IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20090005312

UNDER	Section 18(1)(a) of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Opuatia No 6D No 2D Block
BETWEEN	AMELIA RAUTANGATA Applicant
AND	KENNETH RAUTANGATA & OTHERS Respondent

Hearing: 8 April 2011
(Heard at Hamilton)

Appearances: Mr S Hartnett, Counsel for the Applicant
Mr P Jefferies, Counsel for the Respondents

Judgment: 26 September 2013

RESERVED JUDGMENT OF JUDGE S TE A MILROY

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[1] On 15 September 2011 I gave a preliminary determination in this matter.[1] I do not propose to set out the full background to the application, as that is available to be read in the preliminary determination. Suffice it to say that the applicant, Amelia Rautangata ("Amelia"), was married to Douglas Rau also known as Douglas Rautangata ("Doug"). Together they built a home and other buildings on Opuatia 6D 2D, which was solely owned by Doug. The land constitutes the only significant asset in Doug's estate. On his death Amelia received, pursuant to s 109(2) of Te Ture Whenua Māori Act 1993 ("the Act"), a statutory entitlement to an interest for life, or until she remarries or enters into a civil union or de facto relationship, in Opuatia 6D 2D. Amelia then applied for an order under s 18(1)(a) of the Act seeking a declaration that she is the sole owner of the dwelling and other buildings on the block.

[2] I made a preliminary determination that the structures, including the dwelling, were fixtures on the land, and that, as between Doug and Amelia, she paid for approximately 85% of the costs of constructing the buildings on the property. There is also a mortgage on the property which Amelia is currently paying off. I adjourned the matter to allow Amelia and the respondents, Douglas Rautangata's siblings, to negotiate a settlement. After a number of adjournments to allow further negotiations, a final adjournment was granted to 7 June 2013. At that time counsel advised the Court that a settlement agreement had not been reached.

[3] I then gave directions for counsel for the applicant to file submissions by 12 July 2013, with counsel for the respondents to file in response no later than 31 July 2013. Counsel for the applicant was then to file a final reply no later than 9 August 2013. In fact the respondents did not file their submissions until 12 August 2013. As a result of the delay the Court granted an extension to 26 August 2013 for the applicant to file the reply.

[4] I note that filed with the applicant's submissions of 12 July 2013 are two affidavits from Ashleigh Brougham and Howard Harker. These affidavits were filed without the leave of the Court and after the taking of evidence had closed. I have not taken this further evidence into account in my decision and the Case Manager will be directed at the end of this judgment to return the evidence to the applicant.

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[1] 27 Waikato Maniapoto MB 252-264 (27 WMN 252-264).

Issue

[5] During the course of making final submissions the respondents conceded that an award proportionate to the Court's preliminary determination was "inevitable". The respondents also accepted that as they were unable to pay monetary compensation an award for ownership of the buildings was appropriate, provided that the ownership was restricted to the house building only and not a four bay stand-alone shed and a pump shed. The respondents also wished the house to be removed from the land.

[6] The issue therefore is what award the Court should make to compensate Amelia adequately for her contributions.

Applicant's submissions

[7] The applicants submissions are as follows:

7.1 The Court may either make an order under s 18(1)(a) declaring the applicant as legal owner of the buildings or imposing a constructive trust in recognition of the applicant's equitable interests under which the applicant is entitled to either monetary compensation or ownership of the buildings;

7.2 Part 8 of the Act, which restricts alienations of Māori freehold land, does not apply to the application because, as already determined by this Court, an order by the Court is not an alienation: see s 4 definition of "alienation";

7.3 The respondents have implicitly accepted that the applicant has an equitable interest and that the interest should be recognised by making an order in favour of the applicant;

7.4 It is not appropriate for the Court to award monetary compensation because the respondents state that they do not have the means to pay any monetary compensation;

7.5 The respondents accept that an award for ownership of the buildings is the only appropriate remedy;

7.6 The award should include the sheds and utilities;

7.7 No deduction should be made for the benefit received by the applicant from the land by reason of her occupation or her use of the shed, utilities and land as it is her statutory entitlement pursuant to s 109(2) of the Act;

7.8 There is no evidence as to the extent of the deduction to be made even if the Court were to take into account the applicant's benefit from the land;

7.9 The applicant has been servicing the mortgage and paying the rates despite having no legal interest in the block apart from the statutory entitlement;

7.10 Had the applicant not met these obligations the block would have to be sold at mortgagee auction, whereas her payments have ensured that the land has been retained for the Rautangata whānau;

7.11 The applicant should, as Doug's wife, be entitled to the 15% which the Court attributed to Doug's contributions;

7.12 The applicant's life interest grants her a right of occupation of the land, and therefore she should not be ordered to remove the house as that is not required to give practical effect to any order;

7.13 In the event the Court is minded to make a monetary award leave is requested to file evidence as to the extent of compensation to be awarded.

Respondents' submissions

[8] The respondents' submissions are:

8.1 It is accepted that Part 8 of the Act does not apply to this matter;

8.2 The Court's finding that the applicant has paid 85% of the costs of construction of the dwelling and servicing of the mortgage on the land is a

clear indication that a finding will be made that the applicant has an equitable interest and an order under s 18(1)(a) of the Act will follow;

8.3 The respondents have no funds with which to pay any monetary compensation;

8.4 In *Stock v Morris – Wainui 2D2B*[2] the Court stated that there was no bar to making a s 18(1)(a) order in favour of a non-owner but an order vesting an interest in the land or a right to possession would:[3]

> ...likely offend the kaupapa and provisions of the Act...Where the Court concludes that a non-owner is entitled to equitable relief, the Court will in the first place look to awarding monetary compensation. If monetary compensation is inappropriate, the Court may award ownership of the house if it can be removed from the land. The Court will take into account the non-owner's free occupation of the land as a factor. Ultimately, each case depends on its own facts;

8.5 The applicant has remained living in the dwelling since Doug Rautangata died, and has had exclusive access to and use of the income generated from leasing the block and grazing stock for sale. Any award for compensation should take into account the benefits the applicant has received from occupation of the land;

8.6 It is accepted that an award proportionate to the Court's preliminary determination is inevitable, but the house structure itself adequately represents the 85% contribution made by the applicant, bearing in mind the income received from the land;

8.7 The respondents have no objection to the applicant removing the house at her own cost but any award should be limited to the house and ought not to include other buildings, being a four bay stand-alone shed and a pump shed together with all necessary utilities and services.

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[2] (2012) 41 Taitokerau MB 121 (41 TTK 121).
[3] Ibid at [70].

Law

[9] Section 18(1)(a) of the Act provides as follows:

> **18 General jurisdiction of court**
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> (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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> (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] It is settled law that the Court's jurisdiction under s 18(1)(a) does not create new rights; rather the Court determines what the existing rights "at law or in equity" are in respect of any interest in Māori freehold land.[4]

[11] On ordinary English common law principles the ownership of fixtures on the land passes with the land. However, s 18(1)(a) gives the Court the jurisdiction to make an order declaring ownership of any interest in Māori freehold land including an interest in buildings and other structures on the land. Thus the Māori Land Court is able to determine that a dwelling or other fixture is not owned by all the owners of the land, but that a particular person is the owner.

[12] In the case of *Tohu – Te Horo2B2B2B*[5] the Māori Appellate Court stated:[6]

> [18] An order under section 18(1)(a)/93 appears to separate the house from the title to land and 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.

[13] In *Bidois and others – Te Puna 154D3B2B*[7] the Māori Appellate Court took the view that the house that was the subject of a s 18(1)(a) order was an improvement on the land, rather than a chattel. In both cases the comments as to the effect of the s 18(1)(a)

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[4] See *Williams v Williams – Matauri 2F2B* (1991) 3 Taitokerau Appellate MB 20 (3 APWH 20), *McCann – Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Takitimu Appellate MB 2 (11ACTK 2) and *Paki – Matauri X Incorporation* (1996) 5 Taitokerau Appellate MB 16 (5 APWH 16).
[5] *Tohu – Te Horo 2B2B2B* (2007) 7 Taitokerau Appellate MB 34 (7APWH 34).
[6] Ibid at [18].
[7] *Bidois– Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102).

order were obiter dicta, but nevertheless each has the weight and persuasiveness of considered comments by a higher court. The conflict between the statements in these two cases was recognised in *Insley v Insley – Awanui Haparapara 2B1B2*.[8] The Court there noted that any conflict would need to be resolved by the Māori Appellate Court.

[14] The reason why this issue has some relevance to the present case is that the kaupapa of the Act as set out in the Preamble and ss 2 and 17 favours the retention of Māori land in the hands of the owners. If the structure remains a fixture on the land then any order under s 18(1)(a) in favour of a non-owner may be seen as disposing of an interest in Māori land in contravention of the kaupapa of the Act. If the effect of s 18(1)(a) is to define a structure built upon the land as a chattel, rather than as a fixture and, therefore, that it is not an interest in the land, the question as to whether such an order can be made in favour of a non-owner is moot. There may, however, be further issues as to whether the non-owner is permitted to occupy or use the structure or must remove it from the land.

[15] In *Stock v Morris – Wainui 2D2B*[9] the Court preferred to recognise a s 18(1)(a) order as allowing the Court to determine a separate equitable ownership of a fixture distinct from the legal ownership of the land. Thus the Court was able to recognise the interest of a non-owner and provide an equitable remedy to recognise his financial contribution to the erection of the cottage on the land. The cottage was not able to be removed from the land, so the Court made orders under s 18(1)(a) giving monetary compensation to the non-owner, with the sum to be paid within a fixed timeframe. A charging order was made charging the owner's interest in the land and the cottage to the extent of the amount of compensation.

Discussion

[16] The only matter in dispute between the parties is not whether the Court should make an order under s 18(1)(a) awarding the house to Amelia Rautangata, but whether she should also be awarded ownership of the other buildings on the land and whether she should be required to remove the house. I will therefore concentrate on those issues, while acknowledging that there is some difference in the legal authorities, which does not require

[8] *Insley v Insley – Awanui Haparapara 2B1B2* (2009) 108 Opotiki MB 255 (108 OPO 255).
[9] *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).

to be resolved in this case, because of the concessions by the respondents and the particular factual situation.[10]

[17] For the sake of completeness I find that Amelia is entitled to be compensated on constructive trust principles for the substantial contributions she made to the buildings and associated developments (sewerage, water and the like) on the land. She made such contributions in good faith, with the full consent of the owner of the land at the time, expecting that she would be able to occupy, use and benefit from the dwelling and other structures. If the Court were to find otherwise Doug's siblings, as the remaindermen, would be unjustly enriched.

Extent of contributions – other buildings

[18] In my preliminary determination I found that Amelia's contributions were equivalent to 85% of the cost of the development of the land including construction of the buildings. The evidence as to the amounts expended by Amelia was not presented in such a way as to enable me to make a distinction between what it cost to build the house, as compared to the cost of building other structures on the property. It was clear from Amelia's evidence that she and Doug worked together on the land, and it follows that her 85% contribution was to the development of the land as a whole and not just to a particular structure.

[19] The contention that Amelia should also be entitled to the 15% contributed by Doug on the basis that she was Doug's wife was unsupported by legal authority. The basis of Amelia's s 18(1)(a) application is that the substantial contribution she made to the house entitled her to a remedial constructive trust to protect her from the effects of the law relating to succession to Māori freehold land, which would otherwise mean that she would have nothing but the statutory entitlement pursuant to s 109(2) of the Act to enjoy the land, including the house and other structures. Her entitlement as Doug's wife to the benefits of Doug's ownership of the land and contributions to the property is already recognised by the statutory entitlement.

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[10] See *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [31] – [70] for a discussion of the divergent Court cases.

[20] Counsel for the applicant has not explained how, within that legal framework, Amelia would also be entitled to an increase in her equitable interest by reason of Doug's contributions. In the absence of authority on that point I take the view that any award made by the Court under s 18(1)(a) is in respect of her 85% contribution only.

[21] By the same token, she is entitled to the benefit of her statutory entitlement in the land. Income she receives from the land may be set against the outgoings that must be paid in order to allow her to enjoy her statutory entitlement. If the income meets or exceeds the amount of the outgoings then that is part of Amelia's entitlement as Doug's wife, and does not affect the assessment of her equitable contribution made in the preliminary determination.

[22] If the income falls short of the outgoings there may be some argument that a further allowance is due to Amelia in terms of the assessment of her contributions. However, no evidence as to the extent to which the income offsets outgoings has been provided. I am also reluctant to enter into a situation where a running tally must be kept as Amelia's contributions, particularly to the capital amount under the mortgage, increase over time. The Court must draw the line at some point in order to bring an end to the proceedings and to provide certainty as to their entitlements to the parties. The usual point at which the line is drawn is the date of judgment.

[23] It follows from these comments, that in my view Amelia is and remains entitled to 85% of the house and other structures on the land, not including the amount still remaining on the mortgage. She will also be entitled to a further amount equal to the amount that payment of outgoings on the property, including rates and mortgage payments, exceed income from the property up to the date of final judgment.

[24] There is no evidence before me which would allow me to determine whether awarding the house alone to Amelia would offset the contributions she also made to the development of the other structures on the land. That means I am not currently in a position to be able to award the house alone to Amelia, as requested by the respondents, in exchange for the other structures passing with the land to the remaindermen.

Removal of house

[25] The respondents rely on the decisions in *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181*[11] and *Stock v Morris – Wainui 2D2B*[12] as authorities for the submission that where the Court makes an order under s 18(1)(a) in favour of a non-owner, the non-owner must then remove the house from the land. In the *Matenga v Bryan* case the applicant wished to remove the house from the land, so the issue of whether she was able to reside on the land did not arise. In the *Stock v Morris* case the house was not able to be removed from the block so that an order in favour of a non-owner with a requirement that the house be removed was not realistic.

[26] As was stated in the other cases, each case depends on its own facts. Here, Amelia is entitled, pursuant to her statutory entitlement, to reside on the block, and she has done so since Doug's death. An order under s 18(1)(a) would give her ownership of the dwelling in which she currently resides. There is no legal imperative which would require her to move the house from the block while her statutory entitlement to reside there enures.

[27] That said, at the termination of Amelia's statutory entitlement the right to occupy the land ceases and the buildings to the value of Amelia's equitable interest will then need to be removed. An issue will inevitably arise as to what buildings ought to be removed from the property by Amelia or the successors in her estate, since removal of 85% of each building is clearly unrealistic. If the mortgage has not been paid off the mortgagee may also have objections to the removal, depending on the circumstances at the time.

[28] An award of monetary compensation would not suffer from the same problem, but neither party wishes to see that result, and it would also require further evidence to be filed. I have considered the option taken in the *Stock v Morris* case of awarding monetary compensation to be paid within a certain period, secured by a charging order against the property. However, the same issues arise – further evidence would be required, the respondents could not pay such an award, and a further charge may well require the consent of the mortgagee.

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[11] (2003) 73 Tauranga MB 150 (73 T 150).
[12] (2012) 41 Taitokerau MB 121 (41 TTK 121).

[29] I therefore consider that the only practicable option is to obtain further evidence as to the value of the house on its own, the value of each of the other structures and the value of the whole property, together with information as to what is remaining on the mortgage and the extent to which outgoings including rates and mortgage payments are met by the income from the property. The Court will then be able to make some assessment as to what buildings would be sufficient to meet the value of Amelia's contributions.

[30] The Court is of a mind to direct the applicant to file the evidence required. However, it may be that the applicant would prefer to have an order granting her ownership of the house alone rather than be put to the time, cost and effort of obtaining the evidence. Counsel for the applicant is therefore directed to advise the Court within two weeks of the date of this judgment as to whether the evidence will be obtained, or whether an order along the lines indicated in respect of the house only is preferred. Once the Court has that indication further directions will be given, or an order will be made.

[31] There is also a direction to the case manager to return the affidavits of Ashleigh Brougham and Howard Harker to counsel for the applicant.

Pronounced in open Court at am/pm in Hamilton on the day of September 2013.

S Te A Milroy
JUDGE