

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

A20160003019

UNDER Sections 18(1)(a), 37, 67, 237 and 242 of Te
Ture Whenua Māori Act 1993

IN THE MATTER OF Papatupu 2A No.2

AND MAUREEN FLUTEY
Applicant

Hearings: 356 Aotea MB 3-12 dated 19 July 2016
357 Aotea MB 200-206 dated 16 August 2016

Appearance: P Allen for the Applicant
I Parker for the Executors to the Estate of Jim Huirua Sullivan

Judgment: 31 August 2016

INTERIM JUDGMENT OF JUDGE L R HARVEY

Solicitors:

I Parker, Parker and Maxengarb, PO Box 33, Whanganui parkermaxengarb@xtra.co.nz
P Allen, Treadwell Gordon, PO Box 4084, Whanganui pba@treadgord.co.nz

Introduction

[1] Maureen Flutey seeks orders that she is entitled to 30.77% of the proceeds of trees harvested from the Papatupu lands currently held by her solicitors amounting to approximately \$102,000.00. Mrs Flutey says she is entitled to these funds on account of an agreement reached between herself and the late Jim Sullivan over use of her land in exchange for the right to participate in the proceeds of the trees to be harvested from that land.

[2] She also seeks costs due, she claims, to the unreasonable delay of over two years in seeking to have this issue resolved without recourse to the Court. Mrs Flutey, through her counsel, Ms Allen reiterates that she has made every reasonable effort to try and reach agreement with Mr Parker and his clients over the proper distribution of the proceeds that are currently held. Despite those efforts the issue remains unresolved.

[3] Mr Parker for the executors to the estate of Jim Sullivan opposes the claim. He says that at best Mrs Flutey could claim only some 26.5% of the proceeds. He also submits that he has not yet obtained detailed instructions from his clients who are entitled to be heard.

Issue

[4] The issues for determination are first, is the applicant is entitled to either 26.5% or 30.77% of the harvest proceeds? Second, if she is then should any deduction be made for the costs of planting, maintaining and harvesting the trees?

Background

[5] Papatupu 2A2 is 11.938 ha of Māori freehold land located on Ngutuwera Road, Waitōtara.¹ The block was created by partition order on 23 May 1930.² As at the date of hearing there are two owners listed on the title, Mr Sullivan and Mrs Flutey holding 18 and 8 shares respectively.

[6] There is no management structure over the land.

¹ 169 Aotea MB 161-162 (169 AOT 161-161)

² 91 Whanganui MB 253

[7] On 29 September 1994 a roadway was laid out over Papatupu 2A and surrounding lands for the purpose of providing access.³

Submissions for the Applicant

[8] Mrs Flutey says that she and the late Mr Sullivan came to an agreement about the lack of rental payments from him for use of her land. In short, she claims that it was agreed between them that in lieu of rental, Mr Sullivan would instead share to proceeds from the harvesting of trees from the land.

[9] Counsel confirmed that payment for the harvest had been received and after a series of discussions it was eventually agreed that the harvesting company would pay the proceeds into the trust account of Treadwell Gordon, solicitors of Whanganui, pending the outcome of claims to those funds by Mrs Flutey and the Estate of Mr Sullivan.

[10] For some months, Ms Allen argued, Mrs Flutey has attempted to reach a resolution of the issues apparently in dispute without success. Counsel contended that Mrs Flutey has taken all reasonable steps to seek to have the issue resolved amicably but for various reasons this has not been possible. She therefore seeks a direction or decision from the Court that the amount of her claim, being 30.77% of the funds held should be paid to Mrs Flutey.

[11] Ms Allen submitted that her client owns eight out of 26 shares in Papatupu 2A2. In 1993, the late Jim Sullivan established a pine plantation on the land. The trees were harvested between the end of 2013 and the beginning of 2014. Counsel confirmed that there was no written agreement between Mrs Flutey or Mr Sullivan relating to the forest.

[12] Counsel further submitted that, according to her client, Mr Sullivan had occupied the land for farming purposes and had paid Mrs Flutey a rent in recognition of her ownership of part of the land.

[13] In her evidence, Mrs Flutey confirmed that there was in fact no agreement, Mr Sullivan had simply informed her that he would no longer pay rent but that when the trees were harvested she would receive her share of the proceeds.

³ 42 Aotea MB 222-223 (42 AOT 222-223)

[14] Counsel also confirmed that a company known as Forest Owner Marketing Services Limited undertook the harvesting and on 5 February 2014 her firm notified FOMS of Mrs Flutey's interest in the land. Subsequently, according to counsel, Mr Sullivan instructed Mr Parker's firm in or about March 2014 to act for him. After further discussion, on 13 March 2014 the parties agreed that FOMS would pay Treadwell Gordon the proceeds to hold as stakeholder with the firm giving the following undertaking:

To hold the funds in our trust account as stakeholder to the command of either;

- (a) FOMS and then paid only to FOMS: or
- (b) Mr Sullivan or Mrs Flutey and then only paid to one or both of them on their joint instructions.

[15] FOMS subsequently paid \$98,164.99 excluding GST to Treadwell Gordon in accordance with the undertaking. Counsel confirmed that as at 4 May 2016 the principal and interest earned amounted to \$102, 129.50.

[16] Ms Allen submitted that in July 2014 correspondence was sent to Mr Parker enquiring as to whether he had made any progress. On 1 August 2014 Mr Parker, according to counsel, attended their offices and requested copies invoices relating to the payment of the proceeds relating to the harvest. Following that, according to Ms Allen, on 28 August 2014 further correspondence was sent to Mr Parker requesting an update on progress and suggesting an interim distribution to both parties. Mr Parker replied on the same day confirming that he had instruction that no distribution was to be made. He also confirmed that he had calculated Mrs Flutey's share of the actual forest area at 26.5%. Ms Allen contended that a response was sent the next day confirming her client's stance that Mrs Flutey's share of the proceeds should be 30.77% in accordance with her ownership of the land.

[17] Toward the end of August 2014 Mr Sullivan died. Contact was then made, according to Ms Allen, with Mr Parker on 10 September 2014 requesting instructions to distribute the proceeds. Mr Parker replied on 16 September 2014 saying that he had no instructions.

[18] Following that, a meeting was suggested between the parties and FOMS and their advisors in an attempt to resolve the outstanding issues, on 14 October 2014. Ms Allen submits that all parties agreed to the meeting except Mr Parker. Ms Allen confirmed that both her client and her firm had "repeatedly contacted Mr Parker by phone and correspondence" but that he had not made any progress.

[19] Then on 23 February 2016 Ms Allen confirmed that she wrote to Mr Parker outlining her client's concern with the lack of progress while noting that no response was received from Mr Parker. Counsel submitted that a follow up letter was sent on 8 April seeking a distribution of 31% to Mrs Flutey and 69% to Mr Sullivan's estate. Ms Allen confirmed that Mr Parker was informed that should no response be received then an application to the Court would be made.

[20] Ms Allen then submitted that "despite numerous phone calls, emails and letters to Mr Parker" her firm had not received any instructions to distribute the funds. Moreover, Ms Allen submitted that she had received no indication of any progress from Mr Parker and that this lack of engagement had caused her client considerable and unnecessary stress. Accordingly, her client sought an order directing distribution from the funds held.

Submissions for the Estate

[21] Mr Parker makes three submissions. First, he acknowledges that the delay in progressing matters in large part is due to his own failure to properly seek instructions from his clients. He pointed out that he also had difficulty, from time to time, in communicating with them, as his letter to the Registrar of 16 August last confirms:

As a result of my procrastination and confusion, I have not yet reported to the remaining Executors Estate JH Sullivan nor the general body of Beneficiaries of the Estate to obtain their views on the Application or the Court directions. The last communication with the Executors was on 11 March 2016.

[22] At the last hearing he acknowledged that the delay was partly his responsibility:⁴

I Parker: I am in the hands of the Court. I accept that it's my fault that the beneficiaries haven't been put in a position to be aware of the submissions that they can make.

[23] Then again he made the fact of his own delays even more plain:⁵

The Court: What I am asking is from August 2014 until now, why hasn't this been settled? What is the hold up? What is the issue?

...

I Parker: From my point of view the issue has really been firstly the inability of the family to discuss the matter with them but secondly my inability to summarise all the position, formally get it out and get the family together to give an informed answer to that. I accept that that is basically the result of my not seeking instructions from the family rather than any out of the way difficulty with resolving any sort of issue which a large group of people have

⁴ 357 Aotea MB 201 (357 AOT 201)

⁵ Ibid, at 204

to deal with in a sense if it was a trust or if they were all owners of a piece of land as opposed to a sum of forestry proceeds, convening a meeting and properly dealing with that.

[24] Second, he suggests that there is no evidence other than Mrs Flutey's assertion that Mr Sullivan agreed to the arrangement she now claims was settled between them. There is, he submits, no other evidence and certainly no independent evidence to corroborate Mrs Flutey's version of events.

[25] Third, Mr Parker also contended that there are still outstanding issues to consider before any distribution could properly be made and that in a best case scenario Mrs Flutey would only be entitled to 26.5% of the proceeds. In his latest letter Mr Parker raises issues of contribution and how the costs of planting, maintaining and harvesting the trees should properly be deducted from any amount claimed by Mrs Flutey:

I have read through all the files concerning the contacts of my firm with Mr Sullivan since 1983, when Mr Sullivan who was then leasing Papatupu 2A2 purchased the 18 shares of Queenie Heremaia. In the court of Will instructions in 1997 and in 2002 there was some reference by Mr Sullivan to the contributions of family members to the planting and silviculture expenses to be recognised on the eventual distribution of forest Harvey proceeds within the family but no reference to any agreement with Maureen Flutey for payment of rent or the distribution of any forest proceeds. It appears that various family members made significant contributions in case and kind to the forest development expenses. On several occasions from 2002 Mr Sullivan indicated that he had purchased the share of Maureen Flutey in Papatupu 2A2, but that had not been recorded on the appropriate records. That information would need to be discussed with family members concerned before I could present any submission regarding allowances to be made on the distribution of forestry proceeds.

Discussion

[26] Mrs Flutey has appeared in this Court on a number of occasions in connection with proceedings concerning the sale and gifting of Māori land. Almost without exception, in my recollection, she has been the purchaser of interests from whānau or has facilitated family arrangements. Then as now I have found her to be, without exception, an honest and forthright individual. She says that Mr Sullivan came to an agreement with her over the proceeds from the harvesting of trees in lieu of rental payments. In the absence of any compelling evidence to the contrary, I have no reason to doubt her.

[27] That there is no independent corroborating evidence is admittedly problematic since Mr Sullivan is deceased. That Mrs Flutey's evidence could therefore be described as self-serving is not in dispute either. Yet even Mr Parker in his contributions to the proceedings made mention of discussions with Mr Sullivan over some of these matters. So it is not as if there is a complete rejection of Mrs Flutey's claim or that the possibility of such an

agreement being struck by her with Mr Sullivan was so improbable to the point of being unbelievable. I acknowledge that Mr Parker also confirmed that there was nothing in writing from Mr Sullivan supporting Mrs Flutey's claim. Similarly, there was he acknowledged no evidence that Mrs Flutey had sold her shares to Mr Sullivan or had intended to, beyond Mr Parker's recollection of what he says Mr Sullivan had told him.

[28] In any event, having considered the submissions, I am satisfied that the applicant is entitled to receive payment of the proceeds currently held by her solicitors. The question is first, what proportion of the funds held is she entitled to receive? After careful reflection, taking into account the evidence on the Court file and the submissions of the parties, I am also satisfied that Mrs Flutey should be entitled to at least the 26.5% of the proceeds in dispute. I direct that 26.5% of the proceeds currently held by Treadwell Gordon be paid forthwith to Mrs Flutey.

[29] I also direct that Mr Parker seek instructions from his clients within one month from the date of this direction as to their views regarding this decision and in relation to the matters previously discussed at the last hearing. If they wish to make submissions on what if any deductions should be made for the costs of planting and maintaining the forest then they should do so within the timeframe specified, noting the earlier adjournment and the request for submissions then. Evidence in support of any alternative position should also be filed within one month.

[30] For completeness I note that Mr Parker was directed to do so in the previous month but, for reasons known only to himself, has failed to do so. I cannot put the point any stronger that if there should be a repeat of this failure at the very least seek instructions then more formal steps in other fora may need to be taken. As an officer of the Court, if Mr Parker considers that he may be unable to comply with this direction, then he should ensure that alternative counsel are instructed without delay.

[31] In that context, I note that, while both counsel in response to questions from the bench seek to provide candid and comprehensive responses – notwithstanding their obligations to their clients – it did appear to me that inadvertently or otherwise, Mr Parker was beginning to give evidence from the bar in a manner that, should this proceeding continue, may also require his withdrawal and the instruction of new counsel. It is well settled that an advocate may only argue the case, not give evidence in support of it.⁶

⁶ *Hutchison v Davis* [1940] NZLR 490 at 506 per Myers CJ

A practitioner cannot be allowed to act in the dual capacities of counsel and witness. If there is a possibility of his being required as a witness, he must make his election at an early stage as to the capacity in which he will act.

[32] Should no response to this direction be received from Mr Parker or his clients then I give notice now that, in the absence of relevant and compelling submissions to the contrary, I intend to order the disbursements of the remaining 4.27% of the proceeds that Mrs Flutey is claiming to her within one month of the date of this direction.

[33] For completeness I note that Mrs Flutey appears to have taken every reasonable step to have the issue resolved without recourse to litigation. Taking into account the delays to date and the absence of any meaningful dialogue let alone resolution it is somewhat understandable that she has felt compelled to seek redress from the Court. Her frustration with what she considered were interminable delays was evident at the last hearing:⁷

M Flutey: Over the period of time that we have been going through this issue I have been in contact with Mr Parker. I would ring him and sometimes before the end of the conversation, “Keep ringing me Mrs Flutey,” he said, “It will keep me going,” but he said he has not had any contact from his clients.

I managed to speak to Hinemoana who happened to come down to the urupā and said that Mr Parker was trying to contact her, and that was the only time. Apparently she contacted Mr Parker, I don’t know what the discussion was but that was the only time, and they said he has never seen them since their father died. It is a family thing where they obviously don’t get on. She is not for want of money, but there are other family members that are.

This long issue of the thing, you know, we have proven that I am in ownership right because you sat in the Court when we actually changed things over in 1975. I’m still here.

[34] One final point. Mrs Flutey has made a claim for costs. There was much force in the submissions of counsel on this point. That Mr Parker has acknowledged some of the delays to date have been as a result of his own difficulties in seeking and then receiving instructions is also acknowledged. Mr Parker and his clients should be under no illusion that there remains at least a reasonable prospect of an award of costs, in the absence of compelling submissions to the contrary.

[35] In any event, there will be further opportunity for counsel to file and respond to submissions on costs in due course.

⁷ 357 Aotea MB 204 (357 AOT 204)

Decision

[36] Treadwell Gordon, solicitors of Whanganui, are directed to pay Maureen Flutey 26.5% of the proceeds currently held in their trust account from the harvesting of trees from Papatupu 2A2.

[37] The executors and trustees to the Estate of Jim Huirua Sullivan are invited to file any further submissions on the balance of the proceeds held by Treadwell Gordon claimed by Mrs Flutey being 4.27% within 1 month from the date of this decision. In the absence of any further submissions the balance claimed by Mrs Flutey may, by further order of the Court, be distributed to her without further hearing.

[38] Leave is reserved for any party to apply for further directions at any time.

[39] Costs are reserved.

These orders are to issue immediately, per r7.5 Māori Land Court Rules 2011.

Pronounced at 4.55 pm in Rotorua on Wednesday this 31st day of August 2016

L R Harvey
JUDGE