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

A20110009306

UNDER	Section 296 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Section 1F No 2 Parish of Katikati
BETWEEN	KEVIN PATRICK TOHIARIKI Applicant

Hearing: 26 April 2012 (40 Waikato Maniapoto MB 162-201)
(Heard at Tauranga)

Appearances: Mr L Watson, Counsel for the Applicant

Judgment: 21 March 2013

RESERVED JUDGMENT OF JUDGE S R CLARK

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Introduction

[1] Mr Kevin Tohiariki is an owner in a block of Māori freehold land known as Section 1F No 2 Parish of Katikati ("the block"). He wishes to partition an area of approximately 924 square metres from that block. The issue before the Court is whether or not to grant him a partition order.

Background

[2] The block is 2.5866 hectares in size and situated towards the Bowentown end of Waihi Beach. On its eastern side the block adjoins Seaforth Road, on the western side it overlooks Tauranga Harbour.

[3] The block is vested in three trustees. It is administered as an ahu whenua trust. There are 21 beneficial owners in the block. Mr Tohiariki became an owner on 25 January 1993 when his father gifted him 0.25 shares in the block.[1]

[4] In recent years Mr Tohiariki has become involved in the affairs of the block. In February of 2008 he made contact with one of the then trustees and obtained some background information. In January of 2009 he travelled to the block, met with one of the trustees and identified a piece of land that would be suitable as a housing site for himself.

[5] In his research Mr Tohiariki noted that very little was happening in the formal administration of the trust. No reports or minutes had been filed with the Māori Land Court since 1988 and a number of trustees were deceased. That prompted him to file applications seeking: a review of the trust;[2] that the trustees file a written report with the Court;[3] and removal of trustees.[4]

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[1] 51 Tauranga MB 270 (51 T 270)
[2] Application pursuant to s 231 of Te Ture Whenua Māori Act 1993
[3] Section 238 of TTWMA
[4] Section 240 of TTWMA

[6] Those applications were heard before the Court in 2010.[5] The upshot being that various deceased trustees were replaced with Mr Tohiariki becoming a responsible trustee and the applications for review and removal of trustees being dismissed.

[7] Simultaneously Mr Tohiariki sought an occupation order for an area of approximately 924 square metres for a house site. On 30 July 2010 I granted Mr Tohiariki an occupation order in relation to 924 square metres.[6]

[8] Following the grant of the occupation order Mr Tohiariki built a house on the block. It cost him approximately $400,000. He has had to finance the build totally from his savings and investments and now seeks to partition the same area of land for which the occupation order was granted.

Application for Partition

[9] The application was filed in September of 2011. It is brought pursuant to s 296 of Te Ture Whenua Māori Act 1993 ("TTWMA"). An initial telephone conference was held on 22 November 2011[7] and a site inspection took place on 25 January 2012.[8]

[10] A meeting of owners was called in Tauranga on 28 January 2012 to discuss the application. A number of owners were notified in advance of that hui by way of letter. The meeting was advertised in the Bay of Plenty Times and the New Zealand Herald. No owners attended the hui on 28 January 2012, other than the applicant himself.

[11] The substantive fixture was heard at Tauranga on 26 April 2012.[9] Final evidence confirming advertising was received by the Māori Land Court on 14 May 2012.

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[5] 3 Waikato Maniapoto MB 44-58 (3 WMN 44-58), 5 Waikato Maniapoto MB 266-274 (5 WMN 266-274) and 9 Waikato Maniapoto MB 267-275 (9 WMN 267-275)
[6] 9 Waikato Maniapoto MB 267-275 (9 WMN 267-275)
[7] 33 Waikato Maniapoto MB 209-218 (33 WMN 209-218)
[8] 34 Waikato Maniapoto MB 134-135 (34 WMN 134-135)
[9] 40 Waikato Maniapoto MB 162-201 (40 WMN 162-201)

The Law

[12] The Māori Land Court has exclusive jurisdiction to grant partition orders in relation to Māori freehold land, in accordance with Part 14 of TTWMA. The jurisdiction is discretionary. Regardless of whether a partition applicant is brought pursuant to s 289 or 296, the Court must have regard to those matters set out in s 288 of TTWMA. Section 288 reads as follows:

> **288 Matters to be considered**
>
> (1) In addition to the requirements of subsections (2) to (4), in deciding whether or not to exercise its jurisdiction to make any partition order, amalgamation order, or aggregation order, the court shall have regard to—
>
> (a) the opinion of the owners or shareholders as a whole; and
>
> (b) the effect of the proposal on the interests of the owners of the land or the shareholders of the incorporation, as the case may be; and
>
> (c) the best overall use and development of the land.
>
> (2) The court shall not make any partition order, amalgamation order, or aggregation order affecting any land, other than land vested in a Maori incorporation, unless it is satisfied—
>
> (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
>
> (b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.
>
> (3) The court shall not make any partition order, amalgamation order, or aggregation order affecting any land vested in a Maori incorporation unless it is satisfied—
>
> (a) that the shareholders of the incorporation to which the application relates have been given express notice of the application; and
>
> (b) that the shareholders have passed a special resolution supporting the application.
>
> (4) The court must not make a partition order unless it is satisfied that the partition order—
>
> (a) is necessary to facilitate the effective operation, development, and utilisation of the land; or
>
> (b) effects an alienation of land, by gift, to a member of the donor's whanau, being a member who is within the preferred classes of alienees.

[13] A number of principles have developed in case law. First there are a number of statutory prerequisites to satisfy. They are:

a) The Court must be satisfied that the owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it – s 288(2)(a);

b) The Court must be satisfied that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter – s 288(2)(b);

c) The Court must be satisfied that the partition is necessary to facilitate the effective operation, development, and utilisation of the land or, effects an alienation of land, by gift, to a member of the donor's whānau, being a member who is within the preferred classes of alienees – ss 288(4)(a) and (b).

[14] Second, if the statutory prerequisites are satisfied the Court must then address the mandatory consideration in s 288(1). In this section the Court is directed to have regard to, the opinion of the owners as a whole, the effect of the proposal on the interests of the owners of the land and the best overall use and development of the land – s 288(1).

[15] Third, if the Court is to exercise its general discretion it may refuse to do so if the application would not achieve the principal purpose of Part 14 of TTWMA – s 287(2). The principal purpose being to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional or improved access to land – s 286(1).

[16] As the Māori Appellate Court recently said in *Whaanga v Niania – Anewa Block*,[10] although a Court must tackle each of the three steps separately, often the steps overlap in terms of the evidence that applies to each.

[10] *Whaanga v Niania– Anewa Block* (2011) 2011 Maori Appellate Court MB 428 (2011 APPEAL 428) at [38]

[17] In addition the Court must at all times have regard to the principles set out in the Preamble to TTWMA, s 2 and s 17. Furthermore when assessing the question of what is necessary pursuant to section 288(4)(a) the Court must assess whether there are reasonable alternatives to partition.[11]

The Statutory Prerequisites

Have the owners had sufficient notice of the application and sufficient opportunity to discuss and consider it? – Section 288(2)(a)

[18] I am satisfied, notwithstanding the fact that no one other than Mr Tohiariki attended a hui on 28 January 2012, that the owners had sufficient notice of the application and sufficient opportunity to discuss and consider it. After filing his application with the Māori Land Court Mr Tohiariki arranged for the following:

a) He sent a copy of the application to owners for whom he had addresses;

b) He called a hui which was held in Tauranga on 28 January 2012 at the Tauranga Moana Māori Trust Board premises. That hui was advertised on 7 January 2012 in the Bay of Plenty Times and the New Zealand Herald;

c) Owners for whom Mr Tohiariki had addresses were also sent written notification of the hui and a sketch plan of the proposed partition;

d) A pānui was placed on the Naumai website which was available to the beneficiaries of Otawhiwhi Marae, the closest marae to the block.

[19] Prior to the hui of 28 January 2012, Mr Tohiariki was contacted by Makoha Gardiner, a descendant of one of the owners. At the substantive hearing on 26 April 2012, one of the trustees Mr Thomas Gardiner attended. Mr Gardiner was able to

[11] For an extended discussion see the Māori Appellate case of *Hammond – Whangawehi 1B3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185) at [13]-[24]

confirm that he had received notification of the application. He confirmed that other owners were aware of the application.

[20] In summary I am satisfied that the owners had sufficient notice of the application and sufficient opportunity to consider and discuss it.

Is there a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter? – Section 288(2)(b)

[21] In this case the only owner who expressed support for the application was the applicant himself. Counsel for the applicant referred to support from Makoha Gardiner and Thomas Gardiner. Mrs Makoha Gardiner contacted counsel for the applicant asking questions about the partition application and requesting a copy of any valuation. No other contact was made by her and she did not appear at the substantive hearing.

[22] Thomas Gardiner appeared at the substantive hearing. He is a trustee. He indicated support for the application.

[23] The difficulty in relying upon Makoha Gardiner and Thomas Gardiner as examples of support is that they are not owners. They are probably entitled to become owners if and when succession applications are made. Section 288(2)(b) expressly uses the word *owners*. In this context that means beneficial owners. It does not refer to persons who may become owners in due course.

[24] Therefore whilst I am entitled to take into account the applicant's support for his own application, I cannot take into account the views of Makoha Gardiner or Thomas Gardiner – refer *Marsh v Robertson – Karu o te Whenua B2B5B1*.[12]

[25] Nor can I take into account the support Mr Gardiner gave as a trustee. Section 288(2)(b) speaks to the sufficiency of support by owners, meaning the

[12] (1996) 19 Waikato Maniapoto Appellate Court MB 40 (19 APWM 40)

beneficial owners and not trustees as the legal owners – refer *Whaanga v Niania – Anewa Block*.[13]

[26] It was also urged upon me that I should take into account that there was no expression of opposition from any owners, that is I could take into account their silence. Furthermore it was urged upon me that I could take into account the support Mr Tohiariki received for his occupation order.

[27] In relation to the last point, there is no precedent which supports the proposition that support for an occupation order can then be relied upon as support for a partition order. Nor does common sense suggest that that would be the case. The two types of order are completely different in their nature and effect. Fundamentally a successful partition application involves the separation or partition of owners and leads to the creation of a separate title. An occupation order allows the person in whose favour the order has been granted to occupy Māori freehold land. No separation of owners occurs. A separate fee simple title is not created.

[28] I do agree with the submissions made by counsel for the applicant that it would be oppressive to require applicants to show an absolute majority of shareholding support if a majority do not participate. The Māori Appellate Court has said as much in their decision of *Reid v Trustees of Kaiwaitau 1 Trust*.[14] As the High Court said in *Brown v Māori Appellate Court,*[15] what is sufficient support is in the end a matter for case by case analysis.

[29] In the *Whaanga* decision the Māori Appellate Court referred to the fact that obtaining unanimous consent is invariably impossible or impracticable to achieve in respect of Māori land in multiple ownership. The Court indicated it was not a simple matter of assessing whether an applicant could obtain 50 percent or 75 percent or any other predetermined figure.[16]

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[13] *Whaanga v Niania – Anewa Block*, above n 10
[14] (2006) 24 Gisborne Appellate Court MB 168 (34 APGS 168)
[15] (2001) 1 NZLR 87 at [97]
[16] *Whaanga v Niania – Anewa Block*, above n 10

[30] In this case Mr Tohiariki owns 0.25 shares out of a total of 7, on a percentage basis that is 3.6 percent. Mr Tohiariki is one of 21 owners, on a percentage basis that is 4.8 percent.

[31] In his oral submissions counsel for the applicant made a submission that the percentage in support of the application, is similar to that found in the *Whaanga* decision. Counsel submitted:

> The actual statistics are fairly similar in an ironic way to the *Whaanga* case because there you do have here a very low percentage of those who are actively participating in the trust and I think that the principles are still applicable even if the numbers are different. [17]

[32] On the question of sufficiency I note that in the *Whaanga* case the Māori Appellate Court was very careful to indicate that a nuanced and fact specific analysis of sufficiency needed to be undertaken. The Court was also very careful to explain that:[18]

> Certainly, our conclusion does not set any benchmark or precedent as every case must be assessed on its own merits. The circumstances of this case are particularly unique.

[33] An important distinguishing factor between the *Whaanga* case and the case now before me is that in *Whaanga* the applicant was able to point to support from owners other than herself. 82 owners in fact, being 2.17 percent of the owners and representing 9.97 percent of the owners by shareholding supported the application. Only two owners opposed the application.[19]

[34] Even taking into account that a number of owners are deceased and have not been succeeded to, I know of no application for partition which has succeeded when the only owner supporting the application is the applicant. The situation might well be different if Mr Tohiariki was a major shareholder. It is not uncommon to find that one shareholder owns a majority of the shares. In a situation such as that an applicant, if they were the only owner supporting the application, might well be able to persuade a Court that they had sufficient support for the application among the owners. As in all cases a fact specific analysis of sufficiency would be required.

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[17] 40 Waikato Maniapoto MB 162-201 (40 WMN 162-201) at p 196
[18] *Whaanga v Niania – Anewa Block*, above n 10 at [72]
[19] *Whaanga v Niania – Anewa Block*, above n 10 at [19]

[35] In this case there are simply no owners, other than Mr Tohiariki who support the application. Whilst it would be wrong to suggest that silence equates opposition, it is equally wrong to suggest that silence amongst the owners equates to support. The words of s 288(2)(b) require a sufficient degree of support among the owners. Support from one owner, Mr Tohiariki being 3.6 percent of the owners and representing 4.8 percent of the shareholding does not in my opinion amount to sufficient support among the owners.

[36] As an aside I note that the appellant in the *Whaanga* case returned to the Māori Land Court for a rehearing of her partition application. The sole matters before the Māori Land Court were those matters set out in ss 288(4), 288(1) and 287(2). Judge Coxhead dismissed the application on the basis that the partition was not necessary to facilitate the effective operation, development or utilisation of the land, as required by s 288(4).[20] The appellant again appealed to the Māori Appellate Court. A different division of the Māori Appellate Court dismissed the appellant's appeal.[21] Notwithstanding the fact that the issue of sufficiency of support was not before it, the Māori Appellate Court at paragraph [38] of their decision commented upon the earlier Māori Appellate Court's approach to the question of sufficiency. For the purpose of this decision I have treated those comments as obiter remarks, as they were not necessary to decide the issues before the Court. I have followed the approach of the earlier *Whaanga* decision as being a correct exposition of the law on sufficiency.

Does the partition order effect an alienation of land, by gift, to a member of the donor's whānau, being a member who is within the preferred classes of alienees? – Section 288(4)(b)

[37] The primary basis for Mr Tohiariki's partition application is that it effects an alienation of land, by gift, to a member of the donor's whānau.

[20] (2012) 22 Tairawhiti MB 167 (22 TRW 167)
[21] *Whaanga v Smith – Anewa Block* (2013) 2013 Maori Appellate Court MB 45 (2013) APPEAL 45)

[38] What the applicant relies upon is evidence as to the nature of the gift from his father which occurred in 1993. Specifically the applicant points to the following passage which appears in the minute of a Court hearing which occurred on 25 January 1993:[22]

> **Ben or Benjamin Tohiariki:** I would hope that the vesting would provide a housing section for my son as it is equivalent to about 937 square metres.
>
> **Court:** The area of this block is only about 2.5 hectares and obviously is suitable basically for housing development. Because of the relationship between the parties there is exemption from the requirements to furnish a special valuation under section 228/53. There is an Order under section 213/53 vesting the donor's shares in the above block in the donee. It is certified that the vesting is exempt from Stamp Duty on the grounds that this is a housing site.

[39] At the time Mr Benjamin Tohiariki gifted his shares to Kevin Tohiariki he owned 0.25 shares out of a total of 7 shares. At that stage, as there is now, there were a number of other beneficial owners. The mere fact that Benjamin Tohiariki gifted those shares to his son was not sufficient in itself to create a "housing site". There was no application at that stage for example pursuant to s 440 of the Māori Affairs Act 1953, which was a section which allowed for an owner of Māori land to vest the whole or part of an estate in any Māori or descendant of a Māori to provide them with a site for a dwelling.

[40] The application made by Mr Benjamin Tohiariki in 1993 was brought pursuant to s 213 of the Māori Affairs Act 1953. The minute records that an order was made pursuant to s 213 and the sealed order clearly refers to the fact that the vesting order was made pursuant to that section.

[41] Although Judge Carter made reference to a "housing site" that was done in the context of exempting the gift from Stamp Duty. The order as sealed specifically certifies that the order was exempt from Stamp Duty by virtue of the provisions of s 214(2) of the Māori Affairs Act 1953.

[22] 51 Tauranga MB 270 (51 T 270)

[42] The Māori Appellate Court has explained the differences between ss 213 and 440 of the Māori Affairs Act 1953. In the decision of *Waiomio – Te Koutu Mourea*[23] it said:

> 21. s.440/53 was designed to enable the vesting of all or any part of an applicant's interest in any land in a Mäori, or a descendant of a Mäori, to provide him or her with a site for a dwelling. (See *Bennett v Mäori Land Court*, 11 August 2000, High Court, CP 5/99, Hansen J). If a house is not built on the site within five years the Court may cancel the vesting order, unless it was shown to the Court that the failure to use the site for a dwelling was beyond the applicant's control (s 440(3)/53).
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> 22. s.440/53 was a stand-alone provision and was not subject to the provisions of s 213/53, which concerned the alienation of interests by vesting order. Under s 213/53 the Court could give effect to any arrangement or agreement made between the persons concerned, and could in its discretion make a vesting order transferring any interest in Mäori freehold land to a Mäori or a descendant of a Mäori. s.213/53 did not provide for any particular purpose for the transfer of interests.
>
> 23. s.213/53 was directed towards facilitating dealings between owners with interests in Mäori land, to reduce fragmentation, and to aid the extinguishment of uneconomic interests in Mäori land by arrangements made by the owners themselves. (See Norman Smith, *Mäori Land Law*, AH Reed 1960 p 128-9). s.440/53, as mentioned above, had a specific and limited purpose, which was to enable the vesting of interests in land for the purpose of a dwelling site.

[43] There is very little in the way of reported authority on instances in which partition orders have been granted pursuant to s 288(4)(b). In *Dudley – Te Konoti B4A3B2*[24] Judge Ambler made a reserved interim decision granting a partition. In that case the applicant was one of five children of the late Pungarehu Dudley. Pungarehu Dudley was the sole owner of Te Konoti B4A3B2 block. In his will he purported to vest an existing house and surrounding area of approximately one acre to his daughter Rose Dudley solely. On succession to the interests of Pungarehu Dudley, Rose Dudley together with four other siblings succeeded to their father's interests in the block. Rose Dudley also sought and was granted an order determining that she was the sole owner of the house on the block.

[44] Rose Dudley subsequently lived in the house. Later she sought to partition out her share in the block in order to obtain a loan from a bank to complete renovations to her house.

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[23] (2004) 10 Waiariki Appellate Court MB 246 (10 AP 246)
[24] (2008) 127 Whangarei MB 1 (127 WH 1)

[45] Judge Ambler made an interim decision granting the partition on the basis that it would effect an alienation of land by gift to a member of the donor's whānau. He was satisfied that it was arguable that the circumstances whereby the late Pungarehu Dudley specifically left the house and one acre to Rose Dudley in his will satisfied the requirements of s 288(4)(b).

[46] In *Ririnui – Rawhiti No 2 Pt Lot 4 DP 10483*[25] Judge Ambler granted a partition to Maude Ririnui. The block before the Court comprised some 45.4107 hectares. It was formerly the sole property of Maude Ririnui's grandfather, Te Whiu Hau. Mr Whiu died leaving a will whereby he left a homestead, cowshed and other farm buildings and 40 acres of the block to his son Wi Hau (Maude Ririnui's father) and the balance of the land to his other 11 children.

[47] Judge Ambler was satisfied that this was one of those unusual applications which qualifies under s 288(4)(b). This was an application for partition which was to effect an alienation of land by gift, as the purpose of the partition is to give effect to the will of Te Whiu Hau. Therefore he granted the partition application.

[48] I have also utilised s 288(4)(b) in situations in which the sole owner of a block wishes to gift interests to persons who fall within the preferred classes of alienees and then partition out those interests to create housing sites. I have sat on applications that have come before the Māori Land Court in Tauranga whereby an applicant gifts shares to a member of their whānau pursuant to s 164 and at the same time seeks to partition an area of land equivalent to the size of the shareholding represented in the gift. In those circumstances I have granted the partitions as there is a clear intention on the part of the owner to effect an alienation of land by gift.

[49] In those types of cases it is not necessary to consider whether the application is necessary to facilitate the effective operation, development and utilisation of the land – s 288(4)(a). However the Court still needs to take into account s 288(1) and s 287(2) matters in deciding whether or not to grant a partition. In those cases after taking into account the size and location of the blocks, the desire of the applicant and extended whānau members to create housing sites, and after hearing evidence from

[25] (2008) 127 Whangarei MB 278 (127 WH 278)

territorial and regional authority officials, I decided that partition is the best overall use and development of the land.[26]

[50] Returning to the application now before the Court I do not consider that the particular circumstances of this case can be brought within s 288(4)(b). The vesting under s 213 of the Māori Affairs Act 1953, could not provide for any particular purpose (in this case a house site) for the transfer of the interests. The mere gifting of his interests was not enough on the part of Mr Benjamin Tohiariki. He needed to have successfully brought an application pursuant to s 440 of the Māori Affairs Act 1953.

[51] Nor does this case fall within those examples in which the Court has applied s 288(4)(b). Those situations have typically involved a sole owner of a block of Māori freehold land who in their will sets out a clear intention that part of the block is to be partitioned in favour of a whānau member. Nor is this a situation in which a sole owner of a block of Māori freehold land wishes to gift part of that land to a whānau member for the purposes of creating, by partition, a housing site.

[52] Therefore I consider that the application premised on s 288(4)(b) must fail.

Is the application necessary to facilitate the effective operation, development and utilisation of the land? – Section 288(4)(a)

[53] Alternatively Mr Tohiariki submitted that if the Court was unable or unwilling to grant a partition on the basis that it would effect an alienation of land, by gift, to a member of the donor's whānau, that a partition is necessary to facilitate the effective utilisation, operation, development and utilisation of the land – s 288(4)(a) ground.

[54] All applicants for partition must satisfy the criteria set down in s 288(4)(a) *or* s 288(4)(b). My tentative view is that it is not open to an applicant if they do not meet the criteria set out in one of the subsections to then alternatively argue that they fulfil the criteria set out in the other subsection. There is an absence of precedent on

[26] See for example A20100009888, 14 Waikato Maniapoto MB 47-62 (14 WMN 47-62) and 17 Waikato Maniapoto MB 57-77 (17 WMN 57-77)

this point and I stop short of making a decision on that point. Out of deference to the arguments put before me I address those below.

[55] A number of factors were relied upon by Mr Tohiariki. The primary reason related to his financial situation and the desire for greater security. Notwithstanding that an occupation order was granted, Mr Tohiariki was unable to raise finance from his bank to fund construction of his house. The cost of constructing the house was $400,000 contributed in no small part by Mr Tohiariki having to spend approximately $80,000 on connecting sewage and electricity and the payment of Council "development contribution fees". Mr Tohiariki points to the fact that the block is now serviced by a reticulated sewage scheme and a proper power connection. Thus his fellow owners will benefit from those actions and costs which Mr Tohiariki has undertaken personally.

[56] Mr Tohiariki experienced the phenomenon common to many who wish to build on multiply owned Māori land. That is that despite being in a secure financial position, his financiers refused point blank to lend money to him to enable him to build a house. Mr Tohiariki made inquiries into the Whenua Kāinga Housing Scheme and found that he did not meet the criteria for that particular scheme. What he did was use a combination of cash he had with his bank, and utilising various unsecured loans and increased mortgages he held over other properties to finance the build. The point he makes is that he believes he was disadvantaged in that he had no reasonable ability to finance "in the normal way", that is obtain a mortgage over the block.

[57] When questioned as to whether partition was upper most in his mind when the occupation order was granted, Mr Tohiariki denied that. He indicated that at that stage he did not think an application for a partition order was necessary. Now having spent approximately $400,000 on the build, he wishes to obtain the fee simple title to the land underneath his house, then using that as security refinance and reduce his financing expenses.

[58] Mr Tohiariki points to the fact that this block is zoned residential within the Western Bay of Plenty District Council territorial authority area and suitable for

housing. The block is relatively small and although previously grazed, is not a block which is suitable for grazing or cropping. Mr Tohiariki stresses that the best possible utilisation of the block is for residential housing.

[59] Mr Tohiariki pointed to the fact that he has attempted to raise a level of awareness and activity on the block and engage with his whanaunga to take proactive responses to issues such as strategic planning, rates arrears, whānau development and the like. On this point Mr Tohiariki pointed to the applications that he had put into Court to review the operations of the trust. He has made various attempts to communicate with other owners to discuss a strategic vision for the block. He has met with the Western Bay of Plenty District Council officials concerning rates arrears and negotiated a settlement whereby rates arrears on a derelict property were removed. He sought to negotiate with the Council as to an extension of the public sewer along an adjoining road and when the Council refused to do so, he paid at his own personal expense for that to occur. Although he didn't say this outright, one gets a sense of an underlying level of frustration on the part of Mr Tohiariki with his fellow owners for displaying a lack of initiative and/or participating in any ongoing discussions concerning the future of the block.

[60] At the outset I accept the proposition that this block is well suited for housing. Its zoning is residential. As the valuation report filed in support of the application states, the block is considered to be "ripe for residential subdivision". Subdivision in a residential zone of the Western Bay of Plenty District Council is a controlled activity. In this situation where sewage reticulation is available the minimum site requirement is as little as 350 square metres net land per dwelling.

[61] I have been on a site visit to the block. I noted that the block at its western end adjoins Tauranga Harbour. At its eastern end it adjoins a public road, Seaforth Road. Having seen the block I agree that due to its size, location, availability of services including access, sewage reticulation, availability of power supply and its current zoning the best use of this block is for residential housing.

[62] Mr Tohiariki was questioned as to whether there has been any consideration among the owners of a housing scheme generally. He conceded that was possible

however in his opinion the cost in order to develop a residential development would be in the order of $6,000,000. His opinion was that financing any residential development would always be a problem.

[63] Having now spent a large sum of money in providing services to the block and building his dwelling, Mr Tohiariki wishes to rationalise his position, partition the area for which he has an occupation order and obtain security of title.

[64] I have sympathy for Mr Tohiariki's position. However much of the evidence which he put before the Court under this heading suggests a subjective approach to the requirements set out in s 288(4)(a). Is granting a single partition application to 1 out of 21 owners necessary to facilitate the effective operation, development and utilisation of the land? I do not consider that it is.

[65] The High Court in *Brown v Maori Appellate Court*[27] said that the word "necessary" is properly construed as "reasonably necessary" and that it is "closer to that which is essential than that which is simply desirable or expedient". Viewed objectively, granting a partition to Mr Tohiariki which would allow him to refinance and obtain security, whilst desirable or expedient for him personally, cannot be said to be necessary to facilitate the effective operation, development, and utilisation of the block as a whole.

[66] My view is that the test posited at s 288(4)(a) is an objective one in which the Court must take into account from an overall perspective whether the application before it is not only necessary but also facilitates the effective operation, development and utilisation of the land. For example if there had been a discussion and agreement by the owners that this block was suitable only for housing, and that a number of applications for partition were prosecuted collectively before the Court, the result might be different. However the Court would always need to know whether such applications were reasonably necessary and when viewed from an overall perspective they facilitated the effective operation, development and utilisation of the block.

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[27] [2001] 1 NZLR 87

[67] I readily accept that Mr Tohiariki has attempted to promote discussion amongst his fellow owners to develop a strategic vision for the block. That has been unsuccessful, through no fault of Mr Tohiariki's. However when viewed at its most basic level, Mr Tohiariki sought to reconnect himself with the land and with his whanaunga, and then to build a house. Notwithstanding the considerable difficulties he has had in financing the build, he has achieved his purpose. Thus again it would seem that a partition in his favour is not necessary.

[68] I also remind myself that when considering the s 288(4)(a) criteria the Court must assess whether there are reasonable alternatives to partition. One option which was not advanced by Mr Tohiariki is whether the trustees are prepared to grant him a lease. If they were and the lease was registered, a legal estate in leasehold is created – s 41 Land Transfer Act 1952. A registered lease will result in the creation of a computer interest register – ss 9 and 10 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002. It is possible, that a bank or financial institution might be willing to provide finance using the leasehold estate as security. If successful no partition is required. That is an option which does not appear to have been explored by Mr Tohiariki.

[69] As I said at the outset of this section I doubt whether an applicant can rely upon ss 288(4)(a) and (b) as true alternatives. Having said that, even if Mr Tohiariki is able to do so, I find that the requirements of s 288(4)(a) are not made out in this particular case.

Summary

[70] I find:

a) The owners have had sufficient notice of the application and a sufficient opportunity to discuss and consider it – s 288(2)(a);

b) There is not a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter – s 288(2)(b);

c) The proposed partition order does not effect an alienation of land, by gift, to a member of the donor's whānau, being a member who is within the preferred classes of alienees – s 288(4)(b);

d) The application for partition is not necessary to facilitate the effective operation, development and utilisation of the land – s 288(4)(a). As Mr Tohiariki does not satisfy the statutory prerequisites it is not necessary for me to go on and consider the requirements of ss 288(1), 287(2) and 286(1).

Decision

[71] The application is dismissed.

Miscellaneous Matters

[72] In reviewing the minutes of previous hearings I note that a minute which I prepared following the site inspection contains a spelling error. At 34 Waikato Maniapoto MB 135, second paragraph the word "affront" is used in the second line of paragraph 2. That word should read "fronts". **Accordingly I make an order pursuant to s 86 of TTWMA amending 34 Waikato Maniapoto MB 134 changing the word "affront" to "fronts".**

[73] The current trustees of both Section 1F No 1 Parish of Katikati and Section 1F No 2 Parish of Katikati are recorded as Jimmy Sidney, Kevin Patrick Tohiariki and Thomas Gardiner. During the course of the substantive hearing on 26 April 2012 evidence was given that one of the trustees, Mr Jimmy Sidney is now deceased. **Of my own motion pursuant to s 37(3) of TTWMA:**

a) **I make an order pursuant to s 239(1) of TTWMA reducing the trustees of the Katikati Lot 1F1 and Katikati 1F2 Trust upon the death of Jimmy Sydney; and**

b) **I make an order pursuant to s 239(3) of TTWMA vesting the land and assets of the trust in Kevin Patrick Tohiariki and Thomas Gardiner as responsible trustees.**

Pursuant to Rule 7.5(2)(b) of the Māori Land Court Rules 2011 these orders are for immediate release.

[74] I draw to the attention of Mr Tohiariki that there is no s 18(1)(a) application before the Court to determine the ownership of the dwelling that he has built. That is a matter which he should consider.

[75] During the course of reviewing this file, it was drawn to my attention by the Case Manager that on 15 June 1988 the Māori Land Court made a recommendation pursuant to s 439 of the Māori Affairs Act 1953 that an area be set aside as a Māori reservation for the use and benefit of the Hirini Whānau Trust as a place of recreation, papakāinga and a place of historical interest.[28]

[76] The order is conditional upon the applicant providing a plan of the area to be set aside. It appears that the applicant Mr Haimona Gardiner did provide a handwritten sketch plan to the Māori Land Court on or about 14 November 1989.

[77] The file (51125) records that the recommendation was sent to the Iwi Transition Agency on 22 January 1990. The next communication is dated 25 January 1994 stating as follows:

> Before we are unable to forward the Recommendation to Wellington for gazetting, we need a surveyed map with the reserve clearly shown on it.
>
> Please note that the map you have submitted to us (copy attached) is not sufficient enough to support your application.
>
> Please forward the above as soon as possible.

[78] No further action appears to have been taken on the part of the applicant in that matter and/or the Māori Land Court.

[28] 46 Tauranga MB 282 (46 T 282)

[79] The recommendation made by the Court was not conditional upon a "surveyed map" being prepared. Precisely where that requirement came from is unclear on the face of the file, that is whether it was something insisted upon by the Iwi Transition Agency or staff of the Māori Land Court. On the face of it, the conditional recommendation made by the Māori Land Court on 15 June 1988 appears to have been satisfied and **I direct the Registrar of the Māori Land Court at Hamilton to forward a copy of the recommendation together with the plan provided by Mr Haimona Gardiner to the Chief Executive of Te Puni Kōkiri for gazettal. I also direct the Registrar of the Court to keep Mr Kevin Tohiariki and Mr Thomas Gardiner informed of any developments and progress in that matter**.

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

S R Clark
JUDGE