

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT**

**A20170007462
APPEAL 2018/3**

UNDER Section 58, Te Ture Whenua Māori Act 1993

IN THE MATTER OF An appeal against an order of confirmation made on 8 December 2017 at 177 Waiariki MB 254-268 in respect of Kapenga A No 5

BETWEEN URUTOMO DEBBIE CLARK AND LORIN MANAHI
Appellants

AND TRUSTEES OF OPEHUIA WHĀNAU TRUST
Respondents

Hearing: 10 May 2018
(Heard at Rotorua)

Court: Judge C M Wainwright (Presiding)
Judge L R Harvey
Judge S Te A Milroy

Appearances: C Bidois for the Appellants
G Dennett for the Respondents

Judgment: 19 July 2019

JUDGMENT OF THE COURT

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Introduction

[1] At the hearing of this appeal on 10 May 2018, the proceedings were adjourned by consent for two months to 17 July 2018 to provide the parties with the opportunity to discuss amalgamation or partition of the interests of the beneficial owners who opposed the transfer and subject to the parties reaching an agreement in detail.¹

[2] On 6 July 2018, a joint memorandum of counsel was filed advising that counsel Ms Rachell Scott of the Parekarangi Trust had circulated a proposal that had the potential to satisfy all parties. Counsel required their client's instructions on the proposal and sought a further one month adjournment, which we granted on 13 July 2018.²

[3] A further joint memorandum of counsel dated 4 September 2018 summarised progress that had been made and advised that a majority of owners confirmed their support for a proposed partition. Counsel confirmed that they needed more time for further discussion and negotiation to finalise financial and ancillary matters for inclusion in a deed of settlement and respectfully sought an adjournment to November 2018, which was granted on 6 September 2018.³

[4] On 7 December 2018 we issued directions that counsel confirm whether the appeal needed to return to Court and to also check counsels' availability for a further hearing. Counsel were given the opportunity to file a further update as to progress. Those directions were distributed on 17 December 2018.

[5] On 20 December 2018, Mr Bidois filed a memorandum requesting:

- (a) The appeal not be set down for a further hearing on the basis that terms of settlement had been agreed and were in circulation for execution among the parties;
- (b) Leave to file an executed deed of settlement under cover of a joint memorandum on or before Friday, 18 January 2019; and

¹ 2018 Māori Appellate Court MB 257 (2018 APPEAL 257)

² 2018 Māori Appellate Court MB 417 (2018 APPEAL 417)

³ 2018 Māori Appellate Court MB 509 (2018 APPEAL 509)

- (c) The joint memorandum would seek directions for disposal of the appeal proceedings on the papers.

[6] In response, on 17 January 2019, we issued directions confirming that the proposals were entirely suitable and requested confirmation that the appeal could now be concluded by consent. The directions were distributed to the parties on 20 February 2019.

[7] Counsel then filed a joint memorandum dated 19 June 2019 together with a Deed of Agreement dated 2 May 2019. The Deed is summarised as follows:

Summary of Agreement

1. The Deed of Agreement has been entered into by the appellants, the trustees of the Opehuia Whanau Trust, and the trustees of the Parekarangi Trust.
2. In summary, the parties agree that the land be partitioned to allow the appellants to retain their land interests as *taonga tuku iho* whilst permitting the beneficiaries of the Opehuia Whanau Trust to exercise their right of sale.
3. The trustees of Parekarangi Trust have agreed to meet the costs of partition up to a limit of \$25,000.00 inclusive of GST.
4. In consideration for that support, the appellants have agreed:
 - (a) to discontinue the current proceedings; and
 - (b) to cooperate to support a change of status application in respect of the balance land; and
 - (c) to grant Parekarangi Trust an option to lease the partitioned land for a term of five years.

Disposal of the appeal

[8] The joint memorandum of counsel seeks directions as follows:

- (a) In order to give the effect to the attached Agreement, the parties respectfully seek a conditional order for partition of the appellants' interests and an order under section 56(1)(d) referring these proceedings back to the Māori Land Court for the making of final partition orders under section 289.
- (b) The partition order would be conditional in nature, pending the Lower Court being satisfied as to the matters set out in Part XIV of the Act including the submission of a survey plan for approval by the Court and local authority consent for subdivision by way of partition.

- (c) Assuming the Court is minded to make that order, then leave is respectfully sought to contemporaneously discontinue the current appeal proceedings in the form of an appeal.

Discussion

[9] The background to this appeal is that a majority of owners wish to sell the block to the neighbouring trust, while a small minority are adamant that they wish to retain their interests in the land. The appeal was filed on the basis that there were various irregularities in the procedure needed for a valid sale, but it was clear that the most important requirement, the majority vote of 75% of the ownership, had been met and could be met in future. The appeal was an attempt by the minority owners to delay or prevent the sale in order to protect their interests in the land.

[10] During the hearing of the appeal we suggested to the parties that, while we could hear arguments about whether the trustees of the block had complied sufficiently with the requirements of the Act, it might be that a partition of the opposing owners' shares could resolve the issues between the parties. Positive indications were given by counsel, and accordingly we adjourned the matter pending a suitable settlement agreement being reached by the parties.

[11] We are satisfied that an appropriate compromise has been reached by the parties which will allow those opposing the sale of the block to retain their interests, while also allowing those who wish to sell to do so. Such a compromise is consistent with the principles of the Preamble and s 2 of Te Ture Whenua Māori Act 1993 for retention as well as utilisation and development of land by the Māori owners, their whānau and hapū. It is also consistent with s 17 of the Act which bids the Court, when exercising its jurisdiction and powers under the Act, to ascertain and give effect to the wishes of the owners s 17(2)(a); to determine and facilitate the settlement of disputes s 17(2)(c); and to promote practical solutions to problems arising in the use or management of the land s 17(2)(f).

[12] This Court has jurisdiction pursuant to s 56(1)(f) to make any order that the Māori Land Court could have made in the proceedings, and pursuant to s 56(1)(d) to direct the Māori Land Court to make such other or additional order as this Court thinks fit. Pursuant to s 37(3), the Māori Land Court can exercise any other part of its jurisdiction during the course of any proceedings. Thus, this Court can make the conditional partition order

requested and then refer the matter back to the Māori Land Court to consider those matters set out in Part 14 of the Act.

[13] We apprehend that a conditional order for partition is sought with a view to limiting the Māori Land Court's considerations to the technical aspects of a partition, such as ensuring that the partitioned land is proportionate to the value of the shares of the appellant owners, survey matters, necessary local authority consents and the like. We consider that such a limitation is appropriate given this Court's indication to the parties at the hearing of the appeal that a partition seemed a viable solution. However, we are still required to have regard to the matters set out in s 288 of the Act in order to make the conditional partition order. We are assisted in this task by all the evidence before the Māori Land Court and this Court.

[14] In terms of the matters to which we must have regard in s 288(1), a conditional partition order will not only allow the respective majority and minority owners to obtain their goals, but will also avoid adversarial litigation, which would be costly, time-consuming and destructive of relationships between the owners. Those owners who wish to sell do so because the land is not sufficiently economically viable, while the neighbouring trust, who are the purchasers, may be able to make better use of it by managing it with their existing land. The appellants who wish to retain their interests are nevertheless prepared to agree to a lease of the partitioned land to the neighbouring trust for five years. This seems to us a sensible arrangement for utilisation of the land as a whole, but with some flexibility for future changes of use and occupation.

[15] We note that in the year since the hearing of the appeal the parties have undertaken considerable discussions in order to reach the settlement agreement, and that the majority of shareholders support the partition. In these circumstances we are satisfied of the matters set out in s 288(3).

[16] Section 288(4) requires us to be satisfied that the partition order is necessary to facilitate the effective operation, development and utilisation of the land. The only way the minority owners can retain their interests is by partition. It would not be consistent with the principles of the Act to require them to endure the sale of their land where another way is available and which still provides for utilisation and development of the land. Accordingly we are also satisfied that the s 288(4) requirement is fulfilled.

[17] Finally, these orders are a matter of consent between the parties. Looking at the overall situation we are satisfied that the proposed orders should be made.

Orders

[18] There are orders pursuant to Te Ture Whenua Māori Act 1993 as follows:

- (a) Section 56(1)(f) and s 37(3) making a preliminary order pursuant to s 289 for a partition of the shares of the appellants in the above land, such order being conditional pursuant to s 73 on the Māori Land Court being satisfied of the matters set out in Part XIV as limited above;
- (b) Section 56(1)(d) referring this matter to the Māori Land Court to undertake a hearing of the matters set out in 18 (a), including submission of a survey plan for approval by the Court, local authority consent, and other technical matters relating to partition;
- (c) Discontinuing this appeal pursuant to r 8.23, Māori Land Court Rules 2011.

[19] Costs should lie where they fall.

Pronounced in Wellington at 1.30pm on Friday this 19th day of July 2019.

C M Wainwright
JUDGE

L R Harvey
JUDGE

S Te A Milroy
JUDGE