

Hei tīmatanga kōrero*Introduction*

[1] Sandra Logan owns a farm in Ōtane, Hawkes Bay. The farm is made up of four separate parcels of land. One of those parcels is Māori freehold land, being Patangata 2F Section 2B, comprising 37.1 hectares (“Patangata 2F 2B”). Sandra Logan is the sole owner of this block.

[2] Sandra Logan wishes to sell her farm. She tendered the farm between 7 October 2021 and 11 November 2021 and accepted a tender to purchase the farm for \$3,300,000 plus GST by counter-signing a sale and purchase agreement on 12 November 2021 (the “sale and purchase agreement”). Because Patangata 2F 2B is Māori freehold land, Sandra Logan has applied to the Māori Land Court for confirmation of the sale and purchase agreement under s 151 of Te Ture Whenua Māori Act 1993 (“the Act”). The sale is conditional on Ms Logan obtaining this confirmation.

[3] As Māori freehold land, the sale of Patangata 2F 2B is subject to a right of first refusal in favour of various classes of Māori, referred to in the Act as the preferred class of alienees. The respondent, Amber Logan, falls within one of these classes. She wishes to exercise the right of first refusal and seeks more time to obtain finance to purchase the farm.

[4] The main issue to determine is whether the Court should confirm the sale and purchase agreement dated 12 November 2021. This will require the Court to be satisfied that the statutory process to sell Patangata 2F 2B has been followed. Particularly, whether Amber Logan has had a reasonable opportunity to exercise her statutory right of first refusal over Patangata 2F 2B.

Whakataunga*Decision*

[5] For the reasons that follow, I confirm the alienation of Patangata 2F 2B by Sandra Logan to Ashley and Mikayla Dixon per the sale and purchase agreement dated 12 November 2021.

I ahatia?

What has happened here?

[6] The process to sell the farm, including Patangata 2F 2B, commenced in October 2021. After a real estate agent was engaged, the farm was advertised for tender for a period of 5 weeks. Signage was erected at the farm gate. The farm was advertised in the rural section of the local newspapers, Hawkes Bay Today and Farming Today. The farm also appeared in the real estate agent's catalogue. As a result of this marketing process, Sandra Logan received 14 requests for tender. On the close of the tender period, she received three tenders. She says that many of the persons who made requests for tender did not submit an actual tender because the farm includes Māori freehold land. One of the received tenders did not offer to purchase the Māori freehold land, and instead sought to lease that land.

The 12 November 2021 sale and purchase agreement

[7] After reviewing the three tenders for the farm, Sandra Logan accepted an offer from Ashley and Mikayla Dixon. Sandra Logan countersigned the associated sale and purchase agreement on 12 November 2021. The relevant key terms of that agreement include the following:

- (a) A purchase price of \$3,300,000 plus GST.
- (b) A settlement date of 1 April 2022.
- (c) The agreement is conditional on Sandra Logan applying to the Māori Land Court for confirmation of the sale of Patangata 2F 2B and receiving confirmation from the Court on or before the settlement date.
- (d) The agreement is conditional on the purchasers obtaining finance within 10 working days of the date of acceptance of the tender (being 12 November 2021).

The application for confirmation

[8] Sandra Logan applied to the Māori Land Court on 12 December 2021 to have the sale confirmed. As at this date, the finance condition in the 12 November 2021 sale and purchase agreement had been satisfied. Accordingly, when the application was made to the Court, the only condition that remained to be satisfied was confirmation of the sale by the Court.

[9] The application was formally received by the Court on 16 December 2021. Because Patangata 2F 2B is Māori freehold land, the right of first refusal process in s 147A of the Act was triggered. Among other things, this process requires a seller of Māori freehold land to give notice to the preferred classes of alienees. As part of this process, Sandra Logan filed draft public notices with the Court, which she proposed to publish in relevant newspapers. Court staff sought directions from me in relation to these advertisements. Although I did not issue any formal directions, I advised Court staff that I was comfortable with the proposed advertisements. Sandra Logan was advised of this by email on 16 December 2021 and by formal letter from Court staff dated 21 December 2021.

Initial public notice of the sale of Patangata 2F 2B

[10] Notices appeared in Hawkes Bay today on Saturday 18 December and Friday 24 December 2021. A notice also appeared in the New Zealand Herald on Monday 20 December 2021. These notices advised the preferred class of alienees of the fact that Patangata 2F 2B was to be sold. The notices also requested members of the preferred class of alienees who wished to be considered as a prospective purchaser to file in the Māori Land Court, by Monday 17 January 2022, written notice of their intention to pursue a right of first refusal over Patangata 2F 2B.

Initial private notice of the sale of Patangata 2F 2B

[11] Sandra Logan also gave private notice that she intended to sell the farm to her brother Kim Logan and son Nicholas Logan, and both provided written letters of support for the application dated 12 October 2021. Neither Kim nor Nicholas were interested in exercising the right of first refusal to purchase the land. By the time that the public notices were first

published in December 2021, Sandra Logan had not directly notified any other member of the preferred classes of alienee that the farm was for sale. Notably, Sandra Logan did not send a private notice to Amber Logan of the sale of the farm at this stage, although she had Amber Logan's email address as a result of previous communications.

Court hearings and re-advertising of the sale of Patangata 2F 2B

[12] The application was set down to be heard on 25 January 2022. Notice of this hearing was sent to all parties for whom the Court held addresses on Tuesday 21 December 2021.

[13] In late December 2021, Amber Logan became aware of the sale of the farm and made contact by email with Sandra Logan seeking more information. The extent of information Amber received at the time and its sufficiency as notice of the sale is contested between the parties. Unfortunately copies of these emails have not been filed as evidence and I have not had the benefit of reviewing them. Even so, on 12 January 2022 counsel for Sandra Logan emailed to Amber Logan:

- (a) The signed sale and purchase agreement for Patangata 2F 2B dated 12 November 2021 between Sandra Logan and the proposed buyers.
- (b) The application for confirmation of alienation.
- (c) The registered valuation.
- (d) A copy of the newspaper advertisement to the preferred class of alienees.

[14] On 13 January 2021, the Court received a letter from Amber Logan indicating her intention to pursue her right of first refusal as a member of the preferred class of alienee. She advised that she had not received private notice of the sale of Patangata 2F 2B. She requested an extension of time to obtain an independent valuation of Patangata 2F 2B and to investigate options for raising finance.

[15] The application was then heard by the Court on 25 January 2022. At that hearing, Amber Logan sought more time to exercise the right of first refusal. I agreed with her request and directed that the parties adhere to the following timeline:

- (a) Amber Logan was to make an offer that was capable of being accepted on or before 8 February 2022. The offer could be conditional or unconditional. It would be for Sandra Logan to accept or reject any conditions.
- (b) Any further negotiations between the parties were to be finalised by 15 February 2022.
- (c) If required, a further hearing to confirm the alienation of Patangata 2F 2B would be held on Friday 18 February 2022 or in the following week.
- (d) Leave was granted to the parties to seek further directions from the Court, if necessary.

[16] On 7 February 2022, Amber Logan made a conditional offer by email to purchase the farm, including Patangata 2F 2B. It was conditional on finance. On 14 February 2022, counsel for Sandra Logan advised the Court that the email did not constitute an offer to purchase the farm, nor was it an offer that was capable of being accepted because:

- (a) the email did not set out with sufficient certainty the nature of the offer;
- (b) there was no certainty as to whether the offer was conditional on finance and, if it was, there was no timeframe for that condition to be satisfied; and
- (c) there were no other specific purchase terms, in particular the identity of the proposed purchaser was unclear, there was no settlement date stipulated and it was not clear whether the purchase price included GST.

[17] The application came before the Court again on Friday 18 February 2022. Amber Logan engaged counsel for this hearing. After hearing from all counsel, I indicated that I was inclined to grant the order of confirmation of the sale of Patangata 2F 2B, with reasons to follow. However, in preparing my decision, I identified some anomalies in the information provided to the Court, some of which arise because of apparent inconsistencies between the Act and the Māori Land Court Rules 2011 (“the Rules”), to which I will return later. I issued a minute on Monday 21 February 2022 setting out those apparent inconsistencies and

directing the Pae Tukutuku (case manager) to confer with counsel to identify a suitable date for a judicial conference to discuss them.

[18] The judicial conference was held later that day on 21 February 2022 and the apparent inconsistencies between the Act and the Rules were discussed with counsel. Subsequently, on 23 February 2022 counsel filed a joint memorandum and sought directions to deal with the inconsistencies between the Act and the Rules. On 24 February 2022 I granted the directions sought, with some qualifications.

[19] In essence, my directions required Sandra Logan to issue further public and private notices to the preferred classes of alienees notifying them of the proposed sale of the farm and providing them a further opportunity to exercise the right of first refusal. Accordingly, public notices were published in Hawkes Bay Today on 26 February and 5 March 2022, calling for tenders to purchase Patangata 2F 2B to be submitted to the Māori Land Court by 4pm on Monday 21 March 2022. Furthermore, Sandra Logan gave private notice to 15 members of the preferred class of alienees for which she held email addresses. She also arranged for the public notice to be published on the Facebook page maintained by Whatuiapiti Marae, on the basis that many of the members of the preferred class of alienees affiliate to that marae. Sandra Logan did not take any further steps to determine the physical or electronic addresses of members of the preferred class of alienees.

[20] In response, Amber Logan submitted a tender directly to Sandra Logan, through her counsel, on 21 March 2022. She did not file her tender with the Court by that date. The key terms of her tender are as follows:

- (a) The purchase price is \$3,301,000, being \$1,000 more than the offer already accepted by Sandra Logan from Ashley and Mikayla Dixon.
- (b) The settlement date is 21 April 2022.
- (c) The agreement is conditional on Amber Logan obtaining finance within 15 working days of acceptance of the tender on terms satisfactory to Amber Logan.

- (d) The agreement is not conditional on Māori Land Court approval.

[21] On 22 March 2022, Sandra Logan rejected Amber Logan's tender. Accordingly, the matter was heard again on 23 March 2022.

He aha ngā kōrero a te kaitono?

What does the applicant say?

[22] Sandra Logan submits that she has complied with the statutory process to sell Patangata 2F 2B, including the process to offer the right of first refusal to the preferred class of alienees. In particular, she says:

- (a) She has given the required notice to the preferred class of alienees of the sale on two separate occasions. The first notices were given between 18 and 24 December 2021 and called for expressions of interest from members of the preferred class of alienees by 17 January 2022. The second notices were given between 26 February and 5 March 2022 and called for tenders to be submitted by 21 March 2022.
- (b) She has provided a reasonable opportunity for any member of the preferred class of alienees to exercise the right of first refusal.
- (c) She has made additional accommodation for Amber Logan to exercise the right of first refusal, including through the processes directed by the Court between 26 January and 15 February 2022 and 26 February to 21 March 2022. Amber Logan has exercised that right by submitting a formal tender on 21 March 2022.

[23] Sandra Logan further submits that the tender submitted by Amber Logan is not on terms at least equivalent to the tender signed on 12 November 2021. The earlier tender is no longer conditional on finance. It is only conditional on Māori Land Court approval. Amber Logan's tender is conditional on finance. There is no guarantee that finance will be obtained. Thus, she argues that Amber Logan's tender is materially different to the terms of the alienation for which Court confirmation has been sought.

[24] Furthermore, Sandra Logan says there are significant consequences for her if the 12 November 2021 sale and purchase agreement is not confirmed by 31 March 2021. She deposed that:

- (a) The sale and purchase agreement is unconditional, save for confirmation by the Court. Settlement is due for 1 April 2022. The current limbo and uncertainty is causing her and the purchasers stress.
- (b) The current lease over the farm expires on 31 March 2022. Sandra Logan has not arranged for a new lessee if the sale and purchase agreement is not confirmed before the expiry of the lease.
- (c) The current lessee has been working to a destocking schedule that would result in all stock being removed from the farm by 31 March 2022. If settlement does not occur by that date, there is significant uncertainty as to how the current lessee (if the lease is renewed) or any new lessee would restock the farm.
- (d) Any continuing farming operator would have started tupping in early February 2022, allowing for a July lambing season. This has not been done for the farm, in the expectation that settlement would have occurred by 1 April 2022.
- (e) If settlement delays occur, she will incur significant additional costs, including having to purchase additional lambs to fatten to maintain the farm as a viable commercial operation.
- (f) She has sold her own stock. Delay adversely impacts on her stocking policies.
- (g) A strict drenching and dipping programme must be implemented for the stock. This cost would not be incurred if settlement occurs as planned. If settlement is delayed, she will need to incur these costs.
- (h) The sale and purchase agreement includes a good husbandry clause. Settlement delays will require significant decisions to be made in relation to

re-grassing of pastures, which would ordinarily have been completed. There are financial implications, particularly if re-grassing is required and it does not take.

[25] Perhaps more fundamentally, Sandra Logan deposes that the purchasers of the farm under the 12 November 2021 sale and purchase agreement are not prepared to extend the settlement date. Thus, if the sale is not confirmed by 31 March 2022, the existing contract will fall through. Sandra Logan will lose the benefit of a binding contract for the sale of the farm.

[26] For these reasons, Sandra Logan requests that the Court confirm the sale of Patangata 2F 2B as per the sale and purchase agreement confirmed on 12 November 2021.

He aha ngā kōrero a te kaiurupare?

What does the respondent say?

[27] Amber Logan submits that the sale and purchase agreement should not be confirmed. Instead, she seeks further time to exercise her right of first refusal over Patangata 2F 2B. She says:

- (a) As a result of prior communications on other matters, Sandra Logan is aware of and has previously used Amber Logan's electronic contact details. Despite having these details, Sandra Logan did not notify her personally that Patangata 2F 2B was for sale when it was first tendered in October 2021. Nor did she receive private notice when public notices were first published in late December 2021.
- (b) She did not become aware of the sale of Patangata 2F 2B until the sale was publicly notified in late December 2021. She promptly made contact with Sandra Logan to express her wish to exercise her right of first refusal over that block.
- (c) Since becoming aware of the sale of Patangata 2F 2B, she has diligently sought to exercise her right of first refusal. However, she has not managed to

confirm all of the details required to submit an unconditional tender to purchase the farm. Hence, her tender is conditional on obtaining finance.

- (d) She has requested a copy of the existing lease for the farm, which she says is important to confirm a detailed offer to purchase the farm. However, the lease has not been provided to her, which has hindered her ability to submit a detailed offer.
- (e) She is confident that she will be able to secure finance by 21 April 2022 to purchase the farm. She therefore requires only a short timeframe after 1 April 2022 to confirm her ability to purchase the farm.
- (f) Their ancestral whenua is important to her, and she wants the opportunity to purchase and rehabilitate the land for the benefit of her whānau, hapū and iwi.
- (g) She acknowledges that, even if the sale and purchase is confirmed, she will retain her right of first refusal over Patangata 2F 2B. However, she is concerned that the farm may never be offered for sale again to enable her to exercise that right. She has studied land loss in this district and her research indicates that, once land is sold, it is invariably lost permanently to the preferred class of alienees.
- (h) She acknowledges that, through the agreed process to re-advertise the sale of the farm between 26 February and 5 March 2022, the notice provisions in the Act have been complied with. However, she says that these notices (both public and private) should have been given to the preferred class of alienees before the farm was first tendered in October 2021. She argues that it is inconsistent with the Act to notify the preferred class of alienees of the sale after the farm had already been offered to the general public. She says the statutory provisions establish a right of *first* refusal, not a right of *last* refusal.
- (i) Her tender of 21 March 2022 is at least equivalent to the tender for which confirmation has been sought. Her offer is subject to finance. The tender for

which confirmation has been sought was also subject to finance. They are at least equivalent in this respect. Also, her tender is for a slightly higher price.

[28] Accordingly, Amber Logan requests that the sale and purchase agreement not be confirmed at this stage to give her more time to exercise her right of first refusal.

Te ture

The law

[29] Section 151 allows an application to be made to the Court to confirm an alienation of any interest in Māori freehold land. Relevantly, an application can be made by or on behalf of any party to the instrument of alienation, in this case the 12 November 2021 sale and purchase agreement.¹

[30] Section 152(1) provides that the Court must grant confirmation of an alienation of Māori freehold land if it is satisfied of certain matters. It provides:

152 Court to grant confirmation if satisfied of certain matters

- (1) The court must grant confirmation of an alienation of Maori freehold land if it is satisfied—
 - (a) that,—
 - (i) in the case of an instrument of alienation, the instrument has been executed and attested in the manner required by the rules of court; or
 - (ii) in the case of a resolution of assembled owners, the resolution was passed in accordance with this Act or regulations made under this Act; and
 - (b) that the alienation is not in breach of any trust to which the land is subject; and
 - (c) that the value of all buildings, all fixtures attached to the land, all things growing on the land, all minerals in the land, and all other assets or funds relating to the land, has been properly taken into account in assessing the consideration payable; and
 - (d) that, having regard to the relationship (if any) of the parties and to any other special circumstances of the case, the consideration (if any) is adequate; and

¹ Te Ture Whenua Māori Act 1993, s 151(1)(a).

- (e) that the purchase money (if any) has been paid to, or secured to the satisfaction of, the Māori Trustee or court appointed agent or trustees in accordance with section 159; and
- (f) that, if section 147A applies to the alienation, the alienating owners have discharged the obligations in that section.

[31] For the purposes of s 152(1)(f), s 147A applies in this case. This section was amended in 2020 to include new provisions governing how the right of first refusal in favour of the preferred class of alienees is to be exercised. Section 147A provides:

147A Right of first refusal for sale or gift

- (1) A person referred to in section 147 who seeks to alienate any Maori freehold land by sale or gift must give the right of first refusal to prospective purchasers or donees who belong to 1 or more of the preferred classes of alienees, ahead of those who do not belong to any of those classes.
- (2) A right of first refusal must be given in accordance with the rest of this section, unless the proposed sale or gift is to a member of a preferred class of alienees.
- (3) The seller or donor must give a written notice that—
 - (a) describes the land to be alienated, including—
 - (i) the name and area of the block; and
 - (ii) the street address, if applicable; and
 - (iii) the Maori Land Court district that the land is within; and
 - (b) requests tenders to buy the land (for a sale), or expressions of interest in being gifted the land (for a gift), only from members of the preferred classes of alienees.
- (4) The notice must be—
 - (a) sent to every member of the preferred classes of alienees whose physical or electronic address for notices is known to the seller or donor after the seller or donor has made reasonable efforts to determine the addresses; and
 - (b) published as follows and so as to ensure that members of the preferred classes of alienees are reasonably likely to learn of the proposed alienation:
 - (i) in a newspaper that circulates in the Maori Land Court district that the land is within, and in any other newspaper or newspapers; and
 - (ii) on an Internet site to which the members have access free of charge.

- (5) The notice must specify a deadline for receiving tenders or expressions of interest that is—
 - (a) reasonable; and
 - (b) no less than 15 working days after the day on which the notice is first published.
- (6) For a sale,—
 - (a) the notice must specify the terms of sale but need not disclose the minimum sale price set for the land; but
 - (b) any of the terms of sale may instead be specified in a document located at a place or on an Internet site described in the notice.
- (7) The seller or donor may apply to the court for a direction about what is required to satisfy their obligations under this section, and the court may give a direction on those matters.

[32] Rules 11.3 to 11.7 of the Māori Land Court Rules 2011 also apply. Rules 11.5 to 11.7 are most relevant. They provide:

11.5 Procedure for notifying preferred classes of alienees as to right of first refusal

- (1) Where a right of first refusal must be given under section 147A of the Act, an application for confirmation of alienation under rule 11.3 must be referred to a Judge for directions as to—
 - (a) a hearing date that will allow sufficient time for notice of the right of first refusal to be given to the preferred classes of alienees; and
 - (b) any other matter that is relevant, including directions as to notice.
- (2) For determining whether any preferred alienees wish to exercise their right of first refusal, an applicant for confirmation of alienation under rule 11.3 must—
 - (a) give public notice that complies with rule 11.5(3); and
 - (b) following publication, without delay file a copy of the notice with the Registrar; and
 - (c) comply with any directions that the Court has made in relation to notice.
- (3) The notice required under rule 11.5(2) must—
 - (a) be in form 27; and
 - (b) be published at least twice at intervals of not less than 5 working days in a newspaper approved by the Registrar and circulating in the district in which the land is situated; and

- (c) stipulate a date for filing and serving a notice of intention to exercise the right of first refusal that is not less than 15 working days after the date of publication of the second notice.
- (4) On receipt of the notice, the Registrar must—
 - (a) arrange for the alienation to be notified in the next available Panui; and
 - (b) display a copy of the notice on a noticeboard in the public office of the Court for not less than 3 months, or until the application for confirmation is heard, if that occurs before 3 months.
- (5) A preferred alienee who wishes to exercise a right of first refusal must file in the Court and serve on the applicant, within the time fixed by the notice given under this rule, a notice in writing stating—
 - (a) that he or she intends to exercise the right of first refusal; and
 - (b) his or her full name and contact address.
- (6) The Registrar must give notice of the time, date, and place of the hearing of the application for confirmation to each person who files a notice of intention to exercise the right of first refusal.

11.6 Requirement of right of first refusal: when Court may confirm alienation

- (1) In a case where a right of first refusal must be given under section 147A of the Act, the Court may—
 - (a) confirm the alienation that is the subject of the application if the applicant establishes to the satisfaction of the Court that—
 - (i) no preferred alienee has given notice of his or her intention to exercise the right of first refusal; or
 - (ii) that the following applies:
 - (A) 1 or more alienees have given notice of their intention to exercise the right of first refusal; and
 - (B) the provisions of rule 11.7 have been complied with in relation to the exercise of the right of first refusal; and
 - (C) no alienee has in fact exercised the right of first refusal; or
 - (b) confirm the alienation to a preferred alienee who has exercised the right of first refusal in accordance with rule 11.7.
- (2) The Court may confirm the alienation subject to such terms as it thinks fit for the completion of the alienation.

11.7 Exercise of right of first refusal

- (1) An alienor must give a preferred alienee who has given notice of his or her intention to exercise the right of first refusal a reasonable opportunity to exercise that right.

- (2) If more than 1 preferred alienee has given notice of his or her intention to exercise the right of first refusal, the alienor may select the alienee to whom the opportunity of exercising the right of first refusal must be given.
- (3) The right of first refusal must—
 - (a) be on terms that are at least equivalent to the terms of the alienation that is the subject of the application for confirmation; and
 - (b) allow the preferred alienees a reasonable time, having regard to the nature of the alienation, to exercise the right of first refusal.
- (4) If the Court is not satisfied that the preferred alienee has been given a reasonable opportunity to exercise the right of first refusal, the Court may—
 - (a) extend the time for exercise of the right of first refusal:
 - (b) adjourn the application for confirmation to allow negotiation between alienor and preferred alienee to occur.
- (5) If the preferred alienee who exercises the right of first refusal is not the alienee named in the original application, the Court may amend the application and confirm the alienation without the necessity for a new application.
- (6) If a preferred alienee who is selected under rule 11.7(2) fails to complete the alienation, the alienor must then offer the opportunity of exercising the right of first refusal to any of the other preferred alienees who were involved in the selection process under rule 11.7(2) and the provisions of this rule continue to apply until—
 - (a) the right of first refusal has been exercised; or
 - (b) all preferred alienees who have given notice have been given the opportunity to exercise the right of first refusal.

[33] Although s 147A was amended in 2020, the Rules have not yet been updated to reflect those amendments. As a result, s 147A of the Act and Rules 11.5 to 11.7 are inconsistent. For example:

- (a) Section 147A(5) requires a person who wishes to exercise the right of first refusal to submit a “tender”. However, Rule 11.5(3) requires such a person to file and serve a “notice of intention to exercise the right of first refusal”. These are quite different requirements, because a person who gives a notice of intention to exercise the right of refusal need not prove that they can in fact exercise that right.

- (b) Rule 11.5(3) requires the public notice to be published at least twice at intervals of not less than 5 working days. Section 147A does not require the public notice to be published twice.
- (c) Section 147A(5) requires the deadline for receiving tenders to be reasonable and no less than 15 working days after the date on which the public notice is *first* published. Rule 11.5.(3)(c) requires the public notice to stipulate a date for filing and serving a notice of intention to exercise the right of first refusal that is not less than 15 working days after the date of publication of the *second* notice.
- (d) Section 147A(4)(b)(ii) requires the public notice to be published on an Internet site to which the members of the preferred classes of alienees have access free of charge. There is no such requirement in the Rules.

[34] These inconsistencies have created uncertainty for the parties. The inconsistencies will need to be addressed by updating the Rules. In the meantime, I must attempt to navigate the inconsistencies. To do this I have taken the following approach:

- (a) Where there is an inconsistency between the Act and the Rules, the Act prevails.
- (b) If it is reasonable to comply with the Rules despite any inconsistency with the Act, I have required compliance with the Rules.
- (c) If it is oppressive or otherwise inappropriate to comply with the Rules, I have excused compliance per Rule 2.4(2).

Ngā take
The issues

[35] The primary issue to determine is whether the sale and purchase agreement should be confirmed. To answer that question, the following sub-issues arise:

- (a) Are the matters listed in s 152(1) satisfied?

- (b) Has Sandra Logan given the required notice of the sale of Patangata 2F 2B to the preferred classes of alienees, including providing a reasonable deadline to submit tenders?
- (c) Has Amber Logan exercised the right of first refusal?
- (d) If Amber Logan has exercised the right of first refusal, is Sandra Logan required to accept Amber Logan's tender?

Kōrerorero

Discussion

Is s 152(1) satisfied?

[36] The Rules require the sale and purchase agreement to be signed by the parties to it and witnessed.² If the sale and purchase agreement is not witnessed, the Court may confirm it if satisfied that suitable evidence has been adduced that establishes that Sandra Logan has signed it. The sale and purchase agreement is clearly signed by Sandra Logan. However, it is not witnessed. Sandra Logan appeared before the Court on the basis that she has signed it. It has not been asserted that Sandra Logan has not signed the sale and purchase agreement. I am satisfied that the sale and purchase agreement has been executed and attested in the manner required. Section 152(1)(a) is satisfied.

[37] There is no trust in respect of Patangata 2F 2B. Section 152(1)(b) is satisfied.

[38] The purchase price recorded in the sale and purchase agreement is far in excess of the valuation of the farm, although I note that the valuation is dated November 2019, being over two years prior to the date on which the application for Court confirmation was made. The purchase price was obtained following an extensive marketing campaign, which elicited three tenders. I am satisfied that the purchase price is adequate taking all relevant matters into account. Sections 152(c) and (d) are satisfied.

[39] Section 152(1)(e) does not apply in this case. This subsection cross-refers to s 159, which in turn does not apply to the proceeds of any alienation that is effected by the sole

² Māori Land Court Rules 2011, r 11.10(1), (3) and (4).

owner of the interest in the land. Sandra Logan is the sole owner of Patangata 2F 2B, thus ss 159 and 152(1)(e) do not apply.

[40] Ashley and Mikayla Dixon are not members of the preferred classes of alienees, which means s 147A applies. Section 152(1)(f) requires Sandra Logan to discharge the obligations in s 147A. To determine whether s 152(1)(f) is satisfied requires an assessment of how the right of first refusal obligations have been discharged by Sandra Logan.

Has Sandra Logan given the required notice of the sale of Patangata 2F 2B to the preferred classes of alienees, including providing a reasonable deadline to submit tenders?

[41] Sandra Logan has publicly notified the sale of Patangata 2F 2B on two separate occasions. The first notices appeared in local and national newspapers between 18 and 24 December 2021. In direct response to Amber Logan's request for more time to exercise the right of first refusal and to address anomalies with the first public notices arising out of the inconsistencies between s 147A of the Act and Rules 11.5 to 11.7, Sandra Logan issued further public notices between 26 February and 5 March 2022. These further public notices were issued in a manner consistent with my directions, which were sought jointly by counsel for the parties on 23 February 2022. Based on this joint request by counsel, I issued the following directions:

- (a) Public notice was to be published in Hawkes Bay Today on Saturday 26 February and Saturday 5 March 2022. Although s 147A does not require two public notices, it is not inconsistent with s 147A to publish two public notices. Because Rule 11.5(3)(b) requires two public notices at intervals of not less than 5 working days, I considered it reasonable to comply with this requirement.
- (b) I approved a form of the public notice that required tenders to be submitted (as per s 147A), rather than notices of intention to exercise the right of first refusal (as per Rule 11.5(3)(c)). Section 147A clearly requires tenders to be submitted, such that a notice of intention (as is required by Rule 11.5(3)(c)) would not meet the standard required by the Act. In this instance, I considered that the Act overrides the Rule.

- (c) I approved of a deadline for submitting tenders of Monday 21 March 2022. This date is 15 working days after the date of the first public notice for this second round of notices (being 26 February 2022). This timeframe complies with Rule 11.5(3)(c) and s 147A(5)(b). However, s 147A(5)(a) also requires this timeframe to be reasonable. I was satisfied that the timeframe was reasonable, taking into account that the sale had already been publicly notified to the preferred class of alienees in December 2021. Taking that earlier public notification into account, the timeframe between the first public notice on 18 December 2021 to 21 March 2022 is a period of over 3 months.
- (d) I otherwise excused compliance with Rule 11.5(3)(c) because it is oppressive or inappropriate, as aspects of it are inconsistent with the Act, requiring compliance may inhibit the timely conclusion of these proceedings, and that there had already been public notice of the alienation in early December 2021.

[42] In *Taueki – Horowhenua X1B41 North A3A and 3B1*, the Māori Appellate Court observed that the Act is silent on what is a reasonable opportunity to exercise the right of first refusal, and therefore is a matter of judicial discretion considering all the relevant circumstances of the case.³ Section 147A of the Act has since been amended and now includes more comprehensive requirements for providing notification to the preferred class of alienees. Relevantly, section 147A(5)(a) still requires a seller to specify a reasonable deadline for members of the preferred classes of alienees to submit tenders to exercise the right of first refusal. Therefore, I consider the Appellate Court’s comments to be helpful in my assessment of what constitutes a reasonable deadline. The Appellate Court stated:⁴

[75] Section 147A is one of the key mechanisms in the Act to give practical effect to the principle of retention of Māori land. It represents the final opportunity for those associated with Māori land in terms of tikanga Māori to prevent the land falling into outside ownership. Vendors cannot expect a hasty treatment of that right. Equally, potential purchasers within the preferred class of alienees cannot expect a drawn out process. The time allowed must be practical and reasonable, having regard to the aim of retention of Māori land as expressed in the Preamble and section 2 of the Act...

³ *Taueki - Horowhenua X1B41 North A3A and 3B1* (2008) 16 Aotea Appellate MB 30 (16 WGAP 30) at [71].

⁴ At [75].

[43] Sandra Logan has given public notice in accordance with my directions. Amber Logan has not raised an issue with the public notice. I am satisfied that Sandra Logan has given public notice in accordance with ss 147A(3), 147A(4)(b) and 147A(5). In particular, given that the period between the first public notice and the date for submitting tenders was over three months, I am satisfied that the deadline for submitting tenders of 21 March 2022 was reasonable for the purposes of s 147A(5)(a), also having regard to the principles of the Act as contained in the Preamble, ss 2 and 17.

[44] I have heard from Amber Logan that she wishes to purchase the farm to not only keep the land in her whānau, but also to rehabilitate the whenua for the benefit of her wider whānau, hapū and iwi. This is a goal which is supported by the principles of the Act to retain and utilise the land as a taonga tuku iho for future generations and is a relevant consideration in determining what constitutes a reasonable deadline for submitting tenders per s 147A(5)(a). However, considering the first public notice was published on 18 December 2021, in effect the timeframe for members of the preferred classes of alienees to exercise the right of first refusal has been over three months. This is by no means a hasty treatment of the right. I further note that, during this period, Amber Logan had the ability to submit an expression of interest by 17 January 2022, an offer to purchase the farm by 8 February 2022 and a tender by 21 March 2022. Amber Logan took each of those opportunities.

[45] Sandra Logan gave limited private notices when she first notified the sale of the farm to the members of the preferred classes of alienees in late December 2021. In particular, she did not give a private notice to Amber Logan at this stage even though she had Amber Logan's email address.

[46] Sandra Logan deposes that, for the second round of notification between 26 February and 5 March 2022, she gave private notices to 15 email addresses that she holds for members of the preferred classes of alienees. She also confirms that the public notice was posted on the Whatuiapiti Marae Facebook page on 25 February 2022. Her evidence is that the Whatuiapiti Marae Facebook page has 308 private members.

[47] Section 147A(4)(a) requires Sandra Logan to make reasonable efforts to determine the addresses of every member of the preferred classes of alienees. The membership of these classes can be extensive. The broadest class is likely to be the descendants of any former

owner who is or was a member of the hapū associated with the land. What constitutes reasonable efforts must be assessed in this light. For example, in most instances it would be unreasonable to expect a seller to spend significant time and effort to determine the addresses of each and every descendant of a former owner of the land. Indeed, it would be difficult to determine where to start. The process followed by Sandra Logan to privately notify the sale of Patangata 2F 2B was consistent with the joint memorandum of counsel filed on 23 February 2022 and my resultant directions. Amber Logan has not raised an issue with the private notice. I am therefore satisfied that Sandra Logan has made reasonable efforts to determine the physical or electronic addresses of the members of the preferred classes of alienees and has sent written notice in accordance with ss 147A(3) and 147A(4)(a).

Has Amber Logan exercised the right of first refusal?

[48] Counsel for Amber Logan argued that the process followed by Sandra Logan did not provide for a right of first refusal. The argument is that, because Sandra Logan first tendered the farm to the general public and not to the members of the preferred classes of alienees, she has not offered a right of first refusal to those members. To comply with s 147A, Sandra Logan should have offered the farm to the members of the preferred class of alienees *before* offering it to the general public. This is because s 147A(1) requires the right of first refusal to be given to the members of the preferred classes of alienees *ahead* of those who do not belong to any of those classes.

[49] I do not read s 147A(1) to require a seller to first seek offers from the members of the preferred classes of alienees. It requires the seller to give the right of first refusal to those members, ahead of those who are not members. This right can be given after the seller has an offer on the table. Indeed, this is invariably what happens. This approach is also contemplated by the Rules. For example, Rule 11.7(3)(a) contemplates that there is already an application for confirmation before the Court before the right of first refusal is given. Amber Logan has therefore been given a right of first refusal over Patangata 2F 2B.

[50] Amber Logan submitted a tender on 21 March 2022. The tender complies with the requirements of s 147A. It is sufficiently certain to constitute an offer to exercise the right of first refusal.

[51] Counsel for Sandra Logan argued that, because Amber Logan did not submit her tender to the Māori Land Court, there is a procedural issue that may impact on the validity of the tender. It is accepted that Amber Logan submitted her tender directly to Sandra Logan (through counsel) and not to the Māori Land Court. I do not see this oversight as fatal to Amber Logan's tender. Section 147A does not require tenders to be submitted to the Court. It was reasonable for Amber Logan to submit the tender to Sandra Logan. Accordingly, I consider that Amber Logan has submitted a tender per s 147A and has therefore exercised her right of first refusal.

Is Sandra Logan required to accept Amber Logan's tender?

[52] Section 147A is silent as to what happens if a tender is submitted by a member of the preferred class of alienees. For example, the section does not require the seller to accept that tender, irrespective of its terms. Nor does it expressly allow the seller to reject the tender. If the seller can reject the tender, s 147A does not specify the grounds on which such a rejection can be based.

[53] Guidance can be taken from the Rules. Rule 11.7 speaks to how the right of first refusal is to be exercised. Rule 11.7(3)(a) provides that the right of first refusal must be on terms that are at least equivalent to the terms of alienation that is the subject of the application for confirmation. In the present case, those terms are set out in the 12 November 2021 sale and purchase agreement.

[54] When the application to confirm the 12 November 2021 sale and purchase agreement was made, the finance condition in it had been satisfied. At that point and ever since, Sandra Logan has had the benefit of a binding contract for the sale and purchase of the farm, albeit conditional on confirmation of sale by the Court. Put another way, she has had certainty that the purchasers have the funds to purchase the farm in accordance with the contract.

[55] Amber Logan's tender is subject to finance. This constitutes a material difference between Amber Logan's tender and the terms of the alienation that are before this Court. A tender that is conditional on finance carries with it a risk that finance may not be obtained. By accepting a tender that is subject to finance, Sandra Logan would give up a binding contract that will settle on 1 April 2022 (provided it is confirmed by the Court) in return for

a conditional contract that may not become unconditional. The finance condition therefore makes a material difference. I therefore consider that Amber Logan's tender is not on terms that are at least equivalent to the terms of the alienation that is the subject of this application for confirmation.

[56] The Rules do not then set out what happens if a tender is not on terms that are at least equivalent to the terms of the alienation for which confirmation is sought. However, it can be inferred by the mandatory language in rule 11.7(3) that a seller is not bound to accept an offer by a member of the preferred class of alienees that is not on equivalent terms. Accordingly, I determine that Sandra Logan is not required to accept Amber Logan's tender.

[57] Sandra Logan has pointed to the prejudice she will suffer if the 21 November 2021 sale and purchase agreement is not confirmed. I have placed no weight on those matters. That sale and purchase agreement is expressly conditional on Māori Land Court confirmation. There is always a risk that the Court may not grant that confirmation. A seller that makes plans (or fails to make plans) assuming that the Court will confirm an alienation must also bear the risks of the Court declining to grant confirmation. The prejudice associated with presuming a court outcome cannot be used as justification to obtain that outcome. Otherwise, the result is a self-fulfilling prophecy.

Ngā ōta *Orders*

[58] The Court must grant confirmation if the requirements specified in s 152 are satisfied.⁵ Because Sandra Logan has met those requirements, I must therefore grant her application for confirmation.

⁵ *Loach v Bidois – Matarikoriko No 7B2A* (2015) 336 Aotea MB 183 (336 AOT 182) at [33] and *Hogarth – Taumarunui Papakainga – Section 11A* (2021) 435 Aotea MB 141 (435 AOT 141) at [22].

[59] I confirm the alienation of Patangata 2F 2B by Sandra Logan to Ashley and Mikayla Dixon per the sale and purchase agreement dated 12 November 2021. I grant orders per s 151 and 152 of the Act accordingly.

I whakapuaki i te 2.00 pm i Te Whanganui-a-Tara, rua tekau mā rima o ngā rā o Poutū-te-rangi i te tau 2022.

D H Stone
JUDGE