IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU

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UNDER	Sections 135, 136 and 338 Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Rapaki Māori Reservation 875 Part Sec 6A & Sec 6B1B2C
	HENRY TAMATEA COUCH MARIATA MARGARET LAFFEY DOUGLAS FALCON HEREWINI COUCH Applicants

Hearing: 4 December 2015, 34 Te Waipounamu MB 229-245
(Heard at Christchurch)

Appearances: R Williams for the applicants
R Calman for the Chief Executive of the Canterbury Earthquake Recovery Authority

Judgment: 15 June 2016

REASONS FOR JUDGMENT OF JUDGE S F REEVES

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Introduction

[1] On 4 December 2015 I granted orders to change the status of four blocks of land at Rāpaki from Māori freehold land to General land to facilitate a sale and purchase transaction between the applicants who are the landowners and the Crown in the aftermath of the Canterbury earthquakes. I also ordered that, following the transaction, the status of the blocks revert to Māori freehold and I recommended that the blocks be vested as Māori reservations.

[2] By the date of hearing, time was of the essence because only a few days remained before the deadline for accepting Crown offers to purchase the land. At the conclusion of the hearing, I granted the orders and made the recommendations requested, but explained that I would reserve my reasons. The Court does not change the status of Māori freehold land to General land lightly, and it is important that the Court gives full reasons when such orders are made. I set these out now.

Background

[3] Rāpaki is situated on the eastern shoreline of Lyttelton Harbour in Christchurch and is home to descendants of Ngāti Wheke hapū. The settlement was founded near the end of the 17th century by Te Rakiwhakaputa, a rangatira of Ngāi Tahu to whom the applicants' whakapapa back to. In 1859, the land from which the blocks are comprised became a Māori reserve by virtue of the Port Cooper purchase agreement between Ngāi Tahu and the Crown. Since the mid-19th century the land has been partitioned into various individual titles.

[4] My decision addressed three sets of applications relating to four separate blocks at Rāpaki Māori Reserve 875. Each set of applications sought to change temporarily the status of the block(s) to General land (to facilitate their sale to the Crown), to set the block(s) aside as a Māori reservation for the benefit of the applicants, and to have the status of the block(s) revert to Māori freehold land. The applications by Henry Tamatea Couch related to section 6B1B2A, the applications by Mariata Margaret Laffey related to section 6B1B2B, and the applications by Douglas Falcon Herewini Couch, Mariata Margaret Laffey and Henry Tamatea Couch together related to two blocks, Part Section 6A and Section 6B1B2C.

[5] The applications came before the Court as a result of the grave impact of the 2010-2011 Canterbury earthquakes on Rāpaki. The blocks in question lie directly beneath Rāpaki's maunga, Te Poho o Tamatea. During the second major earthquake in February 2011, large boulders were dislodged from the mountain and fell onto the land below. Some of these boulders descended at such a speed that they crashed straight through a couple of homes coming to rest on the road below. Thankfully there was no loss of life or injury, but to date the extreme threat of rock fall from the mountain is ongoing and poses high risk to life. As a result, the blocks are unsuitable for residential purposes and were red-zoned by the Crown.

[6] As part of its regional earthquake recovery plan, the Crown made offers to all owners of residential red zone land to purchase their land at pre-earthquake 2007 rateable value. The aim was to allow owners to receive funds from sale of their land to help them move on with their lives. However, because the blocks at Rāpaki were Māori freehold land – the alienation of which is subject to the provisions of Te Ture Whenua Māori Act 1993 (the Act) – the applicants could not accept this initial Crown offer in the manner proposed. Furthermore, the applicants did not wish to alienate the land out of Māori ownership.

[7] In 2015, the Crown developed the Residential Red Zone Offer Recovery Plan to address certain categories of red zone land that had fallen outside previous recovery policies. This plan included a specific proposal for Rāpaki, under which a temporary change of status would allow the Crown to purchase the land as General land. After this sale, the land would be set aside as a Māori reservation for the benefit of the applicants and their descendants and its status would revert to Māori freehold. This proposal depended on the Court making the necessary orders and recommendations, and so the applications that are the subject of this judgment were made.

The Law

Change of status from Māori freehold land to General land

[8] The relevant sections are ss 135 and 136 of the Act, which state:

> **135 Change from Maori land to General land by status order**

> (1) The Maori Land Court shall have jurisdiction to make, in accordance with section 136 or section 137, a status order declaring that any land shall cease to be Maori customary land or Maori freehold land and shall become General land.
>
> (2) The court shall not make a status order under subsection (1) unless it is satisfied that the order may be made in accordance with section 136 or section 137.
>
> (3) A status order under subsection (1) may be made conditional upon the registration of any instrument, order, or notice effecting a conveyance of the fee simple estate in the land to any person or persons specified in the order.
>
> **136 Power to change status of Maori land owned by not more than 10 persons**
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> The Maori Land Court may make a status order under section 135 where it is satisfied that—
>
> (a) the land is beneficially owned by not more than 10 persons as tenants in common; and
>
> (b) neither the land nor any interest is subject to any trust (other than a trust imposed by section 250(4)); and
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> (c) the title to the land is registered under the Land Transfer Act 1952 or is capable of being so registered; and
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> (d) the land can be managed or utilised more effectively as General land; and
>
> (e) the owners have had adequate opportunity to consider the proposed change of status and a sufficient proportion of the owners agree to it.

[9] Members of the preferred class of alienees (PCA) must be formally notified of the application and the hearing and the Court will strictly adhere to this requirement.[1] In the present case, such notice had been given, so I was able to proceed with the application, the hearing, and the orders made.

The two-step process

[10] The structure of the statutory provisions points the Court towards a two-step process when assessing an application to change the status of Māori freehold land to General land.[2]

[11] First, the Court should ensure that all the statutory preconditions in s 136(a) through to (e) are satisfied. Most require a simple determination of fact. To show that these

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1 *Te Whata – Waiwhatawhata 1A2B6 Lot 1 DP 168554* (2008) 125 Whangarei MB 294 (125 WH 294) at [11]; *Cleave – Orokawa 3B* (1995) 4 Taitokerau Appellate MB 95 (4 APWH 95) at 102.

2 *Te Whata*, above n 1, at [12]

are met, applications must be supported by "full and cogent evidence".[3] The precondition in s 136(d), that the land can be managed or utilised more effectively as General land, is often the hardest to satisfy. The applicant must demonstrate, via sufficiently detailed and reasonably tested evidence, that specific plans for the land exist, which could be achieved more effectively if the land were General land.[4] As this issue is preliminary, the Court need not be satisfied that change of status is the only available option, but simply that it would allow the proposal's objective to be more easily or more effectively achieved.[5]

[12] Second, if the s 136 preconditions are satisfied, the Court should consider whether to exercise its discretion to change the land's status. The granting of a change of status order is fact-specific and each particular application should be dealt with on its merits.[6] If a change is granted, it must be strictly proportionate to the objective.[7] The Court should exercise its discretion in accordance with the Act's Preamble and ss 2 and 17.[8] The overarching principles of retention and utilisation are important, as is the s 2(2) requirement that the Court seek to exercise any discretion in a manner that upholds these principles.[9]

[13] A s 135 order removes the PCA's first right of refusal in relation to alienation of the land, which the Court should not permit lightly.[10] The Court should weigh the PCA's position on the status change when exercising its discretion.[11] Where the PCA support a status change or make no objection, this will be a weighty factor, but is insufficient on its own to justify a change, especially if the circumstances of the case are not distinctive.[12]

[14] The essential question for the Court is whether changing a block's status would undermine the balance struck in the Act between landowners' right to engage with their

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3 *Te Whata*, above n 1, at [13]; *Hoko - Papamoa 2A1* (2003) 20 Waikato Maniapoto Appellate MB 167 (20 APWM 167) at 181.

4 *Te Whata*, above n 1, at [14], [42]; *Craig v Kira – Wainui 2F4D* (2006) 7 Taitokerau Appellate MB 1 (7 APWH 1) at [10]; *Property Ventures Ltd v Parata – Ngarara West B3B* (2007) 16 Aotea Appellate MB 1 (16 WGAP 1) at [34].

5 *Ngarara West B3B*, above n 4, at [35].

6 *Regeling – Orokawa 3B Lots 4, 7 & 8* (2004) 6 Taitokerau Appellate MB 157 (6 APWH 157) at 161.

7 *Wainui 2F4D*, above n 4, at [28].

8 *Te Whata*, above n 1, at [20]; *Cleave – Orokawa 3B*, above n 1, at 100-102; *Wainui 2F4D*, above n 4, at [8]; *Ngarara West B3B*, above n 4, at [29].

9 *Cleave – Orokawa 3B*, above n 1, at 101-102; *Te Whata*, above n 1, at [37].

10 *Wainui 2F4D*, above n 4, at [28].

11 *Te Whata*, above n 1, at [17].

12 *Ngarara West B3B*, above n 4, at [45]; *Te Whata*, above n 1, at [51].

land as they wish, and the wider hapū interest in land as a collective taonga tuku iho.[13] A case should be "outside the ordinary run of cases" to warrant a finding that this balance would not be undermined by an order granting change of status.[14]

Submissions in support of the applications

[15] The Court benefitted from full submissions in support of the applications, presented jointly by the Crown and the land owners. In these, it was submitted that the change of status applied for was but one "part of an overall transaction" with a twofold purpose: to help the applicants move forward with their lives through receipt of the Crown's purchase price for their land and to facilitate their retention of that land in Māori freehold title post-purchase. This overall transaction featured the (almost simultaneous) completion of a series of steps:

(a) A Court order under s 135 to change the land's status to General land.

(b) The Crown purchase of the land as General land.

(c) A Court recommendation under s 338 that, following purchase, the land be set aside as a Māori reservation for the benefit of the applicants and their descendants.

(d) A Court order under s 133 returning the land's status to Māori freehold land.

[16] The submissions suggested that the only s 136 preconditions in issue were that the land could be more effectively managed or utilised as General land, and that the owners had had adequate opportunity to consider the proposed change of status and a sufficient proportion agreed to it. It was submitted that both were fulfilled.

[17] In relation to the effective management or use of the land it was submitted that:

(a) The Canterbury earthquakes significantly disrupted the applicants' ability to manage, use and develop the land. The specific plan for the land set out in

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13 *Wainui 2F4D* above n 4, at [19].
14 *Ngarara West B3B*, above n 4, at [20]; *Wainui 2F4D*, above n 4, at [44].

the Recovery Plan was the applicants' preferred means of managing and using their land in the reality of the post-earthquake context.

(b) The proposed transaction was tailor-made for the land at Rāpaki to navigate the constraints of the Act, the Canterbury Earthquake Recovery Act 2011 (CER Act) and the Recovery Plan. Specifically, the Act restricts alienation of Māori freehold land, while the only option available to the Crown to assist with red zone recovery under the CER Act is to offer to purchase the land. The proposal reached in the Recovery Plan balances the obligations under both Acts most fairly for the owners of the Rāpaki blocks.

(c) The Act's alienation process for Māori freehold land was a less effective use or management of the Rāpaki blocks and would create significant unfairness for the applicants when compared to the owners of red zone General land. The blocks would first need to be offered to the PCA, but because the land's value had dropped, the PCA would be required to pay far less than the Crown's offer. Accordingly, the transaction proposed was not about getting the applicants a better price, but about ensuring they would "partake equally alongside the other red zone property owners in the Crown's earthquake recovery response."

(d) The change of status was necessary for the proposed transaction. The status of the Rāpaki blocks as Māori freehold land had obstructed the applicants' acceptance of earlier offers. It would go on to stop them from accepting the Crown's latest offer and therefore from accessing the finance to move on with their lives. As such, the specific plans for the land set out in the Recovery Plan would not simply be more easily and effectively achieved by a change of status, but would be made possible.

[18] In relation to the owners' opportunity to consider the proposed change of status and whether a sufficient proportion of owners were in agreement, it was submitted that:

(a) The applicants and their descendants were sufficiently notified about the proposal, which was designed collaboratively. The applicants had been

involved in discussions with CERA, Te Rūnanga o Ngāi Tahu and the Māori Land Court over several years to determine the new specific Crown offer.

(b) CERA representatives explained the proposal and necessary process at various meetings, which were publically notified and attended by the owners, as well as representatives from the Māori Land Court and Te Rūnanga o Ngāi Tahu.

(c) The details of the proposal were set out in the Crown's offer letters.

(d) The applicants wished to accept the Crown's offer.

[19] The submissions also stated that it was appropriate for the Court to exercise its discretion to grant the orders in this case because:

(a) The application for a change of status was "inextricably linked" to the applications for the s 338 recommendations and the s 133 orders. Indeed, the Crown's offer to purchase the land was conditional on the Court making these orders and recommendations. So, the s 135 application should be assessed in light of the purpose and outcome of the transaction as a whole.

(b) The purpose was twofold: to allow the owners to achieve their goal of receiving finance for their land to help them move on with their lives following a severe earthquake, and to retain the land in Māori ownership for the applicants and their descendants.

(c) The proposed change of status was only an interim and temporary step in the wider transaction to enable the money to change hands, after which the land would revert to Māori freehold status and be set aside as a Māori reservation. The temporary change of status is accordingly granted for the least extent necessary to achieve the desired objective of fulfilling the entire transaction. It is therefore analogous to the change of status orders for sale that were envisaged as acceptable in *Te Whata*.[15]

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15 *Te Whata*, above n 1, at [33].

(d) The proposal was a pragmatic response to exceptional and unusual circumstances. It strikes a good balance between empowering the owners to manage and utilise the land and promoting the land's retention as Māori freehold land.

(e) The PCA were notified of the proposal and expressed no objections. The applicants' descendants support the applications. Although the change of status would temporarily remove the PCA's right of first refusal, in the long-term this right is protected because the land's status reverts to Māori freehold land after the transaction.

Discussion

[20] The Court benefitted from comprehensive legal submissions in support of the applications. I am fully satisfied, for the reasons set out in the submissions that the legal tests justifying a change of status were fully made out in this case.

[21] The purpose of changing the status of the land at Rāpaki was to facilitate its sale. However, looking more closely, the key fact here is the purpose of the sale itself, which aimed to promote effective use of the land, as well as the retention and control of Māori land as tāonga tuku iho by Māori owners and their descendants. It was one step in a process that allowed the Crown to purchase the property at pre-earthquake rateable valuation (adjusted to reflect that the Crown was purchasing General land) so that the applicants could recover this value from their red-zoned property. As soon as the transaction was effected, the land was set aside as a Māori reservation and its status reverted to Māori freehold land, for the benefit of the applicants and their uri.

[22] The circumstance of the Christchurch earthquake, the red-zoning of the land, the need for the applicants (and their express wish) to receive value for their land on the same basis as any other owner of red-zoned property would, and the conditionality of the change of status on a reversion back to the Māori freehold land following the transaction, together make this a unique and exceptional case. Given the case is so tightly confined to its facts,

granting an order for a change of status is unlikely to trigger a run of unwarranted cases in reliance on this decision.[16]

[23] The balance of meeting the owners' needs to realise the value of their land through sale to the Crown, and retaining the land for the future benefit and enjoyment of the applicants and their uri has been well struck, although arguably these principles were never truly in conflict; the end point was always intended to be the retention of the land, with the sale merely a facilitative exercise to realise funds for recovery in the context of a natural disaster. In any case, I consider that the devised transaction upheld the Act's underlying principles.

[24] I do wish to make one further observation. My understanding from the hearing is that the Crown offers were devised on the basis that the land could not be alienated to the Crown as Māori freehold land. It is not strictly true that the Crown would have been unable to purchase the blocks at Rāpaki as Māori freehold land, although, I do accept that the CER Act was drafted with the purchase of General land in mind. Nevertheless, I note that had the conditions of purchase been fulfilled following the Act's alienation process for Māori freehold land, then under s 151 the Court would have had no discretion regarding whether or not to confirm the alienation. This would perhaps have produced greater certainty for all parties.

[25] However, I accept that by the time of hearing, the proposal arrived at by the Crown and the applicants had been many months in the making. It was a good solution in very difficult circumstances. The collaborative approach was to the credit of all parties involved, and the final proposal reflects the objectives in s 17 of the Act to ascertain and give effect to the wishes of the owners of land, and to promote practical solutions to problems arising in the use or management of any land.

Dated at Wellington this 15th day of June 2016

S F Reeves
JUDGE

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16 *Wainui 2F4D*, above n 4, at [22].