IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20190001151

	UNDER	Section 18(1)(a), Te Ture Whenua Māori Act 1993
	IN THE MATTER OF	Te Tii Mangonui A3
	BETWEEN	HOROMONA HEREWINI Applicant

Hearing: 27 May 2019
(Heard at Whangārei)

Judgment: 27 June 2019

JUDGMENT OF JUDGE T M WARA

Introduction

[1] This decision concerns an application filed by Horomona Herewini seeking an order pursuant to s 18 of Te Ture Whenua Māori Act 1993 determining that the Rapine and Rangimarie Herewini Whānau Trust owns a house situated on Te Tii Mangonui A3.

Background

[2] Te Tii Mangonui A3 is 12.8361 hectares of Māori freehold land located in Te Tii, administered by the Otoa Ahu Whenua Trust. The Rapine and Rangimarie Herewini Whānau Trust ("the Whānau Trust") is an owner of Te Tii Mangonui A3 and holds 27.312 shares out of a total of 295.764.

[3] Rapine Herewini passed away in the early 1980s, and Rangimarie Herewini passed away on 9 June 1996. The Whānau Trust was established on 31 January 1997.[1] On 15 April 1998 an order was made determining those entitled to succeed to Rangimarie's beneficial interests in Māori freehold land, and those interests were vested in the Whānau Trust.[2] This excluded any interest in Te Tii Mangonui A3, which were vested into the Whānau Trust by way of a variation of trust on 15 June 2004.[3]

The history of the whānau house

[4] During the 1970s, Rapine and Rangimarie Herewini expressed a desire to their whānau to build a house on Te Tii Mangonui A3. This eventuated in the early 1980s, and materials were purchased and donated by many members of the whānau. This included materials from the marae in Te Tii, as the whare was being dismantled to make way for a new one. Unfortunately, Rapine passed away before building commenced. The whānau house was completed in the mid-1980s and was available for whānau to stay while visiting Te Tii.

[5] In the early 1990s, Rangimarie sold her house in Manurewa and used the proceeds of the sale to carry out extensive alterations to the whānau house. She installed a new

---

1 2 Kaikohe (Succession) MB 277 (2 KH(S) 277).
2 2 Kaikohe (Succession) MB 372-373 (2 KH(S) 372-373).
3 30 Auckland MB 248-249 (30 AT 248-249).

bathroom; a master bedroom; two single bedrooms; a new laundry and a new kitchen. In addition, new furnishings were installed including carpet, linoleum and drapes.

[6] Various whanāu members have lived in the house since the mid-1980s. Robin lived in the whānau house in approximately 1984 while assisting with the build. Between 1985 and 1986, Ringapoto resided there, and Zenith lived in the whānau house until 1988. Between 1990 to 2001, the whānau house was occupied by Erihi Herewini, who managed the extensive alterations, subject to Rangimarie's approval.

[7] In 2002, Ringapoto Herewini and his whānau moved into the whānau house, where they remain.

The Law

[8] In *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1*, Judge Milroy summarised the established case law as follows:[4]

> [34] Case law makes it clear that the Court's jurisdiction is declaratory in nature – the Court may declare existing ownership rights at law or in equity but cannot create new ownership rights. It follows from the wording of the section that the Court may also determine that a building is not part of the land and that the beneficial owners of the land as a group are not the owners of the building.
>
> [35] Although common law provides that the owners of the land own any fixtures, s 18(1)(a) enables the Court to recognise that one or more of the owners may separately own a particular improvement. In determining these matters the Court has equitable jurisdiction and may recognise constructive trusts.
>
> [36] The Māori Appellate Court has expressed differing views as to the effect of a s 18(1)(a) order, in particular whether, on making the order, a house remains a fixture or becomes a chattel. There are also conflicting authorities on whether a s 18(1)(a) order can be made in favour of a non-owner and, if not, whether the Court can grant some other remedy in favour of a non-owner.
>
> [37] The Māori Appellate Court in *Tohu – Te Horo 2B2B2B Residue* commented:
>
> > [18] An order under section 18(1)(a)/93 appears to separate the house from the title to land and to treat it as a chattel. There is no ability to succeed to any such order, it not being an interest in land and the order is treated as being personal to the holder and lapsing on death. Anyone who wishes to sustain a further claim for the house needs to apply for another order.

---

[4] *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West* 2B2A1 (2012) 49 Waikato Maniapoto MB 223 (49WMN 223) (footnotes omitted).

> [38] I note that the learned Judge in the decision *Stock v Morris – Wainui 2D2B* took a different view of the law and considered that when the Court makes a s 18(1)(a) order the nature of the improvement as a fixture and the legal ownership of the land remains unchanged, although as a result of the Court's equitable jurisdiction the house may be owned separately by those specified in the order. As the learned Judge put it:
>
> > ... The Court is merely declaring the co-existence of legal and equitable interests in land. That is what s 18(1)(a) expressly empowers the Court to do. In my view, there is no need to conceptualize the house as a chattel.
>
> [39] In the *Stock* decision the learned Judge set out the history of the preceding sections to s 18(1)(a) and came to the view that there is no restriction on who may apply for an order under s 18(1)(a) – the applicants are not restricted to the legal owners. In reaching that conclusion the Judge relied on the case of *Sadlier – The Proprietors of Anaura* which considered s 30(1)(a) of the Māori Affairs Act 1953, the predecessor section to s 18(1)(a).
>
> [40] I have also made a s 18(1) order in favour of a non-owner in the *Matenga v Bryan* case. I note however that in *Matenga* the decision was that on making the s 18(1)(a) order the house was treated as a chattel and able to be removed by the person in whose favour the order was made.
>
> [41] The leading case in New Zealand on the question of whether an improvement is a fixture or not is *Auckland City Council v Ports of Auckland*, which adopted the approach set out by the House of Lords in *Elitestone Ltd v Morris and Anor*. In *Elitestone* the House of Lords proposed a broader, common sense approach to the question of whether an improvement could properly be said to have become part and parcel of the land. The main indicators that an improvement is a fixture are the degree of annexation and the purpose of annexation.

[9] I adopt that approach.

Is the house a chattel or a fixture?

[10] Whether an improvement is a fixture or a chattel depends on the degree and purpose of annexation.

[11] The whānau house was built as a permanent dwelling. It is a multi-level dwelling that is elevated from the ground in part and extended over time. Any attempts to remove the dwelling will result in its destruction, therefore I am satisfied that the whānau house is a fixture.

Who owns the whanau house?

[12] At the hearing, all whānau present agreed that the house belonged to Rangimarie Herewini. This is supported by evidence that the majority of the funds for the build came

from Rapine and Rangimarie Herewini; that many people who contributed to the build did so out of aroha; and that the funds from the sale of Rangimarie Herewini's house in Manurewa were used to carry out extensive alterations in the 1990s.

[13] Rangimarie Herewini passed away on 9 June 1996. She left a will dated 30 May 1996, and probate was issued on 12 May 1997 appointing Erehi Herewini; Nukumai Herewini (deceased); Solomon Herewini and Ringapoto Herewini as the administrators of her estate.

[14] The will provides as follows:

> …
>
> 2. I GIVE DEVISE AND BEQUEATH all my property both real and personal whatsoever wheresoever and of what nature or kind soever including any property over which I may have a power of appointment or disposition to my Trustees upon trust to sell call in and convert into money such parts of it as may not consist of money the power to my Trustees to postpone the sale calling in and conversion of any part for so long as my Trustees think fit notwithstanding that it may be of a terminable or wearing out nature or may consist of a hazardous investment.
>
> 3. I DIRECT my Trustees after payment of my debts funeral and testamentary expenses and all duties payable upon the whole of my dutiable estate to hold the residue (herein after referred to as "my residuary estate") upon the following trusts:
>
> a) To hold as well the capital as the income thereof upon trust for such of them my children as survive me and obtain the age of 20 years and if more than one as tenants in common in equal shares to the intent that the net annual income therefrom shall be accumulated by my Trustees for the maintenance and upkeep of the whānau home and as well to permit the income generated by my residuary estate to be applied in giving financial support to any of my children living in Australia when and if the need for them to travel to New Zealand arises. My trustees shall be entitled to encroach upon capital as well as income in furtherance of the objectives of this my Will.
>
> b) …
>
> c) After the death of the last of my children alive at the date of my own death my residuary estate is to be divided equally between such of them my grandchildren alive at the date of death of the last of my own children and if more than one as tenants in common in equal shares.

[15] Neither the whānau house or Rangimarie's beneficial interest in Māori freehold land are specifically disposed of in the will, therefore the property falls into the residuary estate.

In accordance with cl 3(c) of the will, all property is to be held on trust until the death of Rangimarie's last child, whereby the property is divided equally between her grandchildren who were alive at the date of her last child's death, as tenants in common in equal shares.

[16] In spite of the will, on 15 April 1998 the Court made a determination that Rangimarie's 13 children were entitled to succeed to her interests, with substitution for four of her children who pre-deceased her. That determination was limited to her interests in the following lands: Whakataha Z1C; Waimate North A & B; Paparimurimu A No 3; Takou; and Tapuaetahi Incorporation.

[17] Where succession to beneficial interests in Māori freehold land has taken place and a house or building is on that land, then the succession will include the house or building pursuant to s 99(2) of the Act. However, in the present case it appears that there was no succession to Rangimarie's beneficial interests in Te Tii Mangonui A3. These interests were simply vested into the Whānau Trust on 15 June 2004 by way of a variation of trust, together with the additional interests of Horomona Herewini in Te Tii Mangonui A3.[5]

[18] While this may have been a mistake, it cannot be overlooked. The result is that s 99(2) does not apply and the whānau house was not included in the succession. The house is owned by Rangimarie's estate and is to be administered by the administrators in accordance with her will.

Decision

[19] Pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993, I determine that the whānau house located on Te Tii Mangonui A3 is owned by the estate of Rangimarie Herewini.

[20] I vest the whānau house in Erehi Herewini; Solomon Herewini and Ringapoto Herewini equally, as the surviving administrators of the estate, to hold on trust until the death of Rangimarie's last child, where it is to be divided equally between her grandchildren who are alive at the date of death of her last child, as tenants in common in equal shares.

---

5 30 Auckland MB 248-249 (30 AT 248-249).

[21] Finally, I would like to remind the whānau of Rangimarie's sentiments concerning the whānau house as set out cl 3(b) in her will:

> It is my wish that my Trustees acknowledge that in the making of this my Will it is my very strong belief that no one child of mine (together with his her or their own children) has a greater right than any other member of my family to reside in the whānau home and that whichever member or members of my family happen to be at any time in occupation of the whānau home shall take great care of it and show the home every respect in accordance with the Māori expression kai tiaki.

Pronounced at 4.05 in Whangārei on Thursday this 27th day of June 2019.

T M Wara
JUDGE