

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

**A20130006772
CJ 2013/40**

UNDER Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF Tau Pere Pokaihau also known as Tau Pera Rogers
AND MAHUE TARAWA
Applicant

Hearing: 19 September 2018, 2018 Chief Judge's MB 668 - 688
(Heard at Whangarei)

Judgment: 21 December 2018

RESERVED DECISION OF DEPUTY CHIEF JUDGE C L FOX

Introduction

[1] Mahue Tarawa (the applicant) seeks an order under s 45 of Te Ture Whenua Māori Act 1993 (the Act) to cancel a confirmation order made on 7 August 1980 at 11 Kaikohe MB 208-210 in relation to a transfer of shares in Kohatutaka 6G1A from Tau Pere Pokaihau also known as Tau Pera Rogers to Sophie Wipou.

[2] The applicant claims that 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 Tau Pere Pokaihau vested all his interests to Sophie Jane Wipou and Mahue Tarawa equally through his will, however Kohatutaka 6G1A was transferred to Sophie Jane Wipou, solely.

[3] The applicant claims that she has been adversely affected by the order complained of because she is not able to become an owner in Kohatutaka 6G1A as per the Will of Tau Pera Pokaihau.

Background

[4] The Registrar's Preliminary Report and Recommendation dated 15 August 2018 sets out the background to the application. The report is reproduced in full as follows:

PRELIMINARY REPORT AND RECOMMENDATION

Introduction

1. This application filed by Mahue Tarawa (the applicant) pursuant to section 45 of Te Ture Whenua Māori Act 1993 (the Act) seeks to cancel a transfer dated 5 December 1977 and confirmed on 7 August 1980 at 11 Kaikohe MB 208-210 relating to Kohatutaka 6G1A transferring the interest of Tau Pere Pokaihau (also known as Tau Pera Rogers) to Sophie Wipou.
2. The applicant claims the transfer is incorrect because an error occurred in the presentation of the facts of the case to the Court because the Will of Tau Pere Pokaihau vested all his interests to Sophie Jane Wipou and Mahue Tarawa, equally, however Kohatutaka 6G1A was transferred to Sophie Jane Wipou, solely.
3. The applicant claims she has been adversely affected by the order complained of upon the grounds that she is not an owner in Kohatutaka 6G1A as per the Will of Tau Pera Pokaihau.

Concise history of Orders sought to be amended/cancelled

4. On 7 June 1978, an Application for Confirmation dated 16 May 1978 was filed by Manu Rogers (Solicitor) in the Māori Land Court seeking a confirmation of alienation by way of transfer and containing the following information:

Name of Land:	Kohatutaka 6G 1A
Total area of Land:	58.0723 hectares
Number of Owners:	1
Nature of instrument:	(a) Memorandum of Transfer
Date of first signature of alienor:	2 nd December 1977
Consideration:	\$42,000.00
Maoris alienating:	1
	<u>TAU PERA POKAIHAU</u> (also known as <u>TAU ROGERS</u>)
Shares owned:	whole (fee simple)

5. Accompanying the application was a form titled "Particulars of Title" certified as correct at 30 August 1978. On that form the owner of the interest in Kohatutaka 6G1A was recorded as "*ESTATE TAU PERA POKAIHAU (ROGERS)*".
6. The application was initially heard on 3 April 1979 at 10 Kaikohe MB 359. At that hearing the Court stood down the application "for information to support appln for exemption. S.228".
7. On 3 April 1979 at 10 Kaikohe MB 364-5 the application was brought back before the Court. The minute from that hearing is set out as follows:

KOHATUTAKA 6D1A
XIX/53

Mr Macauley. from fol. 359
Valuation 1.7.76 LV 18000 I. 24000 CV \$42000.
The proposal was to transfer the land on the basis that the transferee take over the liability – The Māori Land Board consented to it on that basis. There was to be a mortgage back.

Court. Exemption s.228 will be granted and time for confirmation is extended but transferee should be quite sure before confirmation is granted as the contract could be enforceable against her.

Adjourned until Mr Macauley clarifies position.

8. On 29 June 1979 Mrs Rangihetini Wipou filed a notice of intention to appear in opposition of the application upon the grounds that:

I am the legal wife of Tau Pera Pokaihou dec'd and I wish to be heard on the application of the transfer by Tau Pera Pokaihou to Sophie Jane Wipou, of Kohatutaka 6G1A

9. On 30 April 1980 at 11 Kaikohe MB 118-9 the application came back before the Court. The minute from that hearing is set out as follows:

KOHATUTAKA 6D1A

Pt XIX/53

Mr P G Macauley appears as counsel. Advised Court that Mr France of Messrs O'Neill Mahood Armstrong Ross & France is acting for legal wife and wishes to record his interest.

Court: A notice of intention to appear has been filed.

Court: This application for confirmation was filed on the 7th June 1978. The transfer was dated 2 December 1977 and should have been lodged within 3 months i.e. prior to 2 March 1978. The Court has a direction to accept the filing of such application outside the 3 month period. Apparently, the transferor died on 16th April 1978 and this caused delay not only in filing but in prosecution of the application after filing. On 29 June 1979, a notice of intention to appear was filed by Mrs Rangi Wipou who claimed to be the legal wife and for whom Mr France now acts. On the 3rd August 1979, the Court (KT 10/364-5) granted leave to file beyond time allowed and also granted exemption from filing a special valuation.

The Court understands that there could be some delay in the grant of administration to the deceased transferors estate. At the same time the Court is concerned to see applns are prosecuted without unreasonable delay. Over 12 Months has elapsed since the last hearing of this matter and over 2 years since the transferor died.

The Court therefore directs the applicant as follows:

1. A special fixture has been made for this appln to be heard at Kaikohe on Thursday 7th August next at 2 pm.
2. Failing prosecution of the appln at that hearing the appln will be referred to the Court for dismissal under Rule 27.
3. Mrs Rangi Wipou is required to file in Court and serve on the applicant's solicitor Mr M Rogers PO Box 21864 Henderson, fuller details of her grounds of objection to the appln at least 14 days prior to 7th August 1980.

Adjourned accordingly

Copies of minutes to be sent to

1. Mr M Rogers, Solicitor for the applicant
2. Mr P G Macauley, Box 296 Kaikohe
3. Mr France of Ms O'Neill Mhood Armstrong Ross & France

10. On 7 August 1980 at 11 Kaikohe MB 208-210 the Court made an order confirming the transfer. The minute from that hearing is set out as follows:

KOHATUTAKA 6D1A

Part XIX

Mrs Beer appears for the transferee Sophie Jane Wipou and also for the estate of the late Tau Rogers. A will was found on 22 May 1980 – copy produced to the Court.

Court: There is no appearance of Mrs Rangi Wipou nor has she filed the details of her objection as required by this Court. The Court therefore intends to proceed with the application for confirmation.

As to the transfer

1. The Court accepts there is no question of aggregation.
2. As to consideration. The purchase is \$42,000 which is based on the Government Capital Roll value as at the 1 July 1976. The price of \$42,000 was to be satisfied as to the part by taking over existing mortgage to the Māori Affairs and Special Agriculture Assistance Fund. The transferee was to give a mortgage back for \$33,000 and the balance was a gift between the transferor and transferee.
3. The Court has previously granted exemption from a special valuation see KH10/364-5 and accepted the consideration as adequate. Presumably this was done on the basis of the family relationship and the proximity of the transaction to the then government value at the time the transfer was executed on 2.12.77

In the circumstances, this Court is prepared to confirm the transfer. See also previous minutes KH10/364.

Both parties i.e. the executor and transferee seek confirmation.

Transfer confirmed

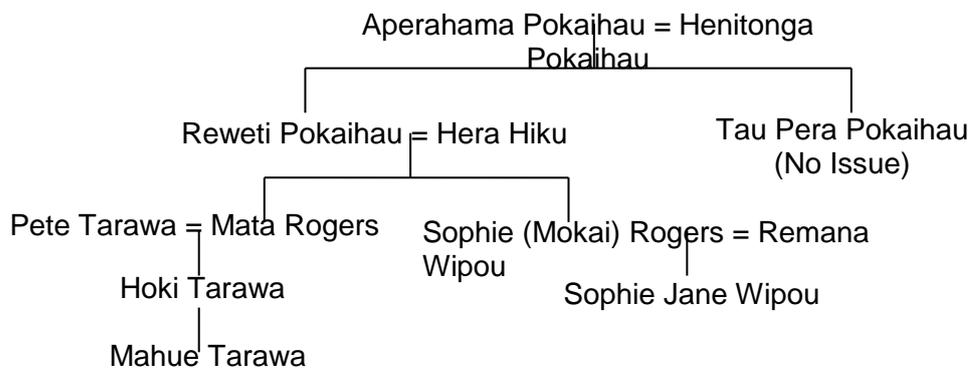
- 1.No monies are to pass under the transfer
- 2.Consideration is fixed at \$42,000
- 3.Transferee takes subject to existing title

Copy minutes to Mrs Beer c/- Wallace Spencer & Co.

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

11. The applicant has provided the following documents in support of her application:

a) Whakapapa which is set out as follows:



b) A copy of the Notice of Change of Ownership from Tau Pera Pokaihau to Sophie Jane Wipou setting out the date of agreement as 2 December 1977 and date of possession as 10 December 1980;

- c) A copy of a Certificate dated 12 August 1958 setting out the details for Kohatutaka 6G1A including that Tau Pera Pokaihau is the person entitled to the land;
- d) A copy of the Will of Tau Pera Pokaihau (also known as Tau Pera Rogers) dated 17 August 1973 which is set out as follows:

THIS IS THE LAST WILL AND TESTAMENT of me TAU PERA POKAIHAU (also known as TAU PERA ROGERS) of Otatau in New Zealand Farmer I HEREBY REVOKE all former Wills and testamentary dispositions made by me and declare this to be my last Will I GIVE DEVISE AND BEQUEATH the whole of my property both real and personal wheresoever situate or being and including all my interests in Maori lands unto SOPHIE JANE WI POU and MAHUE WHIU TARAWA absolutely AND I APPOINT my cousin PURA PERA ROGERS (also known as BULA PERA ROGERS) sole executor of this my Will.

- e) A supporting letter by the applicant to the Court dated 8 August 2013 which is set out as follows:

Tau Pera Pokaihau is my Granduncle. He brought Sophie Jane Wipou and myself up on his farm and we worked it with him. When my nanny died, Bulla Rogers, an uncle, who was made executor of the will, ended up in a relationship with my cousin, his niece, Sophie. (He is now deceased).

I came back from Auckland and lived on my brother's farm which as next door, and did work on both. Bulla Rogers lived with Sophie on the farm and they always made sure I would know that I owned nothing there, so they took over everything and I left it at that.

Over the years they had sold all the farms assets and now the farm is in a shocking state.

My brother now keeps me informed on what's happening back there, and has told me that Sophie wants to now sell the land and I would like to stop that happening.

I would just love to go back on my nanny's land and bring it back how it should be. The place is so run down it is so sad.

- f) A copy of the Death Certificate for Hunia Tetau Rogers (Pokaihau) who died on 20 April 1978. Rangihaketini Wipou is recorded as his wife;
- g) A copy of the Birth Certificate for Mahue Whiu Tarawa;
- h) A copy of the Marriage Certificate for Mahue Terri Tarawa and Karika Kat Strickland. The date of marriage is recorded as 25 April 1979;
- i) A copy of a letter dated 6 July 1982 from PH Cockle, Solicitor of Beckerleg Cockle & Manley to the applicant (under her married name; Mrs MT Strickland) and relevant extracts from that letter are set out as follows:

Dear Mrs Strickland,

YOUR INTEREST IN YOUR UNCLE'S ESTATE

You will recall that some time ago, you had asked the writer to attempt to obtain a valuation of your land which you thought you had inherited from your grand uncle Tay Pera Pokaihau. This has proved more difficult than at first expected. We have carried out extensive searches at the Registry of Maori Lands at Whangarei and have ascertained that your uncle had interests in the following Maori land:

- a) Kohatutaka 6K1 50.540 shares out of 1935.000 shares
- b) Kohatutaka 6K3 5.260 “ “ “ 1306.000 “
- c) Kohatutaka 6G1 in which he was the sole owner.

Out of all these, the latter appears to be the most important on account of the fact that there are no other owners. The land is 143½ acres and is held under Certificate of Title 864/220. A search of the title made on 29th June 1982 shows that the land is vested in Tau Pera Pokaihau alias Tau Rogers on the 7th October 1958. The Maori Land Court records show that the Government valuation as at 1st July 1976 was \$42,000.00 and as at 1st July 1981, \$83,000.00. The Maori Land Court records further show that there was an unregistered mortgage through the Department of Maori Affairs for the sum of \$1,000.00 payable in 1980 but without interest.

They further show a transfer of this property to Sophie Jane Wipou which was approved by the Maori Land Court in December 1980. The Maori Affairs mortgage was discharged before the vesting of title in Miss Wipou. The records further show that the Department granted to her an advance of \$5,100.00 in December 1977.

The history of these transactions is interesting to say the least, and it proceeds in the following way: -

1. Your uncle executed a will leaving all his property to yourself and Sophie Wipou and appointed his cousin Pura Pera Rogers (also known as Bula Pera Rogers) executor.
2. By memorandum of transfer your uncle transferred all his interest in the property to Sophie for the stated sum of \$42,000.00. The transfer purports to be signed on 2nd December 1977.
3. He died on the 16th April 1978.
4. By letter dated 3rd October 1978, P.T. Birks, solicitor, requested a certificate of values in his estate on behalf of Haratua Pera Pokaihau Rogers (CBE, JP) of Rotorua. That shows the parents as Pera Pokaihau Rogers and Hemeitanga Hiku and his brothers and sisters as Hari Taune, Reweti Pera Pokaihau Rogers, Hira Pera Pokaihau Rogers, Hunia te Tau Pera Pokaihau Rogers, Atarangi Pera Pokaihau Rogers, Hoki Pera Pokaihau Rogers, Hohepa Pera Pokaihau Rogers and Harotau Pera Pokaihau Rogers.
5. The beneficiary rent search prepared by the Court showed only the Block 6K1 and 6K3, but also shows that the deceased was successor to Hira Pera Pokaihau. The Court in its answering letter explained that 6G1A had been omitted from the certificate of values because an application had been lodged of confirmation of a transfer to Sophie Wipou.
6. The application for confirmation came before the Court on 3rd April 1979. The Court minute shows that an extension of time for confirmation was granted (the application should have been made

- within three months of the date of transfer, that is by the 2nd March 1978).
7. The application was again considered by the Court on the 30th April 1980 and the Court record shows that the original application was filed on the 7th June 1978. The Judge noted that the death of Mr Pokaihau on the 16th April 1978 had caused a delay. He noted also on 29th June 1979, Mrs Rangi Wipou who is said to be Mr Pokaihau's legal wife asked for leave to appear. The Court noted that as there was to be further delay in completing administration of Mr Pokaihau's estate, the application would remain adjourned to be heard on Thursday, 7th August 1980. The Judge directed Mrs Wipou to deliver details of her grounds to the transfer to Miss Sophie Wipou's solicitor, Mr Manu Rogers.
 8. By letter dated 7th July 1980, Wallace Spencer & Co's solicitors, wrote to the Court stating that they were acting for the executor of the deceased's will which had recently been discovered. The Court was advised that you were one of the beneficiaries under the will.
 9. The next hearing was 7th August 1980 and the Judge in the minutes noted that the will was found on the 22nd May 1980. He noted that Ms Wipou had failed to give any details of her objection and she did not appear. He proceeded to deal with the application and made an order confirming the transfer which was sought both by Mr Bula Rogers and Miss Sophie Wipou. The Judge noted that Miss Wipou was to pay the \$42,000.00 by taking over an existing mortgage to Maori Affairs for special agricultural assistance funds and to give back a mortgage for \$33,000.00. He said the balance (whatever that was), was to be a gift between Mr Pokaihau and Miss Wipou. He did not refer to any documentary evidence supporting the arrangement for the mortgage of \$33,000.00 nor the gift.
 10. On the 22nd January 1982 Wallace Spencer & Co., solicitors, applied for a further certificate of values which was sent to them on 28th January 1982.

The history of the property 6G1 is to the writer's mind, most unsatisfactory. Furthermore, it does not accord at all the notion of Sophie purchasing your interest in the property. There must be much more documentary evidence to support this whole transaction. The transfer itself was clearly drawn by Manu Rogers, who has been practising from Henderson throughout. For unexplained reasons the transfer however, appears to have been prepared by Mr G.M. Sidney, solicitor, at Browns Bay. It is odd that the transfer was not prepared by one of Wallace Spencer & Co. who had drawn your granduncle's will in 1973. It is further odd that Sophie had not told you of the transfer to herself (assuming she knew of it).

Please let us have your instructions in this matter. If you wish to challenge the validity of the transfer, then proceedings should be taken as soon as possible. It appears to the writer that any such proceedings must be taken against your uncle executor, Mr Bula Rogers. Before such proceedings are taken, Mr Rogers must be requested to supply particulars of the estate including details of the sale. To hold the situation in the meantime, a caveat can be lodged against the title to the land and that will prevent the registration of Miss Wipou's transfer.

...

P.S. Whatever the position on the 6G1A property, from the Court's notes it would appear that you would be entitled to one half of the \$33,000.00 supposedly owing under the mortgage from Sophie at least.

- j) A copy of a letter dated 9 September 1982 from PH Cockle, Solicitor of Beckerleg Cockle & Manley to the applicant enclosing a copy of correspondence from Wallace Spencer & Co's dated 3 September 1982 which is set out as follows:

Attention: Mr P. H. Cockle

Dear Sirs

re: T. P. Rogers Estate

Thank you for your letter dated 11 August 1982. The file is currently with the N.Z.I Trust Department and we had been awaiting its return before replying to your letter. However, we have not yet received it and we do not wish to delay a reply any longer.

It is untrue that Mrs Strickland has received no indication of the value of the estate. We wrote to her on several occasions asking her to consult a solicitor and advising her of the position.

Mr Rogers died in 1978 but it was not until 1980 that enquiries were made of our firm and a will was discovered. Mr Manu Rogers of Henderson had been taking steps to obtain Letters of Administration but the executor instructed us to obtain Probate. This we did but we have been unable to obtain any details of the assets and liabilities at the date of death, partly due to the passage of time but more particularly due to the total failure of the executor and the other beneficiary to furnish us with any of the late Mr Roger's papers. We have enlisted the aid of Maori Affairs but they have had no more success in obtaining co-operation than we have done.

Mr Rogers had a small dairy farm at Otua which he and the other beneficiary, Miss Wipou farmed together. During Mr Roger's lifetime, he executed a transfer of the land to Miss Wipou taking a mortgage back for \$33,000.00. We obtained confirmation of this transfer after the death of Mr Rogers. The mortgage, being of Maori land, is of course unregistered but it is also undated and unstamped. From memory, no interest rate is provided.

When the file is returned to us we propose to hand it to the Maori Trustee since we are unable to make any progress whatever.

Court research

12. The legislation in force at the time of the hearing was the Māori Affairs Act 1953. Part 19 of that Act dealt with alienation of land by Māori. Sections 224-233 relate to confirmation of alienations and are set out as follows:

224 Alienations by Maoris to be confirmed

- (1) Except as may be otherwise expressly provided in this or any other Act no alienation of Maori land by way of transfer by a Maori shall have any force or effect unless and until it has been confirmed by the Court.

- (2) An appeal shall lie to the Appellate Court from any decision of the Court to grant or refuse confirmation of an alienation or from any variation by the Court of the terms of any alienation.
- (3) In this section and in sections 227, 227A, 228, 230, and 318 of this Act, the expression alienation by way of transfer includes any agreement to alienate by way of transfer.

225 Application for confirmation

- (1) Except as provided in subsection two hereof, confirmation of an alienation of Maori land by way of transfer by a Maori shall not be granted unless application for confirmation is made by or on behalf of a party to the instrument of alienation within [3] months after the date of the execution of the instrument by that Maori; or, if the land is situated in the Chatham Islands, within [4] months after that date.
- (2) Notwithstanding anything in subsection one hereof, the Court may, in its discretion, and subject to such terms and conditions as it thinks just, confirm any alienation [by way of transfer] for the confirmation of which application was not made within the time limited by that subsection, if, in all the circumstances of the case, the Court is of opinion that the alienation should be confirmed.
- (3) When an instrument of alienation by way of transfer 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.

226 Effect of confirmation

- (1) Confirmation shall be granted by a certificate of confirmation endorsed or otherwise written on the instrument of alienation, under the seal of the Court and the hand of the Judge by whom it was granted, or of any other Judge.
- (2) On confirmation being granted the instrument of alienation shall (if otherwise valid) take effect according to its tenor, subject to the requirements (if any) of registration under the Land Transfer Act 1952, as from the date on which it would have taken effect if no such confirmation had been required.
- (3) For the purposes of the Stamp and Cheque Duties Act 1971, the date of the certificate or of each successive certificate of confirmation shall be deemed to be the date of the execution of the instrument in respect of the alienation thereby confirmed.

227 Conditions of confirmation

- (1) No alienation by way of transfer of Maori land shall be confirmed unless the Court is satisfied—
 - (a) That the instrument of alienation has been executed and attested in the manner required by this Act; and
 - (b) That the alienation is not in breach of any trust to which the land is subject; and
 - (c) That the alienation, if completed, would not result in an undue aggregation of farm land; and
 - (d) That the value of any millable timber, minerals, or other valuable thing in or upon the land has been properly taken into account in assessing the consideration payable; and

- (e) 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.
- (1A) An alienation by way of transfer to a person who is not a New Zealand citizen or to an "overseas corporation" within the meaning of Part 2A of the Land Settlement Promotion and Land Acquisition Act 1952 (as inserted by section 5 of the Land Settlement Promotion and Land Acquisition Amendment Act 1968) of any land which, if it were General land, could be acquired by that person or corporation only with the consent of the Land Valuation Court under that part of that Act shall not be confirmed unless the Maori Land Court is satisfied that it should consent to the acquisition of the land accordingly.
- (2) In the course of determining if an alienation would result in the undue aggregation of farm land, the Court shall have power to determine (in conformity, as far as may be possible, with the relevant provisions of the Land Settlement Promotion and Land Acquisition Act 1952) whether the land affected by the alienation is farm land and shall have regard to the several matters that a Land Valuation Committee is, by Part 2 of that Act, required to consider in relation to applications made to the Land Valuation Court for its consent to transactions to which the said Part 2 is applicable.
- (2A) In determining whether it should consent to the acquisition of any land by a person or corporation referred to in subsection (1A) of this section under a transfer before it for confirmation, the Court shall, as far as possible, act in conformity with the relevant provisions of the said Part 2A of the Land Settlement Promotion and Land Acquisition Act 1952, and shall have regard to the several matters that a Land Valuation Tribunal is, by that Part of that Act, required to consider in relation to applications made thereunder.
- (3) If the Court is satisfied as to the matters referred to in subsections (1) and (1A) of this section a certificate of confirmation shall be granted as a matter of right.
- (4) No certificate of confirmation shall be questioned or invalidated on the ground of any error or irregularity in the procedure pursuant to which it was applied for or granted.

228 Except in special circumstances application for confirmation to be supported by special valuation

- (1) Except as may be otherwise provided by Rules of Court or unless exemption from the requirements of this section is granted by the Court, every application for the confirmation of an instrument of alienation by way of transfer shall be supported by a special valuation of the land to which the instrument of alienation relates. Every special valuation made for the purposes of this section shall be made by the Valuer-General and shall be transmitted by him to the Court.
- (2) For every valuation made by the Valuer-General for the purposes of this section there shall be paid by the applicant for confirmation a fee to be fixed by the Valuer-General.
- (3) In determining the adequacy of the consideration the Court shall have regard to the valuation made by the Valuer-General as aforesaid, but shall not be bound to determine the adequacy of the consideration in conformity with that valuation.

229 Terms of alienation may be modified

- (1) If on the hearing of an application for confirmation it appears to the Court that some modification in favour of the Maori owners should in justice be made by way of an increase of the amount payable as purchase money the Court may, with the consent of the alienee, modify the terms of the alienation, and may confirm the same as modified. The terms of any such modification so made by the Court shall be set out in the certificate of confirmation.]
- (2) If the alienee does not consent to any modification proposed by the Court for the purposes of this section, the Court, notwithstanding anything to the contrary in section 227 hereof, may refuse to confirm the alienation.

232 Confirmation as of right

When any valid agreement for sale and purchase has been duly confirmed, the confirmation of any transfer in pursuance of that agreement shall be granted as a matter of right and without notification.

233 Instruments to be produced to Registrar

- (1) No alienation of Maori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court.
- (2) An additional copy of the instrument of alienation shall at the time of its production to the Registrar for the purposes of subsection (1) of this section be lodged with the Registrar for transmission to the Maori trustee for the purposes of the recovery, pursuant to section 231 of this Act, of the proceeds derived for the alienation.]

13. On 7 August 1980 at 11 Kaikohe MB 208-210 the Court confirmed the following:
 - a) No monies were to pass under the transfer;
 - b) Consideration was set at \$42,000.00;
 - c) The consideration comprised of \$33,000.00 (mortgage) and \$9,000.00 gift from transferor to transferee; and
 - d) An exemption from furnishing a special valuation was granted on 3 April 1979 at 10 Kaikohe MB 364-5

What was the effect of the vendor's death on the transfer document?

14. The death of one of the contracting parties between contract and completion does not affect the validity of the contract. The burden and benefit of the contract simply pass to the personal representative of the deceased (executor of the seller's estate) who are then bound to complete.
15. However, the transfer cannot be completed until the seller's personal representative has obtained a grant of probate for the estate from the High Court.
16. Tau Pere Pokaihau entered into a memorandum of transfer on 2nd December 1977, but subsequently passed away on 16th April 1978 before settlement could be effected. As set out above the death of Mr Pokaihau did not invalidate the contract, though the settlement of the matter was delayed until a grant of probate had been obtained, followed by confirmation of the alienation by the Māori Land Court.

17. A grant of probate for the estate of Tau Pera Pokaihau (also known as Tau Pera Rogers) was issued by the High Court in Whangarei in 1980 in favour of Pura Pera Rogers (also known as Bula Pera Rogers) as executor.
18. The memorandum of transfer was then confirmed by the Māori Land Court on 7 August 1980.

Did the Court have any discretion in confirming the memorandum of transfer?

19. The application for confirmation was filed on 7 June 1978, and as such was subject to sections 224 to 233 of the Maori Affairs Act 1953.
20. While the application for confirmation was not lodged within the required timeframe (within 3 months after the date of execution), the Court did have the discretion afforded by section 225(2) to confirm any application for alienation made outside of that 3 month period.
21. The Court exercised its discretion and accepted the filing of the application outside the 3 month period, due to the delay caused by the transferors' death in terms of filing and prosecuting the application.
22. On 7 August 1980, the Maori Land Court confirmed the alienation of Kohatutaka 6G 1A by way of memorandum of transfer being satisfied that the following conditions of the confirmation had been met:
 - a) That the instrument had been executed and attested in the required manner; and
 - b) That the alienation was not in breach of any trust. The minutes at 10 Kaikohe MB 364-5 record that the Maori Land Board had consented to the proposal for the transferee to assume liability of the Mortgage.
 - c) That the alienation would not result in an undue aggregation of farm land. The minutes at 11 Kaikohe MB 208-210 record that the Court accepted that there was no question of aggregation.
 - d) That in assessing the consideration all improvements or thing of other value had been considered. The minutes at 10 Kaikohe MB 364-5 record that the Court had granted an exemption for the need to file special valuation.
 - e) 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. The minutes at 11 Kaikohe MB 208-210 record that the Court accepted the consideration as adequate, presumably based on the family relationship and the proximity of the transaction to the government valuation.
23. From reviewing the relevant minutes, it is evident that the Court was satisfied that all of these conditions had been met, and therefore the Court had to confirm the alienation as a matter of right. The Court had no discretion to consider anything other than the above conditions when assessing an application for confirmation.
24. I note the will of the deceased was produced before the Court on 7 August 1980.

What was the effect of the confirmation?

25. I note that registration of the memorandum of transfer was never registered against the title. The instrument was never registered against the provisional title

(NAPR220/88) as the title was subject to the provisions of Section 461 of the Maori Affairs Act 1953 which is reproduced as follows:

- 461** (1) This section shall apply in any case where a memorandum of mortgage to Her Majesty or to a State Loan Department affecting any area of Maori freehold land cannot be immediately registered under the Land Transfer Act 1952 by reason of the fact that any order of the Court constituting the title to that land has not been so registered.
- (2) In any case to which this section applies, the Registrar of the Court, on request made by or on behalf of the mortgagee, shall forward to the District Land Registrar of the district in which the land is situated a certificate under his hand setting forth with respect to the land the following particulars:
- (a) The kind of order constituting the title to the land to which the mortgage relates:
 - (b) The date of the order:
 - (c) The description of the land as shown in the order:
 - (d) The area or approximate area of the land as appearing in the order:
 - (e) The name or names of the persons entitled under the order, and, if more than one, their several shares or interests in the land.
- (3) On receipt of any such certificate, the District Land Registrar shall proceed to register the same in accordance with the following provisions of this section.
- (4) If the title to the land affected by the order referred to in the certificate is registered or provisionally registered under the Land Transfer Act 1952, he shall register the certificate against the title in the register or the provisional register, as the case may be.
- (5) If the title to the land is not so registered or provisionally registered, the District Land Registrar shall embody the certificate in the provisional register as a separate folium thereof, and, except as otherwise provided in this section, all the provisions of the Land Transfer Act 1952 as to provisional registration shall thereupon apply accordingly.
- (6) On the registration of a certificate under this section, no instrument in respect of the land referred to in the certificate shall thereafter be registered except-
- (a) A mortgage or memorial of charge in favour of Her Majesty or of a State Loan Department:
 - (b) An order made by the Court creating or evidencing a charge in favour of Her Majesty or of a State Loan Department:
 - (c) An order of the Court or other instrument transmitting title to any person who has executed any such mortgage or whose interest in the land is subject to any such charge:
 - (d) An instrument evidencing the discharge of any such mortgage or charge or any dealing therewith.
- (7) On deposit for registration of the order of the Court constituting the title to any land as aforesaid the District Land Registrar shall cancel the registration of the certificate given by the Registrar of the Court and, as the circumstances require, shall issue a certificate of title in respect of the land or register the order of the Court in the provisional register, and in either case shall transfer to the appropriate folium of the register or provisional register all entries and memorials then appearing in the register or the provisional register in respect of the land comprised in the order of the Court.

26. In essence, the provisional title only existed for the propose of registering the Crown's mortgage. The title was a limited title for mortgage purposes only, therefore a transfer of the underlying fee simple could not be registered.
27. At 137 Whangarei 6 – 9 (11 March 2008) as part of the Maori Freehold Land Registration Project the Court made orders pursuant to sections 128 and 131 in respect of Kohatutaka 6G1A to bring the LINZ title up-to-date with the Maori Land Court record.
28. As noted above the LINZ title related only to the Crown mortgage, a copy of the title order dated 6 November 1951 needed to be registered alongside a consolidated order updating the ownership to show Sophie Jane Wipou as the current registered proprietor.
29. A new title (498946) was issued by LINZ on 28 September 2009 declaring the land to be Maori freehold land and recording the current registered proprietor as Sophie Jane Wipou.

Details of subsequent Orders affecting lands to which application this relates

30. Not applicable.

Details of payments made as a result of the Order

31. The clause in the will relating to the distribution of the deceased's property both real and personal fails in respect of Kohatutaka 6G 1A because of the contractual obligations created by the memorandum of transfer which was entered into by Mr Pokaihau prior to his death.
32. However, the \$42,000 consideration for the transfer of the property consisted of a mortgage back of \$33,000 (which included taking over the existing mortgage held by the Crown) held by with the balance of \$9,000 being a gift between the transferor and the transferee.
33. I refer to instrument 410150.1 on former title NA PR220/88 which is a variation to the mortgage dated 17 October 1975. According to that document the deceased (Tau Pera Rogers) increased the principle amount of the mortgage to \$9,600.00 with yearly repayments increasing to \$574.00 annually.
34. By the time the deceased entered into the transfer agreement (1977), I expect he would have made 2 further payments against the mortgage. When the transfer document was signed I estimate the amount of the mortgage to be approximately \$8,802.00 (given a 5% interest rate per annum on the amount of \$3,500). I have not been able to ascertain the interest rate for the original mortgage so have not included any adjustment for this.
35. Once the transfer had been completed, Sophie Jane Wipou would have taken over the existing mortgage of \$8,802 (approximately) with the balance of the "Mortgage back" being owed to the estate of the deceased. Which would have been a balance of approximately \$24,198 (minus any amounts paid to the deceased) .

36. As such under the terms of the will the applicant (Mahue Whiu Tarawa) would have been entitled to a ½ share of the proceeds from the transfer of the property, with the other ½ share of the proceeds going to the mortgagee (Sophie Jane Wipou), minus any administration costs.
37. To date no information is available regarding any distributions made from the estate. The executor of the deceased Pura Pera Roger also known as Bulla Rogers is now deceased.
38. Correspondence has been sent out to both of the recipients under the will asking whether they received any distributions for the estate of the deceased. No response from either party had been received at the drafting of this report.

Other areas of interest

39. I note that Tau Pera Pokaihau is still registered as an owner in the following blocks:
 - a) Kohatukaka 6K3 (5.26 shares)
 - b) Kohatukaka 6K1B (50.54)
40. The interest in Kohatukaka 6K1B was derived from parent title Kohatukaka 6K1 on succession to Pera Pokaihau (father) at 9 Bay of Islands MB 53 dated 26 October 1927, Hohi Pera Pokaihau (sibling) and Hira Pera Pokaihau (sibling) at 26 Bay of Islands 376 dated 10 October 1952.
41. I have not been able to reference the derivation for Kohatukaka 6K3. I note that the deceased is recorded as an owner in the list of historical owners dated 1945 alongside his siblings (Reweti Pera Pokaihau, Haratua Pera Pokaihau, Aturangi Pera Pokaihau and Hohepa Pokaihau).

Reference to areas of difficulty

42. The applicant argues that the Will should take precedence over the Transfer. The applicant has not provided evidence to support her claim.

Consideration of whether matter needs to go to full hearing

43. The Court's approach with an application of this nature is:
 - a) To weigh the evidence provided by the applicant against the evidence provided at the original hearing;
 - b) A challenge to original evidence must be balanced against the presumption that everything has been done lawfully unless there is evidence to the contrary; and
 - c) That the evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct.
44. The applicant is required to prove the existence of the alleged mistake or omission either by the Court or in the presentation of evidence.

45. In the current case, there does not appear to be an error in fact or law that would render the transfer defunct because:
- a) The Court complied with the legislation of the day;
 - b) The Court was aware that the transferor had died and was provided with a copy of his will; and
 - c) There was no error in the presentation of the facts of the case to the Court.
46. Therefore, the applicant has not proved her case.
47. By direction of the Deputy Chief Judge this matter has been set down for hearing at the Māori Land Court in Whangārei on 19 September 2016.

Recommendation of course of action to be taken

48. If the Deputy Chief Judge is of a mind to exercise her jurisdiction, then it would be my recommendation that:
- a) That the application be dismissed.
 - b) A copy of this report be sent to those affected parties for whom we have contact details for, giving them an opportunity to comment or respond in writing, before the scheduled hearing on Wednesday 19 September 2018.
 - c) As directed by the Deputy Chief Judge, the application be heard in the Whangārei Māori Land Court on Wednesday 19 September 2018 at 2.00pm
 - d) Notice of the hearing to be issued to those affected parties for whom the Court holds contact details.

Procedural History

[5] On 21 August 2018, the Registrar's Preliminary Report and Recommendation was distributed to all affected parties for whom addresses were known.

[6] The application was heard before me in Whangarei on 19 September 2018, where evidence was given by parties including Ms Tarawa the applicant. I reserved my decision.¹

The Law

[7] 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:

¹ [2018] Chief Judge's MB 668-688 (2018 CJ 668).

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.

[8] 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)*² and in *Tau v Nga Whanau O Morven & Glenavy - Waihao 903 Section IX Block*.³ I do not propose to repeat those principles again in this judgment.

[9] 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

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

- (a) Does the clause in the will fail with respect of Kohatutaka 6G 1A because of the contractual obligations created by the Memorandum of Transfer entered into by Mr Pokaihau prior to his death; and if not
- (b) Did the Court make a mistake of fact or law when making the order dated 7 August 1980 at 11 Kaikohe MB 208-210 confirming a transfer of shares in

² [2009] Chief Judge's MB 209-225 (2009 CJ 209).

³ [2010] Maori Appellate Court MB 167 (2010 APPEAL 167).

Kohatutaka 6G1A from Tau Pere Pokaihau also known as Tau Pera Rogers to Sophie Wipou; and if so

- (c) Is it necessary in the interests of justice to remedy the mistake or omission?

Discussion

[11] I first consider whether the Court in 1980 had the power to confirm the transfer of Kohatutaka 6G1A to Sophie Wipou following the death of Mr Pokaihau, the transferor. The applicant contends that the Court made an error of law when confirming the transfer and argues that Mr Pokaihau's will should have taken precedence over the Memorandum of Transfer.

[12] Mr Pokaihau transferred the land pursuant to a Memorandum of Transfer on 2 December 1977 to Sophie Jane Wipou. The Memorandum of Transfer created a contractual obligation between Mr Pokaihau and Ms Wipou. At this point, the contract remained in place. Mr Pokaihau then died on 16 April 1978. At the point of his death, the rights that would usually be afforded to Mr Pokaihau, as the seller under the contract, passed to the executor of his estate. The executor would then be required to obtain a Grant of Probate within two years of the testator's death to complete the administration of the estate with respect to all property.⁴ In his case, however, there was a delay and probate was not applied for until 1980.

[13] An application for confirmation of alienation by way of transfer was filed between May and June 1978. No administration of the estate had been completed at this point. The Court issued a direction to accept the application outside of the statutory 3 month time period.⁵

[14] The application was not heard by the Court until 3 April 1979, and was adjourned so that the administration of the estate could be progressed. On 30 April 1980, the Court set the matter down for hearing on 7 August 1980. The minutes record that, while the Court understood that the grant of administration of the deceased's estate may take some time, it

⁴ Māori Affairs Act 1953, s 124.

⁵ Māori Affairs Act 1953, s 225(1).

considered that the applications should be dealt with without unreasonable delay. The Court recognised that over 2 years had now passed since the transferor's death. I note that the delay seems to have been due to a failure to advise the executor of the death of the deceased and then a loss of the estate file by the solicitors acting for the administrator.

[15] On 7 August 1980, the Court was advised that obtaining a grant of probate had still not progressed and so it proceeded to make an order confirming the transfer.

[16] I note that the initial Grant of Probate (No 342/80) was not obtained until 3 September 1980. An application was made for a regrant of probate in 1981, and it was granted on 25th June 1981.

[17] Therefore, the Court made an order before the Grant of Probate had been obtained. However, that does not mean that the will should have prevailed. Rather the contractual obligations created by the Memorandum of Transfer continued as a burden on the Estate.

[18] I note in this regard that when the Court made the order, the Estate of the deceased was represented by counsel and she was present in Court. She raised no objections to the Judge proceeding to make orders. Why would she, given that once the Grant of Probate was obtained, the administrator would have no choice but to seek the confirmation of the alienation as per the Memorandum of Transfer dated 2 December 1977.

[19] I do not consider that the Court was in error, even if it would have been appropriate to have waited until the Grant of Probate was issued. I also agree with the Registrar's Report at paragraphs 43-46.

[20] As there was no error, I do not need to consider whether it is necessary in the interests of justice to remedy the mistake or omission?

Decision/Orders

[21] Having regard to the above, I decline to exercise my jurisdiction under s 45 of Te Ture Whenua Māori Act 1993. The application is dismissed.

[22] The Case Manager is directed to distribute a copy of this decision to all parties.

Pronounced at 10.00 am in Gisborne on Friday, this 21st day of December 2018.

C L Fox
DEPUTY CHIEF JUDGE