IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20150006323

UNDER	Section 43, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Whakarewarewa 2B Block – Rehearing of applications A20150004545 and A20150004856
BETWEEN	KIRI POTAKA-DEWES, KAREN WALMSLEY AND MEREHEENI HOOKER Applicants
AND	KATARAINA KEREAMA AND DONNA HALL Respondents

Hearings:	8 April 2016 8 June 2016 (Heard at Rotorua)
Judgment:	15 June 2016

RESERVED JUDGMENT OF JUDGE C T COXHEAD

Introduction

[1] I heard this matter finally on Wednesday 8 June 2016 and indicated that I hoped to complete a decision within a week and then reconvene the Court to inform the parties of my decision.[1] I have decided however to simply complete the decision and then have the Deputy Registrar provide the decision to all interested parties.

[2] The Court has before it an application to rehear two applications for the transfer of shares. Both applications were heard by Judge Harvey on 3 September 2015 and orders made accordingly.[2] The relevant applications are as follows:

(a) An application by Mrs Kataraina Kereama transferring part of her shares in Whakarewarewa No. 2B and Whakarewarewa No. 3 Section 1B Reserve to her children and grandchildren. There were fifty people in total each receiving a portion of Mrs Kereama's shares.

(b) An application by Ms Donna Hall transferring part of her shares in Whakarewarewa No. 2B and Whakarewarewa No 3 Section 1B Reserve to two whānau trusts.

[3] The applicants in this matter have taken issue with the way in which the transfer of shares influenced the results of an election of trustees of the Whakarewarewa blocks. At the core of their argument are claims that Mrs Kataraina Kereama and Ms Donna Hall, in transferring their shares, have manipulated the number of votes they were able to receive in the election of trustees of the Whakarewarewa blocks.

[4] The applicants also claim that previous comments made by me during other proceedings show that I expressed disfavour to the transfer of shares for the purpose of increasing the vote for an impending trustee election.

---

1 An earlier hearing of the matter was also held on 8 April 2016 at 139 Waiariki MB 69-74 (139 WAR 69-74) where the application was heard and adjourned to allow other interested parties to participate.

2 127 Waiariki MB 267-273 (127 WAR 267-273), 127 Waiariki MB 261-263 (127 WAR 261-263).

[5] The issue for the Court is whether a rehearing of the applications should be granted.

Scope of the application

[6] At the outset, it should be made clear the relevant scope of this application. It is not an application concerning the election of trustees or the appointment of trustees to the Whakarewarewa blocks. The application before the Court is one of rehearing, and is confined to the issue set out above of whether a rehearing should be granted in relation to the transfer of shares applications of Mrs Kereama and Ms Hall.

Applicants' submissions

[7] The grounds in support of the application for rehearing are as follows:

(a) Information pertaining to the election of trustees to Whakarewarewa 2B block was not made available to the Court at the hearing for the transfer of shares applications;

(b) The transfer of shares was for the sole purpose of gaining more votes;

(c) The Court should have been made aware that the transfer of shares would advantage Ms Hall and Mrs Kereama in the election of trustees, and would disadvantage the applicants, who were also standing for election;

(d) The hearing was not publicly notified and the applicants therefore did not know the transfers were about to take place; and

(e) The applicants and other owners did not have an opportunity to express their concerns and object to the transfers. The Court was therefore deprived of their input.

[8] The applicants submit that the Court was not apprised of all the facts pertaining to the two applications, which they claim would have influenced the outcome of the Judge's decision.

Mr Wihapi's submissions

[9] Mr Anthony Wihapi supports the rehearing application. Mr Wihapi filed a letter and submission setting out his concerns, which in summary are:

(a) The transfer of shares applications allowed manipulation of the voting system in the Whakarewarewa block elections; and

(b) While his whānau have waited patiently since 2014 for their succession applications to be completed, the transfer of shares applications appear to have been given priority.

[10] Mr Wihapi also made a number of comments opposing the appointment of Ms Hall to the Trust. They are in the main irrelevant to this rehearing application and are more appropriately raised before the Judge in the appointment of trustees matter.

[11] At the hearing, Mr Wihapi confirmed to the Court that he had no issue with the transfers being made. His concern was the way in which the transfers were made and how they manipulated the voting that took place for the Whakarewarewa trustee elections.

Submissions of Ms Hall and Mrs Kereama

[12] Ms Hall made submissions in writing opposing the application on the grounds that:

(a) The shares she has divested to her immediate family are her shares and the applicants in this case have no interest in those shares;

(b) Mrs Kereama made a deliberate decision to gift shares to her numerous children, grandchildren and great grandchildren during her lifetime, to avoid complications of succession; and

(c) There are good reasons for transferring shares now as changes to Te Ture Whenua Māori Act 1993 create uncertainty around a person's ability to gift their shares.

[13] At the hearing, a number of people spoke in support Ms Hall and Mrs Kereama. Their point in regards to Mrs Kereama was that this was a kuia who was gifting her shares to her children and mokopuna while she was alive and there was nothing wrong with it.

The Law

[14] A rehearing may be sought pursuant to s 43 of the Te Ture Whenua Māori Act 1993 ("the Act") which provides:

> **43 Rehearings**
>
> (1) Subject to subsection (2) of this section, on an application made in accordance with the rules of Court by any person interested in any matter in respect of which the Court has made an order, the Judge by whom the order was made or any other Judge may order a rehearing upon such terms as the Judge thinks reasonable, and in the meantime may stay the proceedings.
>
> (2) A rehearing under this section shall not be granted on an application made more than 28 days after the order, unless the Judge is satisfied that the application could not reasonably have been made sooner.
>
> (3) An application under this section shall not operate as a stay of proceedings unless the Judge so orders.
>
> (4) The rehearing need not take place before the Judge by whom the proceedings were originally heard.
>
> (5) On any rehearing, the Court may affirm its former determination, or may vary or annul that determination, and may exercise any jurisdiction that it could have exercised on the original hearing.
>
> (6) When a rehearing has been granted, the period allowed for an appeal to the Maori Appellate Court shall not commence to run until the rehearing has been disposed of by a final order of the Court.

[15] Rule 8.1 of the Māori Land Court Rules 2011 ("the 2011 Rules") also governs rehearing applications and provides:

> **8.1 Rehearing**
>
> (1) An application for a rehearing under section 43 of the Act may be made—
>
> (a) during the sitting in which the decision in the matter to be reheard was given, in which case the application may be made in open court or in writing to the clerk of the Court; and
>
> (b) at any other time, in writing to the Registrar.

(2) The application must set out the grounds relied upon.

(3) The application may be considered and determined without notice in the Panui (except to the extent that it must be notified under rule 6.6), without notice to any party, and without any appearance by the applicant if the Court is satisfied that, on the face of the application, there has been a breach of procedure or natural justice so serious that an order of rehearing is clearly warranted.

(4) A matter may be reheard by the same Judge who first heard it or by any other Judge, and may be reheard at the same sitting or at any other sitting of the Court.

(5) Where the rehearing takes place at any other sitting of the Court, the original application must be notified and processed in accordance with these rules.

[16] The principles concerning rehearing applications have been outlined in the Māori Appellate Court decision *Henare v Māori Trustee – Parengarenga 3G*. There the Court laid out several general principles concerning rehearing applications:[3]

[18] Section 43(1) contemplates that the Court has a discretion to grant a rehearing in circumstances which might otherwise give rise to a miscarriage of justice.

[19] While the circumstances in which a rehearing may be granted are many and varied, Courts have held that a rehearing is justified in cases where:

a) A judgment has been obtained by any unfair or improper practice of the successful party to the prejudice of the opposite party; or

b) Material evidence has been discovered since the hearing which could not reasonably have been foreseen or known before the hearing; or

c) Any witness has been guilty of such misconduct as to affect the result of a hearing; or

d) A rehearing appears necessary in order to avoid possible injustice to the applicant and there is no injury or prejudice to the opposing party.

[20] An application for a rehearing will not be allowed merely for the purposes of repairing omissions in the presentation of an earlier case or for reshaping that case.

---

[3] *Henare v Māori Trustee – Parengarenga 3G* [2012] Māori Appellate Court MB 1 (2012 APPEAL 1).

[21] Even where it is established that there has been a miscarriage of justice such that a rehearing is justified, the jurisdiction is discretionary, and a Court may very occasionally consider it inappropriate to grant a rehearing.

[22] The appellant submitted that circumstances in which it would be appropriate to allow a rehearing should be limited to:

a) Applications by parties who were not afforded the opportunity to appear and to be heard in respect of the orders; and

b) Applications made on the basis of further material or evidence which was not previously available by a party who used reasonable diligence.

[23] That submission aligns with the Māori Appellate Court decision of *Edwards v Whakatohea Māori Trust Board*, where the Court stated:

> Without going into a treatise on the grounds for a rehearing it can be said that there are normally two grounds which will substantiate an application for rehearing. The first is some procedural defect which denies to one party his full right to natural justice. The second is the availability of further evidence which is material to the proceedings and could not reasonably have been adduced by the applicant for rehearing at the original hearing.

[24] While a rehearing will normally be granted where there are procedural defects denying natural justice and in instances where further evidence becomes available, these are not the only grounds for a rehearing.

[25] In terms of section 43(1), the ultimate question in the case of an application for a rehearing is whether the applicant has established circumstances which, in their totality, amount to a miscarriage of justice that justifies a rehearing. The onus is on the applicant to establish circumstances having those attributes.

[17] Ultimately, the issue for the Court is whether the circumstances give rise to a miscarriage of justice that justifies a rehearing.

Discussion

Previous comments

[18] Before dealing with the substantive issue, I address the submission of the applicants regarding previous comments I made. The applicants claim that I expressed disfavour regarding the transfer of shares for the purpose of increasing votes at a pending election.

[19] However, that contention is not quite correct. The comments the applicants refer to are comments made in relation to the application for the appointment of trustees to the Whakarewarewa blocks. With regard to that application, I was asked to delay the election hui to allow applications for the transfer and gifting of shares and succession to be completed.

[20] In those particular circumstances I objected to any delay and therefore did not allow the hui to be postponed in order for people to transfer or gift shares for voting purposes, or to attend to successions. However, there was nothing preventing people from completing their applications before the elections took place. The gifting and transfer of shares for voting purposes is not uncommon in our Court and there are often positive aspects in terms of allowing people to participate in land matters.

[21] I consider therefore that there is no substance to these arguments put forward by the applicants. I now move to consider the substantive issue.

Should a rehearing be granted?

Is the application made within time?

[22] The first issue in terms of this application, is whether it was made within the 28 day time limit. It clearly was not. The original applications were heard and orders issued by the Court on 3 September 2015. The application for rehearing was not filed until 5 November 2015.

[23] However, in terms of the delay, the applicants noted:

(a) They did not become aware of the applications until 27 October 2015;

(b) On becoming aware of the applications, they then immediately looked to file an application on 30 October 2015 but were unable to as the Court was closed for the 150 year celebrations of the Court; and

(c) The applicants subsequently met with Court staff and filed the application on 5 November 2015.

[24] Given the explanations offered by the applicants, I am satisfied that the application for rehearing could not reasonably have been made sooner.

Should the applicants have received notice of the transfer of shares applications?

[25] The current application is premised on the basis that the applicants did not receive notice of the transfer of shares applications.

[26] Natural justice and the Māori Land Court rules require that notice should be given to a "person materially affected" by a proceeding. Rule 2.5(1) of the 2011 Rules defines the term "person materially affected" to be "any person whose rights or interests in any property may be materially affected by a proceeding". Form 1 contained in the 2011 Rules provides for the applicant to identify each person that might be affected by an application.

[27] The question then becomes whether the applicants are persons materially affected by the transfer of shares applications such that they required notice of those applications.

[28] In *Northcroft v Northcroft – Tauhara Middle 4A 1L 1B 1A*, the Māori Appellate Court made general comments in regard to notice of applications for the transfer of shares. The Court noted:[4]

> **Service/Notice of Applications and Hearings**
>
> We suggest that the value of the gift, the relationship of the donor and donee the age of donor and the views of the donor's immediate family are all important aspects when directions for service are given. A low value gift share to a child or sibling may not require the wider family being brought into the matter, contrast a gift of very valuable interests by an aged donor to one of many children, this situation appears to demand the other children having knowledge of what is contemplated thus allowing for their views (if any) to be put before the Court. Essentially we believe these considerations are at the discretion of the Judge.

[29] The question of notice of an application to transfer shares per s 164 of the Act was considered recently by the Chief Judge in *Skinner v Harawira – Estate of Maryanne Harawira*.[5] In terms of notice to those materially affected the Chief Judge noted:

---

4 *Northcroft v Northcroft – Tauhara Middle 4A 1L 1B 1A* (1995) 9 Waiariki Appellate MB 49 (9 AP 49) at 53.

5 *Skinner v Harawira – Estate of Maryanne Harawira* [2016] Chief Judge's MB 207 (2016 CJ 207).

> [34] What is clear is that the Preamble, ss 2 and 17 require that the interests of those materially affected by such transfers must be taken into account. To do so requires notice to at least the children of the donor. In general a judge should at the least consider the gift's value, the relationship of the donor and donee, the age of the donor and the views of the donor's immediate family.

[30] In that case, the only child of the deceased had not received notice of an application transferring shares of his mother. The Chief Judge found that as the applicant would potentially be disinherited by his mother's decision to vest the land in others, he should have been notified and given an opportunity to put his views before the Court. However, the Chief Judge also noted that if notice had been given the substantive outcome may have ultimately been the same, given the nature of such applications:

> [36] While it is true that the substantive outcome of the application may or may not have been the same, he was still entitled to receive notice and be heard on the application. The reason why the substantive outcome may have been the same is because applications for vesting orders are not lightly refused, especially when they reflect the alienor's wishes, and are between close whānau. This was and is the general approach to such applications even where they may result in the gifting of shares in unequal proportions to children of the alienor.

[31] These authorities demonstrate that in applications for the transfer of shares, the people who are materially affected are generally whānau of the donor and whānau of the donee, given that a transfer of shares may directly affect the ability of those belonging to such groups to inherit those shares. Accordingly, it is those people who should receive notice of the hearing.

[32] In my view the applicants were not persons materially affected by the transfer of share applications in question. They have no interest in Ms Hall or Mrs Kereama's shares and were not entitled to those shares on gifting. While the applicants argued that the implication of the transfers was that voting for the Whakarewarewa trustee elections was affected, that is merely a by-product of the transfer of shares applications, rather than the substantive part of the application which sees the transfer of interests from one person to another.

[33] In the present situation the applicants contend that the transfer applications proceeded, that the outcome of those applications affected voting, that this was a manipulation in terms of generating further votes, that the effect was to their disadvantage, and that they should therefore have been given notice of those applications.

[34] Such argument has more weight when considered retrospectively. However, at the time the orders were made for the transfer of shares, the outcome of the election voting could not be known, nor could the actual affect on voting be predicted. The requirement of notice in these types of applications does not in my view extend to all shareholders in the same land block, or all people who may be influenced by how the donees may vote at an election. Those owners could equally have voted another way. Accordingly, at the relevant time the applicants were not "persons materially affected" and therefore did not need to be notified of the hearing.

[35] In any case, the applicants have not clearly demonstrated that the transfer of shares did in fact affect voting at the trustees' election. As noted in the application, shares were gifted to the block "with the *very high probability* of gaining 30+ votes in the case of Kaa Kereama and Donna Hall a further 3 more votes, accruing to then a *probable* 33+ votes". Although it was possible that those who received shares from Ms Hall and Mrs Kereama could have voted as owners and affected the outcome at the election hui, the applicants did not present any evidence to show that those owners actually voted at the hui, let alone that they voted for either Ms Hall or Mrs Kereama.

Would the applicants' appearance at the hearing have made a difference?

[36] The applicants argue that if they had been aware of the transfer of share applications they could have appeared at the Court hearing and expressed their concern and objection to the applications. They further contend that such objection may have influenced the ultimate outcome of the Judge's decision to grant the orders on those applications.

[37] The nature of applications for transfers of shares was considered by the Māori Appellate Court in *Phillips v Ashby*, where the appellants argued in relation to a s 164 application that tikanga required a hapū to discuss any dealings over the land, and it was not simply a question of the legal owner dealing with the land as they saw fit. The Court noted:[6]

> While we accept that it is common place for many iwi and hapū to observe a process of consultation where the transfer of interests is to move outside of the kin

[6] *Phillips v Ashby – Oromahoe 17B2* (2006) 6 Taitokerau Appellate MB 271 (6 WHAP 271) at [16].

> group, we can find no evidence or authority for the proposition that vestings between closely related whānau, in this case siblings, requires the consent of hapū. Nor does the Act provide support for the Appellant's position. On the contrary, we consider transfers of shares between siblings and close family members are, except in the rarest of circumstances, a private matter between those individuals and their immediate family members only.

[38] Where an applicant is determined to make a gift of shares to one of several children then, in the exercise of the Courts discretion, there would need to be compelling reasons for the Court to ignore the owner's wishes.

[39] I am supported in this view by the recent Māori Appellate Court decision *Matthews v Matthews – Estate of Graham Ngahina Matthews*, where the Court considered the exercise of its discretion in relation to transfer of share applications, essentially noting that the transferring of shares is a whānau matter:

> [71] Judge Harvey concluded that taking into account the Preamble, ss 2 and 17, s 164 did not provide the respondents with a right of veto where a parent seeks to gift shares between children. Judge Harvey noted that counsel accepted that the Act does not say that on gifting, the donor must always make a gift of shares in equal proportions to all the donor's children. We concur.
>
> [72] Judge Harvey went on to conclude:
>
> > [58] While it will often be highly desirable that such an outcome is achieved where this is possible, there is no express requirement in the Act making this mandatory. The short point is that, where an applicant is determined to make a gift of shares to one of several children only, then, in the exercise of the Court's discretion, there would need to be a compelling reason to ignore the ascertaining and giving effect to an owner's wishes. That said, while the Court is not bound to refuse an application simply because of objections, where it is considered that those objections have merit then it is within the Court's discretion to decline a transfer, in whole or in part.

[40] As noted earlier, this application is not about whether Judge Harvey would have ruled differently in relation to the transfers of shares if he knew that there was to be an election, and the outcome of those applications would result in one party receiving an advantage and another a disadvantage. However, even if these matters were put before Judge Harvey it is difficult to see how the applications could have been dismissed or even adjourned on the basis that the transfers would influence voting at a meeting.

[41] In the present case Mrs Kereama gifted shares to her children and grandchildren and Ms Hall gifted shares to her immediate whānau in a whanau trust. Even if the applicants had appeared at the hearing and it could be established that the sole purpose of

the transfers was to secure more votes, a fact which is far from being established, it is difficult to see how Judge Harvey could have declined applications between close family members on the basis of a voting outcome of elections yet to be held and the potential affect on people outside of that close whānau relationship.

Has the rehearing criteria been satisfied?

[42] A rehearing will normally be granted where there are procedural defaults denying natural justice and in circumstances where further evidence becomes available. In this case there were no procedural defects and in my view there is no new material evidence discovered since the hearing which could not reasonably have been foreseen or known before the hearing.

[43] The applicants essentially claim that they were denied natural justice as they were not given notice of the applications and the transfers resulted in a disadvantage to them in terms of trustee elections to the relevant land blocks. However, the applications for the transfer of shares were transfers between close whānau members and were therefore private matters between those individuals and their immediate whānau only. The applicants have no interest in those shares and were not persons materially affected by the transfer of shares applications. As such there was no requirement that they receive notice of those applications.

[44] The applicants have also failed to show that, even if they had received notice of the applications and appeared before the Court, that the basis of their objections to the applications would have affected the exercise of the Court's discretion to grant the orders it did.

[45] Accordingly I am not satisfied that the applicants have established circumstances which in their totality amount to a miscarriage of justice such that a grant of rehearing should be made in this application.

Decision

[46] The application is dismissed.

Pronounced at 11.am in Rotorua on Wednesday the 15th day of June 2016

C T Coxhead
JUDGE