[redacted]

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2004-470-00124

UNDER	the Land Valuation Proceedings Act 1948
IN THE MATTER OF	an appeal under s26 of the Act
BETWEEN	TOA FAULKNER & OTHERS Appellant
AND	TAURANGA DISTRICT COUNCIL Respondent

Hearing: 21 May 2004

Appearances: Appellant Mr Faulkner in Person
MP Ward-Johnson for Respondent

Judgment: 2 June 2004

JUDGMENT OF COOPER J

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[1] Mr Faulkner has appealed against a decision of the Land Valuation Tribunal delivered on 19 September 2003. As the appeal deals with matters of law only, I have decided that I am able to deal with the matter sitting alone, pursuant to s13(4)(d) of the Land Valuation Proceedings Act 1948. The parties did not submit to the contrary.

[2] In its decision, the Land Valuation Tribunal dismissed an objection which had been made in respect of valuations placed on various properties owned or partly owned by Mr Faulkner and others in the district of the respondent Council. Those valuations were made under the Rating Valuations Act 1998 and Mr Faulkner and the other objectors exercised their right to object to the valuations and to require their objections to be heard by the Land Valuation Tribunal under s36 of the Act.

[3] The Tribunal recorded in its decision that Mr Faulkner is a part-owner and lessee of a multiply owned block of land known as Ohuki 1C2 and that he appeared before it as the agent for the owners of four of the other blocks in respect of which objections had been made. It recorded that evidence had been given in support of the objections by Mr Faulkner himself, and by a Mr W Paki and Mr H Wikeepa in respect of other blocks of land. It had also received evidence from a Mr Robert Smith, a kaumatua, whose evidence concerned the meaning and significance of "tikanga". No valuer was called to give evidence on behalf of the objectors. For its part, the Council was represented at the hearing before the Land Valuation Tribunal by Mr Grinlinton, who is a registered valuer employed by Quotable Value New Zealand.

[4] The Tribunal recorded at paragraph [7] of its decision that:

> The consistent theme of the objectors is simply that as the evidence of the witnesses deposed – the land in each case is customary land, it is held according to 'tikanga', the parties belong to the land, the land will never be sold, the land has a nil value for rating purposes.

Mr Faulkner's submissions in this Court essentially reiterated and amplified that argument.

[5] The Tribunal referred to submissions which had been made to it on the basis of the decision of the Court of Appeal in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 but held that that case could be distinguished on the basis that the matters before the Tribunal did not relate to foreshore or seabed, but land held in titles issued under the Land Transfer Act. In the Tribunal's view, as a matter of fact and law, all of the land relevant to the objections had the status of Maori freehold land. Further, referring to *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641, the Tribunal held that the requirements as to the method of valuing such land contained in that decision of the Court of Appeal had been met in the present case.

[6] *Valuer-General v Mangatu Inc* involved land which was Maori freehold land within the meaning of s129(1) of Te Ture Whenua Maori Act 1993. The Court held that in valuing such land under the Valuation of Land Act 1951 constraints on the alienability of such land had to be taken into account. In brief, the Court's reasons for that conclusion concerned the fact that the subject of the valuation was, under the Valuation of Land Act 1951, the "owner's estate or interest" in the land, and not a valuation of the "pure fee simple". The valuation was to be made on the statutory premise that the owner would sell its estate or interest in the land. This followed from the definition of "land value" in s2 of the Valuation of Land Act.

[7] However, in terms of the same definition, the land value was the sum which the owner's estate might be expected to realise if offered for sale on such reasonable terms as a *bona fide* seller might be expected to impose. The value was what a willing, but not anxious seller would sell for and what a willing, but not anxious buyer would be prepared to pay for the property. At page 649-650, the Court said:

> The 1993 Act imposes very significant constraints on the sale of Maori freehold land, particularly sale to a purchaser who would also seek to change its status from Maori freehold land to general land. Parliament could not have expressed the policy more clearly. Drawing on the Treaty of Waitangi and the special significance of land to Maori people, the 1993 Act reflects as the primary objective to be applied throughout the legislation and by the Maori Land Court the retention of Maori land by Maori and the use, development and control of Maori land by Maori. The machinery provisions allowing for alienation of land are directed and restricted to that end. Preferred classes of alienees have priority. Significant conditions and restrictions limit free alienability. There is no question of majority decisions of owners necessarily carrying the day. Any agreement of the owners is subject to the contingency that the Maori Land Court may in the exercise of

> its powers and responsibilities refuse to confirm the alienation or to change the status of the land.

[8] Those legal constraints on alienability were matters which had to be taken into account in determining the land value. Their effect on the saleable value of the estate or interest in the Maori freehold land to be valued was a question of fact. It was the valuer's task to determine what the hypothetical purchaser would pay to obtain the owner's estate or interest in the land, taking such matters into account. Although the Rating Valuations Act 1998 contains its own definition of "land value", it is not different in any material respect from that contained in the Valuation of Land Act 1951, construed and applied by the Court of Appeal in *Mangatu.*

[9] In the present case, the Land Valuation Tribunal for reasons which it gave held that the requirements set out in *Valuer-General v Mangatu Inc* had been met. At paragraph [11] of its decision it recorded a submission which had been made to it that the Court of Appeal's decision meant that the attachment of the family to the land and its effect on the owner's estate and interest had to be valued. Then at paragraph [12] of its decision the Tribunal said:

> This, however, is what the *Mangatu* decision determined and what the Valuer-General has put into practical effect and form by the promulgation of the guidelines relied upon by Quotable Value. The valuation may be a legal fiction because the land, we accept, will not be sold or transferred out of the hapu, but the exercise and assessment of valuation demands an assessment on the basis of a notional sale by a willing, but not anxious seller, to a hypothetical willing, but not anxious buyer. On that basis the value is established and then there is a discount granted by applying the guidelines. This is the very process that the Council valuer, Mr Grinlinton, has endeavoured to carry out by consultation and discussion with the objectors leading to his amended valuations.

[10] The Tribunal further recorded its view that the valuation methodology adopted by Mr Grinlinton was appropriate and held that it was clear that the values he had placed on the land at issue had been conservative (paragraph [15] of its decision). Having expressed that general conclusion, it then went on to deal with each of the individual properties and referred in particular at paragraph [20] to evidence presented to it by Mr Faulkner in the following terms:

> Mr Faulkner's evidence was that the land has been in the hands of his ancestors since before records began, that the land is "tikanga" and therefore has no value for sale for their relation with the land will never end. However

> it is clear that there must be a rental payment by the lessees to the Trust and one would have to assume that that rental is based on a commercial basis in reference to the production capability of the land and the value of the land. Be that as it may, the main argument, of course, is that this is customary land. I have already ruled that it is not customary land and that is confirmed, and was confirmed, by the earlier decision of Blanchard J, High Court, Rotorua *Faulkner v Tauranga District Council* [1996] 1 NZLR 357. There is nothing in the recent statements of the Court of Appeal in the *Ngati Apa* decision which can affect that view or decision. This is Maori freehold land.

[11] Its conclusion was that the valuations assessed by Quotable Value on behalf of the Tauranga District Council were appropriate and there had been no evidence called so as to satisfy the burden of the objectors to establish that the valuations were wrong.

[12] The decision of the Land Valuation Tribunal which is subject to this appeal was made in respect of a district valuation roll prepared under the provisions of the Rating Valuations Act 1998. That Act contained some special provisions dealing with the determination of rateable values, but it was not suggested in argument before me (or apparently, the Tribunal) that any of those provisions was germane to the matters raised by the objection.

[13] The proceeding in this Court was commenced by Mr Faulkner lodging a "notice of motion by way of appeal" from the decision of the Land Valuation Tribunal, on the basis that it was "against the weight of evidence, and wrong in fact and in law". The appeal was dated 30 January 2004 and received in the Court's Tauranga Registry on that day. On 19 March 2004 Gendall J retrospectively granted leave to file the appeal out of time and directed, amongst other things, that points on appeal be filed no later than 21 days prior to the hearing of the appeal. Mr Faulkner filed points of appeal on 30 April alleging that the Tribunal had erred:

(a) In concluding that as a matter of fact and law the land has the status of Maori freehold land.

(b) In failing to properly consider that, under Te Ture Whenua Act 1993, "even though land may have the status of Maori freehold land, any such land held in accordance with Tikanga Maori shall have the status of Maori customary land".

(c) In failing to consider the "common law Privy Council ruling of Lord Phillamore [Tamaki case] that despite Crown grants – all land in New Zealand remains of unextinguished customary title".

(d) In failing to consider that "the land in question is the subject of a Treaty of Waitangi Tribunal claim that the Matapihi Block which was taken by the Crown by Statute (or confiscation) was unjustified, unlawful and a breach of the Treaty of Waitangi principles...".

[14] As to the first alleged error, nothing which Mr Faulkner said before me established that the Tribunal had made any error in treating the land as Maori freehold land. In fact, the same land has been the subject of previous litigation between Mr Faulkner and the Council. In that litigation, the issue raised was the slightly different one that because the land was Maori customary land it could not be liable for general rates. Nevertheless, it is plain from the judgment of Blanchard J, reported as *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 that all of the issues which Mr Faulkner has traversed before me were also dealt with in that case.

[15] Blanchard J comprehensively reviewed the history of the land starting at the point when, prior to the Treaty of Waitangi, it was acquired by Ngaiterangi by conquest, referring to its subsequent inclusion in a district created by proclamation under the New Zealand Settlements Act 1863, the subsequent passage of the Tauranga District Lands Act 1867 and inclusion of the land in the schedule of that Act (as amended in 1868). His Honour held that the effect of the Tauranga District Lands Act 1867 was that customary title had been extinguished in respect of the land to which it applied. His Honour further said at page 365:

> If there could be any doubt on this point it seems to me that it was well and truly settled by the Native Land Court Act 1894. If the Ohuki block remained "customary land" as defined in that Act ("owned by Natives under their customs and usages, the owners whereof have been ascertained by the Court *or other duly- constituted authority*" (such as a commissioner)), (emphasis added), s 73 provided for the land to "thenceforth be and become" subject to the provisions of the Land Transfer Act and for the owners, subject to all equities affecting them and to all existing restrictions on alienation, to be deemed to be the proprietors of an estate in fee simple. It is to be noted that the legislature saw nothing inconsistent in a fee simple which was subject to restrictions on alienation.

[16] The Court's conclusions were set out at pages 366-367 as follows:

> In this case I find that the Crown extinguished the Crown-recognised customary title when it took the district by statute. It no longer recognised the former customary title. But, in accordance with the bargain reached at the pacification meeting, three-quarters of the district including the Ohuki block was later vested back in Maori ownership in undivided shares when the commissioner issued certificates. From that point on the Native Land Court (later the Maori Land Court), correctly in my view, treated the land as Maori freehold land. If there were any doubt about the position it was laid to rest by s 73 of the 1894 Act and, if that were not enough, by the issue of a certificate of title under the Land Transfer Act 1952.
>
> I conclude that Judge Thomas was correct in determining that the Ohuki no 1C2 block is not customary land and that the respondent is entitled to recover general rates on it for the 1992/1993 rating year. The appeal is dismissed.

[17] Mr Faulkner has not urged any matters before me which indicate any basis upon which I might reach a different conclusion from that reached by Blanchard J. Having considered the judgment, I express my respectful agreement with it. I consider that the Land Valuation was quite correct to apply it. I also consider that the Land Valuation Tribunal was correct in its conclusion that there is nothing in the decision of the Court of Appeal in *Attorney-General v Ngati Apa* which leads to a different conclusion. Indeed, the Court of Appeal's decision in that case is not only consistent with Blanchard J's decision in *Faulkner v Tauranga District Council*, but it also shows that the other legal issues which Mr Faulkner purported to raise in this case cannot be sustained. All of the judgments in that case recognise that customary title may be extinguished by statute.

[18] At paragraph [47] for example, Elias CJ said:

> What is of significance in the present appeal is that New Zealand legislation has assumed the continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority.

[19] Gault P, referring to s129 of Te Ture Whenua Maori Act 1993 said, at paragraph [99]:

> By s129 all land in New Zealand must have one of the statuses listed in that subsection. Subsection (2), if intended to be comprehensive, leaves some difficult questions as to the status of some land not easily fitting the descriptions provided. The underlying intention seems to be that once land has been vested in fee simple (that is a Crown grant has issued), so long as the estate subsists (whoever may own it) it cannot have the status of Maori customary land. That is consistent with the conventional approach to native title claims. They are extinguished in respect of land that has been alienated by the Crown as by a Crown grant or consequent upon Crown purchase: *R v Symonds* [1847] NZPCC 387 at p391, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. It is common ground also that they cannot survive the enactment of legislative provisions that are clearly inconsistent with their continued existence.

[20] At paragraph [185] Tipping J observed:

> It follows that as Maori customary land is an ingredient of the common law of New Zealand, title to it must be lawfully extinguished before it can be regarded as ceasing to exist. In this respect Maori customary title is no different from any other common law interest which continues to exist unless and until it is lawfully abrogated. In the case of Maori customary land the only two mechanisms available for such abrogation, short of disposition or lawful change of status, are an Act of Parliament or a decision of a competent Court amending the common law. But in view of the nature of Maori customary title, underpinned as it is by the Treaty of Waitangi, and now by Te Ture Whenua Maori Act 1993, no Court having jurisdiction in New Zealand can properly extinguish Maori customary title. Undoubtedly Parliament is capable of effecting such extinguishment but, again in view of the importance of the subject matter, Parliament would need to make its intention crystal clear. In other words Parliament's purpose would need to be demonstrated by express words or at least by necessary implication.

[21] Finally, recognition that Maori customary title may be extinguished by statute is central to the reasoning of the joint judgment of Keith and Anderson JJ who expressly recognised that native property or title can be extinguished (paragraph [147]), and then extensively discussed various statutes (paragraphs [151] – [180]) for the purpose (paragraph [150]) of answering the question:

> ...whether the legislation to which we have been referred has extinguished the property which is the subject of the present proceedings.

[22] In my view, Blanchard J's decision in *Faulkner v Tauranga District Council* must be seen as holding that there had been an extinguishment of the customary title to the subject land. He further held that the land was properly to be classified as Maori freehold land. In my view, it is plainly untenable for Mr Faulkner now to assert that the land should have any other status under s129 of Te Ture Whenua

Maori Act 1993, and his argument that somehow all land in New Zealand "remains of unextinguished customary title" is patently wrong.

[23] Nor can the unresolved Treaty of Waitangi claim make a difference. The task of the Council, and of the Land Valuation Tribunal in resolving the objection, was to ensure that the land was properly valued in the district valuation roll. That required a proper consideration of the matters relevant to its present status as Maori freehold land, as explained by the Court of Appeal in *Valuer-General v Mangatu Inc.*

[24] In advancing his argument at the hearing, Mr Faulkner mounted what can only be described as a wide-ranging attack on this country's constitutional arrangements and institutions. At its heart was an assertion that all land in New Zealand was, and remains, in Maori ownership, and that successive Acts of Parliament (including, I infer the Land Transfer Act 1952) have been unlawfully made, effectively in usurpation of rights belonging to Maori. Notwithstanding the sincerity with which Mr Faulkner holds those views, they cannot in my view determine the proper outcome of this appeal.

[25] The Land Valuation Tribunal is a creature of statute constituted under s19 of the Land Valuation Proceedings Act 1948. It has powers given it by that Act, and a range of other statutes. Its task in the present case was to determine whether land values had properly been stated for the subject land in the Tauranga district valuation roll. Similarly, on appeal to this Court, my function is to determine whether or not any error is apparent in the Tribunal's conclusions, or as to the manner in which it went about reaching them. I can find no such error and neither was I pointed to one by Mr Faulkner.

[26] Ultimately, it seems to me that his complaint could be summarised as being that the Tribunal made a decision in accordance with its statutory responsibilities. That is a ground for complaint because the statutes which it applied have over-ridden rights which Mr Faulkner claims were inalienable. But the appeal has to be determined according to law.

[27] The appeal is dismissed. If the respondent wishes to apply for costs, it should file and serve a memorandum within 14 days of the date of this judgment. Mr Faulkner is granted 21 days thereafter to respond.

Hillbogger J.

Delivered at 4.00 ~~a.m.~~/p.m. on 2 June 2004.