IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20170005218

UNDER	Section 18(1)(a) of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	KAWHIA U 2B
BETWEEN	NIKI UENUKUITERANGIHOKA TUWHANGAI Applicant
AND	CHRISTINE EVELYN BOON Respondent

A20180005551

UNDER	Section 18(1)(a)(i) of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	KAWHIA U 2B
AND BETWEEN	CHRISTINE EVELYN BOON Applicant
AND	NIKI UENUKUITERANGIHOKA TUWHANGAI Respondent

Hearing: 26 November 2018
(Heard at Hamilton)

Appearances: Ms L M S Farquhar for Ms Christine Boon
Ms L Fraser and Mr A Vasudevan for Mr Niki Tuwhangai

Judgment: 14 December 2018

RESERVED JUDGMENT OF JUDGE S R CLARK

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Introduction

[1] This is an unfortunate case which pits members of the Tuwhangai whānau against each other. The parties are, on the one hand, Mr Niki Tuwhangai, the son of the late Henare Tuwhangai. The other party is Christine Boon, in her capacity as the executor of the estate of her late mother, June Maanga Ormsby.[1] Mrs Ormsby's grandmother, the late Te Kore Tuwhangai, and Henare Tuwhangai were brother and sister.

[2] This judgment concerns the Kawhia U 2B block ("the block").[2] It comprises some 5.7111 hectares. It adjoins the neighbouring Kawhia U 3A and U 3B 2C 1 block on which Mōkai Kāinga is located.[3] The blocks were formerly known as "Kaipapaka". Mr Tuwhangai and Mrs Ormsby were both raised at Kaipapaka. Mr Tuwhangai described the importance of the block in question due to its proximity to Mōkai Kāinga marae of which he is a senior kaumātua. Mrs Ormsby is buried at Kaipapaka urupā as is her late husband. I have no doubt that the block and surrounding lands are of deep significance to Mr Tuwhangai and the late Mrs Ormsby respectively.

[3] Throughout, all parties referred to Mr Tuwhangai as "Uncle Nik". He himself describes Mrs Ormsby as his niece. As I understand the evidence, they are in fact cousins twice removed. Mrs Ormsby's mother, Sally Marshall is Mr Tuwhangai's first cousin. For reasons that will become apparent, that close relationship has been considerably strained by the applications before the Court.

[4] Sometime in late 1989 or early 1990, Mr Tuwhangai and Mrs Ormsby decided to purchase 335.184 shares out of a total of 415 shares in the block. They acquired those shares from Moekau Moke. It was not until 23 March 1992, that the Māori Land Court made an order ("the 1992 order") confirming a resolution of assembled owners that approval be given to the sale.[4] The resolution reads:[5]

> That approval be given to the sale of Moekau Myra Moke (now Couch) of Christchurch formerly a widow, now a married woman, to the sale of 335.184 shares

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[1] Throughout I will refer to the parties as Mr Tuwhangai, Ms Boon and Mrs Ormsby.
[2] There are 10 owners in the block, hold shares as tenants in common in unequal shares. The Computer Freehold Register Identifier is SA 8A/1099.
[3] Both Mr Tuwhangai and Mrs Boon are trustees of that marae reservation block.
[4] Confirmation of Resolution of owners dated 18 December 1991. Block order file 17/2503.
[5] 106 Otorohanga MB 84 (106 OT 84).

> out of the total shares in this block of 415 shares which she holds as a beneficial owner, to Niki Tuwhangai of Te Kuiti, Warden and June Maanga Ormsby of Tokoroa, Controller as *joint tenants* for the sum of $11,500.00. (Emphasis added).

[5] On 21 November 2016, Mrs Ormsby died. On 22 August 2017, Mr Tuwhangai filed an application for transmission by survivorship of Mrs Ormsby's joint interest in the 335.184 shares to himself.

[6] Mrs Boon filed a letter of objection with the Māori Land Court on 4 September 2017. She followed that up by filing a notice of intention to appear and an affidavit in support dated 27 October 2017.

[7] The first hearing of Mr Tuwhangai's survivorship application was held on 22 November 2017.[6] The application, at the Court's prompting, was referred for mediation. A mediation was held on 24 and 30 January 2018. The parties were unable to reach agreement.

[8] The matter returned to Court on 2 February 2018.[7] On that day, then counsel for Mr Tuwhangai submitted that any challenge to the Court order made on 23 March 1992 must fail as the order had been in existence for more than 10 years and thus caught by s 77 of Te Ture Whenua Māori Act 1993 ("the Act"). Counsel sought orders confirming transmission by survivorship in favour of Mr Tuwhangai. Mrs Boon was unrepresented but continued to oppose the application.

[9] I adjourned the application and subsequently issued a reserved decision on 17 April 2018.[8] In it, I held that:

(a) The order creating the joint tenancy on 23 March 1992 could not be challenged as a result of the operation of s 77 of the Act;

(b) The claims in equity, as then framed before the Court, did not seek to overturn the 1992 order. On that basis, I considered that the Court did have jurisdiction to consider any such applications. In doing so, I stated that the Court must be

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[6] 150 Waikato Maniapoto MB 244-248 (150 WMN 244-248).
[7] 157 Waikato Maniapoto MB 172-176 (157 WMN 172-176).
[8] *Kawhia U 2B – Tuwhangai v Boon* (2018) 160 Waikato Maniapoto MB 113-123 (160 WMN 113-123).

careful that any determination did not seek to annul, quash, declare or hold that the 1992 order was invalid.

[10] Mrs Boon subsequently instructed counsel. In addition to opposing Mr Tuwhangai's application, Mrs Boon filed separate proceedings on 20 July 2018 seeking orders that the joint tenancy was severed and the imposition of resulting and/or constructive trusts.

[11] The substantive hearing was held on 26 November 2018. Thereafter, counsel for Mr Tuwhangai filed an amended statement of defence and further legal submissions concerning the effect of s 77 of the Act and laches on 30 November 2018. Counsel for Mrs Boon filed a reply to the amended statement defence on 7 December 2018.

[12] This decision deals with both applications. I consider that the issues that need to be determined in this case are:

(a) Has the joint tenancy been severed?

(b) Should the Court make declarations of resulting and/or constructive trusts?

(c) In the circumstances of the case, should the Court impose a remedial constructive trust?

(d) Are any of the remedies sought by Mrs Boon barred by s 77 of the Act?

Background

[13] In 1989, Mr Tuwhangai commenced discussions with Moekau Moke, who at the time was one of five owners in the block. She owned 335.184 shares, having acquired them from her late husband, Mr Roy Moke. At that time, there were four other owners who held smaller parcels of shares, as tenants in common together with Mrs Moke in unequal shares.

[14] Mrs Ormsby was not initially part of the discussion between Mr Tuwhangai and Mrs Moke. Later in August/September 1989, she became a party to the negotiations with Mrs Moke. An offer was made and accepted by Mrs Moke for the purchase of the shares for $11,500.00.

[15] In April 1990, two separate applications for confirmation of an alienation of the shares were filed with the Māori Land Court. One was filed by Russell Thompson, a solicitor acting for Mr Tuwhangai and Mrs Ormsby, the other by Christchurch based solicitors acting for Mrs Moke.

[16] In support of the application by Mr Tuwhangai and Mrs Ormsby, an agreement for sale and purchase was filed with the Māori Land Court dated 19 February 1990. The purchasers are described as "Mr Tuwhangai and Mrs Ormsby". Following the legal description of the property, the following words appear in the agreement:[9]

> 3.35.184 shares as *tenant in common* (out of a total of 415 shares) being Part Kawhia U 2B Block and being part of the land comprised in C.T. 8A/1099 South Auckland Land Registry. (Emphasis added).

[17] There was a considerable delay in final orders being made by the Māori Land Court. One reason was a jurisdictional issue which restricted alienation of land owned by more than 10 owners. Notwithstanding the fact that the schedule of ownership indicated five individual owners, the number of owners increased to greater than 10 as a result of succession, life and remainder interests. In addition, Mrs Moke at that stage held the interests in her capacity as her late husband's personal representative, the legal interest had yet to be vested in her. These difficulties are recorded in correspondence between the solicitors and the Court and are reflected in various Court minutes between 1990 – 1991.[10]

[18] It is significant to note that on 9 July 1991, the Court dismissed the application for confirmation. Judge Carter indicated that the better course of action was to call a meeting of assembled owners pursuant to s 307 of the Māori Affairs Act 1953.[11]

[19] In giving that indication, the Judge referred to the existence of a separate application to call a meeting of assembled owners. That application had been filed by the solicitor acting on behalf of Mr Tuwhangai and Mrs Ormsby on 23 November 1990. The application contained a proposed resolution which reads as follows:

> That approval be given to the sale by **MOEKAU MYRA MOKE** (now Couch) of Christchurch, formerly a widow now a married woman to the sale of 335.184 shares

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[9] "Documents from Māori Land Court Alienation file" for Mrs Boon at 2.
[10] 104 Otorohanga MB 174 (104 OT 174); 105 Otorohanga MB 127 (105 OT 127); and 105 Otorohanga MB 181 (105 OT 181).
[11] 105 Otorohanga MB 181 (105 OT 181).

> out of the total shares in this block of 415.000 shares, which she holds as executrix on the late **ROY MOKE** alias **RORY MOKE**, to **NIKI TUWHANGAI** of Te Kuiti, Warden and **JANE MAANGA ORMSBY** of Tokoroa, controller as *joint tenants* for the sum of $11,500.00. (Emphasis added).

[20] On 22 July 1991, Judge Carter confirmed that the proposed resolution was in order and directed the filing of further information prior to the summoning of a meeting of owners.[12]

[21] On or about 8 November 1991, letters were sent to the various legal and beneficial owners in the block. The approved resolution was included in that letter which refers to Mr Tuwhangai and Mrs Ormsby acquiring the shares as joint tenants for the sum of $11,500.00.

[22] A meeting of assembled owners was held on 6 December 1991. A copy of a statement of proceedings of the meeting of assembled owners, minutes signed by the alienations officer, a report of the recording officer and a copy of the resolution of assembled owners are all available on file. The resolution of assembled owners and the statement of proceedings all make reference to the acquisition of the shares from Mrs Moke by Mr Tuwhangai and Mrs Ormsby as joint tenants for the sum of $11,500.00.

[23] Thereafter, on 11 February 1992 the solicitors acting for Mr Tuwhangai and Mrs Ormsby filed an application for confirmation of the resolution passed at the meeting of assembled owners.

[24] Later in February 1992, the same solicitors were forwarded a copy of the recording officer's report, statement of proceedings and resolution arising from the meeting of assembled owners.

[25] The application was recalled before Judge Carter on 25 February 1992. It was then adjourned to seek valuation information from Mrs Moke.[13]

[26] That information was subsequently made available to the Court and on 23 March 1992, Judge Carter made conditional orders pursuant to s 319 of the Māori Affairs Act 1953,

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[12] 105 Otorohanga MB 203 (105 OT 203).
[13] 106 Otorohanga MB 62 (106 OT 62).

confirming the resolution to sell the shares of Moekau Myra Moke to Mr Tuwhangai and Mrs Ormsby as joint tenants for $11,500.00. The order was conditional upon payment of the purchase price, plus commission to the Māori Trustee within two months of the date of the order.

[27] On 22 May 1992, in fulfilment of the condition imposed by Judge Carter, the Māori Trustee was paid $10,500.00. Earlier, a deposit of $1,000.00 had been paid on behalf of Mr Tuwhangai and Mrs Ormsby. On 15 July 1992, the Māori Trustee forwarded the $11,500.00 to the solicitors acting for Mrs Moke.

[28] It is not in dispute that Mr Tuwhangai then moved onto the block some time in 1997. He has built a house on it. He has and continues to farm the block and has been responsible for its maintenance and payment of rates.

[29] Mrs Ormsby also made initial contributions towards the purchase of various items of farm machinery, fencing, general farm maintenance and the payment of lawyers' accounts.

Joint tenancy

[30] A joint tenancy arises where a parcel of land is vested in two or more persons without any indication that they are to take distinct and separate shares. Joint tenants do not hold proportionate shares in property in the way that tenants in common do.[14]

[31] Two key features of a joint tenancy are the right of survivorship and the four unities, namely unity of possession, unity of interest, unity of title and unity of time. The four unities reflect that joint tenants have interests in the property that are equal in all respects.[15]

[32] The right of survivorship provides that on the death of the first joint tenant, their interest accrues by operation of law to the survivor or survivors.[16]

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[14] *Harvey v Gateshead Investments Ltd* [2013] NZHC 2253, (2013) 14 NZCPR 485 at [14] and *Gateshead v Harvey* [2014] NZCA 361, (2014) 15 NZCPR 309 at [10].
[15] *Harvey v Gateshead Investments Ltd* [2013] NZHC 2253, (2013) 14 NZCPR 485 at [16] and *Gateshead v Harvey* [2014] NZCA 361, (2014) 15 NZCPR 309 at [12].
[16] *Harvey v Gateshead Investments Ltd* [2013] NZHC 2253, (2013) 14 NZCPR 485 at [17] and *Gateshead v Harvey* [2014] NZCA 361, (2014) 15 NZCPR 309 at [13].

[33] A joint tenancy may be severed in one of five ways:

(a) By a joint tenant acting unilaterally;

(b) By mutual agreement where the joint tenants agree to convert their joint tenancy into a tenancy in common;

(c) By a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common;

(d) By the acquisition by one joint tenant of a greater interest in the land;

(e) Under s 33(3)(b) of the Property (Relationships) Act 1976.

[34] In New Zealand, a joint tenancy can be severed at law or in equity. A legal severance occurs upon the registration of an appropriate instrument under the Land Transfer Act 1952.[17]

[35] It has long been recognised that the right of survivorship may give rise to injustice as it favours the survivor. Thus, the Courts have, at times, found that severance has occurred on relatively thin evidence.[18]

[36] In *Abela v Public Trustee* the Court summarised the issue thus:[19]

> There was a principle that "equity leans against tenancies" because the right of survivorship unduly favoured the person of longevity… in the case of husband and wife, joint tenancy, in favouring longevity, is usually achieving the object for which it was created; but once the matrimonial relationship has broken down the original purpose of the joint tenancy is at an end, and a common intention of severance may more readily be inferred from a course of conduct.

[37] This is a case in which Mr Tuwhangai and Mrs Ormsby, although related, were not married. As I have indicated earlier, they are second cousins. I have not encountered any situations in which the joint ownership of shares in a Māori land block have been held otherwise than by husband and wife. Indeed, there is a long-held presumption that owners

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[17] *Gateshead Investments Ltd v Harvey* [2014] NZCA 361, (2014) 15 NZCPR 309 at [16].
[18] *Williams v Hensman* (1861) 70 ER 862 at 867, *Burgess v Rawnsley* [1975] 3 All ER 142.
[19] *Abela v Public Trustee* [1983] 1 NSWLR 308.

of Māori freehold land own it as tenants in common and not as joint tenants – see s 457 of the Māori Affairs Act 1953 and s 345 of Te Ture Whenua Māori Act 1993.

[38] With those caveats in mind, I now propose to examine the reasons advanced by Mrs Boon as to why she submits the joint tenancy was severed. In this case, Mrs Boon argues for a severance of the joint tenancy in equity.

[39] What follows is a discussion of the arguments put forward by Mrs Boon. The initial two grounds focus on the parties' conduct in the lead up to and immediate aftermath of the Court order confirming the resolution to sell. They are grouped under the headings: "Declaration of trust in favour of Mr and Mrs Ormsby"; and the "Parties' intentions – did they agree to a joint tenancy?" I then go on to focus on the parties' post Court order conduct to explain whether there are any facts which point to a severance.

Declaration of trust in favour of Mr and Mrs Ormsby

[40] In support of this ground, Mrs Boon says that:[20]

(a) In signing the agreement for sale and purchase of the shares, Mrs Ormsby did so as a trustee on behalf of herself and Mr Ormsby;

(b) The funds provided to purchase the shares were the joint funds of Mrs Ormsby and her husband Mr Ormsby;

(c) Mrs Ormsby's interests in the shares were held on trust for herself and Mr Ormsby;

(d) That trust was declared to Mr Tuwhangai and other whānau members over time thus severing the joint tenancy.

[41] It is possible, indeed probable, that the funds provided by Mrs Ormsby to purchase the shares were her and her husband's joint funds. A variety of diary entries from the late Mr John Ormsby are available to the Court. Mr Ormsby predeceased his wife, he died on

[20] Amended Statement of Claim for Mrs Boon dated 12 November 2018 "First cause of action" at [30]-[33].

12 October 2001. The selected extracts cover a period from 14 August 1989 through to 21 December 1994. They are remarkably detailed.

[42] One entry is dated 21 May 1992. The date is significant, being a day before the conditional date imposed by Judge Carter for the purchase of the shares. The relevant part of the entry reads:[21]

> Took a letter to the Bank that afternoon, authorising them to Pay $6,000.00 into Nik Tuwhangai's account to Pay for our land at Kawhia.

[43] There are also earlier entries in which the late Mr Ormsby referred to the block in the following terms:

> Then we also talked about the land we bought just between three of us. The idea of setting up a trust was discussed.[22]
>
> We went to Kawhia on Nik's car. Called into Maggie and Mick Ratu. Had a cup of tea, then we walked around the Piece of land we're buying looking at the fence line etc.[23]
>
> Sitting at Land Court at Te Kuiti 3pm. Case for land we're buying between Nik Tuwhangai and us is coming up today. Maera Moke Kawhia piece. Court case cancelled.[24]
>
> We went to our bank today to arrange a Loan to Pay for our land, $12,000.00, at Kawhia. It was a joint loan between Mum and Nik Tuwhangai but the relieving manager wouldn't agree to it. Mum rang Nik and he said to leave it, he'll get it from Tainui trust. [25]

[44] There are also a number of entries in which the late Mr Ormsby refers to equipment that "we", which I infer in this case to mean he and his wife, were buying to support the purchase. The equipment in question being a tractor and bulldozer. He also mentions payment for fencing materials and contractors' accounts.[26]

[45] I accept the inherent weakness in reliance being placed upon the diaries of a deceased person. What the diary entries tend to show however is that the late Mr Ormsby was far more involved in and aware of the purchase of the shares than Mr Tuwhangai gives him

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[21] Diary entry, 21 May 1992, Common Bundle, 0043.
[22] Diary entry, 10 February 1990, Common Bundle, 0035.
[23] Diary entry, 22 April 1990, Common Bundle, 0036.
[24] Diary entry, 12 June 1990, Common Bundle, 0037.
[25] Diary entry, Common Bundle, 0042.
[26] Diary entries, 22 July 1990, Common Bundle 0038; 17 February 1991, Common Bundle 0039; 19 February 1991, Common Bundle 0040.

credit for. Mr Tuwhangai's unequivocal evidence is that the late Mr Ormsby was not involved in any discussions about purchasing the land. The diary entries suggest otherwise. They suggest that the late Mr Ormsby was:

(a) Well aware that his wife and Mr Tuwhangai were negotiating for the purchase of shares in the block;

(b) That Mr and Mrs Ormsby visited Mr Tuwhangai and walked over the subject block in question a number of times in the lead up to the purchase of the shares; and

(c) That the monies provided by the Ormsbys was more likely than not to be their joint money.

[46] Having said all of that, there is a flaw in the argument being put before the Court by Mrs Boon. Even if the funds used to purchase the shares were the joint funds of Mr and Mrs Ormsby, what that must logically mean is that Mrs Ormsby held her interests in the shares subject to a trust in favour of her husband. There is no evidence before the Court that Mr Tuwhangai was ever made aware that the funds being provided by Mrs Ormsby were joint funds.

[47] During his lifetime, it is conceivable that Mr Ormsby could have set up a claim based in equity against his wife on the basis that he provided joint funds. Mr Ormsby predeceased Mrs Ormsby. Theoretically, his personal representatives could have pursued a claim based in equity against his wife but they did not do so.

[48] Mr Ormsby's estate is not a party to these proceedings. The party alleging that severance has occurred is his wife's estate. I agree with the submission by counsel for Mr Tuwhangai on this point that as a matter of logic, it can only be Mr Ormsby's (allegedly) unrewarded contribution that could form the basis of this claim. As he is not a party to these proceedings, this ground must fail.

The parties' intentions – did they agree to a joint tenancy?

[49] Under this heading, Mrs Boon submits that:[27]

(a) Mr Tuwhangai's evidence that he always treated his and Mrs Ormsby's interests as a joint tenancy is inconsistent. His insistence that the agreement for sale and purchase was changed to read "joint tenants" is suspect and in contradiction to his own evidence;

(b) There was a single solicitor, Russell Thompson, acting for both Mr Tuwhangai and Mrs Ormsby. Any legal advice provided was more likely to have been provided to Mr Tuwhangai than to Mrs Ormsby;

(c) The Ormsbys paid the full purchase price of the shares; and

(d) Mrs Ormsby was not aware of what a joint tenancy meant and the legal implication of holding shares in that manner. As Mrs Ormsby and Mr Tuwhangai were not in a relationship in the nature of marriage, there is no reasonable explanation as to why Mrs Ormsby would have agreed to a joint tenancy if she in fact appreciated what it meant.

The agreement for sale and purchase

[50] I have read the original Māori Land Court file very carefully. There is no doubt that the initial application filed with the Māori Land Court sought confirmation of an alienation of shares. One of the documents filed in support was an agreement for sale and purchase dated 19 February 1990. That agreement for sale and purchase includes a handwritten amendment adding Mrs Ormsby as a purchaser of the shares. It goes on to read in the typed part of the agreement that she and Mr Tuwhangai would purchase the shares as tenants in common.

[51] There was quite a lot of discussion at the hearing about the importance of the agreement for sale and purchase and what it meant. Counsel for Mr Tuwhangai noted that

[27] Synopsis of Submissions for Mrs Boon at [23]-[25].

the words "tenant in common" appeared in the typed portion of the agreement for sale and purchase. She submitted that Mrs Ormsby, who came to the agreement late, was added as a purchaser at a later date, as evidenced by the handwritten amendment to the agreement. Counsel submitted as a possibility that reference to the words "tenant in common" initially referred to Mr Tuwhangai as the sole purchaser of the 335.184 shares, to be held as a tenant in common along with the then four other owners in the block.

[52] Mr Tuwhangai's recall of the agreement for sale and purchase was that it was amended to add Mrs Ormsby and that they would own the property as joint tenants. He was cross-examined on that point and remained firm in his view. The document he referred to, as the original agreement, has been lost. His daughter, Maxine Moana-Tuwhangai also gave evidence on this and was of the view that she too had seen an agreement for sale and purchase which referred to her father and Mrs Ormsby purchasing the shares as joint tenants.

[53] I raised during the course of the hearing if that was the case, why was that agreement for sale and purchase never forwarded to the Court? The only agreement for sale and purchase on the Court file refers to Mr Tuwhangai and Mrs Ormsby purchasing the shares as "tenant in common".

[54] Mr Tuwhangai's evidence about the agreement is also at odds with other parts of his evidence in chief where he indicated that in his discussions with Mrs Ormsby, they never used words like "survivorship" and he did not really know what the effect of a joint tenancy was until after Mrs Ormsby died.

[55] Having re-read the original file, I am of the view that the agreement for sale and purchase is something of a red herring. It was filed in support of the application for confirmation. That application was dismissed by Judge Carter on 9 July 1991 because of jurisdictional issues.[28] Any further reliance on that agreement became redundant.

[56] Thereafter, the application before the Court was for an application to summon a meeting of owners and to confirm a resolution of a meeting of owners. As I have stated in the background section, all documents relevant to that application refer to Mr Tuwhangai and Mrs Ormsby purchasing the shares on a joint basis, they being:

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[28] 105 Otorohanga MB 181 (105 OT 181).

(a) The application to summons a meeting of owners dated 23 November 1990;

(b) The letter to owners dated 8 November 1991;

(c) The statement of proceedings of the meeting of assembled owners dated 6 December 1991;

(d) The resolution of assembled owners dated 6 December 1991;

(e) The order made by Judge Carter on 23 March 1992, which confirmed the resolution of owners.

Legal advice

[57] On the question of legal advice, there is no doubt that Russell Thompson was acting for both Mr Tuwhangai and Mrs Ormsby. Mr Thompson is deceased and his file is no longer available. It is nothing more than speculation to suggest that any advice he gave was more likely provided to Mr Tuwhangai as opposed to Mrs Ormsby.

[58] There is no doubt that the application to summons a meeting of owners was filed by Mr Thompson. All other documentation I have referred to above, was sent to him as the solicitor acting for Mr Tuwhangai and Mrs Ormsby. All of it referred to the purchase of the shares on a joint basis. To that extent, there can be no suggestion that the Māori Land Court inadvertently made an error at the date the order was made. More to the point, no demur was taken by the solicitor as to the basis upon which the order was made. Neither solicitor nor Judge Carter, when the matter was before him, raised any issue as to whether or not the application was properly brought on the basis of a joint tenancy as opposed to a tenancy in common.

[59] Counsel for Mrs Boon made a submission that Mrs Ormsby was not present at the meeting of assembled owners on 6 December 1991. Although recorded as being present at the meeting of assembled owners on 6 December 1991, she did not sign the resolution of owners recording her presence. That is correct, the resolution of assembled owners was signed by those owners in attendance along with Mr Tuwhangai. Mrs Ormsby's signature

does not appear on that although the recording officer does record her as being present in the statement of proceedings.

[60] Given the passage of time, it is impossible to definitively state whether or not she was present. Even if I accept that she was not present, her presence at a meeting of assembled owners was not required as she was not an owner at that stage. More to the point, all documentation that was before the Court starting with her solicitor's application, refers to the purchase on the basis of a joint tenancy. As I have said above, there was no demur by the solicitor at any stage in the lead up to the hearing for confirmation or indeed after the order was made. Had there been a mistake, whereby the solicitor had wrongly interpreted his clients' instructions, one would have expected that issue to have been raised at some stage, it was not.

Ormsbys provided the full purchase price

[61] Mrs Boon argues that the full purchase price of the shares was made by her parents. Alternatively, if they did not pay the full purchase price they paid at least $7,503.00. Mrs Boon relies heavily on what she was told by her parents on this point. An example of that appears at paragraphs 33 and 34 of her brief of evidence where she states that:[29]

> 33. On 25 August 2016, Mum told me that her and Dad had paid the full purchase price for the shares. I remember that date because Mum and I had returned to Mokāi Kāinga for a medal commemoration and presentation for my Uncle Barry.
>
> 34. Dad's diary (**CB 11 & CB 12**) confirms that they paid at least $7,503 to Uncle Nik/Russell Thompson. Unfortunately given the lack of records kept I have not been able to find any written confirmation that they paid the balance. That said, if Mum said that they paid the full amount then that's what happened. Mum was a person of integrity and so she would not lie about that.

[62] The difficulty with that type of evidence of course is that it occurred many years after the events in question. It is susceptible to the vagaries of memory, is second hand in nature and both Mr and Mrs Ormsby are now deceased.

[29] Brief of Evidence of Christine Boon at [33]-[34].

[63] Mrs Boon relies upon certain entries from her father's diary to support the proposition that her parents paid the full purchase price. One of the entries is for 18 May 1992, which I have set out earlier at paragraph [42]. It records that Mr and Mrs Ormsby went to the bank to arrange a loan to pay for the land at Kawhia. They were seeking to borrow $12,000.00 by way of a joint loan between themselves, and Mr Tuwhangai. The diary entry goes on to record that the loan was refused.[30] As the loan was refused, it is of no assistance to Mrs Boon's case.

[64] Mr Tuwhangai gave evidence that he paid a deposit of $1,000.00 in February 1990 via the lawyer, Russell Thompson. There is a document before the Court which is a deposit slip signed by the solicitor, Mr Russell Thompson. It is dated 1 February 1990 for $1,000.00. On the face of it, the deposit slip appears to be made out to N Tuwhangai for $1,000.00 on behalf of N Tuwhangai and J M Ormsby.[31] The deposit slip is consistent with Mr Tuwhangai's evidence.

[65] Mrs Boon challenges it on the basis of what she was told by her parents that they had paid the full purchase price for the shares. I prefer the evidence of Mr Tuwhangai as the best evidence available on this point. He was a party to the transaction, his recollection is that he paid the deposit and the contemporaneous document, the deposit slip, supports him. In addition, there is an extract from Mr Ormsby's diary of 9 February 1990 in which he makes reference to Mr Tuwhangai ringing and informing him that Mr Tuwhangai had paid the deposit. On this ground alone the assertion that Mr and Mrs Ormsby paid the full purchase price is incorrect.

[66] The late Mr Ormsby's diary entries are far more consistent with the proposition that he and his wife paid for half of the shares. A relevant entry is for 21 May 1992. I have set out the entry earlier at paragraph [42] however it is worth setting out again. It reads:[32]

> Took a letter to the Bank this afternoon, authorising them to Pay $6,000.00 into Nik Tuwhangai's account to Pay for our land at Kawhia.

[67] Under cross-examination, Mrs Boon maintained the position that her parents paid the full purchase price for the shares. She reiterated that they were people of integrity and would

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[30] Diary Entry, 18 May 1992, Common Bundle, 0042.
[31] Deposit slip, 1 February 1990, Common Bundle, 0030.
[32] Diary Entry, 21 May 1992, Common Bundle, 0043.

not "lie" about the matter. This is not a case in which the integrity of Mr and Mrs Ormsby is being called into question. Having said that, the diary entry referred to above, was made by Mr Ormsby himself, it is the only evidence which directly sheds some light on how much the Ormsby's paid for the shares. The timing is also significant as the events occurred on 21 May 1992, one day before the condition imposed by Judge Carter with respect to the payment of the purchase price and commission to the Māori Trustee had to be met.

[68] As something of a fall-back position, Mrs Boon also referred to other diary entries to suggest that more than half of the purchase price was paid. The diary entries are:

(a) An entry for 21 June 1992. In it Mr Ormsby records that he rang Nik Tuwhangai to check if the lawyers account had arrived for the land at Kawhia;

(b) An entry for 26 August 1992. Mr Ormsby records that he sent a cheque to Russell Thompson, Lawyers of Te Kuiti for $225.00 for transfer of land to "us and Nik Tuwhangai"; and

(c) An entry for 11 December 1992. Mr Ormsby records that a bank cheque sent to Russell Thompson, Solicitor of Te Kuiti for $1,278.00 being the final payment for land at Mōkai Kāinga.

[69] The difficulty for Mrs Boon's case is that all of those payments occurred after the purchase price for the shares had been paid to the Māori Trustee, which occurred on 22 May 1992. I accept the submission made by counsel for Mr Tuwhangai that logic suggests that the payments made post 22 May 1992 were more likely on account of legal and conveyancing fees, rather than being evidence of additional funds used for the purchase of the shares.

[70] On this point, I consider that the evidence, being Mr Tuwhangai's recollection, the deposit slip and the diary notes of Mr Ormsby, support the proposition that the Ormsby's paid half the purchase price of the shares and not the full purchase price as Mrs Boon contends for. On the basis that she paid half of the purchase price of the shares, she received

legal and beneficial interests in the block equivalent to the purchase price albeit on a joint tenancy basis.

Lack of awareness of what a joint tenancy meant

[71] Mrs Ormsby's alleged lack of knowledge does trouble me. I must say on this point that the submission that she did not understand what a joint tenancy was, lacks any direct evidence. We simply do not know. However, it does puzzle me that in a relationship outside that of a marriage or a permanent de facto relationship, why she would have purchased these shares on a joint tenancy basis. However, that falls far short of the Court making any definitive finding that she did not appreciate or understand what a joint tenancy meant. We simply do not know.

Post-order conduct

[72] I consider that the real focus of the Court should be on the post-order conduct of the parties to examine whether or not there are any factors which point towards a severance.

[73] On this point, Mrs Boon points to:

(a) Mr Tuwhangai occupying the block since at least 1997. He has built a house and other dwellings and farmed the block as if it was his;

(b) Mr Tuwhangai entered into an arrangement to occupy the block which included the payment of rates. It is argued that arrangement is akin to a lease;

(c) The intention and expectation of Mr and Mrs Ormsby to occupy the block and build on "their piece" of the land for the benefit of themselves and their descendants;

(d) The offer by Mrs Ormsby to sell her shares to Mr Tuwhangai in 2009.

[74] On the question of occupation, notwithstanding that Mr Tuwhangai and Mrs Ormsby owned the shares jointly, either was at liberty to occupy and live on the block. In this case we know that Mr Tuwhangai did and he farmed the block. There was nothing stopping

Mrs Ormsby from doing so during her lifetime. Occupation of the block and indeed the payment of rates does not suggest a severing of joint tenancy. Rather, it is a normal incidence of ownership. The payment by Mr Tuwhangai of rates cannot be construed to coming anywhere near what might be considered to be a lease arrangement as argued for by Mrs Boon.

[75] Mrs Boon points to the fact that her parents paid sums of money towards the purchase of farm equipment, for example, a tractor and bulldozer. There is also evidence to suggest that they paid for fencing equipment. At times, they were also called upon to pay rates although there is no evidence to suggest that they actually did so. Again, those payments do not support that the joint tenancy was severed. They seem to be no more than an indication that Mrs Ormsby accepted responsibility as an owner for the payment of some obligations relating to the land during her lifetime.

[76] I accept that Mrs Ormsby made statements to her family to the effect that she, at some stage, intended to live at Kawhia. Indeed, in the video that I have observed, she makes a similar observation. Ultimately, that did not come to pass. Her husband predeceased her and Mrs Ormsby became ill with leukaemia and died before any move to Kawhia. Her expression of an intention does not indicate that the joint tenancy was severed. At best, it seems to have been an unfulfilled desire to, at some stage, return to live at Kawhia and live on the block. That does not take the situation close to what I would consider a common intention, based on the conduct of negotiations to sever the joint tenancy.

[77] The closest act which would support the severing of the joint tenancy post the Court order, is the offer in 2009 by Mrs Ormsby to sell her shares. On 28 September 2009, via her solicitor, Mrs Ormsby offered to sell her "share in the above property for $220,000.00" to Mr Tuwhangai. In support of that, a valuation had been prepared for her in September of 2009. The context, as I understand, was that Mrs Ormsby was in financial difficulty and needed to raise funds in order to pay certain creditors.

[78] Mr Tuwhangai did not agree to that offer. His evidence in chief was that as a condition of the original purchase, he reminded Mrs Ormsby that she would not "try to sell

the land shares at any point. I did not want her to break the agreement we reached when I brought her into the purchase."[33]

[79] At best, there was simply an offer to sell shares. There does not appear to have been any negotiation nor any consensus recognised as a course of dealing where the two joint tenants discussed the possibility of one buying the share of the other. The facts of this case do not align with those in the case of *Burgess v Rawnsley* [1975] CH 429 where the English Court of Appeal were unanimous that an agreement by a joint tenant to sell her interest to a co-tenant effected a severance in equity despite the fact that the agreement was short lived.[34]

Severance arguments – summary

[80] At paragraph [33] above, I set out the five ways in which a joint tenancy may be severed. Although it was not always clear to me from the submissions being made on behalf of Mrs Boon, it appears that reliance was being placed upon the unilateral actions of a joint tenant and course of dealing grounds. Regardless, I have found that none of the pre or post Court order conduct by the parties, when viewed objectively, can be construed as severing the joint tenancy.

The trust arguments and s 77 of the Act

[81] In addition to the severance arguments, Mrs Boon submits that the Court should recognise that the facts of the case support the recognition of an institutional constructive trust, or alternatively a resulting trust. As a further alternative, it was submitted that the Court should exercise its discretion and order a remedial constructive trust in favour of Mrs Ormsby's estate.

[82] Matters relied upon to support those arguments are:

(a) That Mr and Mrs Ormsby paid the full purchase price of the shares or at least half;

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[33] Brief of Evidence of Mr Tuwhangai, 13 September 2018 at [39].
[34] *Burgess v Rawnsley* [1975] CH 429.

(b) That Mr and Mrs Ormsby made initial contributions to the maintenance of the block;

(c) That Mr and Mrs Ormsby had reasonable expectations of an ongoing interest in the block for the benefit of themselves and their descendants;

(d) That the Ormsbys contributions to the block manifestly exceeded any benefits in that they did not obtain any benefit for the payment of the shares and initial maintenance and machinery costs;

(e) That Mrs Ormsby effectively made a "gift" of her interest in the shares to Mr Tuwhangai; and

(f) That Mr Tuwhangai invited the Ormsbys to contribute towards the purchase of the shares because he was not in a financial position to do so.

[83] All of the above matters have been discussed earlier with the exception of the allegation that Mr Tuwhangai was not in a financial position to purchase the shares. Questions along those lines were put to him. He denied that was the case and his evidence was that he paid for half of the purchase price. Earlier I have discussed the issue of the payment of the deposit by Mr Tuwhangai and accepted that he paid the $1,000.00 deposit. That in and of itself indicates that Mr Tuwhangai had some funds to purchase the shares. Although he did not provide any further documentation to support his position, neither did Mrs Boon provide any evidence which supports her allegation that Mr Tuwhangai was not in a position to pay for the shares. There is simply no evidence to support her allegation.

[84] The difficulty facing Mrs Boon is that all of the alleged facts she relied upon in support of her trust arguments occurred in the lead up to and immediately after the order made by Judge Carter on 21 May 1992. Notwithstanding submissions to the contrary, effectively what Mrs Boon is alleging is that the Court order did not reflect Mr Tuwhangai's and Mrs Ormsby's true legal and equitable interests, thus it is invalid.

[85] The trust arguments as advanced are in reality a general plea to equity to intervene and set aside the 1992 order on the basis of an alleged invalidity or more generally unconscionability.

[86] The difficulty Mrs Boon faces is s 77(1) of the Act which reads:

> **77 Orders affecting Maori land conclusive after 10 years**
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> (1) No order made by the court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.
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> …

[87] In my reserved decision of 17 April 2018, at paragraph [23] – [26] I discussed s 77 and the relevant legal principles.[35] At paragraphs [28]-[30] of that decision I said:

> [28] The order creating the joint tenancy between Mr Tuwhangai and Mrs Ormsby in the present case was made in 1992, approximately 26 years ago. Accordingly, the order falls within the provisions of s 77 and this Court cannot look to overturn it. As Judge Ambler noted in *Rogers v Hauraki*, in the absence of any appeal or other challenge to the order since it was made, the Court must therefore proceed on the basis that the order is valid.
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> [29] However, I consider that the claim of Ms Boon as currently framed does not seek to overturn the order made in 1992. Ms Boon claims an entitlement for the successors of Mrs Ormsby based in equity. At no point so far has Ms Boon claimed that the 1992 order should be amended or quashed.
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> [30] While that remains the case, I do not consider that an order under s 18(1)(a) declaring any equitable interest that the successors of Mrs Ormsby might have in the joint tenancy, would offend the provisions of s 77 of the Act. The Court must of course be careful that any such determination does not seek to annul, quash, declare or hold that the 1992 order is invalid.

[88] In my earlier decision, I left open the possibility that the estate of the late Mrs Ormsby might be able to mount a claim based in equity which did not seek to annul, quash, declare or hold that the 1992 order was invalid. I find however that all of the factors relied upon by Mrs Boon seek to do exactly that. Thus, I find that s 77 operates as a conclusive bar to the trust claims mounted by Mrs Boon.

[89] In reality, the same result applies in relation to the severance arguments which relies upon conduct occurring prior to the March 1992 Court order. However, in deference to the

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[35] *Tuwhangai v Boon – Kawhia U 2B* (2018) 160 Waikato Maniapoto MB 113 (160 WMN 113).

parties and the arguments raised, I thought this case warranted the Court's view of those arguments raised by Mrs Boon. For that reason, I entered into a discussion concerning them in some detail earlier in this judgment.

[90] I also record that counsel for Mr Tuwhangai made submission concerning the applicability of the equitable principle of laches. Given my finding concerning s 77, it is not necessary to embark upon discussion of the applicability of laches to Mrs Boon's claims.

Orders

[91] In relation to A20180005551, being the application by Mrs Boon for orders of severance, resulting and constructive trust, that application is dismissed.

[92] In relation to A20170005218, being the application by Mr Tuwhangai, there is an order pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993 determining the joint tenancy held by June Maanga Ormsby and Niki Tuwhangai in favour of Niki Tuwhangai, solely by way of survivorship.

Costs

[93] Mr Tuwhangai is at liberty to seek costs in this matter. Having said that, I do not encourage him to do so. I say that first because Mrs Boon is in receipt of special aid pursuant to s 98 of the Act. Second, although these proceedings have been run in a conventional legal manner, I return to my earlier comments in this decision which is that the case is an unfortunate one involving members of the wider Tuwhangai whānau. My observations at the various Court hearings are of a rift between two sections of what was hitherto a close whānau. The pursuit of costs may only widen that rift.

[94] I also add, as I have done repeatedly since the first application came before me, that this is a case which should have settled. It is for that reason that I encouraged the parties to go to mediation. Notwithstanding the above legal result, the case is an unusual one in the sense that shares in a block of Māori freehold land were obtained on a joint tenancy basis by two people who were not married or in a de facto relationship. There is no doubt that Mrs Ormsby paid for at least half of those shares. Owing to nothing more than timing,

Mr Tuwhangai now becomes the outright owner of all the shares he and Mrs Ormsby originally acquired. That will seem "unfair" in the ordinary sense to Mrs Boon. Once the dust has settled, I again urge the parties to come to an accommodation. Previously Mr Tuwhangai has indicated that he was willing to offer a portion of the shares he owns to Mrs Ormsby's descendants. I encourage Mr Tuwhangai to pursue that avenue in the future.

Pronounced at 4 pm in Hamilton on this 14th day of December 2018.

S R Clark
JUDGE