 December 2012 which states:

> This letter is to confirm that I no longer have any interest in the house at 35 Waiotemarama Gorge Road.

[34] At the hearing on 24 September 2015, I heard from Dora Stevenson, one of the trustees of the Ahu Whenua Trust. Mrs Stevenson confirmed that the trustees accept that Mrs Belcher purchased the house from Mrs Harris. Mrs Stevenson also advised that a majority of the trustees support this application. Mrs Stevenson did advise that two of the trustees, Donna Washbrook and Robert Moetara, did not support the application.[26] Despite that, Mrs Washbrook and Mr Moetara did not appear at the hearing, nor did they file any submissions opposing the application.

[35] As such, there is no real dispute that Mrs Belcher purchased the house from Mrs Harris and an order recognising this should be granted accordingly.

Should the house be vested in the Whānau Trust?

[36] As noted, on 15 November 2013 the Court determined that Mrs Belcher's children were entitled to succeed to her Māori land interests. Those successors then vested the interests in the Ngā Uri o Kathleen Hau Whānau Trust. The applicant states that she has discussed this application with her brothers and sisters and they all agree that the house should be vested in the whānau trust as well.

[37] As I have found that the house has remained a fixture, Mrs Belcher's children are entitled to succeed to the house per s 99(2) of the Act.

[38] I accept Mrs Rata's evidence that her siblings have agreed that the house is to be vested in the whānau trust. This is consistent with the approach that they took concerning

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[26] 116 Taitokerau MB 100-108 (116 TTK 100-108) at 102-103.

the land interests in 2013 and it is understandable why they would want the house to be held along with the land interests in the whānau trust.

[39] I note that the orders below do not resolve the outstanding issue as to occupation of the house site. While the whānau trust will now own the house, and hold shares in the land, issues of occupation should first be resolved with the trustees of the Ahu Whenua Trust. Mrs Stevenson has advised that this is an ongoing issue. If that issue cannot be resolved, either party may seek further orders if necessary.

Decision

[40] I grant the following orders:

(a) Pursuant to s 18(1)(a) of the Act determining that Kathleen Beatrice Belcher also known as Kathleen Beatrice Moetara or Kathy Hau, is the owner of the house located on Pakanae 2W1B;

(b) Pursuant to ss 37(3), 99(2) and 118(6) of the Act vesting the house in those determined entitled at 70 Taitokerau MB 203-213 dated 15 November 2013; and

(c) Pursuant to ss 37(3), 220 and 244 vesting the house in Lisa Kahu Rata, Terry Nigel Sammons, Tracey Belinda Belcher, Antony Robert Belcher and Duane Alan Belcher as responsible trustees of the Ngā Uri o Kathleen Hau Whānau Trust and varying the trust order to include the said house.

Pronounced in open Court in Whangarei at 2.25 pm on Wednesday this 17th day of February 2016.

M P Armstrong
JUDGE