IN THE MĀORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT

A20180006975

UNDER	Sections 37, 43 and 151, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Ngātituhekerangi 23A and 22B
	HINA LUCY LUKE Applicant
	TE URAURA NGANEKO Respondent

Hearing: 16 October 2018, 392 Aotea MB 169
19 December 2018, (Telephone conference)

Appearances: Mr Cox for the applicant
Mr Nganeko in person

Judgment: 20 December 2018

INTERIM JUDGMENT OF JUDGE L R HARVEY

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Introduction

[1] Hina Luke seeks an order for confirmation of alienation by way of sale of Ngātituhekerangi 23A and 22B to Gary and Helen Baylis and the NKS Trustees Limited as trustees of Riverside Trust. The purchase price of the land is $522,974.21. A report filed by Hutchins and Dick Limited, valuers of New Plymouth, dated 27 May 2018 sets the market value for Ngātituhekerangi 23A at $237,000.00 and Ngātituhekerangi 22B at $271,000.00. The purchase price is therefore more than the market valuation.

[2] The application for confirmation was granted at Whanganui on 16 October 2018 subject to several conditions that:[1]

(a) notice being given to the preferred class of alienees in accordance with rule 11.5, Māori Land Court Rules 2011;

(b) insertion of a public notice in the *Taranaki Daily News* on or before 20 October 2018 with a second notice to be published on 27 October 2018;

(c) the Registrar was directed to insert a notice in the next available Māori Land Court National Pānui and place a copy on the office notice board;

(d) the exercise of a right of first refusal must be notified to the Registrar on or before 4pm Friday 23 November 2018.

[3] The minute of the hearing records that, in the absence of any notices of an intention to exercise a right of first refusal from the preferred class of alienees, the certificate of confirmation would issue.

[4] Te Uraura Nganeko opposes the application. He asserts that, contrary to a whānau understanding, the applicant is now seeking to alienate the land out of the hands of the preferred class of alienees. Mr Nganeko contends that the basis of the original transfer to Ms Luke and her husband, the late Richard, was a High Court decision of Jeffries J issued in 1983 concerning the estate of Alec Luke.[2] He argues that no one from his whānau, who were affected parties, had received notice of that hearing. In any event, he claims some of

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1 392 Aotea MB 169 (392 AOT 169)
2 A No. 295/80, 16 June 1983

the evidence given in those proceedings was not correct. Mr Nganeko therefore sought, initially, a delay in the issue of the certificate of confirmation so that he would have the opportunity to review the Hight Court file to assess whether the alienation should proceed.

[5] Mr Cox for the applicant opposed Mr Nganeko's intervention. He argued that, even if Mr Nganeko was granted access to the High Court file, which, had been refused (except regarding a limited range of documents), the prospects of an appeal out of time being granted by the Court of Appeal over three decades later was so remote as to be unrealistic.

Issue

[6] The issue for determination is whether the conditions for alienation have been met and whether the certificate of confirmation of alienation should now issue.

Submissions for Hina Luke

[7] Mr Cox argued that, in short, Mr Nganeko was simply out of time. The decision of Jeffries J had been issued 35 years ago in 1983 and it was most unlikely that an appeal out of time would be successful, let alone be granted. Equally importantly, counsel submitted that key witnesses were now deceased. So even if, in the unlikely event an appeal was granted so far out of time, critical evidence was no longer available. That reality simply underscored the unrealistic nature of the path Mr Nganeko was seeking to traverse, according to counsel.

[8] Mr Cox also queried whether this Court was now *functus officio* in that an order had been granted, subject to conditions, and now those conditions had been fulfilled. Therefore, the certificate of confirmation should be issued without delay.

[9] As to Mr Nganeko's query over the possibility of the purchasers seeking to repudiate the agreement by withdrawing their offer, Mr Cox pointed out that this was not possible as his client had entered into a binding agreement with the purchasers. There would be remedies available to Mrs Luke should the purchasers seek to withdraw from the sale and purchase agreement.

Submissions for Te Uraura Nganeko

[10] Mr Nganeko submitted that his whānau had not been given notice of the 1983 hearing. A review of documents that had been released to him from the High Court earlier

this week appears to confirm that notice was not given because of concerns of the executors over the expense.

[11] In addition, Mr Nganeko contended that Mrs Luke was not entitled to receive the land absolutely since it needed to remain in the hands of those who descend by whakapapa from the ancestor from whom the land had originally derived. Put another way, Mr Nganeko submitted that Mrs Luke was not entitled to receive the land that should have been subject to succession in favour of her children in due course.

[12] Further, Mr Nganeko claimed that from what he had discerned from the judgment of Jeffries J, what the High Court had been told in 1983 was not entirely accurate or correct. If his whānau had been given notice and the opportunity to make submissions then, in his words, "we wouldn't be having this conversation today". Mr Nganeko also claimed that he had wider whānau support for his actions and that it was his responsibility to take all such steps as were necessary to ensure the proper processes regarding the proposed sale had been followed, given the permanent nature of the sale outside the hands of the preferred class.

[13] While Mr Nganeko accepted that he had significant hurdles to overcome to try and persuade the Court of Appeal to grant leave well out of time, he still wished to have access to documents that had been refused to him by the High Court Registry and by the Public Trustee. Mr Nganeko underscored his experience as a former Police officer and detective who, if granted access to the Court file including the transcript of the hearing, would be able to make his own assessment as to whether he should continue to pursue his opposition to this present application. Mr Nganeko also confirmed that, he had not yet taken independent legal advice.

[14] Finally, Mr Nganeko sought an extension of the right of the preferred class of alienees to make an offer to purchase the land from Mrs Luke to the end of February 2019. This would then ensure, he argued, that every reasonable step had been taken to try to secure the retention of the land.

The Law

[15] Section 151 of the Act provides:

> **151 Application for confirmation**
> (1) An application to the court for confirmation of an alienation of any interest in Maori freehold land may be made,—

(a) in the case of an instrument of alienation, by or on behalf of any party to the instrument; or
(b) in the case of a resolution of assembled owners, by or on behalf of any person interested or by the Recording Officer.

(2) The court may decline to consider an application for confirmation if it is made,—
(a) in the case of an instrument of alienation, later than 3 months after the date on which the instrument was executed by the alienor or, where the land is situated in the Chatham Islands, later than 4 months after that date; or
(b) in the case of a resolution of assembled owners, earlier than 14 days or later than 12 months after the date on which the resolution was passed.

(3) Notwithstanding subsection (2)(a), where an instrument of alienation is executed at different times by different parties alienating, successive applications for confirmation may be made in respect of the successive executions of the instrument, and the alienation may be confirmed from time to time accordingly.

[16] Section 152 states:

152 Court to grant confirmation if satisfied of certain matters

(1) The court must grant confirmation of an alienation of Maori freehold land if it is satisfied—
(a) that,—
(i) in the case of an instrument of alienation, the instrument has been executed and attested in the manner required by the rules of court; or
(ii) in the case of a resolution of assembled owners, the resolution was passed in accordance with this Act or regulations made under this Act; and
(b) that the alienation is not in breach of any trust to which the land is subject; and
(c) that the value of all buildings, all fixtures attached to the land, all things growing on the land, all minerals in the land, and all other assets or funds relating to the land, has been properly taken into account in assessing the consideration payable; and
(d) that, having regard to the relationship (if any) of the parties and to any other special circumstances of the case, the consideration (if any) is adequate; and
(e) that the purchase money (if any) has been paid to, or secured to the satisfaction of, the Māori Trustee or court appointed agent or trustees in accordance with section 159; and
(f) that, if section 147A applies to the alienation, the alienating owners have discharged the obligation in that section.

(2) Before granting confirmation, the court may, with the consent of the parties, vary the terms of the instrument of alienation or resolution.

(3) The Maori Land Court may confirm an alienation to a person of any Maori freehold land that is, or is part of, an overseas investment in sensitive land within the meaning of the Overseas Investment Act 2005 only if consent to that investment has been obtained, or an exemption from consent applies, under that Act.

[17] Te Ture Whenua Māori Act 1993 as originally enacted granted the Court a general discretion upon which to refuse to grant confirmation under ss 153 and 154. Those provisions were repealed in 2002.[3] The effect being, that the Court must now grant confirmation if the conditions as set out in s 152 of the Act are satisfied.

[18] Rule 11.7 is also relevant and it provides:

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[3] Te Ture Whenua Māori Amendment Act 2002

11.7 Exercise of right of first refusal

(1) An alienor must give a preferred alienee who has given notice of his or her intention to exercise the right of first refusal a reasonable opportunity to exercise that right.
(2) If more than 1 preferred alienee has given notice of his or her intention to exercise the right of first refusal, the alienor may select the alienee to whom the opportunity of exercising the right of first refusal must be given.
(3) The right of first refusal must—
  (a) be on terms that are at least equivalent to the terms of the alienation that is the subject of the application for confirmation; and
  (b) allow the preferred alienees a reasonable time, having regard to the nature of the alienation, to exercise the right of first refusal.
(4) If the Court is not satisfied that the preferred alienee has been given a reasonable opportunity to exercise the right of first refusal, the Court may—
  (a) extend the time for exercise of the right of first refusal:
  (b) adjourn the application for confirmation to allow negotiation between alienor and preferred alienee to occur.
(5) If the preferred alienee who exercises the right of first refusal is not the alienee named in the original application, the Court may amend the application and confirm the alienation without the necessity for a new application.
(6) If a preferred alienee who is selected under rule 11.7(2) fails to complete the alienation, the alienor must then offer the opportunity of exercising the right of first refusal to any of the other preferred alienees who were involved in the selection process under rule 11.7(2) and the provisions of this rule continue to apply until—
  (a) the right of first refusal has been exercised; or
  (b) all preferred alienees who have given notice have been given the opportunity to exercise the right of first refusal.

[19] In *Muraahi v Phillips - Rangitoto Tuhua 551B and 55B1A2 (Manu Ariki Marae*) the Māori Appellate Court discussed the first right of refusal at length:[4]

> [113] An alienation by way of sale or gift has to be confirmed by the Māori Land Court under s 152 of TTWMA. This section requires the Court to be satisfied as to a number of preconditions including the proper discharge of the vendor's obligation under s 147A to grant the right of first refusal to the PCA.
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> [114] A right of first refusal is a procedural requirement of TTWMA. Where it applies and an application is filed for confirmation, the application is referred to a Judge and directions given as to public notice of the right of first refusal. Those members of the PCA interested will be given a date to notify the Court of their interest in exercising that right and will then be advised as to a date of hearing at which they will be entitled to pursue the right of first refusal. Rules governing the procedure are contained in the Māori Land Court Rules 2011.
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> [115] The right of first refusal differs from a contractual right given to an individual. It is a right created by statute for the benefit of a group or classes of people. There are procedures to identify those interested in exercising the right. If there is more than one person interested, the vendor is entitled, by virtue of rule 11.7(2) of the Māori Land Court Rules 2011, to select the person he wishes he deal with. If the selected member of the PCA fails to complete the alienation, the alienor must offer the right to another member of the PCA who has given notice until either the right of first refusal is exercised or all the members of the PCA who have given notice have been given the opportunity to exercise the right of first refusal.

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4 [2013] Māori Appellate Court MB 528 (2013 APPEAL 528)

> [116] The procedure outlined above provides an opportunity for the PCA to purchase the land by exercising the right of first refusal. It is not a right that they can exercise unilaterally. It is a right that has to be exercised through the Court as part of the application for confirmation. Until the process is completed and the person who is to be offered the right of first refusal is selected, the procedure merely provides a potential for a member of the PCA to be selected. At any stage prior to confirmation the vendor may decline to go ahead with the alienation and withdraw his application.

[20] Then in *Taueki – Horowhenua X1B41 North A3A and 3B1* the Māori Appellate Court emphasised the importance of notice:[5]

> [75] Section 147A is one of the key mechanisms in the Act to give practical effect to the principle of retention of Māori land. It represents the final opportunity for those associated with Māori land in terms of tikanga Māori to prevent the land falling into outside ownership. Vendors cannot expect a hasty treatment of that right. Equally, potential purchasers within the preferred class of alienees cannot expect a drawn out process. The time allowed must be practical and reasonable, having regard to the aim of retention of Māori land as expressed in the Preamble and section 2 of the Act….

[21] In an earlier decision *Collins v Te Whaiti - Kehemane Reserve 2A1* the Appellate Court considered that a time frame of five months for a purchase of 4,047 m^2 from a sole owner was inappropriate.[6] In summary the authorities underscore that, where there is any doubt in the context of reasonable notice, the Court should err on the side of caution and ensure that every reasonable opportunity has been provided to the preferred class of alienees.

Discussion

[22] The Māori Appellate Court has emphasised the need for reasonableness and latitude when enabling the preferred class of alienees to exercise their right of first refusal. As foreshadowed, in *Taueki* the Appellate Court emphasised the need for reasonable notice to be given to the preferred class of alienees.[7] In that case the Court confirmed that a tender process was not an offer of the right of first refusal.

[23] In terms of the appropriate length of time to enable the right to be exercised, the Appellate Court confirmed that the Act does not stipulate what that timeframe should be since it was a matter of judicial discretion. That Court went on to observe that the time allowed must be practical and reasonable, having regard to the aim of retention of land as expressed in the preamble in s 2 of the Act.

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5 (2008) 16 Aotea Appellate MB 30 (16 WGAP 30)
6 (2005) 14 Tākitimu Appellate MB 42 (14 ACTK 42)
7 (2008) 16 Aotea Appellate MB 30 (16 WGAP 30)

[24] Then in *Karena v Whitfield – Omahu 4C Section 6* the Appellate Court once again stressed the importance of notice to the preferred class of alienees.[8] The Court considered what is set out in rule 11.5 of the Māori Land Court Rules 2011 to be "a minimum requirement for notice to the PCA." The Court went on to note that this Court might excuse compliance with the rule having regard for its purpose, the consequences of non-compliance of a party or any person affected by it in the fairness of requiring compliance or otherwise.

[25] As is often the case in proceedings of this nature, a request for an adjournment to consider steps to be taken to obtain an offer from the preferred class of alienees emerges after the closing date has passed.[9] That said, the authorities underscore the necessity of providing a reasonable timeframe for the preferred class to be able to receive notice and exercise their right. According to the minute of 16 October 2018, final notice was given on 27 October 2018 following which prospective offers were to have been received by 23 November 2018, a period of almost a month. As the case manager notes, no such offers were made.

[26] Mr Nganeko notified the case manager of his objection to the sale on 6 November 2018. This was two weeks and two days before the expiry of the date set as the time when offers should be received. As the Appellate Court has underscored, notice must be reasonable. On the face of the available evidence, it would appear this was the first time Mr Nganeko became aware of the proposed sale, in early November 2018. Mr Nganeko soon followed up that initial contact with a series of emails and correspondence demonstrating that he was taking urgent steps to enquire into the circumstances surrounding the original 1983 High Court decision which was the starting point for the transfer of the land to the applicant and her late husband. In short, I accept that, as soon as he became aware, Mr Nganeko took appropriate steps to notify the Court of his concerns with the application and of his opposition to the sale.

[27] After careful reflection, considering the circumstances, which are unusual, I am prepared to vary that condition by re-opening the date for receipt of offers from the preferred class to 23 February 2019. This date also takes into account the impending holiday period. While the prospects of a successful appeal out of time may appear very remote, the importance of the principle of retention cannot be overlooked. Balanced against that is the

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8 [2018] Māori Appellate Court MB 170 (2018 APPEAL 170)

9 For example, see *Loach v Bidois - Matarikoriko No 7B2A* (2015) 336 Aotea MB 182 (336 AOT 182); and *Loach v Bidois - Matarikoriko No 7B2A* - (2013) 312 Aotea MB 195 (312 AOT 195)

potential prejudice to Mrs Luke. A delay would certainly be inconvenient, noting that the expiry date for the receipt of offers from the preferred class was almost one month ago. There is presently no evidence as to what other prejudice might impact on Mrs Luke and this is because Mr Cox no doubt was not anticipating Mr Nganeko's late attempt, an intervention on the sale process. For completeness, I note Mr Nganeko's submission of 10 December 2018 where he says that the purchaser, Mr Baylis, does not oppose the proposed delay since, according to Mr Nganeko, this would not affect Mr Baylis' farming operations. That's as maybe – as foreshadowed, one question is the extent of any prejudice to Mrs Luke.

[28] As foreshadowed, what Mr Nganeko is now seeking is an extension of that date by three months, (considering the end of year holiday period), or four months since the day of the hearing. A delay of four months when measured against the permanent alienation of Māori freehold land, especially in an area notorious for the historical confiscation of Māori land on a vast scale, while doubtless very inconvenient to Mrs Luke, does not strike me as being unreasonable to the point of being unjust, especially when the somewhat unusual circumstances of this case are considered. If Mr Nganeko can procure an identical offer to that currently before the parties, then the principle of retention that is fundamental to the Act would have been satisfied. Conversely, if no new offer is received, and proceedings for an appeal out of time have not been filed, or are unsuccessful, then the certificate of confirmation will issue without further delay.

[29] In extending the offer period, in light of the arguments of Mr Nganeko, I have taken into account the submissions of Mr Cox and note the terms of the sale and purchase agreement that the sale is conditional on the approval by this Court. While the present approach may be somewhat unorthodox, it may ultimately prove the more efficient, considering rights of appeal and rehearing.

[30] I also urge Mr Nganeko to secure independent legal advice as soon as possible.

Decision

[31] The condition regarding the filing of offers from the preferred class of alienees is extended from 23 November 2018 to 4pm, 23 February 2019.

[32] Mr Nganeko is directed to obtain legal advice as a matter of urgency.

[33] Failing receipt of an offer to purchase on or before 23 February 2019, the certificate of confirmation shall issue forthwith.

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

Pronounced at 5.15pm in Whanganui on Thursday this 20th day of December 2018

L R Harvey
JUDGE