

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

A20150004107

UNDER Section 18(1)(a), Te Ture Whenua Māori Act
1993

IN THE MATTER OF Utakura No. 8

BETWEEN FRED POMARE
Applicant

A20150001238

UNDER Section 18(1)(a), Te Ture Whenua Māori Act
1993

IN THE MATTER OF Utakura No. 8

AND BETWEEN WIREMU POMARE
Applicant

Hearing: 24 September 2015
27 January 2016
(Heard at Kaikohe)

Judgment: 1 November 2016

RESERVED JUDGMENT OF JUDGE M P ARMSTRONG

Introduction

[1] Separate applications have been filed by Fred Pomare and Wiremu Pomare seeking an order per s 18(1)(a) of Te Ture Whenua Māori Act 1993 (“the Act”) to determine the ownership of a house located on Utakura No. 8.

[2] The issue in this case is who should be determined the owner of the house.

Background

[3] Utakura No. 8 (“the block”) is 1.967 hectares of Māori freehold land. There are three owners: Fred Pomare as to 0.55 shares, Wiremu Pomare as to 0.225 shares, and Ben Pomare as to 0.225 shares. Fred, Wiremu and Ben are brothers. Mihi Ruka was their mother. Ben has passed away.

[4] Mihi was the original owner of the block. In around 1989, Mihi built a house on the block. This house is the subject of this proceeding.¹

[5] Wiremu filed his application on 23 January 2015. Fred filed his application on 14 July 2015. Both applications were heard on 24 September 2015.² After hearing from the parties, I issued directions timetabling the filing of further evidence and set the applications down for further hearing.

[6] The applications were then heard on 27 January 2016.³ After hearing from the parties, I directed the filing of further evidence and advised that, once the further information was received, I would issue my decision in writing.

[7] That further information was filed as directed. Fred then filed a further submission on 8 June 2016. Wiremu filed a further submission on 25 June 2016.

¹ On 30 September 1966, an order was granted determining that the house on a former title Utakura 2D2B was owned by Mihi Ruka and Paihau Ruka as tenants in common in equal shares. See 4 Kaikohe MB 216-233 (4 KH 216-233). This is the old family homestead and is not the house which is the subject of this proceeding.

² 113 Taitokerau MB 273-286 (113 TTK 273-286).

³ 125 Taitokerau MB 89-126 (125 TTK 89-126).

The Law

[8] In *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* Judge Milroy summarised the relevant authorities on determining ownership of a house on Māori freehold land: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 Maori 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 Maori 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.

[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 Maori Affairs Act 1953, the predecessor section to s 18(1)(a).

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

[40] I have also made a s 18(1)(a) 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.

Is the house a chattel or a fixture?

[9] As noted, the main indicators that an improvement is a fixture are the degree of annexation and the purpose of annexation.⁵

[10] In the present case, Wiremu advised that the house is fixed to a concrete slab. Fred disagreed and argued that the house is fixed to timber piles. I have not undertaken a site inspection nor have photographs of the house been provided. Ultimately, this does not affect whether the house is a chattel or a fixture. Whether fixed to a concrete slab, or to timber piles, there is no dispute that the house is fixed to the land. It is also clear that the purpose of annexation was to provide a permanent dwelling on the block.

[11] In order to build the house, Mihi took a loan with the Housing Corporation of New Zealand (“HCNZ”) which was secured by a mortgage against the block. During this period, HCNZ commonly entered into a ‘tripartite deed’ where the land in question was administered by a trust. Under these deeds the security held by HCNZ related to the house erected on the block rather than the underlying land. Previous decisions have been made by this Court concerning the effect of such tripartite deeds.⁶

[12] In the present case, as Mihi was the sole owner of the block, it was not necessary to enter into a tripartite deed. Instead a mortgage was granted over the block itself. The memorandum of mortgage does not address the status of the house.

⁵ See *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614.

⁶ See *Housing Corporation of New Zealand – Waimanoni 1B3B2A* (1996) 19 Kaitia MB 227 (19 KT 227) and *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206).

[13] I am satisfied that the degree of annexation and the purpose of annexation indicate that this house is a fixture.

Who owns the house?

[14] Conventional common law provides that a fixture belongs to all of the owners of the land according to their respective interests. However, there is a clear line of authority that in relation to Māori freehold land, even where a house is a fixture, this Court has equitable jurisdiction per s 18(1)(a) of the Act to determine ownership of a house as distinct to ownership of the underlying land.⁷

[15] As there have been no prior orders granted concerning the house, in order to determine who owns it, it is necessary to look at the history of the block, the building of the house, rights of succession, and the subsequent agreements entered into.

Who originally owned the house?

[16] On 29 March 1972 a partition order was granted creating this block in favour of Mihi as the sole owner.⁸

[17] On 9 March 1989, Mihi took out two loans with HCNZ in order to build the house on the block. The first loan was for \$39,907.00. The second loan was for \$9,063.00. Both loans were secured by way of mortgage against the block in favour of HCNZ as mortgagee.⁹

[18] On 14 February 2000, the loans and the mortgages were transferred to the Home Mortgage Company Limited as mortgagee.¹⁰

[19] The memorandum of mortgage records Mihi as the mortgagor and Fred as the guarantor. The guarantor clause in the memorandum of mortgage states:

⁷ See *Tohu – Te Horo 2B2B2B Residue* (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34), *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102), *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223), *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121), *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206).

⁸ 47 Whangarei MB 302-306 (47 WH 302-306).

⁹ Title Notice R11/1865 and Title Notice R11/1866.

¹⁰ Title Notice R14/802.

...

It is hereby acknowledged between the mortgagor and the guarantor that while the guarantor between the mortgagor the mortgagee and the guarantor is a guarantor only as between themselves that they shall be jointly and severally liable for the due observance of the obligations, conditions and covenants hereunder and that accordingly the house property to be erected with the loan monies secured hereunder shall be owned as tenants in common in equal shares by the mortgagor and the guarantor hereunder.

[20] The funds from these loans were then used to build the house which is the subject of this proceeding. Fred and Mihi lived together in the house from when it was built, up until Mihi's death. According to Fred's evidence, prior to his mother's death, he and his mother made equal contributions towards the loan repayments.

[21] As such, when the house was built, Mihi was the sole owner of the block. According to conventional common law principles, Mihi would have been the sole owner of the house being a fixture to the land. However, the guarantor clause in the memorandum of mortgage is clear that the house was to be owned by Mihi and Fred as tenants in common in equal shares. This is further supported by Fred's evidence (which was not disputed) that he and Mihi made payments towards the loan in equal contributions up until Mihi's death.

[22] For these reasons, I find that when the house was built, it was owned by Mihi and Fred as tenants in common in equal shares.

Who was entitled to succeed to Mihi's share in the house?

[23] Mihi passed away on 30 November 1993. She left a will dated 9 March 1990. On 3 November 1995, probate was granted in favour of Fred as the executor.¹¹

[24] Clause 3 of the will states:

I GIVE DEVISE AND BEQUEATH unto my said son FRED POMARE all my estate and interest in that piece of land being Utukura 8 Block, Mangamuka Survey District, being 1.8210 hectares more or less being Taitokerau Māori Land Court Registry, together with and included therein any interest in any dwelling erected on that land.

¹¹ 9 Taitokerau Registrar's MB 100 (9 RGTO 100).

[25] On 21 August 1997, an order was granted vesting the block in Fred solely pursuant to the terms of the will. An order was not granted concerning ownership of the house.

[26] There is no contest as to the validity or the effect of the will. Clause 3 of the will is clear that Fred was to receive Mihi's interest in the house.

[27] As such, I find that Fred was entitled to succeed to Mihi's interest in the house. This means that Fred would have been the sole owner of the block and the house.

What was the agreement entered into between Fred, Wiremu and Ben?

[28] Fred advised that, following his mother's death, he continued to live in the house and made the repayments towards the loan. In 2005, Fred defaulted on the loans and there was a risk that the mortgagee would exercise its power of mortgagee sale. As such, Fred entered into an agreement with Wiremu and Ben concerning repayment of the loans. This agreement was not recorded in writing and the terms of that agreement are now in dispute.

[29] Wiremu's evidence is that all three agreed that he and Ben were to take over the repayments of the loan, and as a result, Wiremu and Ben were to receive ownership of the house. Wiremu further advised that, pursuant to that agreement, Fred moved out of the house, Wiremu and Ben started making repayments towards the loan, and Wiremu then lived in, or utilised, the house from 2005 to 2013.

[30] Wiremu further advised that, after this agreement was reached, he and Ben spoke to Fred about obtaining shares in the block. This was to ensure that they had an interest in the underlying land on which the house stood. According to Wiremu, Fred agreed to gift shares in the block to him and Ben.

[31] On 12 April 2006, Judge Spencer granted an order vesting 0.45 shares in the block in Wiremu and Ben equally by way of gift.¹² This resulted in the current ownership of the block between Fred, Wiremu and Ben as noted above.

¹² 38 Kaikohe MB 31-32 (38 KH 31-32)

[32] Wiremu further advised that, due to ill health, Ben subsequently withdrew from the agreement to repay the loans. Wiremu then paid off the loans on his own, and as such, he considers that he is now the sole owner of the house.

[33] Initially, Fred's evidence around the nature of the agreement reached was unclear. However, in response to questions from the Court, Fred accepted that when Wiremu and Ben took over repaying the loans, he understood that they were going to receive ownership of the house. Fred further argued that because Ben withdrew from the arrangement, the original agreement he entered into with his two brothers terminated as his agreement was with both Ben and Wiremu not just Wiremu. Despite that, Fred accepted that he never raised this concern with Ben or Wiremu.

[34] Fred also agreed that he transferred shares in the block to Wiremu and Ben as a gift so that they would have an interest in the land that the house was sitting on.

[35] Sadly Ben has now passed away. His wife Anne, and daughter Donna, both gave evidence. I was advised that Donna is entitled to succeed to Ben's interests in this block pursuant to his will, although a copy of his will was not produced. Both Anne and Donna support that Fred should be determined as the owner of the house.

[36] Anne advised that when Wiremu and Ben agreed to take over the loan payments, it was on the understanding that they would never own the house. Anne asserted that the agreement reached allowed Ben and Wiremu to use the house as a holiday home, but they were not entitled to live there permanently.

[37] Anne further advised that she and Ben received advice from a local solicitor, David Shanahan, concerning obtaining an occupation order with respect to the house. However, while that was being organised, Ben became terminally ill and was unable to make the loan repayments. As such, Ben withdrew from the arrangement.

[38] Anne advised that Fred transferred the shares in the block to Ben and Wiremu by way of gift, and also as repayment for Ben and Wiremu repairing Fred's car.

[39] On 26 September 2007, Mr Shanahan sent a letter to Wiremu on behalf of Ben. That letter states:

You will recall talking to me about the above property and the arrangements with your brother, Ben, when you came to my office on 6 July 2007.

I have received further instructions from Ben with regards to this matter. The instructions relate to settlement of your taking over the ownership of the family home at the property. I wish to record Ben's understanding of the arrangements that were made between him and yourself and your brother, Fred, last year.

You and Ben were advised last year that your brother Fred was having difficulty meeting the mortgage instalments to the Home Mortgage Company secured over Utakura No.8. The mortgage was a loan that had been originally taken out by your late mother in 1989 for the purposes of building her home on the property. There were two loans. A first mortgage of \$39,907.00 and a second mortgage of \$9,063.00 making a total of \$48,970.00.

On your mother's death she gifted Utakura No.8 in her will to your brother, Fred.

When Ben and you were advised of the situation you each contributed to paying the arrears of the mortgage to the Home Mortgage Company. Those arrears amounted to \$7,698.00. You reached an agreement with Fred which included you and Bill meeting the costs of the repair of his Nissan Skyline motorcar (copy of the invoice for repair attached) in exchange for him transferring 45% of the shares to you and Ben equally. Under the arrangement you and Ben would take over the Home Mortgage Company loan and the right of occupation of your late mother's home.

Ben and you paid the arrears and commenced paying \$140.00 each a fortnight to meet the mortgage. At the same time the Māori Land Court transferred 45 shares each to you and Ben and Fred retained 110 shares in the block out of a total of 200 shares. The transfer of the shares was ordered by the Court on the 12th April 2006.

The area of Utakura No.8 is 1.821 hectares (approximately 4.2 acres). The shares that you and Ben received would entitle you to approximately 2 acres between you.

It was understood between you and Ben that you would apply to the Māori Land Court for an occupation order in respect of the family home and 1 acre of land surrounding that home. A copy of the proposed occupation site is **attached**. It is apparent that you and Ben would be entitled to at least 1 acre each in proportion to the shares that you have in Utakura No.8.

Early in 2007 Ben suffered from a heart condition and was unable to continue with the mortgage payments and ownership of the home at Utakura No.8. He advises that you agreed with him to take over the payments of the mortgage and would reimburse him for what he had paid to date. In exchange for this Ben would consent to you having an exclusive occupation right of the family home together with an acre surrounding the family home. This arrangement was recorded between you in a note dated the 12th February 2007 (copy **attached**).

I understand that there has now been a disagreement between you both as to the ownership of the land. Ben instructs me to seek your reconsideration of your position. The reasons for doing so are:

1. The mortgage was specifically raised by your mother to pay for the construction of the family home. It was not to do with land ownership.
2. By you paying the mortgage instalments and reimbursing Ben (balance owing \$3,401.00) you would take over full responsibility for the mortgage and you would have the full and exclusive occupational rights in respect of the home. This is a right that you would be able to pass on to your next of kin on your death.
3. Under the arrangement as outlined, Ben would support you having an occupation order in respect of the house and the 1 acre site as already agreed. Ben would retain his 45 shares in Utakura No.8. This would not change your rights with regards to the occupation order.

Ben would like to have this matter resolved between you as brothers without any further bad feeling or dispute. As you are aware he does not keep good health and he does not wish to have an ongoing dispute with you.

Could you please give the above your serious consideration and advise whether or not you accept Ben's proposal within 14 days from the date of this letter.

[40] Anne advised that Wiremu did not reimburse Ben for the payments he had made towards the loans. As such, Ben took proceedings against Wiremu in the Disputes Tribunal. The Disputes Tribunal ordered that Wiremu had to pay Ben for the money that Ben contributed towards the loans. Anne advised that Wiremu was ordered to pay \$7,000.00 but that he only paid \$4,000.00 with \$3,000.00 still owing.

[41] A copy of the order from the Disputes Tribunal was not filed but Wiremu accepted Anne's evidence as to the order granted, the payment he made and the amount owing.

[42] Having considered the evidence as a whole, I find that the agreement reached between Fred, Wiremu and Ben in 2005 provided that as Wiremu and Ben were going to take over the repayment of the loans, they were to receive ownership of the house.

[43] I reject Anne's evidence that Wiremu and Ben were to use the house as a holiday home, but were not to live there permanently, and were not to receive ownership of the house.

[44] I consider that the letter from Mr Shanahan supports this finding. In doing so, I note that Mr Shanahan did not present evidence before me and I was unable to question him on the instructions he received. As such, the comments in that letter must be treated

with some caution. Despite that, the content of the letter is consistent with Wiremu's evidence, rather than Anne's evidence, as to the agreement reached.

[45] Mr Shannahan's letter states that in return for taking over repayment of the loan, Wiremu and Ben were to receive a right to occupy the house. Other parts of the letter refer to an exclusive right of occupation, and that an occupation order was to be obtained with respect to the house. This is inconsistent with Anne's evidence that Wiremu and Ben were allowed to use the house as a holiday home but did not have a right of permanent occupation.

[46] While parts of the letter refer to a right to occupy the house, other parts are clear that Mr Shannahan is referring to ownership of the house:

...

I have received further instructions from Ben with regards to this matter. The instructions relate to settlement of your taking over the **ownership** of the family home at the property.

...

Early in 2007 Ben suffered from a heart condition and was unable to continue with the mortgage payments and **ownership** of the home at Utakura No.8.

[Emphasis added]

[47] It is also significant that Fred accepted that Wiremu and Ben were to receive ownership of the house in return for taking over the loan repayments. This is supported by the fact that Fred transferred shares in the block to Wiremu and Ben by way of gift, so that they would have an interest in the land on which the house stood. Why would he do this if Wiremu and Ben did not own the house?

[48] I also consider that Ben forfeited his claim of ownership when he withdrew from the arrangement. Mr Shannahan's letter is clear that Ben sought reimbursement from Wiremu for the payments he made towards the loan, and that by doing so he was forfeiting any rights with respect to the house. This is also consistent with the evidence from Fred, Wiremu and Anne.

[49] Ben took proceedings in the Disputes Tribunal and received an order to recover this money from Wiremu. Any claim Ben had to the house must have been waived in lieu of

the award of damages he received. This was also confirmed by Anne and Donna who are not seeking rights of ownership to the house on behalf of Ben's estate.

[50] I note that Wiremu accepts that he has not paid to Ben, or his estate, the full amount of damages awarded by the Disputes Tribunal. I do not consider that this disentitles Wiremu from any rights of ownership that he may have to the house. Neither Anne or Donna are seeking a determination that Ben has retained any rights in the house. Part payment of this award does not give rise to any rights to the house in favour of Fred. If the damages awarded have not been paid in full then Ben, or now the administrator of his estate, is entitled to take steps to enforce that award.

[51] Fred further argues that, when Ben withdrew from the arrangement, this breached the original agreement he entered into which was with both Ben and Wiremu. Fred contends that, as a result of this breach, the original agreement should be terminated and ownership of the home should revert to him.

[52] There is some merit in Fred's argument that he should have been included in those discussions given that he was the original owner of the house, and he was a party to the agreement reached with Ben and Wiremu in 2005. Despite that, I do not consider that Ben's withdrawal means that Fred is now entitled to ownership of the house.

[53] Fred agreed that Wiremu and Ben would take over the repayment of the loans and in return they would receive ownership of the house. Fred was aware that Ben withdrew from this arrangement and that Wiremu repaid the loans on his own.

[54] Wiremu advised that he spent a total of \$43,000.00 in repaying the loans. Wiremu has filed statements from the Home Mortgage Company which show that regular payments were made from 01 May 2006 up until 08 May 2014. That statement also records that one of the loans has been repaid and that the balance of the remaining loan as at 1 May 2014 was \$18.05.

[55] In response to questions from the Court, Fred accepted that he never raised his concern about Ben withdrawing from the arrangement with Wiremu. Fred advised that:¹³

¹³ 125 Taitokerau MB 111 (125 TTK 111).

Yes. I thought I should have but I didn't. Yes, I left it.

[56] It is only now that Wiremu has repaid the loans that Fred has raised this argument.

[57] I consider that Fred is estopped from denying that Wiremu has received sole ownership of the house. If Fred considered that the original agreement had been breached he should have raised this when Ben withdrew from the arrangement. It is unconscionable for Fred to do so now when Wiremu has already repaid the loans in reliance on the belief that by doing so he would receive ownership of the house.

[58] As Wiremu has repaid the loans I also consider that Fred would be unjustly enriched if he was to now receive ownership of the house.

[59] For these reasons, I find that in 2005 Fred, Wiremu and Ben agreed that Wiremu and Ben would take over the repayment of the loans in return for receiving ownership of the house. Ben subsequently withdrew from that arrangement. Wiremu repaid the loans on his own and is now the sole owner of the house.

Further arguments raised

[60] By letter dated 30 May 2016, Fred has raised a number of additional matters. This includes that:

- (a) He is willing to pay Wiremu for the amounts he contributed towards the loans in return for ownership of the house.
- (b) If he has to pay Wiremu for the house then he wants Wiremu and Ben to return the shares in the block that he gifted to them.
- (c) If he does not receive the house, or the return of those shares, Fred wants Wiremu and Ben to pay for the shares that he gifted to them in 2006.

[61] These arguments do not relate directly to the question I am being asked to determine and so I have not taken them into account in coming to the decision made above. For the sake of completeness, I make the following brief comments.

[62] Given my findings, if Fred wants to purchase the house off Wiremu, he will have to enter into an agreement with Wiremu to do so.

[63] If Fred seeks the return of, or payment for, the shares transferred in 2006, he should raise that with Wiremu, and the administrator of Ben's estate, or file an appropriate application before the Court. It is not appropriate to comment on the merits of any such potential application.

Decision

[64] Pursuant to section 18(1)(a) of Te Ture Whenua Māori Act 1993 I grant an order determining that Wiremu Pomare is the sole owner of the house erected by Mihi Ruka on Utakura No.8.

[65] These orders are to issue forthwith pursuant to rule 7.5(2)(b) of the Maori Land Court Rules 2011.

Pronounced at 11.30 am in Whangarei this 1st day of November 2016.

M P Armstrong
JUDGE