I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Appellate Court of New Zealand
Waiariki District

A20180009254
APPEAL 2018/21

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Te Tumu Kaituna 14 block
I WAENGA I A *Between*	MALCOLM SHORT, ANARU BIDOIS, KEITA EMERY, UENUKU FAIRHALL, PIRIHIRA FENWICK, WALDO HOUIA AND EMILY ROTA AS TRUSTEES OF TUMU KAITUNA 14 TRUST Ngā Kaitono *Appellants*
ME *And*	KAREN STOWERS ON BEHALF OF TUKERE AND GRACE REHU WHĀNAU TRUST Te Kaiurupare Tuatahi *First Respondent*

Nohoanga: *Hearing*	13 May 2019, 2019 Māori Appellate Court MB 229-254 (Heard at Rotorua)
Kooti: *Court*	Deputy Chief Judge C L Fox (Presiding) Judge L R Harvey Judge S F Reeves
Kanohi kitea: *Appearances*	G Dennett, L McEntegart for the Appellants M Sharp for the First Respondent M Malcolm for the Second Respondent M Kyriak for the Third Respondents
Whakataunga: *Judgment date*	9 April 2020

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

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(Further parties to proceeding continued overleaf)

(Proceedings continued)

ME	RANIERA ERUERA MORGAN
And	Te Kaiurupare Tuarua
	Second Respondent
ME	GEORGINA WHATA, TE HURIHANGANUI WHATA
And	AND MARY WHATA AS TRUSTEES OF TE HURIHANGANUI DAVID WICKLIFFE WHĀNAU TRUST
	Ngā Kaiurupare Tuatoru
	Third Respondents

Introduction

[1] The trustees of the Tumu Kaituna 14 Trust appeal a decision of the Māori Land Court dated 24 October 2018, dismissing an application for a change of status of land and a trust order variation. Judge Coxhead decided that he did not have the jurisdiction to grant the change of status application over part of the Tumu Kaituna 14 block and was not satisfied that the variation of trust order application had sufficient support from the owners.[1]

[2] The grounds for the appeal are that Judge Coxhead:

(a) erred in finding the Court had no jurisdiction to grant the orders;

(b) erred in finding that the evidence showed there was insufficient support from the beneficiaries for the applications; and

(c) wrongly dismissed the applications.

[3] We consider that the principal issues for determination are:

(a) Did the Court have jurisdiction to make the change of status orders sought?

(b) Did the Court properly weigh the evidence of opposition to the variation of trust order application?

Background

[4] The appellants had applied to change the status of 55.48 ha out of 240.7626 ha of Te Tumu Kaituna 14 from Māori freehold land to General land. They also sought to vary the trust order to permit the creation of legal entities for the commercial administration of the land. Significant developments had been undertaken on neighbouring Māori land, and it was said that the trustees saw this as an opportunity to develop Te Tumu Kaituna 14 to the benefit of the owners. They contended that changing the status of part of the land would provide new funding opportunities to enable the further development of the rest of the land not otherwise available. The respondents opposed the application on the basis that the Court has no jurisdiction to change the status of only part of a Māori land title.

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1 *Short v Stowers – Tumu Kaituna 14 Block* (2018) 199 Waiariki MB 188 (199 WAR 188).

[5] Judge Coxhead found that the 55 ha were not in a separate title and the Court had no jurisdiction to create a "half-caste" title. Despite the lack of jurisdiction, the Judge went on to consider whether he could have otherwise granted the orders sought. He was satisfied that the appropriate notice had been provided to the parties, information was available and that beneficiaries had sufficient opportunity to discuss and respond to the proposal at two hui and via a survey. Of the 126 responses to the survey, 75 per cent were in support of the status change. However, the Court then received notices of opposition from 103 owners when the application was eventually filed with the registry. The Judge decided that, despite the survey results, the documents filed subsequently confirmed that there was insufficient support to enable the proposals to proceed.

Procedural history

[6] This appeal was filed on 18 December 2018 and then heard on 13 May 2019 in Rotorua.[2] Following the hearing the Court directed that a report from the Registrar be prepared regarding the evidence that had been filed concerning the support and opposition to the proposals. On 30 July 2019, the report of the Registrar was distributed to counsel.

[7] On 19 August 2019, the Presiding Judge issued a direction dealing with concerns raised by counsel over the scope and content of the registrar's report.[3] Counsel were directed to file further memoranda outlining those issues, following which a further direction or decision, if necessary, would be issued without the need for any further hearing or judicial conference. The Deputy Registrar was also asked to file submissions, which we received on 20 September 2019.

The Deputy Registrar's Report

[8] The Registrar's report dated 23 July 2019 is reproduced below in full for convenience:

REPORT TO THE COURT
Te Ture Whenua Māori Act 1993, Section 40
The Māori Land Court Rules 2011, Rule 6.27(2)

Subject:	Tumu Kaituna 14
Legislation:	Section 58/93 - Application to the Māori Appellate Court

2 2019 Māori Appellate Court MB 229-254 (2019 APPEAL 229-254).
3 2019 Māori Appellate Court MB 465-467 (2019 APPEAL 465-467).

Background

1. In May 2019 the Deputy Chief Judge directed that the Registrar produce a section 40 report summarising the ownership information in Tab 8 of the Record of Appeal. The summary was to indicate:
   a) The number of shareholders in the Tumu Kaituna 14 Block.
   b) The votes in favour and against the proposal.
   c) An explanation as to how the information was received.
   d) A review of the correspondence linked to votes.

2. The information was to be compiled using the Share Register Report (the Report) prepared by the lower court case manager.

3. The Report was only accessible in PDF format and a new spreadsheet was created duplicating the Tumu Kaituna 14 Owners List and adding formulae to calculate the information required. A copy of the spreadsheet is attached to this memorandum.

Summary of the Tumu Kaituna 14 Owners List spreadsheet

4. The Block information is as follows:

Block	Amount/Number
Total Shareholding in Block	42200
Total Area of Block	240.7626
Number of owners in block	4910

5. The number of shareholders in favour and against the proposal is as follows:

Number of owners for-consented	18	0.37%
Number of shares for-consented	355.3295149	0.84%
Number of owners against	237	4.83%
Number of shares against	5315.194097	12.60%

6. An explanation as to how the voting information was received is as follows:

	For	Against	Totals
No of owners email	4	136	140
No of shares email	30.686667	2671.509999	2702.196666
No of owners letter	9	56	65
No of shares letter	292.709336	2102.597703	2395.307039
No of owners phone	5	41	46
No of shares phone	31.93351187	474.492011	506.4255229
No of owners counter	0	3	3
No of shares counter	0	52.42438369	52.42438369
No of owners unknown source	0	1	1
No of shares unknown source	0	14.17	14.17

7. The number of whānau trusts and life interest parties who voted are as follows:

No of LT that have voted	**17**
No of WT that have voted	**48**

Review of correspondence linked to votes

8. 140 votes were received by email. A review of emails indicates that:

   a) 90 votes have supporting emails noted in the Record of Appeal (ROA) These email votes are highlighted in yellow on the Tumu Kaituna 14 Owners List (TKOL) spreadsheet with corresponding ROA page numbers noted against shareholder names in column C, e.g. Dean Whiti 1718-1719.
   Of these, 4 votes are for and 86 votes are against the proposal
   b) 32 votes against the proposal have supporting emails which were not included in the ROA. A list of voters and copies of the email correspondence is attached to this memorandum. These votes are highlighted in blue on the TKOL spreadsheet.
   c) 18 votes against the proposal do not have supporting email correspondence. These votes are highlighted in green on the TKOL spreadsheet

9. 65 votes were received by letter. A review of letters indicates that:

   a) 53 votes have supporting letters noted in the ROA. These votes are highlighted in yellow on the TKOL spreadsheet with corresponding ROA page numbers noted against shareholder names in column C.
   Of these, 8 votes are for and 45 votes are against the proposal
   b) 11 votes against the proposal have supporting letters which were not included in the ROA. A list of voters and copies of the letters are attached to this memorandum. These votes are highlighted in blue on the TKOL spreadsheet.
   c) 1 vote in support of the proposal does not have supporting correspondence. These shares belong to Pirihira Janet Fenwick (0.01334 shares).

Further information

10. A review of the data relating to those who voted for the proposal indicates that:

   a) Five votes were received by phone including a vote from Lorraine Victoria Williams who holds a life interest in the block.
   b) The case managers Share Register Report notes that the Kai Tiaki trustee for Ell'e Ransfield voted in favour of the proposal. This is incorrect, as the trustee voted against the proposal as recorded at page 1474-1478 and 1746-1747 of the ROA

11. A review of the data relating to those who voted against the proposal indicates that:

   a) Phone votes were received by owners who stated that their siblings voted against the proposal, and they were submitting votes on their behalf. These votes have been included in the data.

12. Approximately 75 votes noted in the lower court Report were deemed invalid because voters were not on the Tumu Kaituna 14 ownership list or were recorded as deceased.

Recommendation

13. The section 40 Report be referred to the coram for review and further directions.

Did the Court have jurisdiction to make the change of status orders sought?

Appellants' submissions

[9] Mr McEntegart submitted that the order sought was to change the status of 55.48 ha of Tumu Kaituna 14 from Māori freehold to General land and was to be conditional on a separate title being obtained. The trustees' reasons for seeking the orders were:

(a) they cannot otherwise obtain funding for the development of the land;

(b) development of the land is clearly desirable;

(c) the proposed area would be alienated only to a subsidiary of the trust, and further alienation would require trustee and beneficiary approval;

(d) the trust has limited resources and sought a guarantee of the change of status before committing funds to the necessary survey and related expenses for a partition; and

(e) the alienation is necessary and desirable to allow for the trust's commercial operations.

[10] Counsel also submitted that the Māori Land Court ought to have made the orders sought because that would have been in keeping with the principal kaupapa of Te Ture Whenua Māori Act 1993, which promotes "the retention, use, development and control of Māori land…by Māori owners".[4] Section 2(1) of the Act sets out that Parliament intended the Act be interpreted and applied in a manner furthering that kaupapa. He contended further, that the principles of use and retention are specifically applied to General land owned by Māori by s 17(1) of the Act.

[11] Mr McEntegart referred to s 137, which gives the Court discretion to make a status order in relation to land where it is satisfied that alienation is "clearly desirable" for a commercial operation. He submitted that the land currently produces very little income for the beneficiaries and has limited scope for economic or commercial growth. At the time they were appointed, the trustees expected a change for the land was being signalled and development was in the future. Counsel submitted that it is clearly desirable for the trust to participate in land development in the area generally and on the land in question in particular.

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4 Te Ture Whenua Māori Act 1993, s 2(2).

However, that required funding and assets to be used as security. With the land's current title, the trust can only access a small fraction of the costs they need for their development plan. However, the land itself has a high value that could be leveraged to gain funding, if the land was instead in General land title.

[12] With the 55.48 ha converted to General land, the appellants submitted that they would have access to $500,000 per annum over the five years required to have the land rezoned as residential. Once rezoned, it was estimated that the land would then be able to sustain borrowings of up to $16 million, and create impetus for further funding against the balance of the trust's Māori freehold land.

[13] Counsel contended that Tauranga City Council have invested in sustainable development in Te Tumu area and so the opportunity that represents for the trust's development was self-evident. The appellants considered that the proposed status change was required for the trust to engage in developing the land for the benefit of the owners.

[14] Regarding opposition to the proposed changes, counsel submitted that this was led by beneficiaries who hold personal grievances against the trustees. It was argued that the cultural evidence brought by the opponents to the development proposals in the Court below lacked depth and explanation and many misunderstood the likelihood of the land being alienated outside of the preferred class.

[15] On matters of jurisdiction, Mr McEntegart argued that three uncontested points underly the Court's powers. First, the application of the principles of the Act require an exercise of discretion. Second, the use of "may" in s 137 gives the Court the discretion to exercise any power thereunder. Third, under s 73, conditional orders can be made, requiring certain steps to be completed before those orders are finalised.

[16] Counsel referred to the judgment of this Court in *Craig v Kira* as a relevant precedent.[5] That decision confirmed that the Court would be willing to grant a change of status if it best addresses the circumstances of the application, where it falls outside of the ordinary run of cases. On that basis, the finding of lack of jurisdiction appears contrary to *Craig*. Counsel also distinguished the current case because there was no requirement for partition to precede the change of status, but established that it was necessary in the circumstances of that case.

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5 *Craig v Kira – Wainui 2F4D* (2006) 7 Appellate MB 1 (7 APWH 1).

[17] Mr McEntegart submitted that the Court should respond to the particular circumstances of a case and provide outcomes to Māori landowners that promote the kaupapa of the Act. The Court has been flexible where the circumstances required, and this case was just such a situation. Counsel referred to *Re Skudder*, where a change of status was granted to enable the owner to sell land as he was in ill health and had failed to find a buyer from within the preferred class of alienees.[6] Counsel also referred to the comment of Judge Clark in *Mangatawa Papamoa*: "an approach which supports building on Māori freehold land is preferred by me to an approach which insists upon principle before people."[7]

[18] Counsel submitted that s 137(1)(c) created a disjunctive scheme and the Court need only consider whether alienation is "clearly desirable" for "any commercial operation of the owner;" therefore there is no need for additional or substitute land. This proposal, it was argued, is supported by case law in the Māori Land Court.[8] In this instance, the appellants are proposing that the land will be alienated to a commercial entity solely held by the trust. Counsel contended that this approach was consistent with *Mangatawa Papamoa* as the "asset is not being depleted", and therefore there is no need for acquisition of further land.[9]

[19] Finally, Mr McEntegart argued that the matter of the Court's jurisdiction to make an order contemplating a title that is partly Māori freehold and partly General land need not be considered. He submitted that the Māori Land Court misunderstood the orders sought by the trust. The appellants argued that s 147 of the Act provides jurisdiction for the alienation of all or part of a block which allows for the conditional orders that the appellants sought. The application contemplated conditional orders granting a change of status which would not be triggered until a separate title was created for the 55.48 ha. Counsel maintained that jurisdiction is not the issue on this appeal and that without a jurisdictional bar to granting orders, the Court should facilitate the wishes of landowners in accordance with the kaupapa of the Act. Such was the approach of the Court when granting conditional orders in *Mangatawa Papamoa*.[10]

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6 *Skudder – Tahorakuri A No 1 Sec 8B* (2017) 160 Waiariki MB 242 (160 WAR 242).

7 *Management Committee of Mangatawa Papamoa Blocks Incorporation – Lot 1 DPS 65413* (2018) 156 Waikato Maniapoto MB 77 (156 WMN 77) at [59].

8 *Māori Trustee v Hanford – Ohiro 19 & 21 Block 10* (2006) 165 Aotea MB 131 (165 AOT 131) at [41]; *Management Committee of Mangatawa Papamoa Blocks Incorporation – Lot 1 DPS 65413* (2018) 156 Waikato Maniapoto MB 77 (156 WMN 77) at [98].

9 Above n 7 at [97].

10 Above n 7.

Respondents' submissions

[20] The respondents submitted that the Māori Land Court was correct in finding that it had no jurisdiction to make the order under s 135, conditional or otherwise on the following grounds:

(a) the Court has no jurisdiction to change the status of only part of a title;

(b) the lack of jurisdiction also prevents conditional orders being made;

(c) the conditions sought would be impossible to carry out as only the Court has authority to partition Māori land. Tauranga City Council and Land Information New Zealand (LINZ) cannot do so; and

(d) there is no precedent for the appellants' proposal and in all the cases referred to by the appellants, the status change occurred *after* the land was partitioned.

[21] Counsel argued that Judge Coxhead was also correct in finding the definition of land in the Act prevented the exercise of his jurisdiction under s 135. The definition clearly contemplates a single fee simple title, allowing no opportunity for part of the land to have a different status from the whole.

[22] The respondents submitted that the appellants proposed that conditional orders would be made to change the status of part of the land, the title would then be taken to Tauranga City Council and Land Information New Zealand (LINZ) to create the separate title, and that title would, finally, be brought to Court for "confirmation" of a partition. Although the Court has confirmed in earlier cases that a flexible approach is not unprecedented, the only body with jurisdiction to partition Māori land is the Māori Land Court. Judge Coxhead was therefore correct in his determination that he cannot make conditional orders that are impossible to meet.

[23] It was further contended that the authorities referred to by the appellants confirmed that the procedure is for partition to be sought before orders for status change will be made. The appellants have not followed this process.[11] The respondents referred to s 150 of the Act,

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[11] *Craig v Kira – Wainui 2F4D* (2006) 7 Appellate MB 1 (7 APWH 1); *Management Committee of Mangatawa Papamoa Blocks Incorporation – Lot 1 DPS 65413* (2018) 156 Waikato Maniapoto MB 77 (156 WMN 77); *Skudder – Tahorakuri A No 1 Sec 8B* (2017) 160 Waiariki MB 242 (160 WAR 242).

which states that "no undivided interest in any Māori freehold land may be alienated", except where a separate title is not necessary.

[24] The respondents argued that this Court should limit itself to considering only the matter of jurisdiction, as the substance of the application under s 135 was not properly considered by the Court below. If this Court should find that jurisdiction exists to make the orders, the case should be remitted back to Judge Coxhead as he had not expressed any view on the outstanding status order issues, he has good background knowledge of the issues and has the advantage of having already heard a large amount of the evidence.

[25] The respondents contended that the issue of whether replacement land is required under s 137 remains outstanding and guidance from this Court would be needed. In any case, it was argued that the Māori Land Court lacked jurisdiction under s 137(1)(d) as the trust has not acquired replacement land. Additionally, the respondents deny that the change of status is "clearly desirable" as the appellants have failed to properly establish that it is necessary in order to obtain finance. Nor have the appellants proved that the quorum requirements of s 137(1)(e) are impractical.

[26] Counsel referred to the Māori Land Court's decision *Karena v Karena – Whangaruru Whakaturia* for the principle that the requirements in s 137(1)(a)-(e) are cumulative and all must be satisfied for an order to be made.[12] While the appellants submitted that *Mangatawa Papamoa* is a precedent that replacement land is not required when the land is not alienated outside the trust's ownership, this interpretation was incorrect. The alienation at issue in *Mangatawa Papamoa* was not a sale but a lease on the basis that as the Incorporation was not seeking to sell the land that the Court did not require the purchase of replacement land.[13] The proposed sale by the trustees of the land to their subsidiary will bring the application within the ambit of s 137 and thus requires the purchase of replacement land.

[27] The respondents also underscored that the alienation of the shares to the subsidiary entity will take the land out of the protective jurisdiction of the Māori Land Court and that without the protection of Māori freehold title, there is no requirement for Court or owner approval to any subsequent sale.

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12 *Karena v Karena – Whangaruru Whakaturia 1D6B9 A, B, C & D* (2005) 102 Whangarei MB 259 (102 WH 259).

13 Above n 7 at [98]-[99].

[28] As s 137 is triggered, the respondents submitted that all criteria under that section must be met for the status change order to issue. The Act requires the status change be "clearly desirable", which the appellants have not established. *Craig* considered the balance between the two major principles of the Act – retention and use.[14] The Court should also take into account the effect of removing the preferred classes' right of first refusal and be careful when considering how the status change will affect sale price, as this is not in itself a reason to grant the order.

[29] The Māori Land Court in *Whangaruru Whakaturia* considered whether alienation would make land management more efficient.[15] Then in *Mangatawa Papamoa*, the Court determined that the alienation must be "obviously or unquestionably" desirable.[16] The respondents maintained that the business case put forward by the appellants failed to meet these requirements and argued that the trustees have not established that they cannot raise development finance by some other means. The respondents submitted that the evidence does not establish the status change is necessary for the trust to participate in Tauranga City Council's development of Te Tumu township.

[30] In addition, it was argued that s 137(1)(e) allows an alienation when the necessary quorum and support to pass a resolution is practical. The respondents contended that the appellants have failed to provide reasons for why this section should be triggered. The Court has previously noted that this section applies when a trust has a history of poor participation or does not have current contact details for its beneficiaries. It is not intended to circumvent a resolution that would be successfully opposed by beneficiaries.[17]

The Law

[31] Sections 135 and 137 of the Act provide:

> **135 Change from Maori land to General land by status order**
>
> (1) The Maori Land Court shall have jurisdiction to make, in accordance with section 136 or section 137, a status order declaring that any land shall cease to be Maori customary land or Maori freehold land and shall become General land.
>
> (2) The court shall not make a status order under subsection (1) unless it is satisfied that the order may be made in accordance with section 136 or section 137.

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14 Above n 5 at [22].
15 Above n 12 at [25].
16 Above n 7 at [91]-[95].
17 Above n 12 at [25].

(3) A status order under subsection (1) may be made conditional upon the registration of any instrument, order, or notice effecting a conveyance of the fee simple estate in the land to any person or persons specified in the order.

…

137 Power to change status of Maori land

(1) The Maori Land Court may make a status order under section 135(1) where it is satisfied that—
- (a) the legal estate in fee simple in the land is vested in a Maori incorporation or the trustees of a trust constituted under Part 12; and
- (b) the title to the land is registered under the Land Transfer Act 2017 or is capable of being so registered; and
- (c) the alienation of the land is clearly desirable for the purpose of a rationalisation of the land base or of any commercial operation of the Maori incorporation in which or the trustees in whom the legal estate in fee simple in the land is vested; and
- (d) the rationalisation referred to in paragraph (c) will involve the acquisition of other land by the Maori incorporation in which or the trustees in whom the legal estate in fee simple in the land is vested; and
- (e) the quorum and voting requirements imposed by regulations made under this Act in relation to the resolution necessary to authorise the alienation referred to in paragraph (c) are impractical.

(2) Where the Maori Land Court makes, in accordance with subsection (1), a status order under section 135(1), the status order may be made conditional on the net proceeds of the alienation of the land—
- (a) being applied towards—
  - (i) the purchase of a specified piece of land; or
  - (ii) the improvement of any specified piece of land owned or to be purchased by the Maori incorporation or the trustees; or
  - (iii) both; or
- (b) being held in trust for the purposes of the acquisition of other land pursuant to a land acquisition plan approved by the court or for the purposes of the improvement of land pursuant to a land improvement plan approved by the court; or
- (c) both.

[32] The kaupapa of the Act is set out in the preamble and is, briefly, "…to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu".[18] The Court's jurisdiction in accordance with those principles is set out in ss 2 and 17:

2 Interpretation of Act generally

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be

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[18] Te Ture Whenua Māori Act 1993, Preamble.

> exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.
>
> …
>
> **17 General objectives**
>
> (1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—
>
> (a) the retention of Maori land and General land owned by Maori in the hands of the owners; and
>
> (b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.
>
> …

[33] The interplay between the principles of the Act and application of its sections was discussed in *Firmin v The Committee of Management of Atihau Whanganui Incorporation*.[19]

Discussion

[34] It is trite that the Māori Land Court has the jurisdiction to change the status of Māori freehold land to General land and to grant the partition of Māori freehold land. Invariably, on an application for a partition and status change, partition either precedes or is granted simultaneously with a change from Māori freehold to General land, as the authorities confirm.[20] Given the nature of partition and change of status when considered together, and their effect of severing permanently, in most cases, the connection of the preferred class of alienees from the whenua tipuna, the Act, contrary to its predecessors, sets out important tests that must be satisfied before either application will be granted. This is because the legislation contains at its core the dual principles of retention and utilisation and includes, in the Preamble and s 2, the positive duty on the Court to interpret the Act in a manner that best facilitates those dual objectives.

[35] Part 6 and Part 14 of the Act include positive duties on the Court when considering change of status and partition.[21] For example, with a change of status of land held on trust, per s 137(1), the Court must be satisfied as to three particular criteria: first, that the alienation

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19 *Firmin v The Committee of Management of Atihau Whanganui Incorporation – Atihau Whanganui Incorporation* (2016) 352 Aotea MB 233 (352 AOT 233) at [27]: "…[N]either the Preamble nor s 2 provides any specific jurisdictional powers. They are of general purport and function as a critical guide to interpretation. Accordingly, whilst they are to be given weight in interpreting and applying the jurisdiction of the Act, they do not provide authority for interpretations that go beyond the plain statutory language used by Parliament".

20 Above n 5.

21 *Hammond – Whangawehi 1B 3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185).

of the land is "clearly desirable" for the purpose of a rationalisation of the land base or of any commercial operation of the trust; second, that the alienation will involve "the acquisition of other land" by the trust; and third, that the quorum and voting requirements for a resolution necessary to authorise the alienation are "impractical". So, any application by a trust for a change of status must satisfy these stringent criteria. Like Judge Coxhead, we do not accept that in this case the criteria have been met.

[36] However, even before a detailed consideration of how the application fails to meet the statutory criteria of s 137 can be discussed in any length, a more critical obstacle prevents the application, as currently framed, from progressing further. Like the Court below, we do not accept that a change of status can be made to *part* of a title of Māori freehold land. This is because a change of status is fundamental to the identity of the land that must fit within the legislative definitions set out in the Act. Section 129 provides that land "shall have" *one* of the following statuses:

(a) Maori customary land:

(b) Maori freehold land:

(c) General land owned by Maori:

(d) General land:

(e) Crown land:

(f) Crown land reserved for Maori.

[37] As Judge Coxhead found, there is no reference and therefore no ability for a hybrid or, in his words, a "half caste" title that has been proposed that includes any two of the above definitions. Indeed, the provisions are plain that land can only have "one" of the six statuses. Further, we cannot find support for an alternative view in either the Land Transfer Act 2017 or even the Property Law Act 2007. While ss 339-341 of the Property Law Act 2007 provide jurisdiction in respect of subdivisions of General land, along with s 218 of the Resource Management Act 1991, we can find no mechanism in this legislation to permit the change of status of part of a block of Māori freehold land to General land.

[38] The central question is what is meant by 'land' in this context, and whether it could include part of a piece of land held under one title. The definitions in the Act, the Property Law Act 2007 and the Land Transfer Act 2017 are unhelpful, even though the definition in the Land Transfer Act 1952 (which was in force when the 1993 legislation was enacted) is more extensive. In any event, we consider that it is implicit in all cases that the

definition of "land" includes equitable interests - which may apply to part of a parcel of land that may be under a registered title. Any such equitable interests relevant to part of a parcel of land may be enforced in equity. More importantly, the definition of 'land' may include parts of a parcel or title for the purposes of ss 135-138 of the Act. Section 138 states:

> **138 Alternative or additional power of court**
> Instead of making a vesting order under this Part, or in addition to any such order, the court may, if it thinks it necessary or convenient to do so, amend any existing instrument of title so as to include the land ***or any part of the land to which the application relates***, and the land so included shall thereupon become subject to all reservations, trusts, rights, titles, interests, and encumbrances affecting the other land comprised in that instrument of title.
> Compare: 1953 No 94 s 436(4)
>
> (Emphasis added)

[39] Even so, we are not convinced that, despite these observations, the jurisdiction exists to change part of the status of a Māori freehold land title to General land without a severance into a separate and new title by way of a partition order.

[40] Moreover, while we endorse counsel's submissions on the desirability of a flexible approach to facilitate retention and development of Māori land by the owners, their whānau and hapū, even the most malleable of approaches must comply with the legislation. Our conclusion is that the decision to dismiss the application to change the status of part of the land, conditional or otherwise, because it fell outside of the framework of the Act, was correct.

[41] In the Court below, counsel also referred to s 147(1)(d) as an avenue by which the change of status proposal could find carriage and we note that this argument was not fully developed either in submissions or in the Court's consideration of the point. Section 147(1)(d) provides that trustees can alienate "the whole of any part of" the Māori land vested in them and that this must be done "in accordance with" s 150A of the Act. Section 150A permits alienation of the land, wholly or in part or by long-term lease, but only where 75 per cent support from the ownership has been secured, or for a long-term lease where at least 50 per cent of the owners are in agreement.

[42] Given the evidence before us and in the Court below as to participation levels historically for this trust, the likelihood of those high thresholds being attained are remote, if not impossible. Accordingly, we conclude that s 147 is not relevant to this appeal or to the proceedings in the Court below. For these reasons, we see no point in considering further the arguments that have been made by both parties as to the merits and details of the development proposals. That said, we set out below a number of points which may assist parties in the

future when dealing with applications of this kind in general terms, as well as providing guidance in the instant case.

[43] While counsel argued that the Judge, in effect, misapprehended the intent of the application for change of status, on the basis that it was to incorporate the proposal to create a separate title of 55 ha, we can understand why he may have taken that view. Like Judge Coxhead, we consider that the correct approach would have been for the appellants to seek a partition and change of status simultaneously, as occurred in *Craig*, once the appropriate consultation with the owners had occurred. This would have then circumvented the need for conditional orders since, if the Court had been satisfied as to the relevant tests, a partition order to create a separate title could have been issued along with a change of status. We underscore that the decision to do so would fall squarely within the Judge's discretion and that the threshold for both kinds of orders as set out in Part 6 and Part 14 of the Act is appropriately high.

[44] In addition, given the nature and potential effect of the proposals on the owners' interests, we would have expected that the consultation process might have involved several hui and additional opportunities for owner engagement for those who could not attend general meetings in person. Such engagement might include online discussions by Zoom or Skype, a postal ballot, preceded by detailed information on the proposals and notification by conventional and more contemporary means including the use of websites and social media. While it is correct to observe that there are costs attached to these forms of owner engagement, given the significance of the development proposals, such costs would not be unreasonable in the overall scheme of the development project and the circumstances of this case. We also observe that social media engagement can often be undertaken at relatively low cost. The short point is that the process of owner engagement should properly take into account twenty-first century realities of both owner demographics and the historically low levels of owner participation in general meetings.

[45] It is also important to underscore the general objectives set out in s 17 of the Act. Those objectives include ascertaining and giving effect to the wishes of the owners. In this context we consider three points are apposite. First, it is the responsibility of the trustees to manage the trust land and assets prudently. That includes the duty to consider commercial use and development of the land, especially where there are continuing standing charges like local authority rates that have to be paid. It would be imprudent if the trustees stood idly by allowing rates to accumulate without considering realistic proposals for income generation to ensure those obligations are being met. We do not say that they have but rather acknowledge, through

their long experience, that the trustees have sought to explore a variety of approaches to the use and development of the land during the period of their tenure in that office. Accordingly, we find nothing objectionable in the approach of the trustees in developing proposals to bring to the owners for the use of the land, which may involve the raising of finance and the use of trust lands for security purposes where such activities are permissible under the trust order. Where there is doubt or uncertainty, then it is equally appropriate for the trustees to promote variation to the trust order to achieve their aims.

[46] Second, that some owners may find the development proposals objectionable, including any plans to vary the terms of trust is also understandable and those owners are entitled to raise their objections and have them properly recorded and taken into account by both the Court and the trustees. Obviously, it is in the interests of all owners that they are provided with accurate, timely and correct information so that they are able to then make informed decisions as to their views on the proposals. We note the submissions of the trustees that suggest those in opposition to their proposals are promoting inaccurate or simply incorrect information in, we apprehend, an effort to encourage increased opposition. It does not assist the process if inaccurate information is circulating within the ownership community and the parties need to take responsibility for their conduct and ensure what they communicate to the owners is correct. Ultimately, that too is a matter for the Court's assessment, the extent to which owners have been able to make informed decisions based on accurate information. This is because it is well settled that it is the trustees who make the decisions, not the owners.[22] A wise trustee will always consult with the owners and seek to persuade a majority to their side of the argument but ultimately it is for the trustees to decide and to be held accountable for those decisions.

[47] Third, even where trustees continue to pursue their proposals, which they are entitled to do as prudent fiduciaries, there are important safeguards for owners at critical points. For example, as has occurred in this case, the owners are entitled to express their support or opposition to the variation proposals per s 244 of the Act. This provision requires satisfaction of the three sufficiency tests – sufficiency of notice, opportunity for discussion and of support.[23] Another opportunity for owner input is at general meetings, either those called by the trustees or those that have been requisitioned by the owners using the protection of minorities clauses of the trust order.[24] Then there is the ultimate sanction of seeking the

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22 *Proprietors of Mangakino Township v Māori Land Court* (1999) 73 Taupo MB 30 (73 TPO 30).

23 *Naera v Fenwick – Whakapoungakau 24 Block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [60]-[65].

24 25 Rotorua MB 248-252 (25 ROT 248-252), cl 6.

removal of trustees under s 240 of the Act or of arguing that the trustees no longer fulfil the requirements of s 222 of the Act in that they are no longer broadly acceptable to the owners.[25] That said, we would caution against any attempts to seek to remove trustees without proper consideration of the facts or of the costs implications for unsuccessful litigants. Simply disagreeing with trustee development proposals are not grounds for removal. Moreover, it is well settled that the threshold for the serious step of the removal of trustees is appropriately high.[26]

Did the Court properly weigh the evidence of opposition to application under s 244?

Appellants' submissions

[48] The appellants argued that the percentage of owners for whom the trust holds contact details (29 per cent) is typical and the voting statistics are on par with those obtained by the Mangatawa Papamoa Incorporation (5.88 per cent voted by post).

[49] Opposition to the application was then received by the Court following the postal vote, either by email, over the phone or in person at the registry. Counsel submitted that these expressions of opposition did not adhere to the Court's directions on filing and stem from a campaign against the application led by the respondents. The appellants contended that several of the emails are identical in their wording and have been fuelled by misinformation from the respondents suggesting the trust's ultimate goal is to sell the land.

[50] At the hearing in the Court below, the opposition registered with the Court would be difficult to assess without the Registrar appearing to give evidence. However, counsel submitted, this concern was disregarded in the reserved decision and the opposition formed part of Judge Coxhead's decision. The appellants submitted that the "unverified" and "manipulated" opposition received by the Court undermined the trust's carefully run process to determine the views of the owners and therefore the Court's finding of insufficient support for variation of trust was made in error.

[51] In addition, counsel argued that the amendments sought to the trust order were uncontroversial and not properly addressed by the respondents or the Court. Counsel argued that the first and third respondents did not address the application under s 244 at all, while the second respondent opposed the s 244 application due to an alleged lack of notice, opportunity

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25 *Ellis v Faulkner – Poripori Farm A Block* (1996) 57 Tauranga MB 7 (57 T 7) at 8.
26 *Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233).

to discuss and the absence of owner support. Accordingly, Mr McEntegart submitted that the opposition to variation application was without foundation and the Court did not properly address its merits under s 244.

[52] Counsel contended that the general reference in Judge Coxhead's decision to 103 owners advising the Court of their opposition was poorly defined and misleading. It was not made clear whether that opposition was to the application under s 135 or under s 244 or both, and analysis of the opposition can lead to very different conclusions. The appellants were not properly informed of this opposition and had to request a copy of the schedule of opposition which, surprisingly, had only been provided by Court staff to respondent counsel. The appellants maintained that it was inappropriate for the Court to ignore the results of a properly run postal ballot in favour of the list of expressions of opposition, given the obvious weaknesses in the value of that material as reliable evidence.

[53] At the hearing of 13 May 2019, the appellants provided their own evidence, the affidavit of Murray Patchell, which considered and analysed the support and opposition for the trust's applications as received by the Court and by the trust. Mr Patchell deposed that 149 submissions were received by the Court but 59 of those were not from landowners. In addition, 30 of those submitters used a template to lodge their opposition and three submitters supported the proposal in Court and by the trust's postal vote. Mr Patchell grouped the submissions according to common features:

(a) 12 owners who voted in support in the postal vote but lodged objections with the Court;

(b) Seven owners voted against in the postal vote and lodged objections with the Court;

(c) 71 owners who did not vote by post but lodged opposition with the Court;

(d) 59 individuals who made submissions to the Court but are not owners; and

(e) 11 owners submitted support for the application with the Court, with three of those owners having also voted in support in the postal vote.

[54] In the postal vote, 223 votes were received in favour of the status change and 49 against. On the variation application, 232 votes were received by post in favour of the trust amendments and 38 against. On these numbers, Mr Patchell asserted that of all those owners who participated by post or submission to the Court, 62 per cent are in favour of the status change and 71 per cent support the amendments to the trust order. The appellants argued,

therefore, that the Registrar's report and the revised figures provided in the submissions are "fundamentally flawed" and should be rejected by the Court as they do not account for the postal vote and do not themselves constitute a vote.

Respondents' submissions

[55] The respondents rejected the argument that the application under s 244 was wrongly decided. Counsel referred to the decision of this Court in *Lake Taupo Forest Trust* for the proper application of s 244.[27] The two-step test, requiring sufficient notice and opportunity to discuss followed by sufficient beneficiary support, is overlaid by the Court's discretion. This allows the Court to determine whether the proposed variation should be granted even once the test is met.

[56] Counsel submitted that Judge Coxhead acted within his discretion in refusing to grant the variation. If the appellants seek to overturn this discretion on appeal, they must establish it was exercised under an error of law or principle or that the Court took into account irrelevant considerations or that the Court failed to take into account relevant considerations or that the decision was plainly wrong.

[57] The respondents submitted that in determining whether the opposition received is irrelevant, the Court should apply the following considerations:

(a) Is the opposition relevant to the case?

(b) Is the opposition evidence?

(c) If the opposition is evidence, is it admissible?

[58] The respondents go on to apply this test. On relevance, it was submitted that the opposition clearly went to the heart of the matter before the Court, which was whether there was sufficient support for the proposed variations. There is established common law that requires the Court to take into account the wishes of beneficiaries and to provide them with proper notice and opportunity to both inform themselves and to express their wishes.[28] Counsel submitted that on matters of retention of Māori land, all owner views should be taken into account and considered by the Court.

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27 *Clarke – Lake Taupo Forest Trust* [2014] Māori Appellate Court MB 16 (2014 APPEAL 16) at [14]-[15].

28 *Taane – Hauturu East 8* (2015) 104 Waikato Maniapoto MB 95 (104 WMN 95) at [106].

[59] Section 69 of the Act provides that the Court may accept "any…matter that, in the opinion of the court, may assist it to deal effectively with matters before it, whether the same would, apart from this section, be legally admissible in evidence or not." The respondents submitted that the opposition received by the registry is evidence under s 69, as the Court below had allowed time for submissions in opposition or support to be filed and has the power to accept that material despite it being unsworn.

[60] As the evidence of further opposition was (eventually) provided to the appellants and as it was also referred to in the evidence of Mr Patchell, the respondents submitted that this material is admissible. In addition, in the directions of the Court below regarding support and opposition, no method for filing was prescribed. Although the appellants may have opposed the results of an online petition against the proposed variations being included, the results do not fall outside the Court's direction. The respondents also support the Registrar's conclusions and submitted that that data should be taken into account, given the centrality of the issue of support or opposition to the proposals.

[61] Counsel opposed the inclusion of the results of the postal vote run by the trust with the figures provided by the Registrar. It was submitted that the postal votes were not received by the Court and cannot therefore be counted since the results of the postal vote are already in evidence.

Deputy Registrar's submissions

[62] On receipt of the Registrar's report, counsel raised some concerns with the content. The Court directed that counsel file submissions with the Registrar to respond in due course. In her submissions, the Registrar noted anomalies arising in the shareholding spreadsheet and provided an amended version which she claimed properly reflect the number of shares and the date. The Registrar also confirmed the nature of the interests of certain owners referred to by the appellants and accounted for not referring to owners by their unique ID, which she stated provided no further clarification.

[63] Regarding the postal vote run by the trustees, the Registrar submitted that that data was not included in the original Owners List as the evidence provided did not clarify who voted or how they voted. The Registrar then reconciled Mr Patchell's evidence with her own. This reconciliation shows the owner's name, shareholding, and described their position as follows:

(a) 12 owners voted in support in the postal vote but then changed their minds in subsequent submissions;

(b) Seven owners who voted against the proposal in the postal vote maintained their opposition;

(c) 71 owners who did not vote in the postal ballot opposed the applications in their submissions to the Court;

(d) 59 individuals who submitted to the Court in opposition are not currently owners; and

(e) 11 owners voted in support in the postal vote.

[64] The Registrar updated the tables from her 23 July report, as follows:

Number of owners for-consented	20	0.40%
Number of shares for-consented	725.5795149	1.72%
Number of owners object	232	4.67%
Number of shares object	4905.557986	11.62%

Discussion

[65] As foreshadowed, s 69 allows the Court to receive any documents as evidence, regardless of their admissibility in orthodox terms. The material before this Court appears to confirm that of the 276 owners who voted in the postal vote held by the trustees on whether the land should be converted to General land, 223 were in support, 49 were opposed and four were undecided. Of the 276 who voted on whether to amend the trust order, 232 were in favour, 38 were opposed and six were undecided.

[66] Even so, we must express our unease as to the accuracy and veracity of some of the information that is currently before the Court. Telephone calls to the case manager cannot always be verified and there have been examples, regrettably, in other cases, where persons have posed as owners without the latter's knowledge let alone consent. We are not suggesting that that is what occurred in this case, merely highlighting the risk to the process where verification of owner identities may be at issue. In addition, a sizeable group of individuals purported to participate who are not recorded as owners on the Court's title. That they may be potential successors to deceased owners, is a possibility but it is well settled that where a vote becomes necessary, only those individuals who have their names recorded on the title as

held by the registry on the date of the general meeting or by the time a postal ballot has been held, are entitled to participate.[29]

[67] Overall, we consider that the process to ascertain the views of the owners, in the context of s 244, was less than ideal and that includes the submission of statements in opposition to the registry in person, by telephone, email or letter. In summary, we consider that there was a risk that the process was not sufficiently robust to have enabled the Judge to dismiss the variation application. It would have been preferable for that part of the proceeding to have been adjourned so that the process could be re-run to ensure that any issues of accuracy and validity might have been resolved.

[68] Moreover, given the issues at stake, and the strongly held views on both sides, we consider that the most appropriate course of action is for the process to commence afresh and on an arm's length basis, if the trustees decide that is how they wish to proceed given the earlier dismissal of the variation application. We invite the trustees to consider this approach on the basis that they may have decided to abandon the development proposals altogether and so directing a further process of owner engagement would be unnecessary.

[69] Alternatively, the trustees may decide that the variation application should be reheard, following a fresh owner engagement process. That would involve the preparation of owner information packs and voting forms as approved by the trustees, following consultation with the registrar and using appropriate personal identification to ensure the validity of the vote and the overall integrity of the process. The process might also benefit from both the support of registry staff with the logistics of issuing voting packs and a Court appointed independent scrutineer to oversee the entire procedure, thereby reducing the risk of any future challenge. Such an approach is not unprecedented.[30]

[70] It would also include opportunities for owner engagement, either online or by question and answers posed and posted. In any event, with the current and unprecedented Coronavirus 19 "lock down" in place, the likelihood of general meetings in person and voting by ballot are unrealistic at the present time. We invite the trustees to consider this option within two months from the date of this judgment and for counsel to advise the case manager on the appeal in due course.

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29 *Re Parihaka X* (2005) 154 Aotea MB 45 (154 AOT 45).
30 *Wall v Karaitiana – Tauhara Middle 15* (2011) 38 Waiariki MB 218 (38 WAR 218) at [41]-[42].

Decision

[71] The appeal is allowed in part. The trustees are invited to consider further consultation with the owners over the proposals to vary the trust order, taking into account the comments on the approach to owner engagement. Counsel is to advise the case manager within two months from the date of this judgment.

[72] Following the conclusion of the consultative process, the application for variation of the trust order will be remitted back to the Māori Land Court for further proceedings.

[73] In all other respects the decision of the Māori Land Court is affirmed.

Pronounced at 11.15 am in Rotorua on Thursday this 9th day of April 2020

C L Fox	L R Harvey	S F Reeves
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**