IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20180003812

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Otarihau 2B1C
BETWEEN	HEMA WIHONGI Appellant
AND	MARGARET SAMSON AND MASSEY SAMSON Respondents

Hearing:	7 August 2018 (Heard at Whangarei)
Coram:	Judge C T Coxhead (Presiding) Judge L R Harvey Judge M P Armstrong
Appearances:	B Tupara and C Hirschfeld, for Appellant
Judgment:	14 August 2018

JUDGMENT OF THE COURT

Copies to:
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Introduction

[1] On 20 December 1983, Thelma Wihongi transferred her shares in Otarihau 2B1C to her brother Samuel Samson, so he could build a house on the land. Twenty-five years later, Thelma's daughter, Hema (Broad) Wihongi filed an application in the Māori Land Court seeking the return of those shares. She argued that Thelma and Sam had an arrangement that, once he obtained a house site on the land, the shares would be returned.

[2] On 29 March 2018, Deputy Chief Judge Fox dismissed that application.[1] Ms Wihongi now appeals that decision and, through her counsel, Messrs Tupara and Hirschfeld, asks that the case be referred back to the Māori Land Court for a rehearing. The issue in this case is whether the appeal should be upheld.

[3] The respondents, Margaret Samson and Massey Samson were not represented, but made several submissions.

Background

[4] Otarihau 2B1C was created by partition order on 9 August 1910. It was vested in three owners Kare Pire, Toki Aporo and Waitote Toki.[2]

[5] Various succession and vesting orders were granted up until 1969 when the land was sold to William Peter Witana for $1,800.00.[3] Upon settlement, the land was deemed to be European (General) land. Following William's death, the land was transferred to the administrator of his estate, and then to his wife Daphne Witana.

[6] On 2 May 1975, Walter Witana purchased the land from Daphne for the sum of $2,000.00. Walter passed away on 31 January 1979. By his will, Walter gave the freehold interest in the land to his seven daughters, Mereana Robinson, Maria Ashby, Thelma Wihongi, Margaret Tito, Lena Stockley, Rachel Witana and Amelianne Witana, as tenants in common in equal shares. Walter's eight sons received a leasehold interest in the land but did not receive a freehold interest.

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1 170 Taitokerau MB 81-84 (170 TTK 81-84). See also *Broad v Samson – Otarihau 2B1C* (2018) 169 Taitokerau MB 138 (169 TTK 138).
2 3 Hokianga MB 218-219 (3 HK 218-219).
3 Title Notice R7/512.

[7] On 20 December 1983, Thelma transferred her one-seventh freehold interest to her brother Samuel. This transfer was registered by way of memorandum lodged with Land Information New Zealand ("LINZ"). Samuel then owned a one-seventh share in the land along with his six sisters.

[8] On 9 December 1988, the Māori freehold status of the land was restored.[4] Then on 5 September 1989, a trust created under s 438 of the Māori Affairs Act 1953 (now called an ahu whenua trust) was constituted over the land.[5] On 24 September 1990, the trustees granted a licence to Samuel to occupy an area of 4,048m² which was noted in the Māori Land Court's title records.[6]

[9] Samuel died on 21 December 1990. Thelma died on 26 July 2008. The current application was filed by her daughter Hema on 8 June 2009.

What are the grounds of appeal?

[10] The appellant argues that:

(a) The Māori Land Court failed to consider the tikanga of the appellant's whānau;

(b) The Māori Land Court rejected that Samuel held the interests on trust but failed to consider whether Samuel was required to return the shares under contract; and

(c) At the relevant time Thelma should have been advised to support Samuel's licence to occupy and that a transfer of shares was not necessary.

[11] We consider these issues in turn.

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4 16 Kaikohe MB 375 (16 KH 375).
5 68 Whangarei MB 266-267 (68 WH 266-267).
6 Title Notice R13/12.

Discussion

Did the Māori Land Court fail to consider the tikanga of the appellant's whānau?

[12] The appellant argued it is the tikanga of her whānau that land is passed down through the wāhine. She asserts this is why her grandfather, Walter, left the freehold interests in the land to his daughters and only a leasehold interest to his sons. The appellant contends that the learned Judge failed to take this into account.

[13] There are several significant hurdles to this argument. Firstly, this issue was not pursued before the Māori Land Court. In 2014, a notice of intention to appear was filed by Mereana Robinson, Makere Tito and Racheal Witana in support of the appellant. That notice states:[7]

> It was our father's wish for this land to remain in the blood line of his daughters hence his bequeathing of these lands to us, to hold the land and care for it, including as kaitiaki, an arrangement which as a matter of tikanga inextricably runs with the land; …

[14] However, Mr Tupara was unable to show how this argument was advanced or maintained in the Māori Land Court. Instead, counsel argued there was an obligation on that Court, in exercising its inquisitorial function, to inquire into this issue. We do not agree.

[15] While the Māori Land Court has inquisitorial powers, there is no obligation on the judge to frame or advance a party's case. While a judge may ask questions from time to time, including those that may appear leading, ultimately, it is for litigants to prosecute their cases. This is especially so where there are competing parties before the Court. The obligation was always on the appellant to lead evidence in support of her application. She failed to do so. Moreover, by 2014, all parties had become aware that this "tikanga" argument was being formally advanced, based on the notice filed by counsel for persons claiming to be affected by the original gifting. Having signalled this line of argument, it was then the responsibility of those persons framing such contentions to ensure that they were properly pursued.

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[7] 90 Taitokerau MB 30-66 (90 TTK 30-66) at 31.

[16] In any event, the argument that such a tikanga exists is also inconsistent with the evidence on the record. As foreshadowed, William Witana purchased this land in 1969. Upon his death, the land went to his wife Daphne, who sold the land to Walter Witana. So, two acquisitions of the shares were by way of purchase, not through succession or gifting. Under his will, Walter left the land to his daughters. Prior to this, there is no evidence of the land being passed exclusively down the female line. On the contrary, the land was purchased by two males, firstly William and then Walter.

[17] When the Māori freehold status of the land was restored, various applications were filed with the Māori Land Court. One of these applications was heard by Judge Spencer on 8 June 1992. During that hearing, Thelma addressed the Court on the very issue of her shares:[8]

> I have been asked to represent the Trustees. I was an owner in this block through my father Waata Witana and my mother Ripareta Toki Pangari. There were 14 children in our family; all the girls (ie 7 of us) were given shares; I gave all my shares to my brother Sam Sampson. I do not know why my father left the boys out of the land. [sic]

[18] This evidence does not support that there is a well-known whānau tikanga in place, where the land is to pass down the female line. Such a tikanga, if it exists, must either be of recent origin, or not well known, given the history of the land, the evidence from the appellant's mother and the respondents' submissions.

[19] Mr Tupara and then Mr Hirschfeld, argued the appellant did not have the benefit of legal advice or representation in the Māori Land Court and was unable to lead evidence on the claimed whānau tikanga. They submit that we should refer this case back to that Court for rehearing so that evidence can be led on the tikanga issue.[9] We consider that there is no merit to this argument for four principal reasons.

[20] Firstly, while the appellant was not represented through most of the proceeding in the Māori Land Court, by the time of the final hearing on 29 March 2018, the appellant had instructed Mr Tupara. Mr Tupara and the appellant chose not to attend the final hearing. Instead, they signalled they were going to challenge the Court's decision. If the appellant

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8 20 Kaikohe MB 17-20 (20 KH 17-20) at 18.
9 Te Ture Whenua Māori Act 1993, s 56(1)(e).

wished to adduce further evidence on whānau tikanga, she could have done so at that final hearing but chose not to, presumably on the advice of her counsel.

[21] Secondly, rather than file the current appeal, the appellant could have sought a rehearing before the Māori Land Court to lead this further evidence. The appellant was clearly familiar with this process as she applied for a rehearing of the application for succession to Samuel Samson, which was granted.[10] Despite that, the appellant did not seek a rehearing to adduce evidence on whānau tikanga.

[22] Thirdly, the appellant could have applied to adduce further evidence on appeal.[11] Once again, no such application was filed.

[23] Finally, the appellant first filed her application in the Māori Land Court in 2009. It has thus been before the Court for almost 10 years. The respondents are entitled to finality. The appellant should have filed this evidence in the Māori Land Court. She had ample opportunity to do so. Failing that, she could have sought a rehearing or applied to adduce further evidence on appeal. For these reasons, we consider that there is no basis to send this case back for rehearing now.

[24] This ground of appeal must fail.

Did the Māori Land Court fail to consider a right based in contract?

[25] The appellant contends Thelma and Samuel entered into an oral contract that, once Samuel received a licence to occupy, he was to return the shares to Thelma. The appellant submits this contractual right should be enforced but the Māori Land Court failed to take this into account.

[26] This argument was never raised in that Court. Consequently, it is difficult to see how it could have been considered.

[27] In response to our questions, Mr Tupara accepted that, per s 2 of the Contracts Enforcement Act 1956,[12] this "agreement" was not in writing, was not signed by Samuel,

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10 40 Taitokerau MB 118-182 (40 TTK 118-182).
11 Te Ture Whenua Māori Act 1993, s 55(2) and Māori Land Court Rules 2011, r 8.18.

and so cannot be enforced. Mr Tupara also accepted that, per s 4 of the Limitation Act 1950,[13] any such action had to be brought within six years from the date on which the cause of action accrued. Thelma transferred the interests to Samuel in 1983. The licence to occupy was granted to Samuel in 1990. Any action to enforce any claimed contract had to be brought by 1996. Mr Tupara accepted that no such action was filed and any such claim under contract is now statute barred.

[28] Faced with these insurmountable hurdles, Mr Tupara sensibly withdrew this ground of appeal. Given the obvious statutory obstacles, it seems surprising that this argument was ever pursued and raised as a point on appeal in the first place, taking into account the evidence and the facts.

Should Thelma have received better advice?

[29] Mr Tupara argued that, prior to the transfer, Thelma should have been advised to support Samuel's licence to occupy and that a transfer of shares was not necessary. He contends if Thelma had received proper advice, the shares would not have been transferred and would have remained in Thelma's name.

[30] While there may have been other options available to Mrs Wihongi to support her brother occupying the land, Mr Tupara was unable to articulate how this is a ground of appeal or how this should result in the Court reversing the transfer registered against the certificate of title with LINZ.

[31] Mr Tupara resorted to evidence from the bar which, exceptional enough on an appeal, surprisingly consisted of pure speculation as to the advice Thelma may or may not have received. Mr Tupara then attempted, once again, to argue there was an obligation on the Māori Land Court to inquire into this transaction further. We consider that such an argument is without merit. It was surprising that counsel would advance such a speculative argument in any court, let alone on an appeal.

[32] This final ground must also fail with the result that the appeal is dismissed.

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12 This Act was in force at the relevant time.
13 This Act was also in force at the relevant time.

[33] One final point. By way of observation, and in the interests of seeking to restore amicable familial relationships between the whānau directly affected, the respondents, at some point in the future, may wish to consider restoring some of the shares received by Sam back to the uri of Thelma, rather than seeking to gift a specific area of land. After all, Thelma's principal desire appears to have been to ensure that *all* the descendants of their parents were included in the land. Her selfless act in transferring all her shares to support her brother could be properly acknowledged by a return gifting of some of the shares in due course. Then those uri of Thelma could themselves decide how that might utilise any such re-gifted shares. Ultimately this is a matter for the children of Sam.

Decision

[34] The appeal is dismissed.

[35] Fortunately for the appellant, the respondents were not represented, and so there is no issue as to costs. If costs were in issue, we would have granted a significant award against the appellant, since, as we have found, the arguments on appeal were without merit.

Pronounced 4.15pm in Rotorua on Tuesday this 14th day of August 2018.

C T Coxhead **JUDGE**	L R Harvey **JUDGE**	M P Armstrong **JUDGE**