IN THE COURT OF APPEAL OF NEW ZEALAND

CA214/2013
[2015] NZCA 121

BETWEEN	MERE JOSLYN WHAANGA Appellant
AND	CASSINO EGYPT SMITH, JEFFERSON POWDRELL, RAYMOND DAVID GREENING-CROMBIE, RUKANIANIA, TOM TE KAHU, TUMANAKO WALTER WILSON AND WHETI MANUEL AS TRUSTEES OF THE ANEWA TRUST Respondents

Hearing:	1 April 2015
Court:	Randerson, Stevens and Miller JJ
Counsel:	T H Bennion and L Lefever Black for Appellant M B Lawson for Respondents
Judgment:	17 April 2015 at 3:00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondents for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] For some time the appellant Ms Whaanga and members of her whanau have been seeking the partition of an area of land known as the Anewa block which lies to the north of Wairoa. The total area of the Anewa block is some 1,911 hectares (4,723 acres). Ms Whaanga seeks to have vested in her whanau an area of approximately 121 hectares (300 acres) that represents their late father's interest in two blocks known as Tutuotekaha 1B5B1 and 1B5B2. These two blocks had been amalgamated in 1967 with several other blocks to form Anewa. The respondents are the trustees of the Anewa Trust that administers the land on behalf of a large number of owners. They oppose the partition.

[2] There has been substantial litigation over the partition application:

(a) On 14 December 2010 the Maori Land Court (the MLC) dismissed the application on the basis that the appellant had failed to show a sufficient degree of support for the partition as required by s 288(2)(b) of the Te Ture Whenua Maori Act 1993 (the Act).[1]

(b) Ms Whaanga then appealed to the Maori Appellate Court (the MAC) which delivered its first judgment on 19 August 2011.[2] The MAC allowed the appeal, finding there was a sufficient degree of support for the partition among the owners. The MAC directed a rehearing on other aspects of the partition application.

(c) After a rehearing, the MLC issued a second judgment on 5 June 2012.[3] The application was again dismissed, this time on the basis that the partition was not necessary to facilitate the effective operation, development and utilisation of the land as required by s 288(4)(a) of the Act.

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1 *Whaanga – Anewa Trust* (2010) 11 Tairawhiti MB 46 (11 TRW 46) [MLC first judgment].
2 *Whaanga v Niania – Anewa Block* (2011) Maori Appellate Court MB 428 (2011 APPEAL 428) [MAC first judgment].
3 *Whaanga – Anewa Trust* (2012) 22 Tairawhiti MB 167 (22 TRW 167) [MLC second judgment].

(d) A differently constituted MAC delivered a second judgment on 12 February 2013.[4] It dismissed the appeal, finding no error in the MLC's approach.

[3] Ms Whaanga now appeals against the second MAC judgment.[5] The focus of the appeal is on the conclusion reached in the second judgment that partition of the land was not necessary to facilitate the effective operation, development and utilisation of the land. Ms Whaanga submitted through counsel that the MAC had erred in two main ways. First, through failing to analyse whether Ms Whaanga's proposals for the land would facilitate the effective operation, development and utilisation of the land. Second, by mischaracterising the nature of the research identified in Ms Whaanga's proposals for the use of the land. It was submitted this led to a decision that was plainly wrong. Orders are sought setting aside the decision of the MAC in its second judgment and directing a rehearing before the MLC.

The background facts

[4] In the MAC's second judgment, it was content to adopt the background facts set out in its first judgment. The following summary is drawn from the MAC's first judgment which Mr Bennion for Ms Whaanga accepted as correct.[6]

The history prior to amalgamation of title

[5] It is not in dispute that Ms Whaanga, her whanau and tipuna have had a long association with the land they seek by way of partition. The Native Land Court awarded title to Tutuotekaha in 1868. By 1915, the land remaining in Maori ownership was held in seven titles, namely Tutuotekaha 1B1 to 1B7. These were essentially whanau blocks comprising about 300 acres each. Ms Whaanga's great grandfather, Puhara Timo, was the principal owner of Tutuotekaha 1B5. His interests were later partitioned with those of some minor owners into Tutuotekaha

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4 *Whaanga v Smith – Anewa Block* [2013] Maori Appellate Court MB 45 (2013 APPEAL 45) [MAC second judgment]

5 An extension of time to appeal was granted on 3 December 2013, *Whaanga v Smith* [2013] NZCA 606.

6 MAC first judgment, above n 2, at [2]–[22].

1B5B. Following his death, Puhara Timo's seven grandchildren, including Epanaia Whaanga, succeeded to Puhara's interests in Tutuotekaha 1B5B in 1931.

[6] Puhara Timo's son-in-law, Tihi Whaanga, farmed the land before his son Epanaia took over. The farm is known as "Rata" due to a large Rata tree in the bush. The country is described as steep and originally contained heavy timber, much of which was used for fencing. Epanaia ran sheep on the land, and, during his second marriage, Ms Whaanga and her sisters were born. By 1954, Epanaia had cleared the land and a cottage and yards were built. By that time, Epanaia had acquired all of Puhara Timo's interests in Tutuotekaha 1B5B and, by further partition, Epanaia acquired a one acre section containing the cottage (Tutuotekaha 1B5B1). He also acquired a majority interest (with 25 other owners) in the balance area of 300 acres (Tutuotekaha 1B5B2).

[7] Although Epanaia wanted to develop the land further, he was unable to obtain development finance and leased the Rata land until the lease was surrendered in 1959. Thereafter the Rata land was used by the nearby Tutuotekaha A and B Incorporation. Epanaia and his family continued to return to the cottage for holidays until about 1961 when work took him further afield. He learned in later years that the cottage had been burned down by farm workers.

The creation of the Anewa Trust

[8] In 1966, the Tutuotekaha Incorporation approached the then Department of Maori Affairs to develop its land in neighbouring blocks under Part XXIV of the Māori Affairs Act 1953. In order to achieve this, it was necessary for the various titles to be amalgamated. Epanaia Whaanga agreed to this and signed the necessary consent forms. Then, on 24 October 1967, the MLC issued an amalgamation order cancelling 14 titles including Tutuotekaha 1B5B1 and 1B5B2 and creating the Anewa block.

[9] On 12 November 1986, the MLC constituted the Anewa Trust under s 438 of the 1953 Act. Under the Trust's Order, the trustees hold office for a period of three years. The Anewa block has a total of 3,966 beneficial owners with nearly 104,000 shares in total. All but 200 owners hold fewer than 100 shares. Ms Whaanga and

her family have the second largest shareholding, equating to 1.85 per cent of the total ownership.

[10] We set out the MAC's description of the land and its current usage:[7]

> [12] Today, the Trust continues to farm sheep and beef. The effective farming area is 1030 hectares or 53 percent of the land area. The remaining land is in native bush and scrub and is largely steep and erosion prone. The land has been farmed as two farming units since its amalgamation. In the west is the original farm that formed the [Tutuotekaha] Incorporation. In the east are some of the whanau blocks that were amalgamated in 1967. In the middle is much of the non-effective land that is in bush and scrub. Rata is in this middle section.
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> [13] Rata dissects Anewa from north to south. All but 40 acres have reverted to bush or scrub. The 40 acres is in grass but is either steep hillsides – described by Mere Whaanga as "goat country" – or swampy. She said it had little farming value, a view that was not contradicted by the Trust. Although this middle section lies between the two farming units – and the proposed partition would mean that Anewa would be held in two severances – this area of bush and scrub is not used by the farming operation due to its steep terrain and any stock movements are along the council road which lies along the northern boundary.
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> [14] An area of 295 hectares within the middle section has been set aside as a Māori reservation "as a place of historical, scenic and cultural interest and use" for the owners of Anewa. In 1993, 202 hectares was initially set aside. In 1995 the area was increased to 295 hectares.

[11] As we later discuss, the existence of the Māori reservation assumes some importance. Approximately 80 per cent of the Rata land is within the Māori reservation. The reservation extends beyond the Rata land into other parts of the Anewa block.

The partition application

[12] Ms Whaanga began looking into the partition application in late 2005 and early 2006. At the Trust's Annual General Meeting in 2007, all the owners present, with the exception of the then trustees, supported the partition. There was no other opposition. Later, the MLC directed a meeting of owners which took place on 11 December 2009. The owners present passed a resolution in support of partition by 20 votes to two. The two opposing owners were two of the then trustees. The

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7 MAC first judgment, above n 2 (footnotes omitted).

other trustees abstained from voting. The MLC staff reported that the total level of support following the various meetings was 82 owners, representing 2.17 per cent of the owners and 9.97 per cent of the ownership by shareholding.[8]

[13] Ms Whaanga's proposals for the Rata land were described by the MAC in its second judgment in these terms:[9]

> [5] Ms Whaanga proposed to use the land to carry out research work consisting of a number of individual projects investigating viable and productive uses for the land, bearing in mind its nature. The land is classified, pursuant to the New Zealand Land Use Classification Scheme as Class VII land - that is, non-arable land with moderate to very severe limitations as to its use. Removal of tree cover in the past has encouraged severe erosion and silting of the wetland area on the land. Ms Whaanga was also concerned about the possibility that the Anewa Trust could remove further mānuka/kānuka and other native trees from the land, which would cause further damage to the land.
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> [6] Ms Whaanga's proposals include the following:
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> a) Use of the primary bush as a seed source and area of ecological survey;
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> b) Regrowth of mānuka/kānuka as potential honey and oil sources;
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> c) Viability of restoration of the wetland area;
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> d) Use of the primary bush and regrowth areas for rongoā and gourmet native plant products;
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> e) A truffiere;
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> f) A tōtara plantation; and
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> g) Possible development of a base for eco-tourism.
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> [7] Ms Whaanga stated that work could start immediately on the research projects if partition is granted. Several of the projects require preliminary trials to determine viability as well as the best way to carry out the research. For example in relation to the tōtara plantation project, which is a long-term project, Ms Whaanga stated it will be necessary to gather information on the following:
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> a) The right time to gather seed;
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> b) The most suitable planting sites;
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> c) Measurement of growth and suitable spacing of trees;

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8 These figures include the beneficial interest of Ms Whaanga and her whanau.

9 MAC second judgment, above n 4.

d) Growth speeds of tōtara;

e) Response to fertiliser;

f) Effect of pruning.

[8] Some of the projects could be done relatively quickly, but others such as the tōtara plantation would require a timeframe of 70 years to come to fruition. The eco-tourism project is also likely to be long term and carries considerable risks and uncertainty.

[9] Ms Whaanga advised us that she and her whānau were able to access funding sources which could provide grants to begin these research projects. The whānau did not anticipate needing to raise loans via mortgage security, at least not in the initial few years of the projects.

The statutory framework

[14] The jurisdiction of the MLC to make partition orders is contained within pt 14 of the Act. For present purposes, the relevant provisions are ss 286 to 288:

286 Purpose of this Part

(1) The principal purpose of this Part is to facilitate the use and occupation by the owners of land owned by Maori by rationalising particular landholdings and providing access or additional or improved access to the land.

(2) Where it is satisfied that to do so would achieve the principal purpose of this Part, the court may make partition orders, amalgamation orders, and aggregation orders, grant easements, and lay out roadways in accordance with the provisions of this Part.

287 Jurisdiction of courts

(1) Subject to subsection (3), the Maori Land Court shall have exclusive jurisdiction to make partition orders, amalgamation orders, aggregation orders, and exchange orders in respect of Maori land, and to grant easements and lay out roadways over Maori land.

(2) The jurisdiction conferred on the Maori Land Court by this Part shall be discretionary, and, without limiting that discretion, the court may refuse to exercise that discretion in any case if it is not satisfied that to do so in the manner sought would achieve the principal purpose of this Part.

(3) Nothing in this section shall apply in respect of any Māori reserve.[10]

[10] Section 287(3) does not apply to a reservation under pt 17 of the Act. A "Maori reserve" is defined under s 4 of the Act as meaning land vested in the Māori Trustee for the purposes of a Māori reserve and has no application to the subject land.

(4) Except as provided in subsection (1), nothing in this Part shall limit or affect the jurisdiction of the High Court.

288 Matters to be considered

(1) In addition to the requirements of subsections (2) to (4), in deciding whether or not to exercise its jurisdiction to make any partition order, amalgamation order, or aggregation order, the court shall have regard to—

(a) the opinion of the owners or shareholders as a whole; and

(b) the effect of the proposal on the interests of the owners of the land or the shareholders of the incorporation, as the case may be; and

(c) the best overall use and development of the land.

(2) The court shall not make any partition order, amalgamation order, or aggregation order affecting any land, other than land vested in a Māori incorporation, unless it is satisfied—

(a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and

(b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

(3) The court shall not make any partition order, amalgamation order, or aggregation order affecting any land vested in a Maori incorporation unless it is satisfied—

(a) that the shareholders of the incorporation to which the application relates have been given express notice of the application; and

(b) that the shareholders have passed a special resolution supporting the application.

(4) The court must not make a partition order unless it is satisfied that the partition order—

(a) is necessary to facilitate the effective operation, development, and utilisation of the land; or

(b) effects an alienation of land, by gift, to a member of the donor's whanau, being a member who is within the preferred classes of alienees.

The second judgment of the MLC

[15] We focus on the second judgment of the MLC after the rehearing directed by the MAC in its first judgment. Judge Coxhead determined that the partition order should be refused because Ms Whaanga had not satisfied the Court that partition was necessary to facilitate the effective operation, development and utilisation of the land under s 288(4)(a) of the Act.[11] In those circumstances, he did not find it necessary to consider any other aspects of the application.

[16] The Judge placed considerable importance on the existence and significance of the reserve area. He noted that the MAC in its first judgment did not appear to have had regard to the fact that the area was in use as a "place of historical, scenic and cultural interest and use" and was specifically set aside for these purposes so that the native bush could regenerate.[12] He described the reserve area in these terms:

> [12] The reserve area, which forms 80 per cent of the area sought for partition, is, if anything, the "jewel" of the block. It is this prime area which the applicant proposes to utilise in various ways for the benefit of herself and her family, and which the trustees contend is currently utilised as a reservation for the benefit of all owners.

[17] Judge Coxhead rejected Ms Whaanga's submission that she was at odds with the trustees as to what should be done with the land. He noted that the trustees sought to retain 80 per cent of the Rata land in its current form as a reservation for the benefit of all owners. It followed that there was agreement that 80 per cent of the area sought for partition should remain as native bush or regenerating native bush.

[18] The Judge went on to note that Ms Whaanga's proposals for the land were simply proposals or ideas. Research into the proposals had yet to be undertaken. Whether the projects would proceed would depend on the outcome of the research. The MLC noted that Ms Whaanga intended to build on the block at some stage but it was not clear where that would be. Nor were there details about the size of the building, its purpose or when building work would take place.

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11 Judge Coxhead also gave the first judgment of the MLC.
12 MLC second judgment, above n 3, at [11].

[19] Judge Coxhead accepted there were good intentions behind the proposals and that some work had gone into developing them. However, further work was required and there was no guarantee that the proposals would be implemented if the land were partitioned.

[20] The reasons for the MLC's conclusion that Ms Whaanga had not satisfied the Court that partition was necessary to facilitate the effective operation, development and utilisation of the land are summarised:

(a) All of the Rata land was being used: 80 per cent was a Māori reservation and the remaining 20 per cent was used for farming purposes.

(b) In 1992 the trustees of the Anewa block, including Ms Whaanga, had made a strategic decision to reserve an area to allow it to regenerate into native bush for the benefit and use of all owners.

(c) It appeared that most of the projects would be in and around the reserve.

(d) The proposed research could take place immediately without the need for a partition. In particular, the reservation order did not prohibit Ms Whaanga from undertaking the proposed research. If, at the conclusion of the research, Ms Whaanga decided that the projects were viable, the suggestion of a partition might then be reasonable.

(e) There was nothing in the evidence to suggest that the projects required outright ownership of the area other than Ms Whaanga's own desire for separate title. No issue had been raised as to bank funding being required for any of the research projects.

(f) While any activities on the remaining 20 per cent of the Rata land not in reserve would require the cooperation of the trustees, this did not appear to be the main focus of the proposal.

(g) In the Judge's view, Ms Whaanga was seeking a partition, in part, simply to separate out her whanau interests from fellow owners. These reasons were not in themselves sufficient to justify partition.

(h) An occupation order under the Act for a building was an obvious alternative to partition. This could not be rejected as an alternative simply because Ms Whaanga would prefer a partition.

The second judgment of the MAC

[21] In its second judgment, the MAC largely confined itself to a consideration of s 288(4) of the Act.[13] The MAC could not identify any error in Judge Coxhead's second judgment. In particular:

(a) The research proposed would be preliminary to undertaking some of the long-term projects and the outcome of the research would inform Ms Whaanga as to the viability of some of the proposals.

(b) The provision in the Trust order providing for leases to be granted for up to five years would be sufficient time for at least part of the proposals to be undertaken.

(c) An occupation order could be granted on part of the land if whanau members wished to build a residential property. Licences to occupy were a further option.

(d) There was nothing in the purposes of the Māori reservation preventing Ms Whaanga from using the land for the research proposals.

(e) No application had been made to vary or cancel the reservation. This was an important consideration which should not be dealt with as an aside to the partition application. If a review of the reservation were needed as Ms Whaanga had suggested, then a separate application should have been filed so the issues could have been properly canvassed with the beneficiaries. The Court had no evidence as to the

[13] MAC second judgment, above n 4.

support or otherwise of the beneficiaries for a cancellation or variation of the reservation.

(f) The Court could not give much weight to Ms Whaanga's contention that her whanau could not work with the trustees to progress the research proposals. She had conceded that she had never put the research proposals to the trustees without the partition proposal. Nor had she taken any action available under the Act to challenge or review the trustees' action or to seek a variation of the Trust order to allow for longer term leases.

[22] In the MAC, Ms Whaanga submitted that the MLC's second judgment did not reflect some of the general objectives under s 17 of the Act: the wishes of the owners; fairness in dealings with the owners; and practical solutions to problems arising in the use and management of the land.

[23] The MAC rejected these submissions. While the owners actively engaged with the land had consented to the partition, there remained 97.8 per cent of the owners whose views were unknown. It was not therefore correct to say that the wishes of the owners had not been given effect to. While the Court said it was understandable that Ms Whaanga and her whanau would feel frustrated having gone to great lengths to contact shareholders and to discuss their plans with the trustees, the MAC saw no error in Judge Coxhead's approach to the requirements of the statute. These had been crafted to ensure that all the owners are fairly treated, not just those who happen to be before the Court at any particular time. Finally, the Court considered that, to delay consideration of a partition until there was clearer evidence of the viability of the proposals and better assurance that the proposals would be carried out was eminently practical. In particular, Ms Whaanga's preliminary work on the research proposals could be undertaken without the need for a partition.

[24] The more general observations of the MAC about the partition of Maori land are of interest:[14]

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[14] MAC second judgment, above n 4.

> [31] Ms Whaanga spoke eloquently and passionately about her family's connection with the area she wishes to partition. Given the history of Māori land legislation and Māori land tenure it is understandable that many Māori shareholders would rather have their own piece of their ancestral land to do with as they wish. However, it has also been demonstrated quite clearly that where fragmentation occurs by way of partition, historically the result has often led to loss of land for the Māori owners. The intention behind the provisions of Te Ture Whenua Māori Act 1993 was without doubt to make partition more difficult in order to prevent further fragmentation and loss of land. At the same time provision had to be made for the efficient and effective management of multiply-owned Māori land. The trust and incorporation provisions of the statute provide for this purpose. The lower Court decision does not, in our view, run contrary to the overall principles of Te Ture Whenua Māori Act 1993.

[25] Finally, although it was not necessary for its decision, the MAC expressed serious reservations about the MAC's first judgment on the issue of whether there was sufficient support from the owners for the partition application:[15]

> [38] Before completing this decision we wish to comment in relation to the previous decision of the Māori Appellate Court in this matter, which found that there was sufficient support from the owners for the application. We are concerned that prospective applicants may see that decision as "lowering the bar" for partitions by seeming to allow applications where consent has been obtained from only a small percentage of owners, being those taking an active interest in the block. The previous Anewa decision must be seen as an unusual decision heard in unusual circumstances. It was very unfortunate that the trustees of the block did not attend the hearing of that appeal, so that the Māori Appellate Court did not have the benefit of considered submissions putting the case in opposition. We consider that consent from only 2.2% of the total number of beneficial owners holding 10.28% of shares is, in the ordinary run of circumstances, not sufficient support for a partition. The result of the previous appeal is therefore unlikely to be repeated except where there are extraordinary circumstances, such as the forced sale of a block which is opposed by the minority shareholders, with partition being the only way in which that minority could retain an interest in the block (see Marsh v Robertson – Karu o te Whenua B2B5B1 (1996) 19 Waikato Maniapoto Appellate Court MB 40 (19 APWM 40).

The approach to partition under pt 14 of the Act.

[26] Mr Bennion accepted that the correct approach to an application for partition of Maori land under pt 14 of the Act was as described by a full bench of the High Court in *Brown v Maori Appellate Court*.[16] We gratefully endorse all that was said in that case and need only highlight some of the key points:

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15 MAC second judgment, above n 4.

16 *Brown v Maori Appellate Court* [2001] 1 NZLR 87 (HC).

- Part 14 is not a self-contained code but is an integral part of the scheme of the Act. It is to be construed and applied in the context of the Act as a whole including the important directions in s 2, the preamble to which it refers and s 17.[17]

- Key principles of the Act are the retention of land and the facilitation of its occupation, development and utilisation.[18]

- Part 14 is concerned principally with the second of these objectives. Although pt 14 deals with rationalisation and arrangements which facilitate the use and occupation by the owners and the effective operation, development and utilisation of the land, the overall objective of retention of land as far as possible by Maori owners and their descendants is always to be promoted and facilitated where relevant.[19]

[27] With regard to the approach under ss 286 to 288 of the Act, we set out in full the following passages from *Brown*:[20]

> [48] If the two requirements of s 288(2) and (4) are met in the case of an application for partition, the Court, in deciding whether or not to grant the application, is required by s 288(1) to have regard to:
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> (a) The opinion of the owners or shareholders as a whole; and
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> (b) The effect of the proposal on the interests of the owners of the land or the shareholders of the incorporation, as the case may be; and
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> (c) The best overall use and development of the land.
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> [49] Even then, under s 287(2) the Court has a discretion whether or not to grant the application:
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> (2) The jurisdiction conferred on the Maori Land Court by this Part of the Act shall be discretionary, and, without limiting that discretion, the Court may refuse to exercise that discretion in any case if it is not satisfied that to do so in the manner sought would achieve the principal purpose of this Part of this Act.

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17 At [35].
18 At [36]–[38].
19 At [39].
20 *Brown v Maori Appellate Court,* above n 16 (emphasis in original).

> [50] The powers conferred exclusively on the Maori Land Court by Part XIV are for the purposes identified in s 286: "to facilitate the use and occupation by the owners of land owned by Maori". The statute requires particular caution in the case of title reconstruction, especially by way of partition. The Court must be satisfied that there is "a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter" (s 288(2)). And the Court must be satisfied that the partition is "*necessary* to facilitate the effective operation, development, and utilisation of the land" (s 288(4)) (emphasis added).
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> [51] "Necessary" is properly to be construed as "reasonably necessary" (*Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25 [(SC)] at p 54 per North J). We do not accept the contrary suggestion by Judge Spencer in the Maori Appellate Court, where at p 3 of his judgment he expresses the view that, in context, an order is not necessary unless "there is no other way". The Court is not required to conclude in an absolute sense that there is no other way. But the test is not a light one. Necessity is a strong concept. What may be considered reasonably necessary is closer to that which is essential than that which is simply desirable or expedient (*Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 [(CA)] at p 260 per Cooke P).
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> [52] The high threshold imposed by s 288(2) and (4) in the case of partition is consistent with the overall policy of the Act. Partition does not only separate land. Nor does it seem to me to be adequate to describe it, as Chief Judge Durie does in the Maori Appellate Court, as a mechanism for separating people. Partition which excludes owners separates those owners (and their descendants) from the land. In a statute which seeks to promote retention of land as taonga tuku iho for the owners, their whanau, hapu and their descendants, it is understandable that Parliament should require the Court to be satisfied that a partition proposal has "a sufficient degree of support … among the owners" and that it be "*necessary* to facilitate the effective operation, development, and utilisation of the land". So too, it is consistent with the overall policy of the legislation that the Court should have to further assess the matters specified in s 287 and retains a general discretion, particularly if not satisfied that the principal purpose of Part XIV will be achieved if the order is made in the "manner sought".

[28] The significant points emerging from these observations are:

- The Court has a discretion whether or not to grant the application.
- The Act requires particular caution in the case of title reconstruction, especially by way of partition.
- The Act requires a sufficient degree of support for the application among the owners having regard to the nature and importance of the matter (s 288(2)) and the Court must also be satisfied that the partition

is necessary to facilitate the effective operation, development and utilisation of the land (s 288(4)(a)).

- "Necessary" in s 288(4)(a) means reasonably necessary. That is, something closer to that which is essential than that which is simply desirable or expedient. It does not mean the applicant must establish there is no other way.

- The "high threshold" imposed by ss 288(2) and (4) is consistent with the overall policy of the Act.

The approach to this appeal

[29] Mr Bennion accepted that the decision under appeal was essentially discretionary in nature and that the onus fell upon Ms Whaanga to establish one or more of the recognised grounds of appeal in respect of decisions of that nature.[21]

[30] We observe that, to the extent Ms Whaanga challenges factual findings in the MLC and MAC, there are concurrent findings of fact in the second judgments of both the MLC and MAC.

[31] Mr Bennion submitted that some of the findings in the first judgment of the MAC were contradicted in the second judgment of that Court. The possibility of issue estoppel was raised but not developed in argument. It is sufficient to note that the focus of the first MAC judgment was on the sufficiency of support for the proposed partition whereas the second MAC judgment was concerned almost exclusively with the issue of whether partition was necessary for the purposes of s 288(4)(a) of the Act. The MAC also expressed concern in its second judgment that the trustees had not attended the MAC hearing of the first appeal and said the previous judgment should be viewed as "an unusual decision heard in unusual circumstances".[22]

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21 *May v May* (1982) 1 NZFLR 165 (CA) and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

22 MAC second judgment, above n 4, at [38].

[32] In these circumstances, we do not see any issue estoppel arising. Nor do we attach significant weight to any differences on factual matters. As already noted, the essential background facts are not in dispute and any differences there may be between the conclusions of the MAC in its second judgment as compared with the first are matters of emphasis or interpretation. We add that the MAC was entitled on the second appeal to reach its own views on the matters at issue in the light of all the evidence by then before it.

The appellant's case

[33] As developed during argument, Mr Bennion's first point was that the MAC had erred in failing to analyse whether Ms Whaanga's proposals for the land would facilitate the effective operation, development and utilisation of the land.

[34] We are satisfied that the MAC did not err on this point. First, the appellant's submission overlooks the statutory requirement under s 288(4)(a) that the Court must be satisfied that the partition is necessary to facilitate the effective operation, development and utilisation of the land. The focus of the case in both the MLC and the MAC was not on whether Ms Whaanga's proposals would achieve the purposes identified but whether partition was necessary to facilitate those purposes. For reasons we are satisfied were entirely appropriate both the MLC and MAC found that partition was not necessary to facilitate the statutory purposes as we discuss briefly below.

[35] Secondly, the judgments in the lower courts did not rule out the possibility that partition might ultimately be shown to be necessary. The essence of their reasoning was that Ms Whaanga's research into the proposals had not yet reached the point where it could be demonstrated that the statutory test could be met. Ms Whaanga accepted that the viability of the projects had not been proven and that no detailed business plan had been prepared. Although it might be necessary at a later time to borrow against the land, she said there were sufficient funds in hand to undertake the initial research.

[36] Mr Bennion's second point was that the MAC and MLC had mischaracterised the nature of the research required. He submitted that the MLC had been wrong to

describe the proposal as having two parts: first, research into feasibility; and second, depending on the research outcomes, the projects would either proceed or not. Counsel referred by way of example to the proposal to plant and harvest totara.[23] It was said this was better described as field trials requiring the planting of trees in the existing plantation (the 80 per cent of the Rata land) or on the remaining 20 per cent in pasture or regenerating bush. Counsel's point was that the trees would be planted as part of the project.

[37] We accept counsel's point so far as it goes. However it does not detract from the conclusions in the courts below that the viability of the totara planting proposals had yet to be established. We refer by way of example to the MAC's discussion of the totara project at [7] which we have cited at [13] above. Similarly with the other proposals identified at [13] above.

[38] Counsel also submitted that the lower courts had misunderstood the length of time needed to establish the projects Ms Whaanga proposes. For example, the totara plantation might take up to 70 years. We are unable to identify any misunderstanding on this point.[24]

Summary and conclusions

[39] We are not persuaded that any material error of fact or law has been established. We are satisfied that the MAC was entitled to conclude for the reasons it gave that s 288(4) was not satisfied and that the MLC had correctly declined the application for partition.

[40] The critical finding in the lower courts is that the research and field trials proposed to establish the viability of the projects on the Rata land can be undertaken without any need to partition the land. With regard to the 80 per cent of the Rata land in reserve there is no dispute that the projects can be carried out as of right within the existing purposes for which the land was reserved.[25]

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23 MLC second judgment, above n 3, at [20].
24 MAC second judgment, above n 4, at [8], cited at [13] above.
25 For "historical, scenic and cultural interest and use for the common use and benefit of all owners of Anewa".

The use by Ms Whaanga and her whanau of the remaining 20 per cent of the Rata land,[26] requires the cooperation of the trustees. Mr Lawson informed us that the intention of the trustees was to clear this land by spraying the manuka and then to farm the land in conjunction with the balance of the Anewa block.[27] However, he said the trustees were not opposed in principle to granting a lease to Ms Whaanga and her whanau for the whole of the Rata land, subject to there being sufficient support amongst the owners.

[41] Mr Lawson reiterated that Ms Whaanga had never approached the trustees to discuss a proposal that did not involve partition of the land. The trustees were opposed to partition for now since it had not been demonstrated that this was necessary. He asked the rhetorical question, where would the owners be left if partition proceeded but the projects did not in the end prove to be viable or did not proceed for that or any other reason?

[42] We agree with the lower courts that a variety of alternatives to partition exist. These include a lease or licence for up to five years. While the Trust order does not permit a longer term, the Trust order may be varied by the MLC if there is sufficient support amongst the owners. As the lower courts pointed out, an occupation order is limited to residential use but would be sufficient for the purpose of a dwelling should Ms Whaanga wish to erect one.[28] We also draw counsel's attention to s 338(12) of the Act which permits a lease of the reservation land for up to 14 years.

[43] The short point is that the existence of these alternatives strongly supports the conclusion in the courts below that partition is not necessary to facilitate the effective operation, development and utilisation of the land in terms of s 288(4)(a).

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26 Said to be between 40 and 60 acres.

27 Ms Whaanga has expressed some concerns about the intention to spray manuka but we note that any complaints against the trustees' decisions may be addressed under Pt 12 of the Te Ture Whenua Maori Act 1993.

28 Te Ture Whenua Maori Act, ss 328–329.

[44] A further significant point made by the MAC in its second judgment is the application for a partition order should have been accompanied by an application to cancel or vary the reservation.[29] That was not done.

[45] Given the limited degree of support amongst the owners, the lower courts were right to adopt the cautious approach discussed in *Brown v Maori Appellate Court*.[30] We understand Ms Whaanga's desire to obtain ownership of the Rata land to which she and her whanau have a strong historical connection. And we do not doubt the sincerity of her intentions to utilise the land appropriately. We also acknowledge the hard work she has undertaken to develop the proposals so far and to secure the support of the owners as a whole. We add that our conclusions do not rule out the possibility that she may ultimately succeed in her application. For the moment, partition is premature.

Result

[46] The appeal is dismissed.

[47] The appellant must pay costs to the respondents for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Bennion Law, Wellington for Appellant
Lawson Robinson, Napier for Respondents

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29 Section 338(5), (9) and (10) of the Te Ture Whenua Maori Act. See MAC second judgment, above n 4, at [28].

30 *Brown v Maori Appellate Court,* above n 16.