

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

**A20140012616**

UNDER Sections 289 and 67 Te Ture Whenua Māori Act  
1993

IN THE MATTER OF Panguru C9, C10 and C11

BETWEEN PATRICK TE WHIU AND WAIMARIE  
HARRIS  
Applicants

AND MATIU KING AND MARY TOIA  
Respondents

Hearing: 19 March 2015  
26 June 2015  
12 October 2015  
18 December 2015

(Heard at Kaikohe)

Judgment: 18 April 2016

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**RESERVED JUDGMENT OF JUDGE M P ARMSTRONG**

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## Introduction

[1] Patrick Jonathan Te Whiu applies for a combined partition of his interests in Panguru C9, Panguru C10 and Panguru C11.<sup>1</sup>

[2] The issue in this case is whether the partition should be granted.

## Background

[3] Panguru C9 (“C9”), Panguru C10 (“C10”) and Panguru C11 (“C11”) are located near Panguru on the northern side of the Hokianga Harbour. These are adjoining blocks of Māori freehold land. Access is provided to all three blocks from West Coast Road at the northern end of the blocks.

[4] C9 is 30.4333 hectares in size. It has two owners, Patrick Te Whiu and Waru Waitohi. Patrick owns 258 shares in the block. Waru owns 2 shares. A small area of C9, approximately 2023m<sup>2</sup>, is located on the northern side of West Coast Road. The balance of C9 is on the southern side of the road. To the immediate south of West Coast Road are two houses and a Church. One house is owned by Waru, the other is owned by Joseph Te Whiu, Patrick’s grandfather. The Church is used as a local Catholic Church, although that area has not been set apart as a Maori reservation. An occupation order has been granted with respect to Waru’s house site.<sup>2</sup> The area surrounding these buildings is raised, flat, pasture land. The balance of the land, further south, is low lying, undulating land with large areas in swamp and bush.

[5] C10 is 27.7698 hectares in size. It has two owners, Patrick and Tuha Hori Kingi Te Wau. Tuha is deceased. She had 16 children, 14 of whom are now also deceased. Her surviving children are Matiu King and Mary Toia. Patrick owns 182.45 shares in this block. Tuha owns 27.55 shares. C10 is vested in Joseph and Matiu as trustees of the Panguru C10 Ahu Whenua Trust.<sup>3</sup> A small area of C10 lies to the north of West Coast Road. The balance is on the southern side of the road. There is one house located to the

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<sup>1</sup> Mr Te Whiu’s partner Waimarie Harris is also named as an applicant although she is not an owner in these blocks.

<sup>2</sup> 20 Kaitaia MB 125-126 (20 KT 125-126).

<sup>3</sup> 21 Kaitaia MB 196-197 (21 KT 196-197).

immediate south of the road which is owned by the King whānau. As with C9, the area surrounding the house is raised, flat pasture land. The balance of the land, further south, is low lying, undulating land with large areas in swamp and bush.

[6] C11 is 34.986 hectares in size. Patrick is the sole owner of this block. C11 is largely cleared and is in pasture. C11 is raised slightly higher than C9 and C10 and it is not affected by the swamp and reverting bush as the other blocks are.

[7] Patrick received his interests in these blocks from his grandfather, Joseph.<sup>4</sup> Patrick seeks to partition his interests in C9, C10 and C11, and to combine these interests into a single title. It is proposed that Waru is to be awarded an area of land, equivalent to his shareholding in C9, around his house fronting West Coast Road. It is also proposed that Tuha is to be awarded an area of land, equivalent to her shareholding in C10, around the King homestead, also fronting West Coast Road. The remaining lands would then be combined into one title and awarded to Patrick. The area surrounding Joseph's house, and the Church, on C9 are to be included in the area awarded to Patrick.

[8] Waru supports the application. So does Patrick's whānau, including Joseph. The King whānau, represented by Matiu and Mary, oppose the application.

### **History of the proceeding**

[9] This application was first heard on 19 March 2015.<sup>5</sup> Patrick addressed me in relation to the application. Matiu and Mary appeared in opposition. They argued that their parents originally owned the whole of C10. Matiu and Mary questioned the manner in which Joseph had acquired those shares. They further asserted that the shares, and sole ownership of C10, should be returned to their family.

[10] Although the acquisition of the shares by Joseph is not directly related to the proposed partition, in order to try and address the concerns raised by Matiu and Mary, I directed the Registrar to prepare a report, per s 40 of the Act, concerning the acquisition according to the Court records. I adjourned the application so that the s 40 report could be prepared and distributed to the parties.

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<sup>4</sup> 41 Taitokerau MB 233-238 (41 TTK 233-238).

<sup>5</sup> 100 Taitokerau MB 64 (100 TTK 64).

[11] On 17 June 2015, the Registrar completed that report. The report records as follows:<sup>6</sup>

On 22 May 1952 at 23 Hokianga MB 350, the Court by way of consolidation order created the block Panguru C10.

The owners upon consolidation were:

Name	Shares
Kingi Hori te Wau	182.450
Tuha Hori Kingi te Wau	27.550
Total:	210.00

Tuha Hori Kingi te Wau is recorded as a current owner on the title.

On 3 July 1968 at 5 Kaitaia MB 187, the interests of Kingi Hori te Wau were vested in Harry George King as executor in terms of the deceased's Will.

On 11 July 1973 at 8 Kaitaia MB 75, the Court heard an application filed by Mr King to transfer the interests held under an executor capacity to those entitled in terms of the deceased's Will. Mr King was determined the sole beneficiary, accordingly the interests were vested in Mr King, solely.

#### **Sale of Panguru C10**

On 11 May 1973 Joseph Aloysius Te Whiu purchased the interests of Harry George King also known as George King in Panguru C10 along with the Panguru C14A and Panguru C15A blocks for the sum of \$3,000.00 (R9/81).

#### **Current Ownership of Panguru C10**

On 9 July 2010, Joseph Te Whiu filed an application (A20100008703) to transfer shares to Patrick Johnathon Te Whiu, by way of gift.

On 12 March 2012 at 41 Taitokerau MB 233-238, the Court made orders pursuant to Section 164 of Te Ture Whenua Maori Act 1993 vesting the interests held by Joseph Te Whiu in Panguru C10 along with others in Patrick Johnathon Te Whiu, solely.

Patrick Johnathon Te Whiu is recorded as a current owner in Panguru C10 block.

<sup>6</sup> Section 40 Registrar's Report for the Court dated 17 June 2015.

[12] Kingi Hori te Wau was Matiu and Mary's father. Harry George King was their eldest brother. Both Kingi and Harry are now deceased. The report indicates that, according to the Court records, Harry succeeded to their father's interests in C10, and then sold those interests to Joseph.

[13] Following completion of the Registrar's report, the application was heard on 26 June 2015.<sup>7</sup> Despite the report, Matiu and Mary continued to question the manner in which Joseph acquired the interests in C10. At the conclusion of the hearing, I adjourned the application. I directed Patrick to file further information concerning the proposed partition and I indicated that I would convene a site inspection in relation to all three blocks. I also encouraged the King family to seek legal advice in relation to their concerns around the acquisition of the shares by Joseph.

[14] On 12 October 2015, I convened the site inspection. I issued a minute recording my observations from that site inspection, and I set the application down for a further final hearing.<sup>8</sup> The minute also noted the following:<sup>9</sup>

[12] Previously the King family indicated that they wish to seek legal advice. This is likely to be the last hearing of this application and so if the King family do intend to instruct legal counsel, they should do so prior to the next hearing.

[15] The final hearing was then held on 18 December 2015.<sup>10</sup> The King whānau advised that they had filed an application challenging the acquisition of the shares by Joseph. They further requested that the application for partition should be put on hold pending determination of that application. Although no formal application was filed, I treated the request from the King whānau as an application to stay the proceeding.

[16] The application the King whānau said they had filed had not been placed on the file. As such, I adjourned the application and directed the Registrar to refer that application to me in Chambers. I was then going to issue directions timetabling the filing of submissions from both sides concerning the application seeking a stay.

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<sup>7</sup> 108 Taitokerau MB 208-230 (108 TTK 208-230).

<sup>8</sup> 114 Taitokerau MB 53-55 (114 TTK 53-55)

<sup>9</sup> Ibid at [12].

<sup>10</sup> 123 Taitokerau MB 1-10 (123 TTK 1-10).

[17] Following that hearing, the Registrar advised that despite the representations made by the King family, no such application had been filed. On 21 December 2015, I issued a minute determining that as the application had not been filed there was no basis to grant a stay of the proceeding. Accordingly, I dismissed the application seeking a stay and noted that I would issue my reserved decision on the application for partition in due course.<sup>11</sup>

[18] On 2 February 2016, Mary filed a letter with the Court commenting further on the proposed partition. No application was filed to adduce further evidence. There is no indication that Mary served a copy of the letter on Patrick. As such, I have not received that letter as evidence and I have not taken it into account in determining this application.

### **The Law**

[19] Partition is provided for under Part 14 of the Act and in particular ss 285 to 306.

[20] In *Brown v Māori Appellate Court*,<sup>12</sup> the High Court set out the approach to considering an application for partition. That approach has been adopted by this Court, by the Māori Appellate Court, and was recently endorsed by the Court of Appeal.<sup>13</sup> This approach is helpfully summarised in *Hammond – Whangawehi 1B3H1*:<sup>14</sup>

[15] The Court has exclusive jurisdiction to grant partition orders in relation to Māori freehold land in accordance with Part 14 of the Act. That jurisdiction is discretionary. The Act directs the Court to exercise its discretion in three steps.

[16] First, the statutory prerequisites must be satisfied. The Court is expressly prohibited from granting partition if these prerequisites are not satisfied. There are, in essence, three (we do not look at the situation where the land is vested in an Incorporation):

Section 288(2)(a): The Court must be satisfied that the owners have had “sufficient notice of the application and sufficient opportunity to discuss and consider it.”

Section 288(2)(b): The Court must be satisfied that there is a “sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.”

Section 288(4)(a) and (b): The Court must be satisfied that the partition is “necessary to facilitate the effective operation, development, and utilisation of the land;” or, “effects an alienation of land, by gift, to a member of the

<sup>11</sup> 118 Taitokerau MB 245-247 (118 TTK 245-247).

<sup>12</sup> *Brown v Māori Appellate Court & Ors* [2001] 1 NZLR 87 (HC).

<sup>13</sup> *Whaanga v Smith* [2015] NZCA 121..

<sup>14</sup> *Hammond - Whangawehi 1B3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185).

donor's whānau, being a member who is within the preferred classes of alienees."

[17] In *Brown v Māori Appellate Court* the High Court clarified (para 51) that "necessary" in section 288(4)(a) is properly to be construed as "reasonably necessary" and that is "closer to that which is essential than that which is simply desirable or expedient."

[18] Second, if the statutory prerequisites are satisfied, the Court must then address the mandatory consideration in section 288(1). That section requires the Court to have regard to the opinion of the owners as a whole, the effect of the proposal on the interests of the owners, and the best overall use and development of the land.

[19] Third, the Court is to exercise its general discretion mindful that it may refuse to exercise that discretion if it would not achieve the principal purpose of Part 14 of the Act: section 287(2). The principal purpose is expressed in section 286(1) to be "to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional or improved access to the land."

[20] At all times the Court must have regard to the principles set out in the preamble to the Act, section 2 and section 17: *Brown v Māori Appellate Court* (para 66).

[21] I adopt that approach and I address these issues in turn.

**Have the owners had sufficient notice of the application and sufficient opportunity to discuss and consider it?**

[22] There are only three owners in this case, Patrick, Waru and Tuha.

[23] Patrick served a copy of the application and supporting material on Waru. As Tuha is deceased, I directed the Registrar to search the Court records to determine whether orders for succession had been granted with respect to her estate. The Registrar advised that there are no succession records held by the Court. Nor is there any evidence that an administrator has been appointed with respect to her estate.

[24] In the absence of succession orders being granted, or an administrator being appointed, Patrick has been unable to formally notify a legal representative of Tuha's estate. Instead, pursuant to my directions, Patrick served a copy of the application and supporting material on Matiu, who is her surviving son, and is a trustee of the Panguru C10 Ahu Whenua Trust.

[25] Waru, Matiu and Mary have also appeared in the various hearings and have addressed me on their position in relation to the application.

[26] As such, Waru has had direct notice and has had sufficient opportunity to discuss and consider the application. While Patrick has been unable to formally notify Tuha's estate, her surviving son was served and both of her surviving children have appeared on the application.

[27] For these reasons, I am satisfied that the owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it.

**Is there a sufficient degree of support for the application amongst the owners having regard to the nature and importance of the matter?**

[28] As noted, Patrick is the sole owner of C11. Patrick and Waru are the owners in common of C9. They both support the present application.

[29] Patrick and Tuha are the owners in common of C10. Tuha is deceased, succession orders have not been granted, and an administrator has not been appointed with respect to her estate.

[30] Matiu and Mary are not owners in C10, nor are they the legal representatives of their mother's estate. As such, they cannot support or oppose the application as an owner in C10. Notwithstanding that, as descendants of the only other owner in C10, I have still taken their views into account. It is clear that Matiu and Mary oppose the application.

[31] In considering whether there is sufficient support for the application, I must consider not only the level of support in terms of the number of the owners, but also their shareholding. With only two owners in C10, 50 percent of the owners support the application. It is significant that Patrick owns 182.45 shares out of the total 210 shares in the block. This equates to 86.88 percent of the shareholding. As such there is a significant majority in support by shareholding.

[32] What will constitute sufficient support must be assessed on a case by case basis having regard to all relevant facts.

[33] In the present case there are only two owners in C10, one of whom is deceased. The descendants of the deceased owner oppose the application. The surviving owner who seeks the partition holds a significant majority of shares.

[34] It is clear that the principal ground of opposition raised by Matiu and Mary is their concern that Joseph may have acquired the shares in C10 illegitimately. As noted, the s 40 report prepared by the Registrar shows that Joseph purchased the shares from Mary and Matiu's eldest brother, who succeeded to their father's interest in the block. Joseph then gifted those shares to Patrick.

[35] While Matiu and Mary continue to question the acquisition of those shares, they have not presented any actual evidence which calls that purchase into question. Even if such evidence was presented, the legitimacy or otherwise of that purchase is not an issue that is before me. During the hearings, I encouraged Matiu and Mary to obtain legal advice on this issue. I also explained that if they wished to challenge the acquisition of those shares they would need to file a separate application to bring that issue before the Court. Despite that, no such application was filed. No other grounds of opposition have been put forward other than that they oppose the partition generally.

[36] I understand the concern and sentiment that Matiu and Mary raise. Following the consolidation order in 1952, their parents were the sole owners of C10. The family home was built on C10, and I do not doubt that the King whānau have a deep affinity with this land. However, in the absence of a formal challenge to the acquisition of those shares, I must accept the ownership records that are before me.

[37] In weighing the views expressed by the various parties, I am satisfied that there is a sufficient degree of support for the application amongst the owners having regard to the nature and importance of the matter. The application is supported by all owners in C9 and C11. For C10, the application is supported by 50 percent of the owners by number, and 86.88 percent of the shareholding.

[38] I have taken into account the views of Tuha's surviving children in relation to C10. I do not consider that those concerns, or the opposition that they have expressed, displace my overall assessment that there is sufficient support in relation to this application.

**Is the partition necessary to facilitate the effective operation, development, and utilisation of the land?**

[39] In considering this issue, what is “necessary” is properly to be construed as “reasonably necessary” and is “closer to that which is essential than that which is simply desirable or expedient”.<sup>15</sup>

[40] I must also consider whether there is any reasonably achievable alternative in terms of facilitating the effective operation, development and utilisation of the land. If reasonable alternatives exist, then the partition may not be necessary within the meaning of s 288(4)(a) of the Act.<sup>16</sup>

[41] As noted, the houses on C9 and C10 are located at the northern end of the blocks facing West Coast Road. The area around the houses is elevated, flat, clear pasture land. To the south of this area, both C9 and C10 drop down a hill to low lying land. This land undulates and has large areas of swamp and reverting bush. I was also told during the site inspection that this low lying land is prone to flooding due to run off from nearby mountains to the west.

[42] C11 is largely cleared pasture land. C11 is raised slightly higher than C9 and C10 and so has escaped the swamp land.

[43] Patrick does not want to disturb the existing housing on C9 and C10. Nor does he want to take the areas surrounding those houses.<sup>17</sup> Rather, he is seeking to develop the balance of the land to turn it into a productive farming unit. Once developed that land may also provide sites for further housing. In order to effect this, Patrick is seeking to use C11, and his interests in C9 and C10, as a single unit.

[44] Patrick argues that in order to develop and utilise the land productively, he has to clear the reverting bush, erect new fencing, and generally improve the state of the land. In order to do so, Patrick advised that he needs to take out a loan which will have to be secured by a mortgage against the land.

<sup>15</sup> *Brown v Māori Appellate Court & Ors* [2001] 1 NZLR 87 (HC).

<sup>16</sup> *Whaanga v Smith* [2015] NZCA 121; *Reid v Trustees of Kaiwaitau 1 – Kaiwaitau 1* (2005) 34 Gisborne Appellate Court MB 168 (34 APGS 168).

<sup>17</sup> Patrick is seeking to have the area where his grandfather’s house is located on C9, included in his partitioned block, but that is with Joseph’s consent.

[45] I have inspected these blocks and I accept Patrick's explanation. The southern part of C9 and C10 are in a poor state and would require significant capital to bring it back to productive and viable land. I am satisfied that Patrick will have to take out a loan in order to develop and improve the land, and that the loan will have to be secured by way of mortgage against the land. There is no evidence of any schemes or alternative proposals which would allow Patrick to undertake the development necessary without obtaining a loan. Securing a loan by a mortgage against the land for which the loan is taken is standard banking practice.

[46] The assessment does not end there. I must also consider whether a partition is necessary to enable Patrick to take out a loan to be secured by mortgage against the land. In doing so I must consider whether there are any reasonably achievable alternatives to partition to effect this.

[47] It is difficult to see how Patrick could register a mortgage in this case without first partitioning the land. This is particularly so in relation to C10.

[48] As noted, C10 is vested in the trustees of the Panguru C10 Ahu Whenua Trust. Joseph and Matiu are the trustees. Any mortgage over C10 would require the consent of the trustees per s 150A of the Act. The trust order provides that trustees may act by majority. This is supported by s 227 of the Act. As there are only two trustees, both would have to agree to the mortgage. Matiu advised that he will not agree to a mortgage over C10. Matiu further advised that the whole King whānau share this view.

[49] As such, Patrick would be unable to obtain sufficient consent from the trustees to register a mortgage against C10.

[50] Patrick could seek to have Matiu removed as a trustee per s 240 of the Act if he is acting unreasonably by refusing to agree to a mortgage. However, there is no guarantee that such an order would be granted. Matiu may well have legitimate reasons for refusing to agree given that a mortgage would put the whole of C10, including their family home, at risk. Even if this order was granted, the King whānau may well be successful in having a replacement trustee appointed from their family given their interest in C10. If that occurred, the new trustee may not agree to the grant of a mortgage either.

[51] Patrick could seek to have an additional trustee appointed to the trust per s 239 of the Act. Patrick's shareholding in C10 may support an argument that he should be able to nominate an additional trustee to better reflect his interests in the block. Once again, there is no guarantee that such an order would be granted. While Patrick's shareholding would be relevant in such an application, the Court would also have to take into account whether doing so may prejudice the position of the King whānau if they are able to outvote on any issue concerning C10.

[52] Patrick could also file an application to terminate the trust per s 241 of the Act. Again, there is no guarantee that such an order would be granted.

[53] Even if the trust was terminated, any mortgage would still require the agreement of all the owners, or approval by resolution at a meeting of assembled owners, per s 150C(1)(c) of the Act.

[54] Tuha is deceased and so is unable to consent. Even if an administrator was appointed, or succession orders were granted, in relation to Tuha's estate, given the position by Matiu and his whānau, it is unlikely that the administrator, or the successors, would agree with the grant of a mortgage. This means that Patrick could only obtain a mortgage if approved by resolution at a meeting of assembled owners.

[55] The powers of assembled owners are regulated by Part 9 of the Act and the Māori Assembled Owners Regulations 1995 ("the Regulations"). Section 172(e) of the Act allows owners to pass a resolution concerning alienation of the land. That includes the grant of a mortgage.<sup>18</sup>

[56] However, reg 32 of the Regulations provides that the general quorum for a meeting of assembled owners is at least three persons who are entitled to vote, and a recording officer, present in person throughout the meeting. Regulations 25 and 26 provide that those entitled to vote include the owners, any trustees, any duly appointed attorney of an owner or trustee, or any person appointed proxy for an owner or trustee or for a duly appointed attorney of an owner or trustee. In the present case, there are only two owners.

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<sup>18</sup> Māori Assembled Owners Regulations, reg 4.

That creates immediate difficulties as to whether Patrick would be able to obtain a quorum at any meeting of assembled owners.

[57] As such, even if the Trust was terminated, there are considerable difficulties which would likely prevent Patrick from obtaining a mortgage.

[58] It is also significant that even if Patrick could obtain a mortgage without requiring a partition, such a mortgage would be registered across the whole of C9, C10 and C11. As a result, the interests owned by Tuha and Waru, and their houses which are located on C9 and C10, would also be put at risk. If Patrick defaulted on the loan, the mortgagee could exercise its power of sale against all or any of those blocks. If that occurred, Waru and the King family could lose their entire interests in these blocks, including their homes.

[59] However, if a partition is granted, a new title would be issued to Patrick for C11, and his interests in C9 and C10. Separate titles would issue for Waru and Tuha, and their respective interests in C9 and C10. Patrick's mortgage would only be registered against his title protecting Waru and Tuha's interests from any liability.

[60] For these reasons, I am satisfied that the partition is necessary in this case to facilitate the effective operation, development and utilisation of this land. I am also satisfied that there are no reasonably achievable alternatives to partition. Not only will a partition allow Patrick to raise capital to develop and utilise the land, this will also protect the interests of the other owners so as not to place their land, and their family homes, at risk of mortgagee sale.

**What is the opinion of the owners as a whole?**

[61] I have considered the opinion of the owners in assessing whether there is sufficient support for this application.

[62] As noted, Patrick and Waru support the proposed partition.

[63] Tuha is deceased. Her two surviving children are not owners, although I have taken their views into account. They oppose the application. Their main objection is their

concern that Joseph's acquisition of shares in C10 may not have been legitimate. No application has been filed to properly bring that issue before the Court.

[64] I have considered the opinion of the owners as a whole. While there is some opposition from the descendants of one of the owners, they have not put forward a proper basis to persuade me that a partition is not appropriate in this case.

**What is the effect of the proposal on the interests of the owners, and what is the best overall use and development of the land?**

[65] Patrick has filed a valuation from Moir McBain Valuations in Kerikeri. The valuation shows that the area at the northern end of C9 and C10, where the houses are located, has a significantly higher value than the land at the southern end of those blocks. This is not surprising given that the land at the northern end is elevated, flat, cleared pasture land, whereas the land to the south is low lying and is largely covered in swamp and bush.

[66] Patrick proposes that Tuha and Waru should receive an area equivalent to their shareholding, at the northern end of C9 and C10, around their existing houses. Patrick will then take the balance of the C9 and C10 blocks which will be combined with C11. As such, if the partition is granted, Waru and Tuha will receive the most valuable land. Patrick will receive the least valuable land.

[67] The valuation highlights the significant difference between these areas. The flat grass area, at the northern end of C9 and C10 where the houses are located, is valued at \$23,000.00 per hectare. The swamp and bush to the south on C9 and C10 is valued at \$1,000.00 per hectare. The area of pasture at the southern end of C9 is valued at \$5,000.00 per hectare.

[68] In many cases that come before the Court, the applicant seeks to partition the most valuable land for themselves. This is not the case here. Patrick proposes that the other owners should take the flat, usable, and most valuable land. Patrick is seeking to take the least valuable land which is largely covered in swamp and bush.

[69] Patrick is also intending to develop this area into productive farm land. The grant of the partition will allow Patrick to take out a loan to develop this land without putting the houses and land owned by Waru, and the King whānau, at risk. Waru and the King whānau will retain their existing houses on C9 and C10, as well as the most valuable land surrounding those houses.

[70] Despite this, I accept that some detriment will be suffered by the King whānau if the partition is granted. A partition will sever their connection to the balance of the C10 block. The King whānau have a strong connection to the whole of C10 given that their parents were the original owners of that block.

[71] Such detriment was considered by the High Court in *Brown*:<sup>19</sup>

[64] ...The Act is not predicated on a continuing relationship between the owners and the land. If it were, a partition order could never be granted where the effect would be to exclude some of the owners from part of the land because their continuing relationship with that part of the land would be severed.

[72] I interpret the comments in *Brown* to mean that while such detriment is relevant and must be taken into account, this is not determinative. In the present case, I consider that such detriment to the King whānau is outweighed by the benefits that will accrue if the partition is granted. In particular, the partition will allow Patrick to facilitate the development and utilisation of the southern end of C10, while protecting the interests of the King whānau at the northern end.

[73] I also note that there is no evidence before me to suggest that the King whānau have been actively utilising the southern end of C10 in recent times. The current state of the land at the southern end suggests that this area has not been properly utilised for some time. It appears that the King whānau have concentrated on using the family home at the northern end of the block. That use will be preserved.

[74] For these reasons, while there may be some detriment to the King whānau by the grant of a partition, I consider that this is outweighed by the other factors in favour of the application. I am also satisfied that the partition is consistent with the best overall use and development of the land.

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<sup>19</sup> *Brown v Māori Appellate Court & Ors* [2001] 1 NZLR 87 at [64].

**Should I exercise my discretion to grant the partition in this case?**

[75] Having met the statutory pre-requisites, and the mandatory considerations, as provided for in the Act, I must now determine whether I should exercise my general discretion in favour of the partition. In doing so, I am mindful that I may refuse to exercise my discretion if it would not achieve the principal purpose of Part 14 of the Act.

[76] Having considered all of the evidence in this case, I am satisfied that I should exercise my discretion in favour of the partition.

[77] A partition in this case will allow Patrick to undertake steps to develop and utilise his interests in the land, whilst also protecting the interests of the other owners. I consider that this is not only consistent with, and supported by, the principal purpose of Part 14 of the Act, it is also supported by the overall kaupapa of the Act as set out in the Preamble and ss 2 and 17.

[78] I do not do so lightly. The high thresholds imposed by Part 14 recognise that a partition is not readily granted. Despite that, I am satisfied that those thresholds have been met, and that a partition is justified and appropriate in this case.

**Should I impose any restrictions with respect to the partition?**

[79] All of the parties agreed that Waiariki and Te Korotu are the hapū that associate with these lands. They also agreed that Patrick, Waru, and Tuha are all members of those hapū.

[80] Pursuant to s 301 of the Act, a partition between owners who are members of the same hapū, is not subject to the provisions of the Resource Management Act 1991. However, in any such case, I must impose a restriction that the land shall not be sold otherwise than in accordance with s 304 of the Act. That restriction is appropriate and was accepted by Patrick as a necessary consequence if this application was granted.

**Should I terminate the Panguru C10 Ahu Whenua Trust?**

[81] As I have decided that the partition should be granted, I must also consider whether the Panguru C10 Ahu Whenua Trust, which is currently constituted over the existing C10 block, should be terminated.<sup>20</sup>

[82] There are only two owners in C10. On 27 March 2003, Matiu and Joseph were appointed as the trustees of that trust to represent the two owners. With the grant of the partition, two separate titles will be created, one solely owned by Patrick, and the other solely owned by Tuha. In these circumstances, there is no utility in retaining the current Trust. As such, it is appropriate that the Trust should be terminated. Joseph and Matiu should also be relieved from their position as trustees.

[83] I note that this does not prevent Patrick, or the King whānau, from applying to constitute new trusts with respect to the newly partitioned blocks.

**Decision**

[84] I grant the following orders:

- (a) Pursuant to ss 37(3), 239, and 241 of the Act, terminating the Panguru C10 Ahu Whenua Trust and relieving Joseph Te Whiu and Matiu King of their positions as responsible trustees.
- (b) Pursuant to s 289 of the Act, partitioning Panguru C9 into two separate titles. The first title is to be in favour of Waru Waitohi for an area equivalent to his shareholding in the existing Panguru C9 block;
- (c) Pursuant to s 289 of the Act, partitioning Panguru C10 into two separate titles. The first title is to be in favour of Tuha Hori Kingi Te Wau for an area equivalent to her shareholding in the existing Panguru C10 block;

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<sup>20</sup> This issue was raised with the parties at the hearing on 26 June 2015.

- (d) Pursuant to ss 289 and 298 of the Act, combining Panguru C11 and the balance of Panguru C9 and Panguru C10 into a single title in favour of Patrick Jonathan Te Whiu;
- (e) Pursuant to s 304 of the Act, imposing a restriction that the partitioned blocks cannot be sold otherwise than in accordance with s 304 of the Act.

[85] These orders are conditional on an appropriate survey plan being filed with, and approved by, the Court as follows:

- (a) Patrick Jonathan Te Whiu is to engage a surveyor to prepare an appropriate survey plan identifying the partitioned blocks;
- (b) The surveyor is to liaise with the Registrar as to the appropriate plan to be produced before the survey plan is submitted to the Court for approval;
- (c) The survey plan is to be filed with the Court for approval within four months of this decision.

Dated at Whangarei at 4.50 pm this 18<sup>th</sup> day of April 2016.

M P Armstrong  
**JUDGE**