IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2008-488-000588

BETWEEN	MAX MANNING AND HUMPHREY O'LEARY AS TRUSTEES IN THE ESTATE OF WILLIENA POURITANGA MANNING Plaintiffs
AND	MAX MANNING First Defendant
AND	VESTA MAXINE DAVIES Second Defendant
AND	HARRY MCKAY Third Defendant
AND	CAMERON DAPHNE MCKAY Fourth Defendant

Continued: ...-2-

Hearing: 17 February 2009

Appearances: A Barker and A Holgate for the Plaintiffs
C Eckard as Guardian ad litem for minor beneficiaries

Judgment: 25 February 2009 at 4:00pm

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on the 25th day of February 2009 at 4:00pm pursuant to r 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors: Thomson Wilson, PO Box 1042, Whangarei 0140
Cor Eckard Law Office, PO Box 111, Whangarei 0140
Counsel: Andrew Barker, PO Box 4338, Auckland

AND	JIMI-LEE PENE Fifth Defendant
AND	JON REIHANA PENE Sixth Defendant
AND	HENRY GEMMELL PENE Seventh Defendant
AND	PHILLIPA JAYNE PENE Eighth Defendant

Introduction

[1] When she died in August 2004 Mrs Williena Manning was the owner of a beach front property at Bland Bay, Northland (CT 155/86, North Auckland Registry) (the property). The property is Maori freehold land, and as such is subject to the provisions of Te Ture Whenua Maori Act 1993.

[2] In her will dated 20 July 2001 Mrs Manning left her husband, Mr Max Manning, a life interest in the property. The will then provided that on Mr Manning's death:

a) Mrs Manning's daughter Vesta McKay (now Davies) was to have a life interest in a half share in the property, and on her death, the half share was to pass to Vesta's children, in equal shares, with a gift over to any of Vesta's grandchildren alive at Mrs Manning's death;

b) The other half share was to pass in equal shares to the children of Mrs Manning's daughter Daphne Pene (Mrs Pene having predeceased Mrs Manning). Again, there was a gift over provision.

[3] The trustees, Mr Manning, Vesta Davies and Mrs Pene's children wish the property to be sold. To this end, the trustees of Mrs Manning's estate have applied to the court for directions.

[4] There are two reasons why directions are sought. The first is that three of the beneficiaries are minors. Accordingly, the court's consent is sought under s 64A of the Trustee Act 1956. The second reason is that the trustees are concerned as to the application of Te Ture Whenua Maori Act.

Background

[5] The following account is taken from Mr Manning's affidavit, filed in support of the trustees' application. It is noted that Mr Manning is one of the two trustees of Mrs Manning's estate, as well as a beneficiary.

[6] Mr and Mrs Manning were together for some 38 years. When they commenced their relationship Mrs Manning had two daughters – Daphne (then aged 8) and Vesta (then aged 5). For all practical purposes Mr Manning became the girls' father and later, grandfather to their children. It was always a very close-knit family.

[7] Some years before they met, Mrs Manning had inherited a property on the northern head of Whangaruru Harbour. The property was Te Ture Whenua land. It was taken by the Crown for park land in the early 1970s.

[8] Mrs Manning eventually received a plot of land at Bland Bay and a sum of money by way of compensation for the land taken. Mr and Mrs Manning purchased the property concerned in this proceeding in 1998, because it was immediately adjacent to the land expropriated in the 1970s. As the property is Maori freehold land, Mr Manning said, it was purchased in Mrs Manning's name only, through her whakapapa.

[9] Mr and Mrs Manning subsequently built a garage with attached flat, then the main house on the property. They both contributed funds, materials and labour.

[10] Mr Manning said that he and his wife discussed seeking a change in the status of the land from Maori freehold to general land, and sought advice from their solicitor. It became readily apparent to them that this was not a straight-forward, quick, process so that although it was always "on the agenda", there was always something more pressing that needed more attention and time. Accordingly, a change in status was not sought during Mrs Manning's lifetime.

[11] The property is described by Mr Manning as a large beach front property. He said that, as Maori freehold land, its current rating valuation is $790,000.

[12] As Mr Manning has grown older he no longer has the energy, let alone the financial resources, to undertake the maintenance required to keep the property in good condition. He has now moved to a smaller property in Whangarei, but still needs to spent two to three days a week at the Bland Bay property to look after it.

[13] Further, Mr Manning says that none of the other beneficiaries have the ability, or wish, to maintain and make use of the property. Daphne Pene's children have settled permanently in Australia and have no intention of returning to New Zealand to live. They have also said that with the property being in a relatively remote part of Northland, they have no serious intention of making any special trips to Bland Bay to use the property. Further, they do not have the resources or ability to maintain it.

[14] Vesta Davies has made it clear to Mr Manning that she does not have the resources or ability to maintain the property.

Proposal

[15] The trustees have had extensive discussions with the beneficiaries. All have agreed that the most sensible and pragmatic solution is for the property to be sold and the proceeds dealt with in terms of the trust created by Mrs Manning's will. There is one exception, which is that all have agreed that Mr Manning should have a cash payment, rather than a life interest. In order for the proposal to proceed in this manner, Mr Manning has agreed to forego part of his entitlement.

[16] The proposal is, therefore, that if the property can be sold the proceeds of sale are to be divided as follows:

a) Mr Manning: a cash payment of 37% of the proceeds.

b) The remaining 63% to be held on the same Trusts as under Mrs Manning's will, as follows:

i) Vesta Davies and her children, 33%

ii) Daphne Pene's children, 30%

(the proposal)

[17] By this means, Mr Manning would have funds for use in his retirement, while the balance can be held on trust for the benefit of Mr and Mrs Manning's children and grandchildren.

Material before the court

[18] Mr Manning's affidavit had annexed to it Mrs Manning's will and copies of an "Agreement to Surrender of Life Interest" executed by the trustees, Mr Manning (in his capacity as beneficiary), Vesta Davies and Daphne's three adult children. This records the terms of the proposal.

[19] Affidavits have also been filed by Vesta Davies and each of Daphne Pene's adult children, confirming that they agree to the orders sought by the trustees in respect of the proposal.

Position of minor children

[20] One of Daphne Pene's children, Phillipa is 17. Vesta Davies' children, Harry and Cameron McKay, are 12 and 8 respectively.

[21] Mr C F Eckard was appointed *guardian ad litem* to report on whether the proposal is in the best interests of Phillipa, Harry and Cameron. In his report dated 22 December 2008 Mr Eckard said that the proposal would be in the best interests of the minor children. His reasons may be summarised as follows:

a) The property is reasonably isolated and, while it would be an enjoyable holiday home, there is little potential for development without a large amount of capital investment;

b) The property does not have any special historical significance or sentimental value to the beneficiaries;

c) The minor children are not in a position to look after the property, or to be able to visit on a regular basis; and

d) Mr Manning can no longer look after the property because of his age and health, so the property will start to deteriorate and diminish in value.

[22] Mr Eckard also referred to a conditional sale agreement entered into by the trustees. As the status of that agreement is not entirely clear, it is not appropriate to refer to it.

[23] Mr Eckard provided an updated report on 12 February 2009, confirming that he still believed that the sale of the property would be in the best interests of the minor children.

The issues

[24] As set out in the amended statement of claim dated 16 February 2009, the trustees seek:

a) A declaration that the proposal is in the best interests of all beneficiaries;

b) Approval of the proposal on behalf of the minor children;

c) A declaration that either the trustees or the beneficiaries are entitled to sell the property and distribute the proceeds of sale according to the proposal; and

d) A declaration that the trustees, as the persons holding legal title to the property, are to act as trustees and/or agents for the beneficiaries

selling the property, and in distributing the proceeds of sale pursuant to the terms of the proposal.

[25] The directions sought raise the following issues:

a) Whether the court should give consent to the proposal on behalf of the minor children; and

b) Whether Te Ture Whenua Maori Act affects the trustees' and/or the beneficiaries' ability to proceed with the proposal.

[26] These issues will be considered in turn. It is necessary, first, to deal briefly with the rule in *Saunders v Vautier*[1], under which the beneficiaries intend to act.

The rule in *Saunders v Vautier*

[27] The well-known rule in *Saunders v Vautier* has been described as follows:

> If a sole beneficiary has a vested interest in the trust property and has full legal capacity, that beneficiary may put an end to the trust by directing the trustees to transfer the trust property to that beneficiary, despite any directions to the contrary in the trust document. The same rule applies where there is more than one beneficiary.[2]

[28] Mr Barker, on behalf of the trustees, acknowledged that the limits on the application of the rule are that the beneficiaries must be of age and that they must hold a vested interest. The first of these issues can be addressed by way of s 64A of the Trustee Act.

[29] With respect to the second issue, the need for an absolute vested interest, Mr Barker referred me to the judgment of the House of Lords, given by Lord Maugham, in *re Blake*[3] where it was held at p366 that the rule in *Saunders v Vautier* does not apply unless "all persons who have any present or contingent interest in the property are *sui juris* and consent".

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1 *Saunders v Vautier* (1841) 49 ER 282

2 Garrow and Kelly "Law of Trusts and Trustees", 6th ed LexisNexis, at para 25.4.1

3 *re Blake* [1938] 3 All ER 362

[30] In the present case, all beneficiaries other than Mr Manning (who is at present entitled to a life interest in the property) have a contingent interest. As Mr Barker submitted, all beneficial interests, whether vested or contingent, are presently before the court. Those contingent beneficiaries who are of age have consented to the proposal. The consent of the court is sought on behalf of those contingent beneficiaries who are minors.

[31] Accordingly, subject to the court's consent on behalf of the minor children, the proposal can be effected pursuant to the rule in *Saunders v Vautier*.

Consent on behalf of minor children

[32] Section 64A of the Trustee Act gives the High Court power, if it thinks fit, to approve an arrangement varying or revoking a trust on behalf of a person who, because he or she is an infant (that is, a minor), is incapable of assenting. Section 64A also provides that the court shall not approve any arrangement on behalf of the minor if the arrangement is to the minor's detriment. In assessing whether an arrangement is to the minor's detriment, the court may have regard to all benefits that may accrue to the minor, directly or indirectly, as a result of the arrangement.

[33] On the basis of Mr Eckard's reports, I am satisfied that the proposal is not detrimental to the minor children. To the contrary, I am satisfied that it is to their benefit.

[34] Accordingly, my preliminary conclusion is that the High Court's consent may be given to the proposal on behalf of Phillipa Pene, Harry McKay, and Cameron McKay. Before reaching a final conclusion it is necessary to consider whether the High Court has jurisdiction to give consent in the context of a Trust in relation to Maori freehold land. That question is considered later in this judgment, at paras [48] to [51].

Te Ture Whenua Maori Act

[35] The (English) preamble to Te Ture Whenua Maori Act includes that:

> ... Whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to protect their retention of that land in the lands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: ...

[36] The particular relevance of Te Ture Whenua Maori Act, given that the proposal is to sell the property, is that s 146 provides that Maori freehold land may not be alienated (which, as defined in s 2, would include the proposed sale of the property) otherwise than in accordance with the Act.

[37] Section 147 of Te Ture Whenua Maori Act provides that sole owners, joint tenants, owners in common, trustees and a Maori Incorporation have the capacity to alienate Maori freehold land, subject to various provisions of the Act.

[38] In all cases the person seeking to alienate must, pursuant to s 147A, give the right of first refusal to purchasers who belong to one or more of the "preferred classes of alienees". The preferred classes of alienees are defined in s 2 and may be summarised (as relevant to this case) as whanau and descendants of any former owner who is or was a member of the hapu associated with the land.

[39] The right to alienate is also subject to a requirement to confirmation of the alienation instrument by the Maori Land Court under Part VIII of the Act (see ss 150A(3) (alienation by Trustees), 150B(3) (alienation by a Maori Incorporation) and 150C(3) (alienation by Other Owners)). Part VIII of the Act sets out the duties and powers of the Maori Land Court in relation to alienation of Maori freehold land.

[40] The court was advised by counsel for the trustees that it is accepted by the trustees and the beneficiaries that any sale of the property will have to satisfy the requirements of Te Ture Whenua Maori Act. In particular, the requirement as to the right of first refusal must be met and the sale instrument must be confirmed by the Maori Land Court.

Is the proposal contrary to any provision in Te Ture Whenua Maori Act?

[41] The trustees are concerned as to whether the proposal would be contrary to any of the provisions of Te Ture Whenua Maori Act .

[42] It will be recalled that the proposal is that the property be sold and the proceeds distributed so that 37% is paid in cash to Mr Manning, while the remaining 63% is to be held on trust for Daphne Pene's children and Vesta Davies and her children. Mr Barker advised that it is intended that the beneficiaries will direct the trustees as to how the property is to be dealt with.

[43] Mr Barker referred me to s 108(6) of Te Ture Whenua Maori Act. This section is headed "Disposition by Will". Sub-section (2) specifies the persons to whom an owner of a beneficial interest in Maori freehold land may leave that interest by will: essentially, whanau or trustees for whanau. Sub-section (4) provides that the interest may be left to a spouse for life or a shorter period.

[44] Sub-section (6) provides:

> Where any beneficial interest in Maori freehold land is left by will to any trustee, the trustee shall not have power under the will or under any Act to sell the interest; and any provision in the will purporting to confer such power shall be void and of no effect.

[45] Notwithstanding s 108(6), Mr Barker submitted that Te Ture Whenua Maori Act specifically recognises the rights of beneficial interests of Maori freehold land to implement a *Saunders v Vautier* type proposal, such as that before the court.

[46] Mr Barker submitted that s 108(6) does not have the effect of preventing beneficiaries, having consented to the sale, from directing the trustees to sell the property. He referred to s 149 which provides:

> **Alienation of equitable interests**
>
> In the case of any Maori freehold land that is vested in a trustee, every person who is absolutely entitled to any beneficial interest in the land has the same capacity to alienate that interest as that person would have if the legal interest were vested in that person.

[47] Mr Barker submitted that where, as here, all beneficiaries consent to the proposal then, subject to the two matters discussed below, s 149 allows the beneficiaries to deal with the property as if they were the legal, rather than beneficial, owners. Those issues are:

a) Whether in fact the High Court has jurisdiction to give consent on behalf of the minor beneficiaries; and

b) Whether s 149 still applies where some of the interests are contingent.

(d) Jurisdiction

[48] I am satisfied that this court has jurisdiction. In *Grace v Grace*[4] the Court of Appeal held that the High Court's inherent jurisdiction in respect of Trusts affecting land was not excluded by Te Ture Whenua Maori Act.

[49] The Court of Appeal was considering whether the High Court had jurisdiction to deal with trust issues relating to to Maori freehold land, arising out of a matrimonial property dispute. In its judgment the court reviewed the provisions of the Maori Affairs Act 1953. Section 30(1) of that Act conferred general jurisdiction on the Maori Land Court in respect of Maori freehold land, but provided in subs 2 that nothing in the foregoing provisions of this section was to be construed to limit the jurisdiction of any other court.

[50] The Court of Appeal then noted a number of provisions of Te Ture Whenua Maori Act where exclusive jurisdiction is given to the Maori Land Court: for example, ss 26(1), 221 and 287(1). The Court of Appeal concluded that in those cases where it considered it appropriate to do so, the legislature had stated that the Maori Land Court was to have exclusive jurisdiction. Where it had not so provided, the jurisdiction is not exclusive. In particular, the court said at page 5:

> For these reasons we are satisfied that we would not be justified in reading into [Te Ture Whenua Maori Act] an exclusion in relation to Maori freehold land of the inherent jurisdiction of the High court in respect of Trusts affecting land.

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4 *Grace v Grace* [1995] 1 NZLR 1

[51] Accordingly, I am satisfied that the High Court has jurisdiction to consent to the proposal on behalf of the minor beneficiaries.

(b) Contingent interests

[52] In relation to this question, Mr Barker referred to his earlier submissions as to the application of the rule in *Saunders v Vautier*, referring again to the judgment in *re Blake*.

[53] He submitted that it is clear that s 149, in referring to persons who are "absolutely entitled" would not permit contingent beneficiaries from implementing a proposal on their own. However, equally, beneficiaries holding a vested interest ("absolutely entitled") could not implement a proposal without the consent of the contingent beneficiaries.

[54] I accept Mr Barker's submission that when all beneficiaries, vested or contingent, agree to implement a proposal, s 149 is not infringed.

[55] Accordingly, I conclude that the implementation of the proposal would not be contrary to the provision of Te Ture Whenua Maori Act. For completeness, I repeat that the trustees acknowledge that the "first refusal" requirement must be complied with, and that the sale instrument must be confirmed by the Maori Land Court.

Result

[56] The court makes the following orders:

a) A declaration that the trustees of the estate of Williena Pouritanga Manning ("the estate"), with the consent of the beneficiaries of that estate, who are the defendants in these proceedings, are entitled to sell the property legally described as Kirikiri Pawhaoa B2A1 and being all of the land in Certificate of Title 155186 North Auckland Registry ("the property"), subject to the following:

i) That sale being at a fair market value, with such value being determined by reference to an independent valuation of the property prepared by a registered valuer;

ii) That sale being confirmed by the Maori Land Court pursuant to the provisions of Part VIII of the Te Ture Whenua Maori Act 1993;

b) A declaration that the trustees of the estate, with the consent of the beneficiaries, are entitled to apply the proceeds of such sale of the property ("the proceeds"), after the deduction of all costs of the sale and confirmation process and including the costs of these proceedings, in the following shares:

i) The payment of 37% of the proceeds to Mr Max Manning;

ii) The settlement of 33% of the proceeds on trust for the benefit of Vesta Davies, Harry Mackay (on reaching the age of 20), and Cameron Mackay (on reaching the age of 20). Vesta Davies would have a life interest in that trust fund with the other beneficiaries remaindermen to share in equal shares.

iii) The settlement of 30% on trust for the benefit of Jimi-Lee Pene, Harry Pene, Joy Pene, Phillipa Pene (on reaching the age of 20). The entitlement of the beneficiaries would be in equal shares.

iv) The trustees of the trust described at (ii) and (iii) above will be the current trustees of the estate.

c) The Court provides its consent to the arrangements described in paragraphs a) and b) above on behalf of the minors, Harry McKay, Cameron Daphne McKay and Phillipa Jayne Pene.

Andrews J