IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150003016

UNDER	Section 289, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Part Nukuroa 2A3C2 and Lot 2 DP37299
BETWEEN	SAIDIE ANGELL Applicant

A20140010005

UNDER	Section 289, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Part Nukuroa 2A3C2 and Lot 2 DP37299
AND BETWEEN	JEANETTE SPENCE Applicant

A20150006643

UNDER	Section 289, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Part Nukuroa 2A3C2 and Lot 2 DP37299
AND BETWEEN	DOREEN EDWARDS Applicant

Hearing: 28 April 2015, 105 Taitokerau MB 196 – 218.
26 November 2015, 122 Taitokerau MB 3 – 43.
3 May 2016, 129 Taitokerau MB 167-169 (Site Inspection)
27 January 2017, 148 Taitokerau MB 116-165
20 February 2019, 187 Taitokerau MB 283-292
(Heard at Whangārei)

Appearances: Mr C Hockly for S Angell

Judgment: 22 August 2019

JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Part Nukuroa 2A3C2 and Lot 2 DP 37299 are adjoining blocks of Māori freehold land located in Oruawharo. Three applications have been filed seeking a combined partition of the applicants' interests in these blocks. The issue in this case is whether the combined partitions should be granted.

Background

[2] Part Nukuroa 2A3C2 ("Nukuroa") is 62.615 hectares in size. It has 44 beneficial owners who hold unequal shares as tenants in common. Lot 2 DP 37299 ("Lot 2") is 23.9523 hectares in size. It has 43 beneficial owners who hold unequal shares as tenants in common.

[3] Both blocks are administered by the Eruera Ahu Whenua Trust. The trustees are Chris Anthony Cooper, Ann Edwards, Donnie Edwards, Irenee Spence and Thomas de Thiery.[1] The beneficial ownership in both blocks is almost identical. The only difference is that in Lot 2, Doreen Edwards has vested all of her shares in the Doreen and Jack Eruera Whānau Trust.[2] In Nukuroa, Doreen has vested the majority of her shares in that whānau trust but has retained 0.01 share in her personal name.

[4] While separate titles have issued, in practical terms, both blocks are administered as a single unit. A lease over both blocks has been granted to Farr View Limited, a local farming company.

The partition applications

[5] As the three partition applications are closely aligned, they have been considered together.

[6] The first application is brought by Jeanette Spence on behalf of the Jeanette Eruera Spence Whānau Trust ("the Spence application"). The second application is brought by Saidie Angell on behalf of the Saidie Eruera Angell Whānau Trust ("the Angell

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1 137 Taitokerau MB 197-202 (137 TTK 197-202).
2 135 Taitokerau MB 225-227 (135 TTK 225-227).

application"). The third application is brought by Doreen Edwards on behalf of herself and the Doreen and Jack Eruera Whānau Trust ("the Edwards application").

[7] All three applications seek a partition of 6.4 hectares each. The proposed partition areas are adjacent to each other running along the south-western boundary of Lot 2 and down to the southern boundary of Nukuroa. Access will be provided via a proposed roadway running along the north-eastern boundary of the partition areas and connecting to Oruawharo Road.

[8] The applicants seek a combined partition. They apply to combine their interests in Nukuroa and Lot 2, and to partition those interests out as above. If granted, separate titles will issue for the three partitioned areas. The balance of Lot 2 and Nukuroa will be combined into a single new title in favour of the residue owners.

Legal principles

[9] I have jurisdiction to grant a partition under Part 14 of Te Ture Whenua Māori Act 1993 ("the Act"). Section 298(1) of the Act provides for a combined partition, which allows me to treat separate areas of land owned by Māori, as a single area owned in common, when granting a partition.

[10] In *Hammond – Whangawehi 1B3H1,* the Māori Appellate Court took the following approach to partition applications: [3]

> [15] The Court has exclusive jurisdiction to grant partition orders in relation to Māori freehold land in accordance with Part 14 of the Act. That jurisdiction is discretionary. The Act directs the Court to exercise its discretion in three steps.
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> [16] First, the statutory prerequisites must be satisfied. The Court is expressly prohibited from granting partition if these prerequisites are not satisfied. There are, in essence, three (we do not look at the situation where the land is vested in an Incorporation):
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> > Section 288(2)(a): The Court must be satisfied that the owners have had "sufficient notice of the application and sufficient opportunity to discuss and consider it."
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> > Section 288(2)(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."

[3] *Hammond – Whangawehi 1B3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185).

> Section 288(4)(a) and (b): 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 whanau, being a member who is within the preferred classes of alienees."
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> [17] In *Brown v Māori Appellate* Court the Hight Court clarified (para 51) that "necessary" in section 288(4)(a) is properly to be construed as "reasonably necessary" and that it is "closer to that which is essential than that which is simply desirable or expedient."
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> [18] Second, if the statutory prerequisites are satisfied, the Court must then address the mandatory considerations in section 288(1). That section requires the Court to have regard to the opinion of the owners as a whole, the effect of the proposal on the interests of the owners, and the best overall use and development of the land.
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> [19] Third, the Court is to exercise its general discretion mindful that it may refuse to exercise that discretion if it would not achieve the principal purpose of Part 14 of the Act: section 287(2). The principal purpose is expressed in section 286(1) to be "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 the land."
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> [20] At all times the Court must have regard to the principles set out in the preamble to the Act, section 2 and section 17: *Brown v Māori Appellate Court* (para 66).

[11] I adopt that approach.

Have the owners had sufficient notice of the application, sufficient opportunity to discuss and consider it and is there sufficient support?

[12] Edmond Angell is a trustee of the Saidie Eruera Angell Whānau Trust and is Saidie Angell's son. He gave evidence that he and other whānau members established the Eruera Whānau Facebook page. The page has 82 members and is a common forum where all members of the Eruera whānau, who are the owners in these blocks, post notices and discuss whānau issues. Mr Angell advised that two meetings have been held concerning the partition applications. These were advertised on the whānau Facebook page. In addition to that, the applicants have notified owners directly by post, telephone, Facebook messaging and in person. Mr Hockly appeared on behalf of Ms Angell. He filed a helpful summary which demonstrates that 87 per cent of the beneficial owners support the proposed partition.

[13] While the applicants have not publicly notified the applications in a newspaper, I am satisfied that the Eruera Whānau Facebook page has a wide reach and is the common forum that this whānau uses to notify each other about whānau and land matters. I also take into account the direct notice the applicants have given to those owners for whom they were able to contact. I am satisfied that the owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it.

[14] I am also satisfied that there is a sufficient degree of support for the application. There is no requirement for unanimous or even majority consent for this pre-requisite to be met. Rather, I have to consider what is sufficient having regard to the nature and importance of the matter. Support from 87 per cent of the beneficial owners in these blocks is significant on any assessment.

Is the partition necessary to facilitate the effective operation, development and utilisation of the land?

[15] Before I can grant the partitions, the applicants must demonstrate that the partitions are necessary to facilitate the effective operation, development and utilisation of the land. Necessary means reasonably necessary. In *Brown v Māori Appellate Court,* the High Court determined: [4]

> The Court is not required to conclude in an absolute sense that there is no other way. But the test is not a light one. Necessity is a strong concept. What may be considered as reasonably necessary is closer to that which is essential than that which is simply desirable or expedient.

[16] In *Reid v Trustees of Kaiwaitau 1 Trust,*[5] the Māori Appellate Court took the following approach:

> [13] The test in this case must therefore be whether there exists any reasonable alternative to partition in terms of achieving the effective operation, development and utilisation of the land.
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> [14] In addition, as the High Court explained in the *Brown* case, Part XIV is not a code. Regard must also be had to the two-pronged purpose of the Act as reflected in the preamble, s2 and s17 – that is the retention of Māori land and the facilitation (in various formulae) of its use, occupation, management and utilisation.

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4 *Brown v Māori Appellate Court* [2001] 1 NZLR 87 at 96.
5 *Reid v Trustees of Kaiwaitau 1 Trust* (2006) 34 Gisborne Appellate MB 168 (34 APGS 168).

> [15] It can be seen at once that partition is treated under the Act as of being the utmost gravity – akin in some ways to alienation. This sea change in attitude from the Māori Affairs Act 1953 to Te Ture Whenua Māori Act 1993 reflects an acceptance by the legislature that title fragmentation through partition is contrary to Māori economic and cultural interests and should not now be encouraged if there are reasonable alternatives to it. The bar has been set intentionally high. We turn now to consider the various requirements in turn.

[17] I adopt that approach. I first consider the respective arguments for each application before deciding whether the partitions are necessary.

The Spence application

[18] Irenee Spence gave evidence on behalf of her mother Jeanette. Irenee is also a trustee of the Jeanette Eruera Spence Whānau Trust. She advised that she and her family are seeking a partition so that they can build housing and live on the block. She confirmed they are not seeking to take a mortgage against the land to secure loans to build the houses, rather they will be raising finance through other means.

[19] I raised with Ms Spence whether applying for an occupation order is a reasonable alternative to enable her and her whānau to achieve this. Ms Spence advised this is not a reasonable alternative because once they die, the occupation order cannot be passed on to future generations. She also contends that the trustees of the ahu whenua trust may try to interfere with their occupation of the land.

[20] I do not accept this argument. An occupation order may be for a fixed term or may be permanent and can pass by succession.[6] Once granted, the holder of the occupation order is entitled to exclusive use and occupation of that area. Even where there is an ahu whenua trust responsible for administering the wider block, the trustees cannot interfere with the exclusive use and occupation of the area set aside by the occupation order.

[21] Ms Spence further argued that the trustees of the ahu whenua trust could apply, at some time in the future, to cancel the occupation order. That is possible, but that is not to say that such an application would be successful. All orders, including partition, are

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6 Te Ture Whenua Māori Act 1993, ss 328, 329.

capable of challenge.[7] The possibility of such a challenge does not render any alternatives as unreasonable.

The Edwards application

[22] Jack Edwards gave evidence on behalf of his mother Doreen. Jack is also a trustee of the Doreen and Jack Eruera Whānau Trust. He advised that he and his whānau are seeking a partition to live on the land, and to farm the proposed partition area.

[23] As with the Spence application, the Edwards whānau can apply for an occupation order to allow them to live on the block. This is a reasonable alternative to partition.

[24] The proposed partition area sought by the Edwards whānau is the most undeveloped part of both blocks. It is covered in scrub and has steep terrain.[8] Developing this land for farming, or housing, would require significant investment. Mr Edwards advised that they will not be taking out loans to clear and develop the land. He provided little evidence to demonstrate how he and his whānau intended to clear, develop and farm this area. It is not clear that the proposed farming of this area is realistic or viable.[9]

[25] In addition to this, if the Edwards whānau did want to farm this area, they could seek a lease from the ahu whenua trust to do so. Once again, this a reasonable alternative to partition.

The Angell application

[26] Mr Angell gave evidence that he and his whānau are seeking a partition for the following reasons:

(a) To build two houses for him and his mother to live in;

(b) To establish additional housing (up to eight extra houses) which they can rent out to other whānau members, or failing that, to strangers; and

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7 Te Ture Whenua Māori Act 1993, ss 44 – 48.
8 See 129 Taitokerau MB 167–169 (129 TTK 167-169).
9 See *Reid v Trustees of Kaiwaitau 1 Trust* (2006) 34 Gisborne Appellate MB 168 (34 APGS 168) at [22].

(c) To grow crops and operate a general store.

[27] As with the earlier two applications, an occupation order is a reasonable alternative to facilitate the occupation of the land. Mr Angell advised that they are seeking loans from Kiwibank under the Kainga Whenua Scheme to enable them to build. Importantly, this scheme provides that the loans are secured against the house not the underlying land. Mr Angell and his whānau are still able to obtain these loans through the grant of an occupation order rather than a partition.

[28] Mr Hockly argued this is not a reasonable alternative as to obtain a Kainga Whenua loan the house must be on piles, so it is removable. He contends this affects the size of the house and makes it a temporary dwelling rather than a permanent one.

[29] I do not accept this argument. The fact that a house is capable of removal does not mean that it is a temporary structure. There are many permanent houses both on Māori freehold land and General land which are built on piles. There is no evidence to show that a Kainga Whenua loan, or a house on piles, will not allow the Angells to build the type of house they are seeking. To the contrary, Mr Angell has made inquiries with Kiwibank and said that obtaining a Kainga Whenua loan is their preferred option. This demonstrates that using a Kainga Whenua loan to build a relocatable house, which can be achieved with an occupation order, is a reasonable alternative.

[30] Mr Angell gave further evidence that a Kainga Whenua loan is not available to build rental properties. As such, this scheme cannot be used to build the additional eight houses they wish to construct to be rented to family members or to strangers. Mr Angell advised that, while it is not their preference to do so, if they are unable to raise funds any other way they would need to obtain a loan to be secured by a mortgage against the land to build the rental properties. Mr Hockly submits that a partition is necessary to facilitate this development so that the whole of the land is not placed at risk through any such mortgage.

[31] I accept that it may not be appropriate for an individual owner to take out a loan, secured by a mortgage against the whole of the block, for a personal development. This would place the whole block at risk for the benefit of an individual owner or owners. However, I do not consider that a partition is necessary to facilitate a development of this

kind. Occupation orders can be utilised to facilitate the occupation of the land by the Angell whānau. If there is merit in establishing commercial or rental properties on the land, this can be pursued by the trustees of the ahu whenua trust. This would allow the benefits of such a development to accrue for all owners in the block, not just the Angell whānau. The same applies to the proposed cropping or the establishment of a general store.

[32] To the extent the Angell whānau wish to pursue this themselves, separately from the rest of the owners, they could seek a lease from the trustees of the ahu whenua trust. If loans were required to facilitate the development, these could be secured against the leasehold estate rather than the fee simple estate. This would mean that the underlying land would not be placed at risk. There is no evidence to demonstrate that such a leasehold estate would provide insufficient security to secure such loans.

[33] Mr Angell gave further evidence that they cannot facilitate these plans under the ahu whenua trust as the trustees are dysfunctional. He contends the trustees have:

(a) Failed to perform their duties;

(b) Failed to secure trust monies;

(c) Failed to pay rates;

(d) Failed to make sound business decisions; and

(e) Failed to adhere to Court directions.

[34] Mr Angell contends this demonstrates that undertaking these developments under the umbrella of the ahu whenua trust is not a reasonable alternative. These allegations are denied by Thomas de Thierry, one of the responsible trustees for the ahu whenua trust.

[35] It is not necessary, or appropriate, in this proceeding, to determine whether these allegations are true. Even if the trustees are failing in their duties, there are a number of remedies available. This includes filing an application to review the trust, to enforce the trustees' obligations, or to remove the trustees for cause. No such applications have been

filed. When I asked Mr Angell why they have not taken these steps he responded that they have been focussing on the partition application.

[36] To the extent the trust is not operating efficiently or effectively, there are reasonable alternatives available to address these issues. A partition is not necessary to do so.

Are the partitions necessary?

[37] For these reasons, I am not satisfied that the proposed partitions are necessary to facilitate the effective operation, development and utilisation of this land. Reasonable alternatives exist which these applicants can pursue. I accept that those alternatives are not the applicants' preferred option. It is clear that they want to separate themselves from the ahu whenua trust, and the other owners, and undertake these developments themselves, without the involvement or influence of others. I consider that the proposed partitions are desirable, perhaps even expedient, but they are not necessary.

[38] As the applicants have not satisfied this statutory prerequisite, these applications must fail. It is not necessary to consider the remaining factors.

Decision

[39] The applications are dismissed.

Pronounced in open Court in Whangārei at 4:50pm on Thursday this 22nd day of August 2019.

M P Armstrong
JUDGE