

**IN THE MĀORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT**

A20150006353

A20150006354

UNDER Sections 18(1)(a) and 135 of Te Ture Whenua
Māori Act 1993

IN THE MATTER OF Horowhenua 9A6B1

BETWEEN CAROLINE CROSS
Applicant

Hearing: 347 Aotea MB 256-260 dated 18 January 2016

Appearances: S Hepburn for the applicant

Judgment: 19 July 2016

RESERVED JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Caroline Cross seeks orders that she is the current owner of Horowhenua 9A6B1 and that its legal status is that of General land. The Court records confirm that the land is vested in Martin Hartley and Victoria Hartley as joint administrators of the estate of Mirimiri Hartley. However, a number of transfers have occurred through Land Information New Zealand (LINZ), which it appears, were not confirmed by the Court. As a result, Ms Cross is shown as the current registered proprietor of Horowhenua 9A6B1 on the LINZ title.¹

Background

[2] Horowhenua 9A6B1 was created by partition order dated 4 November 1982 and vested in Mirimiri Hartley solely.² Ms Cross purchased the land in 2009 believing it to be General land. She argued that prior to a Court order made on 21 February 2014 declaring the land Māori freehold land, no status order was registered against the title.³ Accordingly, Ms Cross sought clarification as to the status of the land and, if necessary, a change from Māori freehold land to General land.

[3] Ms Cross also confirmed that she was in the process of negotiating a division of relationship property with her former partner, and that the status of the land as Māori freehold land prevented the parties from obtaining financing to allow completion of settlement in relation to Horowhenua 9A6B1.

[4] In an interim decision dated 29 February 2016, I confirmed that the status of Horowhenua 9A6B1 is Māori freehold land.⁴ At the conclusion of the decision, however, I invited Ms Cross to take further advice and, if necessary, file further submissions concerning her change of status application.

Issue

[5] The issue now remaining for determination is whether final orders should be granted confirming the status of the land as Māori freehold and that Ms Cross is its owner.

¹ Computer Freehold Register WN26D/6

² 84 Otaki MB 53 (84 OTI 53)

³ 327 Aotea MB 248 (347 AOT 248)

⁴ *Cross – Horowhenua 9A6B1* (2016) 349 Aotea MB 28 (349 AOT 28)

Is Horowhenua 9A6B1 Māori freehold land?

[6] As foreshadowed, in my interim decision of 29 February 2016, I was satisfied that the status of Horowhenua 9A6B1 is Māori freehold land. I also considered whether the provisions of the Māori Affairs Amendment Act 1967 had the effect of changing the status of the land to General land and the relevance of the principle of indefeasibility. I found that the land was Māori freehold land prior to commencement of Te Ture Whenua Māori Act 1993 (“the Act”) and did not change to General land by virtue of the provisions of the Māori Affairs Amendment Act 1967. The subsequent transfers and the principle of indefeasibility did not alter the status of the land.

[7] Following the issue of my interim decision, counsel for Ms Cross filed a memorandum dated 26 May 2016 advising that no further submissions would be made in relation to the change of status application and that a final decision could be issued.

[8] Accordingly, I am satisfied that the status of the land is Māori freehold land. The registrar now confirms that a status order was recently issued declaring the land Māori freehold land and registered against the title, so there is no need for a further order to issue.

Is the applicant the owner of Horowhenua 9A6B1?

[9] Section 18(1)(a) of the Act gives the Court jurisdiction to determine claims regarding ownership of Māori freehold land. It provides:

18 General jurisdiction of court

- (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
- (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[10] It is well settled that the Court’s jurisdiction under s 18(1)(a) does not create new rights, rather the Court determines the existing rights “at law or equity” in respect of any Māori freehold land or interest in it.⁵

⁵ See *McCann – Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Takitimu Appellate MB 2 (2 ACTK 2)

[11] In the present case the records of the Court as to the ownership of Horowhenua 9A6B1 do not reflect those held by LINZ. Transfers of the land were effected through LINZ and, it appears, without referral to the Court, resulting in a difference between the two titles – not an uncommon occurrence. I consider those transfers below and their effect on the current ownership of the land.

The transfers

[12] The current records of the Court show the land as vested in Martin Hartley and Victoria Hartley as joint administrators of the estate of Mirimiri Hartley. An order transferring the block to the administrators was made on 6 November 1997 and subsequently registered with LINZ on 13 July 1998.⁶ In addition, a transmission to the administrators had already been registered against the LINZ title on 10 October 1997, prior to the Court order.⁷

[13] The LINZ title shows the following subsequent transfers:

- (a) On 16 June 2000 the land was transferred from Martin Hartley and Victoria Hartley to Karen Hartley and Lynaire Hartley and registered against the title on 26 June 2000.⁸
- (b) On 22 August 2001 the land was transferred from Karen Hartley and Lynaire Hartley to Martin Hartley and Loretta Shanks and registered against the title on 11 September 2001.⁹
- (c) On 3 February 2005 the land was transferred from Martin Hartley and Loretta Shanks to Martin Hartley solely, and registered against the title on 9 March 2005.¹⁰
- (d) On 30 November 2005 the land was transferred from Martin Hartley to Dean Mellor and registered against the title on 23 December 2005.¹¹
- (e) On 16 December 2009 the land was transferred from Dean Mellor to Caroline Cross and registered on the same day.¹²

⁶ 77 Aotea MB 41 (71 AOT 41)

⁷ Transmission document B621658.2

⁸ Transfer document B789828.2

⁹ Transfer document 5082379.2

¹⁰ Transfer document 6339759.3

¹¹ Transfer document 6707060.2

[14] The transfers are dispositions of Māori land and therefore come within the definition of alienations contained in s 2 of the Act. As the transfers all occurred after the commencement of the Act they are governed by the provisions in Part 7 and 8 of the Act.

[15] Section 146 provides that no person has the capacity to alienate any interest in Māori freehold land otherwise than in accordance with the Act. Section 147 provides that a sole owner, joint tenants, owners in common, trustees of a Part 12 trust and Māori incorporations all have the capacity to alienate the whole or any part of the land in accordance with specific provisions of the Act.

[16] Relevant to the present circumstances is s 150C(3) of the Act, which provides:

150C Alienation by other owners

...

(3) A person referred to in section 147(1)(a), (b), or (c) who executes an instrument of alienation of Maori freehold land must,—

(a) if the alienation is by way of sale or gift, get the instrument confirmed by the court under Part 8; and

...

[17] Section 156 provides that no instrument of alienation that is required to be confirmed under Part 8 of the Act shall have any force or effect until it is confirmed by the Court. In the present case, the transfers do not comply with the provisions of the Act as they were not confirmed by the Court in accordance with Part 8. On the face of it therefore, those transfers have no force or effect.

The principle of indefeasibility

[18] The principle of indefeasibility is relevant to the ownership of Horowhenua 9A6B1. Despite the transfers in relation to the land not being confirmed by the Court, the LINZ records verify that the transfers were registered against the title.

[19] Section 62 of the Land Transfer Act 1952 (“the LTA”) provides:

62 Estate of registered proprietor paramount

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the

¹² Transfer document 8335863.1

provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—

- (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
- (b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
- (c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

[20] In *Muraahi v Phillips* the Māori Appellate Court considered the principle of indefeasibility and how this relates to a failure to comply with the provisions of the Act.¹³ The appellants in that case sought an order per s 18(1)(a) of the Act that a transfer of Māori freehold land was unlawful, as it did not conform to the provisions of the Act. They argued that in those circumstances ownership of the land should therefore revert back to the transferor.

[21] In dismissing the appeal, the Court referred to the decision of the High Court in *Warin v Registrar-General of Land* and noted:¹⁴

[69] The *Warin* decision measures the relationship between the LTA and Māori land legislation, and traverses well-known precedent relating to indefeasibility of title. The clear conclusion to be drawn from *Warin* is that where Māori freehold land is transferred without compliance with the provisions of TTWMA and none of the exceptions to indefeasibility apply the transferee obtains indefeasible title.

[22] The Māori Appellate Court considered that the failure to comply with provisions of the Act in that case was similar to the *Warin* case, as confirmation of a transfer of Māori freehold land was never sought and no right of first refusal was offered to the preferred class of alienees. The Appellate Court however noted that *Warin* also referred to the decision in *Housing Corporation of New Zealand v Māori Trustee* and together they emphasised the importance of security of title by registration and the need for any legislation, if it is to override the indefeasibility provisions of the LTA, to say so expressly.¹⁵ The Māori Appellate Court found:

¹³ *Muraahi v Phillips – Rangitoto Tuhua 55B1B and 55B1A2 (Manu Ariki Marae)* [2013] Māori Appellate Court MB 528 (2013 APPEAL 528)

¹⁴ *Ibid; Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC)

[118] Section 123(5) of TTWMA provides that orders of the Court, until registered, only affect the equitable title thus acknowledging the superiority of registration under the LTA. The LTA was passed in 1952. In 1993 when TTWMA was passed both the legislature and the draftsmen would have been aware of the importance placed on security of title in the LTA and various Court decisions in favour of indefeasibility of title. Despite the importance placed by TTWMA on retention of Māori land, no provisions were included to protect that land from the overriding provisions of the LTA. We find that the discretion allowed to the Court under s 2(2) of TTWMA is not sufficient to allow us to make a finding in favour of the appellants.

[23] Although the appellants tried to distinguish *Warin* to justify the Court departing from the principles expressed in that decision, the Māori Appellate Court did not consider any of the grounds put forward were sufficient to override the indefeasibility provisions of the LTA and enable the Court to make the orders sought.

[24] The decisions in *Warin* and *Muraahi v Phillips* are directly relevant in the present case. Although the transfers in relation to Horowhenua 9A6B1 did not comply with the provisions of the Act, in terms of being confirmed under Part 8 and a right of first refusal being offered to members of the preferred class of alienees, the transfers were nevertheless registered against the title. There has been no suggestion that the transfers were obtained by fraud or that any of the other exceptions to indefeasibility apply. In such circumstances, and given that the Act does not expressly provide that its provisions override those of the LTA, the principle of indefeasibility will apply. Accordingly the transfers, once registered, gave indefeasible title to the corresponding transferees.

[25] I am satisfied that Ms Cross is the current owner of Horowhenua 9A6B1 by virtue of the transfer registered against the title on 16 December 2009.

Property Relationships Act 1976

[26] For the sake of completeness, I also note that in my interim decision I found that the Property Relationships Act 1976 does not apply to Māori freehold land and Horowhenua 9A6B1 is therefore not subject to that Act. However, as counsel for Ms Cross noted, the former partner of Ms Cross, Mr Hartley, may have an equitable interest in the property, or as she referred to it, a beneficial interest. I am not aware of any such claim currently before the Court. Should Mr Hartley wish to make a claim, he will need to bring such proceedings in his own right.

¹⁵ *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC) at [125]; *Housing Corporation of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC)

Decision

[27] Caroline Cross is the current owner of the Māori freehold land Horowhenua 9A6B1, per s 18(1)(a) of Te Ture Whenua Māori Act 1993.

[28] No issue as to costs arises.

Pronounced at 2.30 pm in Whanganui on Tuesday this 19th day of July 2016

L R Harvey
JUDGE