

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

**A20170006668
CJ 2017/30**

UNDER Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF Paihia 3B9B Residue
BETWEEN REX STANAWAY MURRAY
Applicant
AND TANIA PARKER, JAMES MURRAY,
RAYMOND MURRAY and CAROLONE
MURRAY
Respondents

Hearings: 23 April 2018, 2018 Chief Judge's MB 48 -58
6 July 2018, 2018 Chief Judge's MB 239 - 342
(Heard at Whangarei)

Appearances: C Prendergast for Applicant
C Terei for Respondents

Judgment: 17 October 2018

RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX

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Introduction

[1] Rex Stanaway Murray (the applicant) seeks an order under s 45 of Te Ture Whenua Māori Act 1993 (the Act) to cancel an order of the Court made on 24 March 2009 at 28 Kaitaia MB 24 determining the status of Paihia 3B9B Residue as Māori freehold land.¹

[2] The applicant claims the said order is incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court, because on 17 June 1971 the Court vested Paihia 3B9B Residue block in Glass Murray solely and noted that the block ceased to be Māori land.²

[3] The applicant claims that he has been adversely affected by the order complained of as he is the oldest son of Glass Murray, holds ahi kaa and it was his father's intention to pass Paihia 3B9B Residue block to him.

[4] The applicant seeks that the order made on 24 March 2009³ be cancelled and that Paihia 3B9B Residue block be reinstated as General land.

Background

[5] The Registrar's Report and Recommendation dated 3 April 2018 sets out the background to the application. The report is reproduced in full as follows:

REPORT AND RECOMMENDATION

Introduction

1. This application, filed by Rex Stanaway Murray (the Applicant), seeks to cancel an order of the Court at 28 Kaitaia MB 24 (24 March 2009) determining the status of Paihia 3B9B Residue (the Paihia block) as Māori freehold land.
2. The Applicant claims the said order is incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court because at 47 Whangarei MB 34-35 (17 June 1971) the Court vested the Paihia block in Glass Murray solely and noted that the block ceased to be Māori land.

¹ 28 Kaitaia MB 24 (28 KT 24).

² 47 Whangarei MB 34-35 (47 WH 34-35).

³ 28 Kaitaia MB 24 (28 KT 24).

3. The Applicant claims that he has been adversely affected by the order complained of as, he is the oldest son of Glass Murray, holds ahi kaa and it was his father's intention to pass the Paihia block to him.
4. The applicant seeks that the order at 28 Kaitaia MB 24 be cancelled and that the Paihia block be reinstated as general land.

History of order sought to be amended

5. At 47 Whangarei MB 34-35 (17 June 1971) the Court transferred the Paihia block to Glass Murray solely pursuant to section 445 of the Māori Affairs Act 1953. The hearing minute is reproduced as follows:

Paihia 3B9B1 & 3B9B2 184/53

Ref file 7

Order 184/53 cancelling partition order of 22 Jan 1945 N75/19

Conditional upon the transfer from Dolly Murray to Glass Murray dated 7 February 1971 being stamped and surrendered.

This transfer is not a transfer from administrator to beneficiary as previously recorded. It is pursuant to Part XIX.

Confirmation will be granted on surrender of the stamped transfer.

Order 445/53 ... in respect of Paihia 3B9B (Residue) to issue in the name of Glass Murray ma solely. Land ceases to be Maori Land.

6. A Consolidated Order transferring the Paihia block to Glass Murray issued and was registered against certificate of title 658/198 on 19 July 1971.
7. In 2009 the Registrar lodged an application to determine the status of the Paihia block upon the grounds that:

...it is necessary to determine the status of the land to be Maori freehold land (and providing further protection upon registration of the instrument of title with LINZ) A current search of Land Information New Zealand shows no current certificate of title exists. A request for a new certificate of title is to be sought from Land Information New Zealand.
8. At 28 Kaitaia MB 24 (24 March 2009) the Court determined the status of the Paihia block to be Māori freehold land.
9. On 17 August 2009 Land Information, New Zealand (LINZ) advised the Māori Land Court that the dealing lodged on 10 August 2009 (28 Kaitaia MB 24) had been registered. A copy of CFR NA21A/1054 was issued to the Court indicating the status change and that the proprietor of the Paihia block was Anne Teinati Murray as Administrator.
10. On 23 July 2009, an application was filed with LINZ to transfer the interest of Glass Murray to Anne Teinati Murray as Administrator (Instrument No. 8234512.1). The transfer was not confirmed by the Court.

11. The Māori Land Information System currently records that Glass Murray is the owner of the Paihia block, which is shown as Māori freehold land.

Identification of evidence that may be of assistance in remedying the mistake or omission

12. Counsel for the Applicant, Ms Prendergast, provided the following documentation in support of this section 45 application.
 - i. Memorandum of Counsel in Support of Application to Cancel Order Determining Paihia 3B9B Residue as Maori Freehold Land. (9 November 2017)
 - ii. Application to Chief Judge to Cancel Order Determining Status of Paihia 3B9B Residue as Maori Freehold Land. (9 November 2017)

Attachments

- a) 28 KT 24 (24 March 2009)
 - b) Application for Status Determination (19 March 2009)
 - c) Memorandum of Transfer 267696 (15 February 1935)
 - d) CFR NA658/198
 - e) CFR NA658/199
 - f) 75 N 19 (22 January 1945)
 - g) 47 WH 34-35 (17 June 1971)
 - h) 47 WH 34-35 Consolidated Order (17 June 1971)
 - i) CFR NA21A/1054 and Transfer A568900
 - j) High Court Letters of Administration (20 April 2009)
 - k) Instrument 8234512.1 (23 July 2009) Anne Teinati Murray registered as Administrator
 - l) MFC0 8250175 (10 August 2009)
 - m) A20150006563 – Application by Tania Parker for succession and grant of administration in relation to the estate of Glass Murray
 - n) A20150006563 - Affidavit of Rex Stanaway Murray (2 June 2017)
 - o) A20150006563 - Affidavits of Anne Teinati Murray, Kohingarua Joyce, Raewyn Irene Murray, Tame Kahiti Murray, Heta Conrad, Richard Raroa Murray, Matthew Trebilcock, Gaye Leefe, and Para Raroa Murray in support of Rex Stanaway Murray's claim that he succeeded to Paihia 3B9B Residue as per his father's wishes
13. Copies of these documents are attached to this Report.
 14. By Memorandum of Counsel dated 22 March 2018 Ms Prendergast sought that priority be given to hearing this matter noting that:

Counsel is aware that distribution of the estate of Glass Murray by the Administrator, Anne Murray, is reliant on the determination of the status of the Paihia 3B9B Residue. Since Anne Murray has now died, the status on the Paihia 3B9B Residue is an important consideration in terms of her Will and the administration of both estates that of Anne Murray and Glass Murray.

Court Research

A20150006563 - Succession to Glass Murray or Karaihe Mare – when no grant of administration is held.

15. At 164 Taitokerau MB 63 -65 (20 December 2017) the Court issued a minute stating that:
- a) A solicitor had been engaged to facilitate a settlement conference but the parties were unable to resolve the issue concerning succession to Paihia 3B9B Residue.
 - b) A section 45 application must be determined as to whether Paihia 3B9B Residue is Māori freehold land or general land before succession to the block can be made.
 - c) The part of the application concerning Paihia 3B9B Residue was dismissed.
16. The Court made orders determining that Glass Murray's interests in Paihia 3B10A2 be vested in the following successors:

	<u>Name</u>	<u>Proportion</u>
1	Anne Teneti Murray	Solely
	<i>as to a life interests or until remarriage or entry into a civil union or de facto relationship with remainder to:</i>	
	Rex Stanaway Murray	1/5
	James Phillip Murray	1/5
	Raymond Trevor Murray	1/5
	Tania Jo-Anne Murray	1/5
	Caroline Parlene Murray	1/5

Details of subsequent Orders affecting lands to which this application relates

17. There are no subsequent orders.

Details of payments made as a result of the Order

18. There have been no payments made as a result of the order.

Reference to areas of difficulty

19. In support of the section 45 application the Applicant has provided affidavits of whanau who support his claim to succeed to the Paihia block by way of "testamentary promise". The views of his brothers and sisters would also need to be sought.

20. No status order was registered against the certificate of title 658/198, or CFR NA21A/1054 prior to 10 August 2009, nor is there any other indication as to the status of the land on the title.

Consideration of whether matter needs to go to full hearing

21. Based on the information provided it appears that there has been an error in the presentation of the facts to the Court in that:
- a) The 1971 Court minute noted that the land ceased to be Māori land.
 - b) Glass Murray's interest in the block was registered against certificate of title 658/198 on 19 July 1971.
 - c) Section 2(2)(f) of the Maori Affairs Act 1953 provides:

...

(f) Maori freehold land the legal fee simple in which has been transferred otherwise than by an order of the Court [or of a Registrar] shall, except where it appears on the face of the instrument of transfer that the land has remained Maori freehold land, be deemed to be [General land] until either –

(i) An order is made by the Court under paragraph (i) of subsection (1) of section 30 of this Act determining that the land is Maori freehold land; or

(ii) Any other order is made by the Court because of which the land become or is deemed to have become Maori freehold land

22. It is recommended that the matter [be set] down for hearing, in Whangarei, to afford the parties further opportunity to present evidence on the matters raised above.

Recommendation of course of action to be taken

23. If the Deputy Chief Judge is of a mind to exercise her jurisdiction, then it would be my recommendation that:
- a) A copy of this report be sent to all affected parties, for whom we have contact details for, to give them an opportunity to comment or respond in writing by **Thursday 19 April 2018.**
 - b) The application is set down for hearing at the Whangarei Māori Land Court on Monday **23 April 2018.**
 - c) An order be made pursuant to section 44(1) of Te Ture Whenua Māori Act 1993 cancelling the order at 28 Kaitaia MB 24 (24 March 2009).
 - d) And a further order be made pursuant to section 47(4) of Te Ture Whenua Māori Act 1993 making all other consequential amendments necessary to give effect to this order.

Procedural History

[6] On 3 April 2018, the Registrar's Report and Recommendation was distributed to all affected parties for whom addresses were known.

[7] The application was heard before me in Whangarei on 23 April 2018 whereat counsel for the respondents noted their objection to the application and sought an adjournment on the basis that they had just taken instructions.⁴

[8] The request for an adjournment was granted, Counsel for the respondents then subsequently filed a memorandum dated 22 June 2018 setting out their clients response to the application.

[9] A further hearing was held before me in Whangarei on 6 July 2018 whereat evidence was presented by counsel for both parties and I reserved my decision.⁵ Counsel were also invited to file submissions regarding the distinction between a Court minute and order.

The Law

[10] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in s 44(1) of the Act:

44 Chief Judge may correct mistakes and omissions

(1) On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

⁴ 2018 Chief Judge's MB 48-58 (2018 CJ 48-58).

⁵ 2018 Chief Judge's MB 329-342 (2018 CJ 329-342).

[11] The principles that are applied to s 45 decisions have been previously set out in numerous decisions made by the Chief Judge and myself. These are to be found in the judgments *Ashwell - Rawinia or Lavinia Ashwell (nee Russell)*⁶ and in *Tau v Nga Whanau O Morven & Glenavy - Waihao 903 Section IX Block*.⁷ I do not propose to repeat those principles again in this judgment.

[12] However, for the benefit of the parties, I note that s 44 explicitly refers to situations where the Court has made an incorrect decision due to a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct its record. For this reason, s 45 applications must be accompanied by proof of the flaw identified, either through the production of evidence not available or not known of at the time the order was made or through submissions on the law.

Issues

[13] The issues to determine in this case are:

- (i) was Paihia 3B9B Residue General land at the time the order declaring its status as Māori freehold land was made,⁸ and if so
- (ii) was there an error of law made by the Court when determining the status of the land to be Māori freehold land; and if so
- (iii) is it necessary in the interests of justice to cancel the order made at 28 Kaitaia MB 24?

⁶ [2009] Chief Judge's MB 209-225 (2009 CJ 209).

⁷ [2010] Maori Appellate Court MB 167 (2010 APPEAL 167).

⁸ 28 Kaitaia MB 24 (28 KT 24) dated 24 March 2009.

Discussion

[14] Those who support the applicant, Rex Murray, include his uncle who is a brother and sole surviving sibling of Glass Murray and a number of extended family members. Rex Murray was represented by Ms Prendergast.

[15] Those who opposed the application and the report of the Registrar were Tania Parker, James Murray, Raymond Murray and Caroline Murray. They are all siblings and are some of the grandchildren of Raroa and Dolly Murray.

Context

[16] Ms Prendergast provided the following procedural background to this matter with supporting orders and documentation. I do not understand her chronology to be in dispute so it is repeated here. She noted that:

- (a) Paihia 3B9B was partitioned on 17 November 1920, and sold under Part XVIII of The Native Land Act 1909 by resolution of the Tokerau Māori Land Board confirmed on 25 January 1924 and sealed on 13 December 1924. The Memorandum of Transfer 267696 was forwarded to the Deeds Registry and on 15 February 1935, entered into the Provisional Register Volume 178 Folio 162.
- (b) A certificate of title under the Land Transfer Act 1952 for Paihia 3B9B was issued dated 15 February 1935 (CFR NA658/198). The registered proprietors at that time were George Murray, David Murray, Raroa Murray and Ria Wiri Riwhi, who held an estate in fee simple as tenants in common in equal shares. On the same day, the part of Paihia 3B9B located in Block IX Whangape Survey District was transferred to L and D Lunjevich and a new certificate of title issued (CFR NA658/199).
- (c) On 22 January 1945, the Court made an order for the partition of Paihia 3B9B into 3B9B 1 and 3B9B 2 (MB 75 N 19).
- (d) On 17 June 1971, the Court cancelled the partition order of 20 January 1945, and ordered the surrender of the transfer from Dolly Murray to Glass Murray dated 9 February 1971 on the grounds that the transfer was pursuant to Part XIX of the Māori

Affairs Act 1953, not from administrator to beneficiary as recorded. His Honour further ordered that, on surrender of the transfer, title to Paihia 3B9B Residue was to issue in the name of Glass Murray solely, and the land cease to be Māori land.

- (e) On the same day (17 June 1971), the Court issued a Consolidated Order under s 445 of the Māori Affairs Act 1953, transferring the Paihia 3B9B Residue to Glass Murray as the sole proprietor of an estate in fee simple of the land (MB 47 WH 34-35).
- (f) The Consolidated Order vesting the Paihia 3B9B Residue in Glass Murray was registered against CFR NA658/198 on 19 July 1971, and that title cancelled. A new title, CFR NA21A/1054, was issued on the same day (CFR NA21A/1054 and Transfer A568900). CFR NA21A/1054 remains current today.
- (g) On 16 March 1999, Glass Murray, the registered proprietor of Pahia 3B9B, died by drowning as the result of a diving accident. He left no will.
- (h) Letters of Administration were granted by the High Court on 20 April 2009. Transmission of the land in the estate to the applicant's mother, Anne Teinati Murray as Administrator was registered on 23 July 2009 (8234512.1).
- (i) The Court order of 24 March 2009 determining the status of Paihia 3B9B as Māori freehold land was registered on 10 August 2009 (8250175)

...

[17] Counsel for Mr Rex Murray claims that he is adversely affected by the order made to change the status of Paihia 3B9B Residue.

[18] Attached to his application were affidavits from Anne Murray, Kohingarua Joyce, Raewyn Murray, Tame Kahiti Murray, Heta Conrad, Richard Raroa Murray, Matthew Trebilcock, Gaye Leef and Para Raroa Murray. These affidavits were prepared for other proceedings concerning succession and grant of administration in relation to the estate of Glass Murray.

[19] The respondents through Counsel filed an affidavit from Ms Tania Parker on behalf of her and her siblings.

[20] Most of the evidence above turns on matters that relate to the issue of whether it is necessary in the interests of justice to cancel the order, and will be discussed in detail under that heading.

Issue 1: Was Paihia 3B9B Residue General land at the time the order declaring its status as Māori freehold land was made?

[21] This issue turns on the minute of the Court reproduced by the Registrar in her report at paragraph 5 and the Consolidated Order transferring the Paihia block to Glass Murray, and its subsequent registration.

[22] I note that the Court minute of 1971 was granted conditional upon the transfer from Dolly Murray to Glass Murray dated 7 February 1971 being stamped and surrendered. It was declared to be a transfer under Part XIX. That Part of the Māori Affairs Act 1953 concerned the alienation of land by Māori and such alienations were subject to confirmation by the Court. The Court was prepared to confirm the alienation on surrender of the stamped transfer.

[23] The Court received the stamped transfer on 28 April 1971. As a consequence, the Consolidated Order declaring Glass Murray the owner of Paihia 3B9B (Residue) issued and was registered against certificate of title 658/198 on 19 July 1971.

[24] The transfer did occur, and s 2(2)(f) of the Māori Affairs Act 1953 was triggered. As noted by the Registrar at paragraph 21 of her Report, that provision deemed the land to be General land except where it was apparent on the face of the transfer that the land was to remain Māori land.

[25] I have had regard to the following decisions on the meaning and effect of s 2(2)(f) of the Maori Affairs Act 1953: *Haddon v Rahui Te Kuri Inc – Pakiri R*⁹ and *Law - Allotment 266A3C2 Waimana Parish Block*.¹⁰

[26] Counsel for the respondents submitted that the “noting” and subsequent Consolidation Order of 1971 do not constitute a transfer for the purposes of s 2(2)(f).

⁹ *Haddon v Rahui Te Kuri Inc – Pakiri R* (1994) 3 Taitokerau Appellate 178 (3 APWH 178).

¹⁰ *Law – Allotment 266 A 3C2 Waimana Parish Block* (2014) 103 Waiariki MB 275 (103 WAR 275).

Rather, she contended, it was an exercise of the Court's special powers designed to abate the fragmentation of Māori land interests to declare Glass Murray the sole owner of Paihia 3B9B1 and 3B9B2. She argued that the transfer of the blocks and any subsequent registration occurred before the Consolidation Order was made in June 1971. She then submitted that given that the Consolidation Order was a declaration of ownership, rather than a land transfer, s 2(2)(f) does not apply.

[27] These submissions fail to acknowledge the content of the minute of the Court as reproduced at paragraph 5 of the Registrar's Report.

[28] The transfer did occur before the Consolidated Order issued. Section 2(2)(f) was triggered when the transfer took place and was confirmed. There is no evidence to suggest that the transfer did not result in the land being deemed to be General land.

[29] While the minute of 1971 also records that the land ceases to be Māori land, that was merely declaring what was the deemed result by virtue of the Māori Affairs legislation as it existed at that time. Thus, and unlike in the case of the *Deputy Registrar - Te Ketī A2*¹¹, there was a transfer, it was recognised by the Court in 1971, it resulted in triggering s 2(2)(f) and the land became General land.

[30] As a result of this finding, I do not need to analyse the impact of Part 1 of the Māori Affairs Amendment Act 1967. While the submissions and cases cited by Counsel for the respondents are important in understanding the impact of the 1967 Amendment, it is not necessary to assess their relevance, as I have already found that the land was deemed to be General land by virtue of s 2(2)(f) of the 1953 Act.

[31] Furthermore, s 445(5) of the Māori Affairs Act 1953 provided that the District Land Registrar on the application of the Māori Land Court Registrar was required to register the Consolidated Order against the title to the land affected, and any registration was to have effect to vest the land in the persons named in the order, for the estate and in the relative shares and interests defined in the order.

¹¹ *Deputy Registrar - Te Ketī A2* (2006) 15 Taitokerau MB 76 (15 TTK 76).

[32] Due to the effect of s 2(2)(f), the Consolidated Order was over General land registered against the certificate of title 658/198 in the name of Glass Murray. A new title was issued on the same day CFR NA21A/1054.

Issue 2: Was there an error of law made by the Court when determining the status of the land to be Māori freehold land?

[33] The answer to this question must be yes. As noted in the Registrar's Report, the Court was told that the order pursuant to s 131 of Te Ture Whenua Māori Act 1993 was necessary to effect registration of the Māori Land Court title as Māori land. The Court made the order without further inquiry at 28 Kaitaia MB 24 on 24 March 2009.¹²

[34] In fact a certificate of title CFR NA21A/1054 did exist over Paihia 3B9B and it was by this stage General land.

[35] While there was nothing to stop the Court making the order changing the status of land to Māori land, it would have had to have given reasons for this. It did not, which suggests the Court did not know the title history of this block. As a consequence, I conclude that it made an error of law due to the presentation of facts to the Court.

Issue 3: Is it necessary in the interest of justice to cancel the order made at 28 Kaitaia MB 24?

[36] In considering whether it is necessary in the interests of justice to cancel the order, I have had regard to the basic principles that apply to s 45 applications. I also note that the evidence of both parties demonstrates that Paihia 3B9B is an important block to the Murrays. The Torikiriki Homestead owned by the family is on the block. It was owned by Raroa and Dolly Murray from whom they all descend. It encompasses their hapū maunga, Rangiputa. The hapū is Ngāti Haua. It provides access to the sea for all the whānau and hapū.

[37] It is equally clear from the evidence that Rex Murray has been the kaitiaki of the whenua for many years and that should continue. It is a privilege to be in such a position

¹² 28 Kaitaia MB 24 (28 KT 24).

and it carries great responsibility to care for this taonga for all the whānau. Mr Murray's evidence was that he took that role seriously.

[38] Thus, having regard to the preamble, ss 2 and 17, I think it is necessary in the interests to cancel the order complained of.

Decision/Orders

[39] Accordingly, in terms of s 44(1) of Te Ture Whenua Māori Act 1993, I hereby exercise my jurisdiction and cancel the order made on 24 March 2009 at 28 Kaitaia MB 24 determining the status of Paihia 3B9B Residue as Māori freehold land.

[40] A further order is made pursuant to s 47(4) of Te Ture Whenua Māori Act 1993, making all consequential amendments to any orders necessary to give full effect to the order made above.

[41] The foregoing orders are to issue immediately pursuant to rule 7.5(2)(b) of the Māori Land Court Rules 2011.

Decision as to Costs

[42] A claim for costs has been made by counsel for the applicant. As the respondents were legally aided, costs are to lie where they fall.

[43] The Case Manager is directed to distribute a copy of this reserved judgment to all parties.

Pronounced at 9.45 am in Gisborne on Wednesday, this 17th day of October 2018.

C L Fox
DEPUTY CHIEF JUDGE