IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

A.20/83

1045

BETWEEN ANTHONY RIDLEY ROBSON of Poukawa, Farmer, and LEONARD JOSEPH WEBB of Hastings, Chartered Accountant, as Trustees in the Estate of AMY ROBSON

Plaintiffs

A N D THOMAS ALAN SISTERSON of Gisborne, Farmer

Defendant

Hearing: 17 August 1984

Judgment: 10 September 1984

Counsel: R P Wolff for plaintiffs
N Weatherhead for defendant

JUDGMENT OF HENRY J.

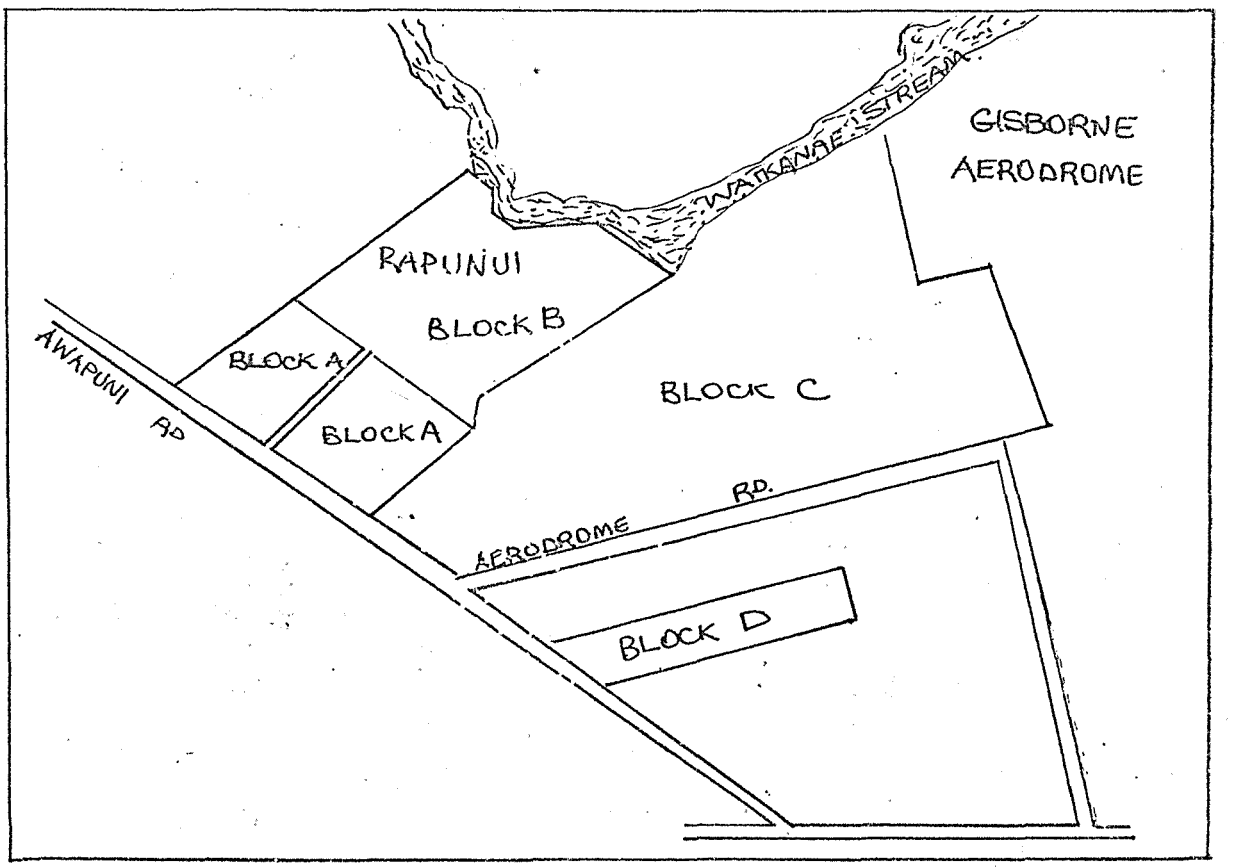
This is an action for partition brought in respect of land comprised in four separate certificates of title which I will refer to as Blocks A, B, C and D respectively. The registered proprietors of each block are the Plaintiffs and the Defendant, the ownership being as tenants in common in the shares of 8/35ths as to the Plaintiffs and 27/35ths as to the Defendant. The Plaintiffs hold their shares as trustees in the estate of Amy Robson, deceased.

The Sisterson family has been interested in and involved in farming the land in question since the 1890's.

In latter years the land was farmed by a partnership under the name or style of The Rapanui Farm Partnership, the Defendant being the only survivor of the original four partners. The partnership has, or is in the process of being, dissolved.

Block A comprises 7.4641 hectares
Block B comprises 10.8860 hectares
Block C comprises 38.0613 hectares
Block D comprises 4.0468 hectares
Total area: 60.45882 hectares

Diagramatically the lands are sited in the manner set out below:



It will be seen from this that Blocks A, B and C together form part of one large block of land, while Block D is separate but only some short distance away. The Defendant owns other property nearby, and has his home adjacent to Block D. All the land is used for mixed farming, including grazing and cropping. It is not uniform in quality, with the majority of the better quality being contained in Block A and the portion of Block B which adjoins Block A. There are some pockets of better quality land also in Block C. It will be seen from the diagram that the Waikanae Stream runs along the northern boundary of Block B and part of Block C, and this causes some flooding prolems, which have increased in recent years with the horticultural development which has taken place in the area. The only improvements to the land are fencing and water supply, the latter being in the form of wells and which would not be sufficient for intensive horticultural purposes. Water from that source is available over the whole property.

The Defendant does not seek any division or sale, but desires to continue farming the whole of the lands The action has had to proceed to hearing because the parties are unable to agree on an acceptable valuation of the plaintiffs' 8/35ths interest despite their intention to terminate the association. The Amended Statement of Claim seeks an order for partition, and in the alternative an order for sale, but the latter only in the event of partition not being available.

The Defendant does not seek a sale and has expressly declined to request one. The consequence of this is, in my view, that the Court has no option but to order partition.

By the Partition Acts (U.K.), which agre in force in New Zealand, a tenant in common has a statutory right of partition. Relief against that absolute right is contained in s.140 of the Property Law Act 1952, which empowers the Court in certain circumstances to order a sale in lieu of partition, but in each case the power can only be exercised at the request of an interested party, which pre-requisite has not here been met. In particular, the Court's power to direct a valuation under s.140(3) on the undertaking of one party to purchase, which the Defendant endeavoured to rely on, first requires a request for a sale by another party, which, as I have said, has not been made. Neither can there be any question of invoking the Court's inherent jurisdiction for such a purpose. It is, I think, quite clear that in the absence of the ability to exercise the power to order a sale under s.140, the Court has no option but to direct partition when a co-owner so applies. See Fleming v Hargreaves [1976] 1 NZLR 123, Gray v Dawson (1910) 12 GLR 511, Polden v Rowling [1958] NZLR 31. In the absence of agreement, there can therefore be no question in the present case of resolving matters by the Defendant's undertaking to buy the shares of the Plaintiffs at valuation.

Partition is obviously practicable, and the only question for decision is how that is to be achieved physically. For the Plaintiffs, it was contended that it would be appropriate to partition off the appropriate area comprising Block A and part of Block B this being, as it turns out, the better quality land, or most of it, as I have mentioned. A number of factors were submitted in support, in particular that it would be conveniently subdivisible from the whole, readily saleable, would make a viable economic unit, and would have adequate road frontage. It was also contended on their behalf that aesthetically this was the better solution - it would leave the remainder of the property as a basic farm unit for the Defendant, bearing in mind that it was the land farthest from his homestead and that he owned other land in the near vicinity which it was said was more conveniently placed to the remainder.

For the Defendant it was submitted that if partition there had to be, the Plaintiffs' entitlement should come from the eastern portion of Block C, adjacent to the Gisborne aerodrome. There was at trial some suggestion as to possible intermediate solutions apart from these two, but the evidence does not in my view allow the Court to make any valued judgment as to how that could be physically achieved in a just and equitable manner, having regard to the differing values which need to be attributed to different parts of the land.

It being accepted by all parties that the land in Block D should properly vest in the Defendant as a result of any partition, it really therefore comes down to a choice whether that portion to vest in the Plaintiffs should come from Block A and part Block B, or from the eastern side of Block C. In my view, that issue is finely balanced. The partition can as easily be made one way as the other. I do not think the site of the Defendant's home is of any real relevance, nor is his ownership of other land in the neighbourhood, particularly if he says those matters are of no real concern to him. Similarly, the Defendant's retention of Block D would appear to be of no significance either way. Whatever happens, one party is going to retain the bulk of the better quality land, and that simply cannot be avoided.

I think there must be some relevance in these circumstances in looking at the preference of the party who desires to retain the whole property, but who is being forced to a division of land in which he and his family have had an undivided interest for some considerable time. I have therefore concluded that the partition should be carried out in such a way as to result in an appropriate area of land at the east of Block C adjoining the Gisborne aerodrome being vested in the Plaintiffs, with the balance becoming vested in the Defendant.

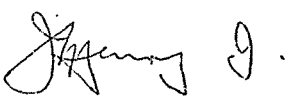
This brings into focus the question of what area is appropriate. This is not to be ascertained by a simple arithmetical calculation of 8/35ths of the total area, because that would not here accurately reflect 8/35ths of the total value because of the lack of uniformity as to land quality. Valuers were called on each side. For the Plaintiffs, Mr McElhinney put a present value of $1,007,500.00 on the whole property, to be compared with the figure of $778,000.00 given by Mr Kelso for the Defendant. It is not necessary for me in these proceedings to determine the value of the land, either as a whole or as individual blocks, providing I am satisfied that an appropriate division can be made so as to accurately reflect the proportionate values to which the parties are entitled. It is probably for this reason that neither counsel embarked on a detailed examination-in-chief or cross-examination of the witnesses to test the validity of the respective valuations. Theoretically it would seem that much the same answer, area wise, would result, providing the difference in valuation for the respective areas appeared to be more or less uniform. It would appear here that the valuers were largely in agreement as regards Block D, with Mr Kelso being approximately 7% less per hectare from Block A than Mr McElhinney, 10% less for Block B, but 24% less for Block C. When converting the share of the Plaintiffs into an area of land, Mr Kelso arrived at 9.2 hectares (disregarding any deduction for the fractional interest - a factor which I

consider should be disregarded for the purposes of the present exercise) for the land to the west comprising Block A and part Block B, and 13 hectares for Block C on the east. Mr McElhinney gave comparable calculations of 10.96 hectares for Blocks A and part Block B, and 18.5 hectares for Block C. It is apparent that Mr Kelso's figure for Block C must contain an error, because although the land is the least valuable by a substantial figure per hectare of all the blocks, the area is still less than 8/35ths of the total area. It must follow from that, that 13 acres from Block C must represent substantially less than 8/35ths of the total value of the land. Mr Kelso recognized that there must be an error, but at the hearing was unable to trace its origin or to correct it. From the evidence I am unable to make any amendment to his figure, and I am therefore in the position of having to accept the alternative figure of 18.5 hectares, which was not demonstrated to be in any way questionable, either mathematically or by reason of the application of incorrect valuation bases.

The Plaintiffs are accordingly entitled to an order for partition. That partition is to be effected by dividing from the land I have described as Block C an area of 18.5 hectares with its eastern boundary being the present boundary between Block C and the Gisborne aerodrome, and its western boundary being at right angles to Aerodrome Road.

As I understand the land is not subject to any charges, there should be no problems giving effect to the above provisions and if necessary orders directing execution of transfers can be made. However, as I am not sure what formal orders, if any, are required in the light of the above findings - either in respect of the present action or in respect of the associated action under no.A.21/83 - leave is reserved to the parties to apply further in respect of any matters arising.

Costs will be reserved.



Solicitors:

Bate Hallett & Partners, Hastings, for Plaintiffs

Wilson Barber & Co., Gisborne, for Defendant