

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI**

*In the Māori Land Court of New Zealand
Waiariki District*

**AP-20230000028432
A20210005453**

WĀHANGA <i>Under</i>	Sections 67 and 289, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Oriwa 1B3E
I WAENGA I A <i>Between</i>	NELLIE ANN ANDREE Te kaitono <i>Applicant</i>
ME <i>And</i>	MARTIN APPELHOF Te kaiurupare <i>Respondent</i>

Nohoanga: 13 October 2021, 242 Taitokerau MB 146-152
Hearing 27 January 2022, 246 Taitokerau MB 183-185
21 March 2022, 248 Taitokerau MB 85-89
27 January 2023, 258 Taitokerau MB 53-64
8 March 2023, 261 Taitokerau MB 256-263
(Heard at Whangārei)

Whakataunga: 20 May 2024
Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ T M WARA
Judgment of Judge T M Wara

Interim decision*Te Whakataunga Tāiri*

[1] Oriwa 1B3E is an elevated block, with views across Whananaki South beach out to the ocean. Nellie Andree has applied to partition Oriwa 1B3E into two lots, so that she can have exclusive use and possession of half the land.

[2] The issue for determination is whether I should grant an order of partition, and if so, on what terms.

Background*Kōrero whānui*

[3] Oriwa 1B3E is 3.546 hectares of Māori Freehold land overlooking Whananaki South beach, located on the east coast of Te Taitokerau. Nellie and her brother Martin Appelhof, share the ownership of the land, each owning 0.5 shares. Nellie and Martin inherited the land from their mother, Jean Appelhof who passed away in 1997.

[4] While Nellie and Martin initially agreed to some rules around land used, there has been a breakdown in the relationship between siblings, and Nellie seeks a partition so that she has exclusive use of half of the land. Martin is opposed to a partition, on the basis of fragmentation and the impact on future generations.

[5] Since the late 1990s, the land has been used for camping with a caravan or small cabin shared on a week-about basis. Martin prefers that the land continues to be used on a temporary basis, such as camping, whereas Nellie seeks a more permanent dwelling. In 2019, Nellie built a small 30m² dwelling on the site that had been for her mother, without Martin's permission. This has been a further source of contention between parties.

[6] During the initial hearing on 13 October 2021, the parties agreed to meet and discuss land use alternatives, including a lease, license to occupy or an occupation order, in an independently facilitated meeting. This meeting took place on 16 December 2021 and, while a settlement was not reached between the siblings, there seemed to be a willingness to find solutions. A tentative agreement was reached, whereby Martin would investigate the cost of relocating Nellie's dwelling to a site approved by both siblings.

[7] However, by the next hearing on 31 March 2022 the matter remained unresolved. Nellie was directed to obtain a valuation report that included options for partition. The Garton and Associates Report dated 21 September 2022 was filed with the Court, and a copy was provided to Martin for his consideration. This report contains three options for partition, taking into account contour, access and potential building sites.

[8] The matter was heard again on 27 January 2023, where Martin re-confirmed a willingness to relocate Nellie’s small dwelling. He was directed to file costings for relocation within four weeks, and the matter was adjourned. Unfortunately, Martin only obtained verbal costings, and there was no agreement as to the best site for relocation. After hearing from the parties on 8 March 2023, my decision was reserved.

[9] Unfortunately, a delay occurred in concluding this matter in connection with our transition into Pātaka Whenua, this included an eight month delay in finalising the minute from the hearing on 8 March 2023.

The Law

Te Ture

[10] The Court has exclusive jurisdiction to grant partition orders in relation to Māori freehold land in accordance with Part 14 of Te Ture Whenua Māori Act 1993 (“The Act”). The Court’s jurisdiction is discretionary and the Court must at all times have regard to the principles set out in the Preamble to the Act.

[11] The Act directs the Court to exercise its discretion in three steps.¹ First, the statutory prerequisites under ss 288(2) and 288(4) of the Act must be satisfied. The Court is expressly prohibited from granting an order unless:

- (a) the owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it;
- (b) there is a sufficient degree of support for the application among the owners;
- and

¹ *Hammond – Whangawehi 1B3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185)

- (c) that the partition is necessary to facilitate the effective operation, development, and utilisation of the land.

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

[13] Third, the Court is to exercise its general discretion mindful that it may refuse to exercise that jurisdiction if it would not achieve the principal purpose of Part 14 of the Act.² This principal purpose is expressed in s 286(1) and is “to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional; or improved access to the land.”

Me whakaae ahau ki te ōta mō te wāwāhanga?

Should I grant a partition order?

[14] Starting with the statutory prerequisites, contained within ss 288(2) and 288(4) of the Act. As to sufficiency of notice and opportunity to discuss, Martin was served with the application on 12 August 2021, and appeared before the Court on a number of occasions between 2021 and 2023. I am satisfied that he had sufficient notice of the application and had sufficient opportunity to discuss and consider it.

[15] Regarding the degree of support, the leading authorities emphasise that sufficiency of support must be assessed on a case-by-case basis having regard to all the relevant facts.³ In the present case, there are two owners who are at odds with how that land should be utilised. The relationship breakdown between the parties is significant and has led to accusations of bullying; access being blocked; threats of destruction to property, and the police being called. During the hearings, the parties were constantly reverting to their entrenched positions and bringing up previous conflicts. However, at the heart of this application is a desire, expressed by both parties, to utilise the land without conflict. Neither party wishes to sell, and Nellie simply wants to be able to plant some roots for her children

² Te Ture Whenua Māori Act 1993, s 287(2).

³ *Whaanga v Niania – Anewa* [2011] Māori Appellate Court MB 428 (2011 APPEAL 428) at [39].

and her mokopuna to enjoy their taonga. Having regard to the nature and importance of the matter, I am satisfied that there is a sufficient degree of support amongst the owners.

[16] As to whether a partition is necessary, the threshold is high. “Necessary” under the Act has been held to be closer to that which is ‘essential’, as opposed to than that which is simply desirable or expedient.⁴ Reasonable alternatives to a partition must be considered.⁵ The parties have considered reasonable alternatives with the assistance of an independent facilitator who has practised law. At the heart of all options, albeit lease, a license to occupy or an occupation order, an agreement is required. The parties have simply not been able to reach an agreement as to any of the options, or potential locations for exclusive use and occupation. As to whether the next generation could take over the responsibility of decision-making through the formation of a trust, both parties agreed that this would be unlikely to resolve the dispute. From the evidence, it is clear that communication between the parties is strained, and there is a complete lack of trust. The conflict has prevented at least one of the owners from being able to occupy, develop and utilise the land which is at odds with the Preamble of the Act. For these reasons, I am satisfied that a partition is necessary.

[17] Turning to the mandatory considerations, these are listed at s 288(1) of the Act. The opinion of the owners overlaps with previous observations that the opinion is divided. As to the effect of the proposal on the interests of the owners, the effect is limited. There is no proposal to change the use of the land, or to further subdivide or sell; both parties will maintain a connection to their taonga. With regard to the best overall use and development of the land, at 3.546 ha the land is not an economic farming unit. The contour is hilly and access is via a small track that requires improvement. Dwellings have been erected on neighbouring blocks, and I therefore consider that occupation is the best use and development of this land.

[18] Finally, I must decide whether or not to exercise my discretion, taking into account the principal purpose in Part 14 of the Act. The principal purpose is to facilitate the use and occupation of the land by rationalising particular land holdings. Having regard to the evidence, and in particular the entrenched conflict between the co-owners, it is my view that

⁴ *Brown v Māori Appellate Court* [2001] 1 NZLR 87 (HC) at [51].

⁵ *Reid v Trustees of Kaiwaitau I* (2006) 34 Gisborne Appellate MB 168 (34 APGS 168).

the use, development and occupation of the land will be more effective if the shared interests are divided into two sperate lots by way of partition.

Whakataunga

Decision

[19] An order will be granted under s 289 of Te Ture Whenua Māori Act 1993, having regard to ss 301 and 304 of Te Ture Whenua Māori Act 1993, in that the parties are members of the same hapū.

[20] The parties are to consider the three (3) options set out in the Garton and Associates Report dated 21 September 2022. While ‘option one’ appears to be the best option in terms of access, contour, and potential building sites, the parties are invited to make submissions as to their preferred option before final orders are issued.

[21] Parties should turn their mind to access, and how this should be formalised.

[22] The parties are therefore directed to submit their preferred option within four (4) weeks from the receipt of this interim decision. If submissions are not received, a final decision will be issued.

I whakapuaki i te 2:00pm i Rotorua, rua tekau o ngā rā of Maehe i te tau 2024.
Pronounced at 2:00pm in Rotorua on this 20th day of May 2024.

T M Wara
JUDGE