IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20170001366

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Mohakatino Parininihi No 1C West 3A2
BETWEEN	HAUMOANA WHITE Appellant
AND	ANGELA HELEN POTROZ, JOHN EDWARD POTROZ AND BARRY STUART KING Respondent

Hearing:	9 August 2017 (Heard at Whanganui)
Court:	Chief Judge Isaac (Presiding) Judge Savage Judge Coxhead
Appearances:	Russell Gibbs, lay advocate for the appellant Susan Hughes QC, for the respondents
Judgment:	30 November 2017

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] This appeal is against a decision of the lower court, *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2*[1]. That decision held that the 1926 sale of Mohakatino Parininihi 1C West 3A2 (the land) from Kereni Wetini to Frederick Waddell was validly completed. Further that Mohakatino Parininihi 1C West 3A2 was erroneously included in succession orders which were issued in relation to Kereni Wetini's estate in 1945.

[2] The grounds of appeal are:

a) that the Court does not have jurisdiction to go behind the succession orders made in 1945; and

b) that equitable title in the land did not pass from Mr Wetini to Mr Waddell, because such title could not have passed until Mr Wetini had received the purchase money for Mohakatino Parininihi 1C West 3A2.

[3] The respondent maintains that equitable title passed from Mr Wetini to Mr Waddell, and thereafter ultimately to the respondents in 2003.

Background

[4] The facts have been canvassed extensively in the earlier iterations of this case. We adopt the summary of facts from the rehearing decision:[2]

> [10] On 10 May 1909 an order in Council was issued declaring Mohakatino Parininihi 1C West 1 and Mohakatino Parininihi 1C West 2 to be subject to Part 1 of the Native Land Settlement Act 1907. The effect of the declaration was that the land was vested in the Māori Land Board to be held on trust for the Māori owners.
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> [11] Then on 24 May 1914 a certificate of title TN78/274 was issued for parts of Mohakatino Parininihi No 1C West. The original registered proprietor was the Māori Land Board. Several years later on 24 July 1917 a partition of Mohakatino Parininihi 1C West 3A was granted. This was followed on 20 June 1924 by a partition of Mohakatino Parininihi 1C West 3A2 granted in favour of Kereni Wetini. A year later on 9 June 1925 an order revesting 1C West 3A2 in Kereni Wetini as beneficial owner was issued in accordance with s 10 of the Native Land Amendment and Native Land Claims Adjustments Act 1922.

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1 *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2* (2016) 361 Aotea MB 146 (361 AOT 146).
2 *Fisher v Potroz – Mohakatino Parininihi No 1C West 3A2* (2016) 361 Aotea MB 146 (361 AOT 146).

[12] Then on 10 February 1926 a memorandum of transfer was executed from Kereni Wetini to Frederick William Waddell in relation to 1C West 3A2.

[13] Several years later, on 8 June 1929, an application for confirmation of alienation was rescinded for non-completion. However, on 12 May 1930 a further application for confirmation of alienation was made by Frederick Waddell in relation to the transfer from Kereni Wetini.

[14] The application was supported by the signed consent of Kereni Wetini dated 9 February 1931 agreeing to the application for confirmation of the sale being reinstated, subject to payment of the purchase money being made to the Māori Land Board together with interest. The Māori Land Board confirmed reinstatement of the application for confirmation of transfer. Later that month, on 27 February 1931, a letter was signed by Kereni Wetini to the Māori Land Board authorising them to pay the purchase money due under the transfer to him.

[15] Two years later on 10 February 1933 a certificate of confirmation was issued by the Māori Land Board under s 219 the Native Land Act 1909 confirming the alienation of 1C West 3A2 from Kereni Wetini to F W Waddell. The next day on 11 February 1933 a letter to Frederick Waddell was sent from the Māori Land Board advising that the certificate of confirmation had been endorsed and was being held pending compliance as to survey fees and rates.

[16] There matters lay for almost a decade until 10 March 1942 when a memorandum of transfer from Frederick William Waddell to the Guardian Trust and Executors Company of New Zealand ("Guardian Trust") as executor of the estate of John Patterson was completed. The transfer acknowledged that Frederick Waddell and John Patterson carried on a partnership and that the land was an asset of that partnership.

[17] Turning back to the interests of Kereni Wetini, he was sadly killed in action in April 1943 in Tunisia. Then on 17 January 1945 succession orders were issued in relation to his estate which included 1C West 3A2.

[18] Many years later on 9 February 1968 a certificate of title TNB1/1352 was issued cancelling the former title TN78/274. The title contained Lots 8 and 9 on Deposited Plan 3569 and Part Mohakatino Parininihi 1C West 3A. The original registered proprietor was the Māori Trustee.

[19] For the next twenty years it appeared that there was little significant change. Then on 9 August 1989 a memorandum of transfer was completed from the Guardian Trust to Thomas Bartholomew Wallace and Lionel Max Lamb.

[20] A subsequent transfer was made on 30 May 2003 transferring the land from Thomas Bartholomew Wallace and Lionel Max Lamb to John Edward Francis Potroz, Angela Helen Potroz and Barry Stuart King being trustees of the J and A Potroz Family Trust ("Potroz Family Trust").

[21] Over ten years later on 23 July 2013 a certificate of title CIR626777 was finally issued for 1C West 3A2 cancelling the former title TNB1/1352. The title issued in the name of Kereni Wetini solely based on the partition order dated 20 June 1924.

[22] Finally on 20 February 2014 orders were issued determining ownership in favour of John Edward Francis Potroz, Angela Helen Potroz and Barry Stuart King

> and determining the land as General land. Those orders were registered against the title on 21 March 2014.

[5] Two other documents, both letters, were produced at the hearing. The first was a letter from Mr Waddell's solicitors to the Registrar of the Waikato-Maniapoto Māori Land Board dated 23 March 1942. The letter related to the transfer of the land from Mr Waddell to the Guardian Trust as executor of the estate of John Patterson and to an inquiry from the Registrar about why the land had not been surveyed. The essence of the response was that the area had not been surveyed because the cost of doing so was prohibitive, and that affairs related to the land would be sorted out once arbitration proceedings between Mr Waddell and Mr Patterson had concluded.

[6] The second letter was from the Registrar to the Official Assignee. It is dated 5 May. The year is not stated, but it is reasonable to assume the relevant year was 1942. The letter informs the Official Assignee that the purchase money related to the land was paid to the Board pursuant to s 110 of the Native Land Act 1931, and would be "retained by the Board until the question of the survey of the block" was settled.

Procedural History

[7] An application to determine the ownership and status of the land known as Mohakatino Parininihi came before Judge Harvey on 20 February 2014.[3] He determined ownership in favour of the respondents and that the land was general land. That decision was appealed. The Māori Appellate Court on 24 March 2016 ordered that that decision be reheard on the basis that it was in breach of natural justice as the successors to Mr Wetini had not been notified of the application.[4]

[8] Judge Harvey reheard the matter and in his 2016 decision held:[5]

(a) that the sale of 1C West 3A2 from Kereni Wetini to Frederick Waddell was validly completed;

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3 315 Aotea MB 243 (315 AOT 243).
4 *White v Potroz – Mohakatino Parininihi No 1C West 3A2*, above n 1.
5 Above n 3, at [144]-[149].

(b) that the subsequent sales, including to the respondents, only transferred an equitable title because they were not registered against any certificate of title for the land;

(c) that the succession to Kereni Wetini in 1945 erroneously included 1C West 3A2 as Kereni Wetini had already transferred the equitable title; and

(d) that a claim of adverse possession by the appellant was not made out.

[9] Other aspects of Judge Harvey's reasoning pertinent to this appeal are:

(a) that, on the authority of *R v Waiariki District Māori Land Board*,[6] Mr Wetini held legal title to 1C West 3A2 when an order was made revesting the land to him in 1925, despite the fact the fact that this order was not registered;[7]

(b) legal title never passed to Mr Waddell, because the Land Transfer Act in force at the time provided that no instrument would be effectual to pass any estate or interest in any land until registration of such instrument.[8]

[10] Judge Harvey's ultimate conclusion was that Angela Potroz, together with John Edward Francis Potroz and Barry Stuart King, being trustees of the J and A Potroz Family Trust, were the owners of the land.

[11] Judge Harvey also confirmed that the status of Mohakatino Parininihi 1C West 3A2 remains Māori freehold land. Something both parties now accept

Appellant's submissions

[12] Several grounds of appeal were advanced by Mr Gibbs for the appellant in his written submissions. At the hearing it became clear that Mr Gibbs was only advancing two lines of argument.

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6 [1922] NZLR 417 (CA).
7 Above n 3, at [73]-[84].
8 At [85]-[96].

[13] The first was that the Court does not have jurisdiction to go behind the succession orders made in 1945 transferring the land to Mr Wetini's successors. Those orders were made over 70 years ago. Orders affecting Māori land are conclusive after 10 years.[9] The appellant says a court cannot now impugn those orders, and that that is what Judge Harvey did in the rehearing decision.

[14] The second was that equitable title in the land did not pass from Mr Wetini to Mr Waddell, because such title could not have passed until Mr Wetini had received the purchase money. This was a different argument to that submitted in the Court below. There it was argued that Mr Waddell had never paid any money in relation to the purchase of the land, and on that basis equitable title did not pass. The appellant now concedes that the purchase money was paid. But they rely on the fact that the money was retained by the Māori Land Board pending a survey of the land, and that it was Mr Waddell who was under a duty to cause the survey to be completed. That survey was never completed. Mr Wetini therefore never saw the benefit of his bargain. In such circumstances the appellant submits that he retained equitable title. Further, no equitable title could have passed in the chain of sales which ended with the sale to the respondents.

Respondents' submissions

[15] The respondents submit that equitable title passed from Mr Wetini to Mr Waddell, and thereafter ultimately to the respondents in 2003. They say the memorandum of transfer dated 10 February 1926 and the certificate of confirmation issued in February 1933 provide compelling evidence of that having occurred. The transfer document contained the following words, inter alia:

> ... the said piece of land is delineated by the plan drawn hereon etched red in consideration of the payment to us of the several sums (being at the rate of fifteen shillings 15/-) per acre set out in the fifth column of the said schedule hereto opposite to our respective names by Frederick William Waddell of Tongaporutu in the provincial district of Taranaki and dominion of New Zealand farmer (hereinafter called the purchaser) the receipt of which said several sums we do hereby acknowledge do hereby jointly and severally transfer unto the purchaser all of our respective estates and interests in the said piece of land.

[16] The certificate of confirmation provided, inter alia:

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9 Te Ture Whenua Māori Act, s 77.

> Whereas the said Board, after due inquiry is satisfied that the alienation purporting to be effected by the within deed has been effected in all respects in accordance with the law in force at the time of the execution thereof, and as to all matters upon which, the said Board is by law required to be satisfied, the said Board hereby confirms the alienation purporting to be effected by the within deed ...

[17] In the face of those documents the respondents recommend that the Court should find that equitable title did pass to Mr Waddell by 1933 at the latest, that the 1945 succession orders were made in error, and that the respondents are the owners of the land.

Discussion

Did Judge Harvey have jurisdiction to go behind the succession orders?

[18] In the rehearing decision Judge Harvey determined that because equitable title had passed to Mr Waddell before Mr Wetini had executed his will, and before the succession orders in respect of the land had been made, the land could not be succeeded to by Mihiata Wetini (Dickson), Mei Jimmerson and Mura Rattenbury.[10]

[19] The appellant submitted Judge Harvey did not have jurisdiction to go behind the succession orders. They relied on s 77 of Te Ture Whenua Māori Act 1993, which provides:

> **77 Orders affecting Maori land conclusive after 10 years**
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> (1) No order made by the court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.
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> (2) Where there is any repugnancy between 2 orders each of which would otherwise, by reason of the lapse of time, be within the protection of this section, then, to the extent of any such repugnancy, the order that bears the earlier date shall prevail, whether those orders were made by the same or different courts.
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> (3) Nothing in this section shall limit or affect the authority of the Chief Judge to cancel or amend any order under section 44.

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10 Above n 3, at [108].

[20] The respondents submitted that the application before Judge Harvey did not seek to appeal the succession orders. They submitted that the essence of Judge Harvey's decision was a finding that the succession order erroneously referred to the title in question, and that 1C West 3A2 had been transferred to Mr Waddell at the latest by 1933 to which end it did not form part of Mr Wetini's estate and could not be succeeded to.

[21] We accept the respondent's submission. Section 77 is not applicable in this case. The respondents did not seek to 'annul or quash' or otherwise seek to have the succession orders invalidated. Rather, they sought to have the issue of who the correct owners of 1C West 3A2 are determined. That was an issue which is within the jurisdiction of the Māori Land Court to determine.[11] Even though one aspect of the reasoning of Judge Harvey was that the succession orders were issued in error, that is not tantamount to his Honour purporting to quash or annul those orders, a jurisdiction only the Chief Judge exercises pursuant to s 45 of the 1993 Act. Therefore, this ground of appeal fails.

Did equitable title pass from Mr Wetini to Mr Waddell?

[22] On the appellant's analysis, equitable title could not have passed because the survey was not completed and Mr Wetini did not receive the purchase money.

[23] We disagree. Section 220(1) of the Native Land Act 1909 provided that "No alienation shall be confirmed unless the Board or Court is first satisfied as to the following matters" (emphasis added). The word 'alienation' in that sentence must be given effect.[12] Both parties accept that Mr Wetini did not alienate his legal title to the land. Therefore the 'alienation' which the certificate confirms must be the alienation by Mr Wetini of his equitable title to Mr Waddell. This Court cannot go behind the certificate of confirmation once it has been sealed. Therefore, we consider that the certificate of confirmation is conclusive evidence that Mr Wetini transferred his beneficial interests in the land to Mr Waddell in 1933.

[24] The appellant submitted that the certificate of confirmation was not perfected because it was held by the Board pending the survey, and on that basis the Court could go

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11 Te Ture Whenua Māori Act, s 18(1)(a).

12 See *Attorney-General v Manga* [1999] 1 NZLR 129: "It is trite to say that all words in a statute should be given effect, unless to do so would clearly run counter to Parliament's intention."

behind the certificate. However, the appellant cited no authority for that submission. In the face of the statutory language, which stipulates that it is the *seal* of the Board which perfects the confirmation, and which triggers the inability of the Court to go behind the certificate, we reject that submission.[13]

[25] Moreover, it does not follow that if the transaction regarding Mohakatino Parininihi No 1C West 3A2 was conditional on Mr Waddell having the land surveyed, beneficial title in the land did not pass to Mr Waddell. Equitable interests in land can arise even though the underlying contract of sale is a conditional contract. The leading case on this point is *Bevin v Smith*. There the Court of Appeal held that whether an equitable interest arises depends on the nature of the contract:[14]

> There will be some conditional contracts, particularly those subject to true conditions precedent, where the parties cannot be regarded as intending that equitable title will pass to the purchaser until the condition is waived or fulfilled.

[26] The test when analysing the relevant condition is whether the parties intended to be bound and remain bound subject to the condition. If they did, then equitable interests can arise via the contract.[15] Commentators have noted that in applying this test "it will no doubt be found that most conditional contracts are intended to pass the equitable title".[16]

[27] However, Courts have found that a condition which, for instance, reserved significant matters for the future agreement of one of the parties, or reserved to one of the parties the ability to withdraw from the contract at will, would signal that the parties did not intend to be bound to the contract.[17]

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13 Section 219(1) of the Native Land Act 1909 relevantly provides: "Confirmation shall be granted by a certificate of confirmation indorsed or otherwise written on the instrument of alienation and sealed with the seal of the Board or the Court, as the case may be."

14 *Bevin v Smith* [1994] 3 NZLR 648 at 665.

15 See *McDonald v Isaac Construction Company Ltd* [1995] 3 NZLR 612 at 619: "In the usual case where the parties intend to be bound and to remain bound subject to the condition, equitable interests in land can arise by means of such conditional contracts." That statement was cited with approval by Glazebrook J in *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [562].

16 *Hinde McMorland & Sim Land Law in New Zealand* (online ed) at 10.009, cited with approval in *Nopera Log House Ltd v Godsiff* [2014] NZHC 639 at [47].

17 See *The Diplomat Apartments Ltd v Cook Island Property Corporation (NZ) Ltd* HC Wellington, CIV-2006-485-1312, 21 September 2006 at [59], and *O'Leary v Sentiero Properties Ltd* (2006) 7 NZCPR 869, (2006) 3 NZCCLR 412 at [33].

[28] Here the relevant condition was that Mr Waddell was to have the land surveyed. A survey is routine in nature. There is no basis to suggest that the parties did not intend to be bound to the contract subject to the fulfilment of that condition. Therefore, on the balance of probabilities we would have concluded that equitable title did pass to Mr Waddell at the latest in 1933 when the certificate of confirmation was issued.

Decision

[29] The appeal is dismissed.

[30] In the normal course, costs would follow the event. If the parties cannot agree, Counsel for the applicant may submit a memorandum within 15 working days of receipt of this judgment. The respondent may reply within 15 working days of that date.

Pronounced at 10:00am in Rotorua on Thursday this 30th day of November 2017.

W W Isaac (Presiding)	P J Savage	C T Coxhead
CHIEF JUDGE	**JUDGE**	**JUDGE**