

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

A20180003007

UNDER Section 289, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Waikite No 3A Block

BETWEEN FRANCES RAUKURA KAHUKIWA, JULIET
TE RANGIPIKITIA RAMEKA AND LARRAINE
AMY GALVIN
Applicants

AND JIM TE WERA ROSS, GLORIA KIWI-GROVES,
MAEA TITIA ROSS AND THERESA
CHRISTINE ANNE HEYWOOD
Respondents

Hearing: 4 July 2018, 193 Waiariki MB 23-35 (judicial conference)
28 February 2019, 207 Waiariki MB 232-240
(Heard at Rotorua)

Judgment: 6 August 2019

JUDGMENT OF JUDGE C T COXHEAD

He hōnore, he kororia ki te Atua, he maungārongo ki te whenua, he whakaaro pai ki ngā tāngata katoa tētahi ki tētahi

E tangi tikapa ana te kanohi ora mō rātou kua hoki ki te marinotanga, ki te urunga tē taka, tāoki mai rā koutou. Heoi, me pēnei noa te whakatau, ko rātou ngā mate ki a rātou, ko tātou te kanohi ora ki a tātou.

Hei tīmatanga kōrero - Introduction

[1] The applicants seek a partition of their whānau interests in Waikite No 3A Block, pursuant to s 289 of Te Ture Whenua Māori Act 1993. The basis of their application is to allow the whānau to utilise their share of the land and facilitate the building of their own thermal bath for whānau use.

[2] The application is opposed by other owners in the block, who argue that a partition would destroy the current living arrangements created by their whānau and that the size of the land means a partition makes little sense. They propose instead that the applicants repair an existing bath as an alternative.

Kōrero whānui - Background

[3] Waikite No 3A is Māori freehold land, 0.018 hectares in area. It was created by partition order dated 13 August 1932.¹ There are currently six owners in the block holding a total of 1.00 share. The owners in the land represent two whānau, the whānau of Amy Kumaiterangi Webber and the whānau of Maea Makarita Loffley Ross, who are sisters. Each whānau collectively own 0.5 shares in the land.

[4] At present, the land is occupied by Jim Te Wera Ross, a trustee of the Maea Makarita Loffley Ross Whānau Trust, and a child of Maea Ross. No occupation orders have been granted by the Court in relation to this land.

Ko te hātepe ture o te tono nei - Procedural history

[5] The application for partition was filed on 18 April 2018 by Frances Kahukiwa, Juliet Rameka and Lorraine Galvin as members of the Amy Kumaiterangi Webber whānau. The

¹ 82 Rotorua MB 176 (82 ROT 176).

applicants sought a preliminary hearing as to the merits of the application before obtaining a valuation.

[6] The matter was initially heard by way of judicial conference on 4 July 2018.² At the conclusion of the conference, I indicated that standard directions would issue and the parties would have two weeks to file all the information they wished to have considered by the Court.

[7] Further information was filed with the Court between 17-18 July 2018 and a site visit was held on 23 August 2018.³ Following the hearing of related proceedings in September 2018, the applicants sought to have the matter progress to a substantive hearing.⁴

[8] The hearing was held on 28 February 2019.⁵ At the conclusion of the hearing I indicated that a written decision would issue.

Ngā kōrero tautoko - Submissions in support

[9] The applicants seek to partition the shares of their whānau, represented by five out of the six owners. The shares equate to 0.5 out of 1.00 share, or half the land, and the applicants propose to partition the land on that basis. The valuation from the Rotorua Lakes Council shows the current land value as \$11,000.

[10] The applicants submit that they wish to utilise their entitlement in the land and to build their own thermal bath for use by their whānau. They say that they are currently denied access to the land and when they have attempted to discuss matters with some of their cousins, it has descended into personal accusations and innuendo and they have become embroiled in their cousins' own whānau issues. In addition, the applicants allege that there has been injury to the land, as building is being undertaken on the land without the consent of all the owners. They advised that an inspection has been carried out by the Rotorua Lakes Council and a notice issued for the building work to cease. The Council directed an engineer

² 193 Waiariki MB 23-35 (193 WAR 23-35).

³ 195 Waiariki MB 15-16 (195 WAR 15-16).

⁴ A20170006680. The related proceedings concern the partial termination of the Maea Makarita Loffley Ross Whānau Trust. The application was adjourned pending the outcome of this partition application. See 196 Waiariki MB 70-75 (196 WAR 70-75).

⁵ 207 Waiariki MB 232-240 (207 WAR 232-240).

be engaged regarding structural issues with the buildings and for a copy of the engineer's report to be sent to the Council.

[11] The applicants noted that a hui was held with the owners on 3 March 2018 to discuss their proposal for the land. While there was heated discussion at the meeting, two of the trustees of the Maea Makarita Loffley Ross Whānau Trust, Margaret Edwards and Pauline Ross, did not object to the applicants pursuing the partition application. The applicants also noted they made contact with Jim Ross who currently occupies the land, both personally and by way of letter, however they have been unable to have any productive discussions on the matter.

[12] The applicants seek to maintain their connection with the land and argue that a partition of their shares will enable their children and grandchildren to experience the same sense of belonging and oneness with the whenua and the richness of "pā life" that they themselves experienced.

Ngā kōrero whakahe - Submissions in opposition

[13] A submission opposing the partition application was filed by Jim Ross, Gloria Kiwi-Grooves, Maea Ross and Theresa Heywood, being four of the seven trustees of the Maea Makarita Loffley Ross Whānau Trust ("the respondents").

[14] The respondents argue that the land is a small piece of land and partitioning it would destroy the existing living environment which was established and maintained by their mother and grandmother, Maea Ross, when she began living there in the mid 1980s. They say Maea Ross originally placed a caravan on the land and the whānau later added a bath house and one-room unit. Over the years Maea Ross paid all the rates and maintained the whenua with the assistance of her whānau.

[15] The Maea Makarita Loffley Ross Whānau Trust was later established in accordance with Maea's wishes, to protect the land. She spoke of a kaitiaki for the whenua and wanted Jim Ross to return home. The respondents note that Jim Ross has maintained the whenua since the passing of Maea Ross in 2015. He has been involved in a beautification project within Ohinemutu village and has planted numerous shrubs and flowers on and around the

whenua, mostly at his own cost. He has also cobbled around the hangi, making it safer for everyone to use, and has created pathways for both locals and tourists to enjoy.

[16] The respondents note that there has been some conflict within the whānau trust, particularly with regard to Jim, and there is currently an application before the Court to partially terminate the trust.

[17] The respondents submitted that they were not aware of the applicants' proposal for some months, and it came at the time when the conflict was happening within their whānau. When the meeting was called by Margaret Edwards in March 2018, they were under the impression it was to discuss a request by the applicants for a bath. However, the meeting quickly descended into heated discussion concerning the whānau issues and the matter of the bath was not discussed fully. Therefore, they have never been given the opportunity as a whānau to sit down and discuss the issue with the applicants.

[18] The respondents do not dispute that the applicants have an equal ownership in the land. However, they argue that cutting the whenua in half as proposed makes little sense. They also note that the Rotorua Lakes Council has concerns regarding the suitability of the land to take the weight of a second bath and the land has been identified as having one or more geothermal hazards. As an alternative, the respondents noted that there is an existing bath on Waikite 3B that requires remedial work and they propose this as an option for the applicants.

Te Ture - The Law

[19] The Court has exclusive jurisdiction to make partition orders in respect of Māori land. The jurisdiction conferred is discretionary and governed by Part 14 of the Act. The principle purpose of Part 14 is to facilitate the use and occupation of the land by its owners, by rationalising particular landholdings and providing access or additional or improved access to the land. In exercising its jurisdiction, the Court must consider whether a grant of partition would achieve the principle purpose of Part 14.

[20] Section 289 of the Act provides:

- (1) Where the court is satisfied that it should partition any Maori freehold land in accordance with this Part, it shall make a partition order, being—
 - (a) an order for the partition of any land into 2 or more defined separate parcels; or
 - (b) an order creating or evidencing the title to any 1 or more of such defined parcels.
- (2) Every partition order shall, upon registration in accordance with section 299, constitute the title to the parcel of the several parcels of land included in it, without any transfer or other instrument of assurance being required.

[21] Section 288 sets out the matters to be considered by the Court when exercising its jurisdiction. It provides:

288 Matters to be considered

- (1) In addition to the requirements of subsections (2) to (4), in deciding whether or not to exercise its jurisdiction to make any partition order, amalgamation order, or aggregation order, the court shall have regard to—
 - (a) the opinion of the owners or shareholders as a whole; and
 - (b) the effect of the proposal on the interests of the owners of the land or the shareholders of the incorporation, as the case may be; and
 - (c) the best overall use and development of the land.
- (2) The court shall not make any partition order, amalgamation order, or aggregation order affecting any land, other than land vested in a Maori incorporation, unless it is satisfied —
 - (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
 - (b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

...
- (4) The court must not make a partition order unless it is satisfied that the partition order—
 - (a) is necessary to facilitate the effective operation, development, and utilisation of the land; or
 - (b) effects an alienation of land, by gift, to a member of the donor's whanau, being a member who is within the preferred classes of alienees.

[22] The approach to applications for partition was considered by the Māori Appellate Court in *Hammond – Whangawehi 1B3H1*.⁶ In that decision, the Court noted that the statutory prerequisites set out in ss 288(2) and 288(4) must firstly be satisfied, followed then by consideration of the mandatory considerations in s 288(1). However, the Court retains a general discretion and can refuse to exercise that discretion if the proposal would not achieve the principle purpose of Part 14. At all times, the Court must have regard to the principles of the Act set out in the Preamble and ss 2 and 17.

Kua pānuhia whānuitia te take nei? ā, kua whai wā ngā kaitiaki ki te kōrero mō te take nei? Has there been sufficient notice of the application and sufficient opportunity for the owners to discuss and consider the proposed partition?

[23] The documents provided with the application show that the applicants first sent a letter to the Maea Makarita Loffley Ross Whānau Trust on 15 October 2017. The letter noted that the applicants' whānau wanted to utilise their combined share to build a bath and welcomed discussion. Following that, the applicants spoke with Jim Ross in early 2018. An owners' hui was then called by Margaret Edwards in March 2018. The hui notice records that the purpose of the hui was to discuss events taking place on the land, including the existing tenancy, and the rights of all land owners.

[24] I note that, while there has been notice of the applicants' intention to utilise the land to build a bath for their whānau use, it is not clear that a partition was initially proposed. The first mention of an intention to partition appears to be in the minutes of the owners' hui held in March 2018. However, I do note that the application was initially heard as a judicial conference and the parties were given an opportunity to consider the application and provide submissions to the Court.

[25] I consider there has been sufficient notice of the application and sufficient opportunity for the owners to discuss and consider it.

⁶ *Hammond – Whangawehi 1B3H1* (2007) 34 Gisborne Māori Appellate Court MB 185 (34 APGS 185) at [14] – [20]. See also *Brown v Māori Appellate Court* [2001] 1 NZLR 87; and *Whaanga v Smith* [2015] NZCA 121.

Pēhea te tautoko mō te wāwāhanga o te whenua? Is there sufficient support for the partition?

[26] As noted, the applicants are members of the Amy Kumaiterangi Webber whānau, who own 50 per cent of the shares in the land and represent five of the six owners. The consents of those owners, including the trustees of the Hokimatemai Raukura Kahukiwa Whānau Trust, are on file.

[27] It also appears that the application is also supported by two of the trustees of the Maea Makarita Loffley Ross Whānau Trust, Margaret Edwards and Pauline Ross. However, four of the remaining trustees oppose the application.

[28] Therefore, the support for the partition is roughly half of the shareholding.

[29] In these circumstances where the land is clearly divided between two family half of the shareholding in my view is sufficient support. Where both family agree on matters there will be one hundred percent support.

[30] It is difficult to see how in this situation of equally split shareholding that the Court can expect fifty one percent support or opposition. When the shareholding are as they are – that is not obtainable. The requirement is not for majority support but rather a sufficiency of support. Therefore, in my view the Court can be satisfied that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter when half of the shareholding supports the application.

Me wāwāhanga te whenua? - Is the partition necessary?

[31] The term “necessary” is properly to be construed as “reasonably necessary”, closer to that which is essential than that which is simply desirable.⁷ The Māori Appellate Court in *Hammond – Whangawehi 1B3HI* noted:⁸

[23] When the Court is considering section 288(4)(a) it must assess whether there are reasonable alternatives to partition, whether they are contained in the Act or elsewhere. This was made clear by this Court in *Re Kaiwaitau 1* (paragraphs 13 and 15) where we went on to explain the gravity of partition orders:

⁷ *Brown v Māori Appellate Court* [2001] 1 NZLR 87 at [51].

⁸ *Hammond – Whangawehi 1B3HI* (2007) 34 Gisborne Māori Appellate Court MB 185 (34 APGS 185).

The test in this case must therefore be whether there exists any reasonable alternative to partition in terms of achieving the effective operation, development and utilisation of the land...

It can be seen at once that partition is treated under the Act as of being the utmost gravity – akin in some ways to alienation. This sea change in attitude from the Māori Affairs Act 1953 to Te Ture Whenua Māori Act 1993 reflects an acceptance by the legislature that title fragmentation through partition is contrary to Māori economic and cultural interests and should not now be encouraged if there are reasonable alternatives to it. The bar has been set intentionally high.

[24] Alternatives to partition may include agreement between the owners, leasing, a trust with a trust order defining areas of use and occupation, occupation orders, subdivision and so forth. This is not intended to be an exhaustive list and the alternatives (if any) will depend on the circumstances of the land and its owners. Importantly, applicants or owners cannot simply reject those alternatives as they do not like them, or perceive them to be inferior when they are not, or simply prefer partition. The corollary of a partition being required to be “reasonably necessary” for the operation, development and utilisation of the land is that reasonable alternatives are not available to achieve the same outcome. The owners cannot unreasonably reject reasonable alternatives.

[32] In the present circumstances, I do not consider that the partition of the land is necessary. As an alternative an occupation order or creating a trust with a trust order defining whānau areas of occupation would be more appropriate.

[33] The small size of the block further leads to a conclusion that there is a need for an alternative to a partition such as an occupation order or creating a trust with a trust order defining whānau areas of occupation.

[34] This land is a small block of only 0.018 hectares. A partition of the land in half will mean that each whānau is only left with an area of 90 square metres. In my view, such a small area of land is not practical and would likely be under the minimum size allowed by the Council for building on. The effect of the partition on the interests of all owners would therefore be significant.

[35] Further, it would be impractical to partition the land in half given the buildings that are currently on the site. The partition would require cutting buildings in half or demolishing part of the dwellings currently on the site.

[36] At the moment, only Jim Ross appears able to use and occupy the land but the applicants as equal owners are entitled to access the land and use the existing bath. This is not Jim Ross’s land, even though he appears to treat it as his solely.

Kupu Whakatau - Decision

[37] For the reasons set out above, I decline to grant the partition. The application is therefore dismissed.

I whakapuaki i te 1:00pm i Rotorua te 6 o ngā rā o Ākuhata te tau 2019

C T Coxhead
JUDGE