IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2009-488-000547

UNDER	the Property Law Act 2007
IN THE MATTER OF	an Application for Partition Order
BETWEEN	JOCELYN BAYLY Applicant
AND	MARION HICKS JOHN HICKS Respondents

Hearing: 27 - 30 July, 1, 4 & 5 August 2011

Counsel: WGC Templeton for the Applicant
K Glover for the Respondents

Judgment: 19 August 2011

INTERIM RESERVED JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 19 August 2011 at 4.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Distribution:
WGC Templeton: wgctempleton@xtra.co.nz
K Glover: kglover@shortlandchambers.co.nz

[1] The plaintiff, Mrs Bayly ("Jocelyn"), and the defendant, Mrs Hicks ("Marion"), are sisters. They have ultimately inherited a coastal farming property known as Paihia following on from their late father's death. Jocelyn now holds an undivided one-half share in the property, and Marion and her husband John, as trustees of a family trust, hold the other undivided one-half share. Both now wish to partition the property. However, they have been unable to agree on the basis of any partition.

Background

[2] The Bayly family has farmed in the Bay of Islands for many years. The original family farm was known as Wairoa. Jocelyn and Marion's grandfather purchased Wairoa in 1929. It comprises 516 hectares and it has been successfully developed as a farming property.

[3] Jocelyn and Marion's late father, Roger Bayly, took over the ownership of Wairoa in 1955. He and another person acquired Paihia in the 1960's. He subsequently bought out the other owner. Paihia is immediately to the north of Wairoa and it shares a common boundary with Wairoa.

[4] Mr and Mrs Bayly senior had four children: Jocelyn, Marion, another daughter, Alison, and a son, Charles. Alison has Down syndrome and she is confined almost permanently to the Hohepa Home near Napier.

[5] Jocelyn and her husband, also called John, were married in 1981. They initially farmed a property in Matamata. They were invited by the late Mr Bayly to return to Wairoa and take over running that farm and the adjoining farm on Paihia. They agreed to do so and returned to Wairoa in early 1985.

[6] In or about October 1985, Mr Bayly senior was diagnosed with terminal cancer. He died some two months later on 10 December 1985. Prior to his death he organised a family meeting and endeavoured to sort out the family affairs. At the time of his death, the family's farming interests, either held directly by Mr Bayly senior, or through trusts, comprised Wairoa, Paihia, a development site which was in large part on Wairoa and also to a lesser extent on Paihia, a farm known as the Toko

Farm in Taranaki, and a dairy unit known as The Woods Dairy Farm, also in Taranaki.

[7] Marion annexed a copy of her father's will to one of her affidavits. It is a complicated document. Mr Bayly senior sought to dispose not only of property owned directly by him, but also to control the disposition of properties owned by various trusts. It further sought to deal with debts owing by various members of the family to others arising from different transactions in the past.

[8] I do not need to set out the terms of the will in detail. It suffices to record that subsequent to Mr Bayly's death, the following arrangements were put in place:

(a) Wairoa was held on trust for Jocelyn.

(b) Paihia was held on trust for Jocelyn and Marion.

(c) Jocelyn received all of the stock and plant associated with the Paihia and Wairoa properties.

(d) The trustees of Wairoa were instructed to proceed with the plans for the development site. If it went ahead, the development was to be sold and the proceeds were to go to Charles, Jocelyn and Marion. If the development did not take place within 10 years, the land was to revert to the underlying property owners, being predominantly the Wairoa trustees, and in small part, the Paihia trustees.

(e) The Woods Dairy Farm along with the stock and plant on that property were divided into shares. A half share was left to Mrs Bayly senior. The other half share was left as to two thirds to Marion and one third to Charles.

(f) The Toko Farm was left to Charles.

[9] In the event, the proposed development did not proceed. There were various disputes and consequentially delays in putting into effect the arrangements

contemplated in the late Mr Bayly's will, as well as problems with the co-ownership of Paihia.

[10] Over time family relationships deteriorated.

[11] Family members attended a mediation in about 2000. They were unable to resolve their differences, with Charles issuing proceedings in 2002. These differences were eventually settled in 2005. Also in 2005, Jocelyn and her husband John took over the trusteeship of the Wairoa Trust. Paihia was transferred by way of distribution to Jocelyn personally as to an undivided one-half share, and to Marion and her husband John, as trustees of their family trust, as to the other undivided one-half share. This transfer was subject to a lease that had been put in place by the trustees of the Paihia Trust as lessor, with the lessee being a family company owned by Jocelyn and her husband, called J & J Bayly Company Limited. Under the lease J & J Bayly Company Limited were to farm Paihia and pay an annual rental of $14,000. Marion was to receive 50 per cent of this rental payment, namely $7,000 per year. Marion has deposed that J & J Bayly Farming Company Limited did not initially pay any rental at all.

[12] The arrangements in respect of Paihia soon proved to be unsatisfactory. Both Marion and Jocelyn have made various attempts over the years to try and resolve matters between them. Proposed partition lines have been suggested and rejected by both sides. They have been unable to agree on a division. They are at an impasse and there is now little or no constructive dialogue between them.

[13] Mrs Bayly senior died in January 2009. She left the residue of her estate to Jocelyn.

[14] Jocelyn and her husband are farmers. They farm Wairoa, and it is Jocelyn's present intention to farm that part of Paihia as becomes hers following a partition. She does not rule out development and subdivision of the property in the longer term.

[15] Marion and her husband John live in Auckland. They are not farmers but they have a very real affection for Paihia. It is their present intention to lease out

whatever part of the property ultimately vests in them in an endeavour to produce sufficient income so that they can maintain the balance of the property. If they are unable to produce sufficient income, then they will consider the development and subdivision of their property, at least in part.

[16] Much more detail is given in the affidavits that have been filed by Jocelyn, Marion, the late Mrs Bayly, and John Bayly. There are differences between them in their respective recollections of events, and all have their own view on what is undoubtedly an unfortunate family breakdown. Nothing is to be gained by reciting this material. It is of peripheral and background interest only. One thing Jocelyn and Marion do agree on is that a partition needs to be finally determined.

Partition – Relevant law

[17] Partition destroys the unity in possession enjoyed by the co-owners of property by the division of the land held in co-ownership into parts to be held by the former co-owners in separate ownership.[1] It is a method of determining the co-ownership of property held either as joint tenants or as tenants in common.

[18] Partition can be either voluntary or compulsory.

[19] If voluntary, it is achieved by the co-owners subdividing the property, and then joining in a memorandum of transfer of each newly created lot to the individual owners. In such situations, they can decide for themselves exactly how the partition is to be made and they are not fixed with the shares in which they initially held the property.

[20] At common law, joint tenants and tenants in common had no legal right to compel partition. In the United Kingdom joint tenants and tenants in common were given a statutory right to partition by the Partition Acts 1539 and 1540. One co-owner could insist on partition and the Court had no jurisdiction to refuse, however inconvenient the result might be. These statutes applied in New Zealand.[2]

---

[1] Hinde, McMorland and Sim *Land Law in New Zealand* (Looseleaf ed, Lexis Nexis) at [13.018]; Bennion et al *New Zealand Land Law* (2nd ed, Brookers, Wellington 2009) at [6.7].

[2] Imperial Laws Application Act 1988, s 3(1); *Fleming v Hargreaves* [1976] 1 NZLR 123 at 127 (CA), and see the discussion in *Patel v Premabhai* [1954] AC 35 (PC) at 41 to 43.

There were difficulties with this legislation and it was ultimately amended, both in the United Kingdom and in New Zealand, so that on a partition application the Court had power to order a sale of the property and division of the proceeds instead of partition.[3] Indeed, where the owner or owners of one moiety or upwards in the land, requested the Court to direct a sale instead of a division of the property, the Court was required to order a sale, unless it saw good reason to the contrary. The burden of showing that there was good reason for a partition instead of a sale rested on those opposing the sale.[4]

[21] In 2007, the old UK partition acts were repealed. So was s 140 of the Property Law Act 1952.[5] The Property Law Act 2007 ("the Act") put new provisions in place governing partition.

[22] Part 6 of the Act confers special powers on the Court to deal with a range of specified situations where interests in land are in issue. Subpart 5 deals with the division of property among co-owners. Relevantly, s 339 provides as follows:

> **339 Court may order division of property**
>
> (1) A court may make, in respect of property owned by co-owners, an order—
>
> (a) for the sale of the property and the division of the proceeds among the co-owners; or
>
> (b) for the division of the property in kind among the co-owners; or
>
> (c) requiring 1 or more co-owners to purchase the share in the property of 1 or more other co-owners at a fair and reasonable price.
>
> (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
>
> (a) despite anything to the contrary in the Land Transfer Act 1952; but
>
> (b) only if it does not contravene section 340(1); and
>
> (c) only on an application made and served in the manner required by or under section 341; and

---

3 Property Law Act 1952 (NZ), s 140.

4 *Polden v Rowling* [1958] NZLR 31 (NZSC); *Wallace v Cottingham* (1999) 4 NZ ConvC 192,890 (CA) per Blanchard J at 192, 895.

5 Property Law Act 2007, s 365.

(d) only after having regard to the matters specified in section 342.

(3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.

(4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.

(5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).

…

[23] This section extends the Court's powers. Under the old UK Partition Acts and the Property Law Act 1952, the Court could only order a partition if it had been requested or direct a sale. Section 339 now gives the Court a discretion to order or refuse either a sale or a partition, andthe power to require one or more co-owners to purchase the share of the other co-owner or co-owners at a fair and reasonable price.[6]

[24] In the present case, both parties seek an order under s 339(1)(b). Marion initially sought a sale under s 339(1)(a), but she has since abandoned that request. Neither party seeks an order under s 339(1)(c) as it is an option that neither can afford.

[25] The expression "in kind" used in s 339(1)(b) must be taken as referring to the property the subject of the application. The subsection envisages division and then allocation of the resulting lots between co-owners. In my view, the overall objective of a partition is to achieve fairness between co-owners when it comes to a division of their common property. To this end, the Court must have power to fix a partition line, and to allocate the divided property among the co-owners. If necessary it can require the payment of compensation if there is an unavoidable discrepancy.[7]

---

6 In *Holster v Grafton* (2008) 9 NZCPR 314 (HC) Fogarty J expressed the view, obiter, that s 339(1)(c) does not expressly enable the Court to impose a sale by valuation upon a co-owner who does not wish to sell his or her share. If a valuation represents a fair and reasonable price then, with respect, it seems to me that the Court can require a co-owner to purchase. That is the effect of s 339(1)(c). The Court does not, however, have express power to order the other co-owner(s) to sell. Quaere whether s 343(g) extends to permit further orders to that effect, or whether the discretion conferred by s 339(1)(c) is only open where one co-owner(s) wishes to sell.

7 Section 343(1)(a).

[26] Pursuant to s 339(2)(c), an order under subs (1) can only be made on an application made and served under s 341.

[27] Under s 341(1), a co-owner of the property can make an application. A co-owner is defined in the Act to mean a tenant in common or a joint tenant.[8] Here, the application is made by Jocelyn as a tenant in common.

[28] Pursuant to s 341(2), the application was required to be served on any person who has an interest in the property that may be affected by the granting of the application. Jocelyn applied for directions as to service as long ago as August 2009. She proposed to serve Marion, John Hicks, Brookfields Nominee Company Limited as the mortgagee and the Far North District Council. Associate Judge Christiansen made directions to this end on 24 August 2009. The application has been served on Marion and her husband John as co-owners, and on the sole mortgagee, Brookfields Solicitors Nominee Company Limited. Brookfields has taken no part in the proceeding. The Far North District Council was also served. It filed affidavits as an interested party and two of its deponents appeared at the hearing at my request to clarify certain issues. The council, however, did not take any active stance at the hearing. For some reason the owners of a property at Days Point were not served. That property enjoys a right of way over one of the titles comprising Paihia. The right of way was created by Transfer D 228646.2, which was registered in 1997. It seems to me that the owner of Days Point should have been served under s 341(2). They are entitled to a benefit under an instrument relating to the property, and the partition proposals have the potential to affect the right of way. Associate Judge Christiansen did not expressly dispense with service on the owners of Days Point and the issue was not covered in the without notice memorandum filed on Jocelyn's behalf and dated 20 August 2009. I come back to this matter below.

[29] As noted in s 339(2), an order under subs 339(1) may be made only if it does not contravene s 340(1). Section 340(1) provides as follows:

> **340 Order under section 339(1)(b) subject to restrictions on subdivision of land**

---

[8] Section 4.

(1) No order under section 339(1)(b) (and no related order under section 339(4)) may subdivide land contrary to section 11 or Part 10 of the Resource Management Act 1991.

…

[30] I do not read this provision as limiting the Court's jurisdiction to proposed partitions that have resource consent.

[31] In this application Jocelyn has proposed a partition line. She has obtained resource consent from the Far North District Council for her proposal.. As a consequence the subdivision proposed by her complies with s 11 and Part 10 of the Resource Management Act 1991. Mr Templeton on Jocelyn's behalf submitted that Jocelyn's proposal was the only complying partition before the Court, and that the alternative proposals advanced by Marion do not have consent. Mr Templeton is correct but I do not consider that the Court's discretion under s 339(1) is constrained so that its only function is to approve or disapprove a complying partition proposal. The restriction contained in s 340(1) does not preclude the Court from making an order for partition. Rather, it provides that no order made under s 339(1)(b) may subdivide land if the subdivision does not comply with the relevant provisions in the Resource Management Act. Land is not subdivided because an order for partition is made.[9] Partition is a two-stage process: first, there is the making of the decree and secondly, there is the subdivision of the property.[10] As is noted in *Land Law in New Zealand*, in some cases it may be possible to finalise both stages in one judgment.[11] In others, only the first stage may be dealt with initially. If the circumstances do not permit completion of the second stage, an order for partition can be made subject to compliance with s 340(1).[12] If the requisite consents cannot be obtained then the Court can fall back on its powers under s 339(1)(a) and/or (c).

[32] Section 342 sets out the relevant considerations that the Court must consider when exercising its powers under s 339. It provides as follows:

342 Relevant considerations

---

9 *Patel v Premabhai* [1954] AC 35 (PC); *Harley v Registrar-General of Land* [2010] 3 NZLR 120.

10 *Patel*, op cit at 45–48.

11 Hinde, McMorland and Sim, op cit, at [13.021(b)].

12 Ibid, at [13.021(b)]. I note that a staged partition where the Court made orders subject to resource consent being obtain was undertaken in *Robertson v Gilbert* HC Auckland CIV 2001-404-3141, 20 July 2007. An application for an extension of time to appeal this decision was dismissed in *Robertson v Gilbert* [2010] NZCA 429 (CA).

> A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:
>
> (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:
>
> (b) the nature and location of the property:
>
> (c) the number of other co-owners and the extent of their shares:
>
> (d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:
>
> (e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:
>
> (f) any other matters the court considers relevant.

[33] The words "must have regard to" are not synonymous with "shall take into account".[13] Nor do they mean "give effect to".[14] The Court cannot ignore the listed factors. They must be given genuine thought and consideration and such weight as the Court considers appropriate. However, they will not necessarily be decisive in determining whether an order should be made.[15]

[34] In addition to its powers under s 339(1), the Court can make further orders under s 339(4). The further orders that can be made are not expressly spelt out in the Act. Rather, s 343 details the further orders that can be made by reference to their effect. It provides as follows:

> **343 Further powers of court**
>
> A further order referred to in section 339(4) is an order that is made in addition to an order under section 339(1) and that does all or any of the following:
>
> (a) requires the payment of compensation by 1 or more co-owners of the property to 1 or more other co-owners:
>
> (b) fixes a reserve price on any sale of the property:

---

13 *R v CD* [1976] 1 NZLR 436 (NZSC) at 437 per Somers J.

14 *New Zealand Fishing Industry v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 551 and 556.

15 *New Zealand Co-Operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 at 612, *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 at 487-8.

(c) directs how the expenses of any sale or division of the property are to be borne:

(d) directs how the proceeds of any sale of the property, and any interest on the purchase amount, are to be divided or applied:

(e) allows a co-owner, on a sale of the property, to make an offer for it, on any terms the court considers reasonable concerning—

(i) the non-payment of a deposit; or

(ii) the setting-off or accounting for all or part of the purchase price instead of paying it in cash:

(f) requires the payment by any person of a fair occupation rent for all or any part of the property:

(g) provides for, or requires, any other matters or steps the court considers necessary or desirable as a consequence of the making of the order under section 339(1).

[35] The power to make a further order requiring the payment of compensation is likely to assist where a partition cannot or does not produce a fair division between co-owners. The power to make a further order providing for, or requiring other matters or steps is likely to help resolve any practical issues of detail. It may also assist in tidying up issues which arise consequent on a partition, for example, in this case by providing for the payment of postponed rates in the event that they become payable as a result of partition.

[36] Finally, I note that under s 339(3), the Court can order that the property be valued. I observe that the Court can also fall back on the High Court Rules, which give it additional powers such as the power to appoint, on its own initiative, independent experts to inquire into and report upon any question of fact or opinion.[16]

[37] In summary, the various provisions relevant to the division of co-owned property give the Court extensive discretions, and, together with the High Court Rules, a formidable armoury to effect a fair and reasonable division.

---

[16] High Court Rules, r 9.36.

Relevant Considerations

[38] Before considering the partition lines proposed by the parties, or any alternative partition, it is necessary to have regard to the relevant considerations detailed in s 342. I consider each in turn:

a) The extent of the share in the property of Jocelyn as the co-owner making application.

[39] Here, Jocelyn has a one-half share in Paihia. So do Marion and her husband. Their equal shares in the property are an important and, in my judgement, a constraining factor. They must form the basis for any partition. The policy of the statute is to respect the property rights of the parties while seeking to resolve conflicts fairly.[17] A division which did not recognise insofar as is practicable their equal shares in the property would be neither fair nor reasonable.

b) The nature and location of the property

[40] Paihia is in very many respects a unique property. It is in a prime coastal location. It is located approximately five kilometres north of the Waitangi and Paihia townships and 10 kilometres east of Kerikeri. Road access is via Kerikeri. A road known as Wharau Road runs for a short distance along part of the western boundary of the property at its northern end. Services are available to the boundary.

[41] The property is presently in two titles:

(a) The northern title comprises Lot 3 DP 334799, computer freehold register 142598, North Auckland Land Registration District. This title is limited as to parcels. The area shown on the title is 238.5105 hectares. A Mr Donaldson, a surveyor who was appointed by the parties for this purpose at my request, has completed a survey. His survey establishes that the actual area of land in the title is 273.8420 hectares. The difference is 35.3315 hectares.

---

[17] *Holster v Grafton*, op cit, at [50]; *Western v Abdoelrahman* HC Auckland CIV 2010-404-2998, 11 March 2011; *Scott v Scott (No 2)* HC Tauranga CIV 2004-470-0094/CIV 2004-470-0957, 5 August 2009 at [54].

(b) The second title is to the west and south. It is computer freehold register NA 5D/1436, and it comprises part section 37 and part sections 57 to 58, block X11 Kerikeri Survey District and Lots 4 to 6 to DP 51237. This title has an area of 158.0710 hectares.[18]

A plan showing the title boundaries is annexed and marked as "A".

[42] There is a small strip of Crown land between the low water mark and the high water mark on Onewhero Bay. That strip of land runs the full length of the bay and comprises 8 hectares. It has a separate title: CT 399/140. It is vested in the Bay of Islands Harbour Board. However, the Harbour Board is no longer in existence. It seems that its assets were vested in the Northland Harbour Board but that body was disbanded in 1989. It was not clear from the evidence who now owns this narrow strip of land. It is shown in the Council's District Plan as a conservation area but it is acknowledged by the Council that this is an error. The Council has no jurisdiction over land below mean high water springs. Unfortunately, this title is not shown on annexure "A".

[43] The sea forms the northen boundary of Paihia and much of its eastern boundary. Part of its eastern boundary adjoins a sandy beach called Onewhero Bay. The beach is approximately 1.4 kilometres long. The sand is a reddish-gold colour, and the beach is pristine. At either end of the beach there is a small headland, which offers some protection. The southern headland and the southern end of the beach are on Wairoa. But for the headlands, the beach is open to the sea and it is exposed in an easterly wind. A row of Pohutukawa trees has been planted on a low ridge or rise immediately landward of the beach.

[44] Onewhero Bay is a superb beach. The evidence established that it is one of the finest beaches in the Bay of Islands. It offers superb swimming and recreational opportunities. It has a safe sandy bottom, clear water, and at present, exclusive privacy. It is unique given its quality and its location.

---

18 In an affidavit dated 12 August 2011, Mr Donaldson states that this title records the correct area. He states that that area is 157.0710 hectares. I suspect that there is a typographical error in his affidavit.

[45] There is a low and relatively narrow ridge immediately behind Onewhero Bay. It runs the full length of the bay. It is common ground that this ridge provides excellent development sites of very high value.

[46] There is then a wider area in pasture with a semi-formed access track running across it in a north-south direction. Further to the west there are some wetlands. To the west of the wetlands, the land rises to a ridge. The ridge runs in a general north-south direction, rising from Wairoa in the south to the headland in the north. It forms a crescent overlooking Onewhero Bay and it creates a natural amphitheatre with the bay in the foreground. It affords panoramic and uninterrupted views over the beach and the Bay of Islands. To the west of the ridge, the land slopes gently away, although there are some higher points. To the south, the land drops away to form a large basin which adjoins Wairoa. There are two significant wetland areas, one in the southwestern corner of the property, and the other in a northwestern corner. There are smaller wetlands in other areas.

[47] The land to the north comprises a headland. The headland is relatively gentle country, although it does slope downwards towards the sea and fall away quite steeply at the coast. The headland is intersected by a number of gullies, some of which have bush in them. The gullies and the ridges run generally in a north-south direction. There are magnificent views to the north over the Kerikeri inlet and also to the east over Days Point and the Bay of Islands.

[48] There are a number of secluded and intimate beaches around this headland. There are three on the eastern coastline to the north of Onewhero Bay. Each of these beaches is a sandy beach, fringed by Pohutukawa and intimate in scale. Two of the beaches can be accessed via walking tracks down through bush-clad gullies, although the tracks are in poor condition. The northernmost beach is accessed from the middle beach via a short cave. The southernmost beach is accessed by climbing over a low stonewall built by the late Mr Bayly or via an access track. There are also two beaches on the northern coast. The beach closest to the northwestern boundary of the headland is a very pleasant beach, less intimate than the headland beaches on the eastern coastline, but nevertheless, pleasant and sheltered. It does have some sand but it also has a significant number of rocks. The other beach on the northern coastland is rather rockier, and, again in my view, rather less attractive than the other

headland beaches. It has little sand and I suspect that it offers more limited swimming opportunities.

[49] I agree with Mr Glover's submission that the beach at Onewhero Bay is the dominant and most attractive feature of the property. The beaches on the northern headland each have their own attractions, but they do not offer the sweep of sand or rival the scale of Onewhero Bay.

[50] Jocelyn and her husband through their farming company currently farm Paihia. They use the property to graze cattle and sheep. The property is fenced, but there are no stock handling facilities on the farm. The evidence suggested that Wairoa is the focus of Jocelyn and her husband's farming operations.

[51] Some parts of Paihia are obviously suitable for farming, while other parts are not. I refer in particular to the wetland areas and to some of the gullies on the northern headland. Indeed, some of the wetlands have been fenced off by the Department of Conservation. Some areas, in particular the northern headland, the land immediately behind Onewhero Bay and the ridge to the west, are more suitable for development than farming. Although the property is currently used for farming, its underlying value stems from its development potential.

[52] In my judgement, the land breaks down into three main areas.[19] First, there is Onewhero Bay, the development land on the low ridge immediately to the landward side of the bay, and then the land on the higher ridge to the west of the wetlands. Secondly, there is the productive farming land to the west and southwest of the high ridge. Finally, there is the northern headland, which presents considerable development potential.

[53] I annex an aerial photograph marked "B". It assists in giving an overall impression of the property.

[54] There are three other features I should note.

---

[19] I note that Mr Nicholls agreed with this view, see the Court transcript at 173.

[55] First, there is the right of way serving the property at Days Point. For the most part it runs along the crest of the northern headland from Wairoa Road to Days Point. The right of way is well-constructed and in good condition.

[56] Secondly, Marion and her husband have located a transportable bach onto the property. That bach is situated just back from the seafront towards the northern end of Onewhero Bay. It faces out over the bay, and it is in a wonderful location. It is a relatively modest structure. It is built on piles and appears to be readily relocatable. At the time that the bach was positioned on the property, both Paihia and Wairoa were held in trust. There is a dispute between the parties as to whether or not the trustees consented to the location of the bach on the property. I am unable to resolve that dispute in the current proceedings, but I doubt that it is particularly relevant. It suffices to record that Jocelyn objects to the bach and that she has not consented to it being located on the property. It is common ground that Marion and her husband did not obtain resource consent from the Far North District Council to locate the bach on the property. The Far North District Council has issued an abatement notice, but it is taking no further action until the current dispute is resolved. Marion and her husband have acknowledged that they will have to obtain consent from the Council and that it may ultimately be necessary for them to relocate the bach.

[57] Finally, Jocelyn and her husband have converted some sheds on Wairoa, at the southern end of Onewhero Bay, to provide limited accommodation and relatively basic facilities. The location is once again superb. They did not obtain resource consent either, although I note Jocelyn's assertion that no resource consent was required.

[58] I should record that I spent the larger part of a day on the property in the company of counsel, the Registrar, and two drivers approved by the parties. We travelled over much of the property. I found that visit invaluable. It has very much assisted me in forming my views in relation to this matter.

c) The number of co-owners – the extent of their shares

[59] In this case, this issue is subsumed under s 342(a). As already noted, there are two co-owners, each owning an undivided one half share of the property.

d) Hardship

[60] There has been little discussion of the meaning of the word "hardship" in the context of s 342. In *Holster v Grafton*, Fogarty J observed as follows:[20]

> "Hardship" is a value laden criterion. It suggests an adverse effect which is of significant impact to the applicant. It has to be read consistent with the policy of the statute which respects property rights of tenants in common, but seeks to resolve conflicts fairly…

[61] Here, in my judgment, hardship needs to be considered both in the round and by reference to the partition proposals advanced by the parties, particularly the partition proposal for which Jocelyn has already obtained resource consent.

[62] Looking at hardship in the round, it seems to me that the hardship that would be suffered by both Jocelyn as the applicant, and Marion as the respondent, is largely the same.

[63] Unless an order is made under s 399(1):

(a) The stalemate between them will continue and cause ongoing friction and antagonism.

(b) Both parties will have to live with the present co-ownership arrangements. These are clearly unsatisfactory. Any renegotiation of the present arrangement is likely to prove difficult.

(c) The present situation precludes both sisters from maximising their interests in Paihia, and from using or developing the property as they see fit. Each has three adult children. At present, neither sister can properly plan for her family's future.

From both parties' perspective, the issue needs to be resolved.

[64] Looking at hardship in regards to the particular partition proposals advanced by the parties, it seems to me that the partition proposed by Jocelyn creates

---

20 *Holster v Grafton* (2008) 9 NZCPR 314 at [50].

additional and specific hardship for Marion. The partition proposed by Marion is little better. I deal with this in detail below.

e) Contributions made by co-owners

[65] Mr Templeton on behalf of Jocelyn submitted that Paihia has been continually and successfully farmed by Jocelyn and her husband for the last 26 years. He argued that the property has been enhanced and developed very successfully by dint of their skills, energy and money. He submitted that if they had not devoted their attention to the property, Paihia would have deteriorated in value. He noted evidence given by John Bayly that the property has increased by over 500 per cent in value, excluding inflation. By contrast, he submitted that Marion had only used the property for recreational purposes, and that her use had been limited to her and her family staying in their "illegally sited" and "transportable" bach.

[66] It seems to me that Mr Templeton's submission overstates matters. Jocelyn and her husband have farmed the property since 1985 but until 2005 they did so as employees, initially of Mr Bayly senior, and then of the trustees. There is no evidence that they personally contributed anything other than their labour to the property over that 20-year period, and presumably they were paid for the work they did.

[67] Moreover, I have seen a summary of the financial accounts for Wairoa and Paihia since 2005. Separate accounts are not kept for each farm. Rather, one overall set of accounts is kept. They were made available at my request by Mr Bayly on a confidential basis, and he gave brief evidence in relation to them.

[68] The accounts establish that Jocelyn and John Bayly have spent significant sums each year on developing and/or maintaining both Wairoa and Paihia. About 45 per cent of that total expenditure is attributable to Paihia. However, they have also derived a very significant income from the properties. Again some 45 per cent of their income is attributable to Paihia. Indeed, their income has exceeded their expenditure in each year and, in most years, by a large amount. The rental they have paid to Marion of $7,000 a year seems to me to be very modest and there was evidence that it is "below market". The rental payment to Marion and Jocelyn is not

separately shown in the accounts. The figures attributed to "rent and bailment" and "interest and rent" are not broken down. This aside, no matter how the issue is addressed, a payment of $7,000 for the use of half share of a 430 hectare property seems to me to be very low.

[69] I do not set out the figures in detail because they were provided on a confidential basis. Nevertheless, I am satisfied that such contributions to the development and maintenance of the property as have been made by Jocelyn and her husband have been more than outweighed by the benefits they have received. I do not consider that this factor should affect the partition exercise at all.

f) Other matters

[70] Here, there are six other matters which in my judgement need to be considered.

[71] First, there is the desire of the Far North District Council to obtain public access to Onewhero Bay. Kerikeri is a relatively large township. Its residents and visitors to the area do not have ready access to good swimming facilities. Onewhero Bay is relatively close to Kerikeri and it offers recreational opportunities which are unique in the area. The Council's affidavits disclosed that it wished to obtain access to the beach, and Jocelyn's application for resource consent for her proposed partition brought matters to a head. The Council granted resource consent, but with various conditions imposed. One of the conditions requires that the parties, in subdividing the property, provide an esplanade reserve along the full length of Onewhero Bay, at a minimum width of 20 metres. The reserve is to vest in the Far North District Council. The Council acknowledges that compensation will be payable to the owners of the property, but it states that it has sufficient funding in place to acquire the reserve. It also advises that additional funding is available to enable it to acquire and complete access to the bay, for fencing, signage, ablution blocks and the like. Jocelyn has filed a notice of appeal challenging this condition. Marion has not done so, but she was not consulted in regard to the resource consent application nor a party to it.

[72] Secondly, there is the Council's desire to obtain public access to the esplanade reserve it seeks to acquire. Evidence was given by a Mr Killalea for the Council in this regard. He is the Council's principal planner. It was his view that there are a number of mechanisms available to the Council to secure access to Onewhero Bay. He considered that the Council could designate the land required for access. Alternatively, he considered that on any further subdivision application, the Council could require public access. Finally, he acknowledged that the Council might simply have to negotiate with the landowners. Clearly, the Council wants to obtain access to any esplanade reserve and it considers that it has the appropriate mechanisms available to it to achieve that end.

[73] A third factor to be considered is the Council's District Plan. Part of Paihia is in the rural production zone in the Plan. Other parts of the property are in the general coastal zone. There are different subdivision rules for each zone. A boundary adjustment is a controlled activity, providing it complies with the boundary adjustment rules in the plan. One of the rules provides that there can be no increase in the number of lots. As already noted, there are currently two titles. Therefore, a partition creating two new lots can be dealt with as a controlled activity. If there is an increase in the number of lots, then any resource consent application falls to be considered as a restricted discretionary activity, and additional assessment criteria have to be considered. Moreover, it becomes more likely that the Council would require the application to be notified, perhaps on a limited basis. The evidence suggests that one of the matters the Council may be able to consider on any application for consent to a restricted discretionary activity is the issue of public access to Onewhero Bay.

[74] Fourthly, there is the issue of access to any lots that are created, and the effect this has on the development potential and therefore value of the lots created consequent upon a partition. The District Plan provides that, as of right, a private access way can serve up to eight residential units. If a subdivision creates nine or more residential units, then access is required to be by way of a public road unless a resource consent is obtained. Any application would fall to be considered as a restricted discretionary activity and the Council would be able to assess the standard of the proposed access being provided.

[75] Fifthly, there is the issue of rates postponement. Under the lease which is in place for Paihia, the rates on the property have been paid by J & J Bayly Farming Company Limited. The Council permits rates to be postponed where the capital value of the property reflects its development value, but the land is used for productive purposes. Here, J & J Bayly Farming Company Limited has taken advantage of this opportunity. As at January 2010, accumulated postponed rates and charges of approximately $188,000 were outstanding. The postponed rates and charge are protected by a statutory land charge in favour of the Council. It is possible that a partition could trigger the need to pay those accumulated rates either in whole or in part, particularly if the land ceases to be used for productive purposes. If part of the land continues to be farmed, the Council may allow postponement to continue on that part. Once the land is partitioned, the postponed rates will need to be apportioned. The new titles will be valued and the Council will apportion the accumulated postponed rates against each of the new titles on the basis of their value. Insofar as the Council is concerned, liability for the postponed rates will rest with the registered proprietors, and not with J & J Bayly Farming Company Limited.

[76] Finally, there is the issue of dotterels. There is unchallenged evidence before me that dotterels nest on Onewhero Beach. Dotterels are a threatened species, and it is suggested that Onewhero Bay has significant wildlife values as a consequence.

Partition lines proposed by the parties

[77] Each of the parties has produced evidence suggesting where a partition line should go. Jocelyn produced the most detailed evidence in this regard. She called evidence from a Mr Alistair Nicholls on this issue. Mr Nicholls' evidence was supported by evidence from a Mr Russell Garton.

[78] Marion called evidence from a Mr Malcolm McBain and from a Mr Guy Scholefield.

[79] I deal with the partition line proposed by each of these witnesses in turn.

Mr Nicholls

[80] Mr Nicholls is a registered valuer. He has had the longest association with the property and he has prepared various reports on land valuation issues over the years. He was approached by the trustees in the mid 1990s and asked to suggest an appropriate partition. In 1996 he prepared a plan suggesting a partition starting from a point roughly mid-way along Onewhero Beach running to a point on the boundary near the wetland in the northwestern corner of the property. In 2000 he suggested a partition line which generally followed the right of way from Wharau Road for a distance, and then dropped down to Onewhero Beach. Under this partition, Marion's bach would have been in the northern portion of the land, and the bach would have had direct access to Onewhero Beach.

[81] In 2008 Mr Nicholls prepared a further partition proposal, and it is this proposal which has been adopted by Jocelyn in the present proceedings. Mr Nicholls' 2008 partition line can be seen on annexure "C". It runs from Wharau Road along the right of way to the first major wooded gulley. It then drops down to Onewhero Bay along the edge of the bush line.

[82] Jocelyn is proposing that she should take the southern portion, and that Marion and Mr Hicks should take the northern portion. Marion and Mr Hick's bach, unless it is relocated, would be in the southern portion and they would have no direct access to it. Jocelyn has indicated that she is prepared to grant them a "limited right of way" permitting access to the bach. By "limited right of way", she meant a right of way limited to foot access only.

[83] As already noted, Mr Nicholls' 2008 partition line has received resource consent from the Far North District Council. The Council required an esplanade resource by way of condition. Further, it put in place protective land covenants over some of the gullies on the northern lot to protect the bush in those gullies. Jocelyn volunteered those covenants, notwithstanding that they affect the lot she proposes should vest in Marion and her husband. Marion and her husband were not consulted about either the resource consent application or the protective covenants. That is unfortunate. Marion regards Jocelyn's actions as being deliberately provocative and as being designed to largely deny her access to her bach and to Onewhero Bay. The

evidence was a little unclear, but it seems that the covenants would limit the type of access ways which could be put in place to give access to the beaches on the northern headland and to Onewhero Bay.

[84] I have no hesitation in finding that Mr Nicholls' proposal is neither fair nor reasonable as between the parties. Further, in my judgement Mr Nicholls' proposal, endorsed by Jocelyn, creates hardship for Marion and Mr Hicks. My reasoning is as follows:

(a) According to Mr Nicholls' figures, the northern block would comprise 112.5 hectares. The southern block would comprise 310.5 hectares.[21] In other words, were Jocelyn to take the southern portion, she would be taking 73.4 per cent of the land area of Paihia. Marion and Mr Hicks would be left with 26.6 per cent. Given that both parties presently have an undivided one-half share in the property, and given the nature and size of the property, it seems to me that a proposal resulting in such a marked discrepancy is unfair.

(b) Mr Nicholls asserted in his evidence that his proposed partition would result in two blocks of land of roughly equal value. In 2008 he assessed the total value of the property at $22,861,000. He valued the northern lot at $11,550,000, and the southern lot at $11,311,000.

I have very real difficulties in accepting this evidence.

First, I note that the methodology adopted by Mr Nicholls in 2008 was unusual. Mr Garton had for example, never used it. It differed from the methodology Mr Nicholls had used both in 1996 and in 2000. It was a methodology he had used previously for partitioning Māori land. It involved identifying areas of land of common value. Mr Nicholls then assessed the value of the areas of common value both on a farming basis and on the basis of their potential for

---

21 Mr Nicholls' estimate of the land areas involved was made before the land was surveyed by Mr Donaldson. Mr Nicholls' figures must now be wrong. For present purposes, the differences are immaterial.

housing/subdivision. Finally, he applied the values attributed to each area of common value to assess the overall value of the land involved.

Mr Nicholls fairly acknowledged that his methodology was dependent on his assessment of the various areas of common value, on accurate measurements of the land areas involved, and on the attribution of an accurate value to each class of land. He accepted that small differences in the assessments could have large implications for the resulting values.

Secondly, Mr Nicholls acknowledged that one of the titles was limited as to parcels. He verified his measurements by planimeter. He considered that the area of the larger title which is limited as to parcels was 265.8085 hectares, and he used this figure in his assessment. Mr Donaldson's survey now establishes that the area adopted by Mr Nicholls was wrong. The correct area of the relevant title is 273.8420 hectares. All of the land of higher value is included in this title. There is no evidence before me as to where the additional land revealed by the survey lies.

The value placed by Mr Nicholls on some of the areas of land was high. For example, Mr Nicholls valued the land with frontage to Onewhero Beach at $375,000 per hectare. The prime ridge land was valued at $250,000 per hectare, and land adjoining the right of way on the northern headland was valued at $220,000 per hectare. Even minor differences in any of the land areas assessed by Mr Nicholls could make a significant difference to the valuation put forward by him.

Thirdly, and notwithstanding his valiant attempts to defend his position, it seems to me that Mr Nicholls' valuation has been overtaken by events. In fixing the partition line, he assumed that the Council would not require an esplanade reserve. The land immediately behind the beach was allocated a high value and that value was part of the overall assessed value of the southern lot. Given

that the Council does require a reserve, it seems to me that this must affect the value he placed on this lot.

Fourthly, I am unable to put much confidence in the values adopted by Mr Nicholls. I do not mean to be critical of Mr Nicholls in this regard. That same comment applies to all valuers who have tried to value the property. The difficulty they faced is that there are no directly comparable properties by which to accurately gauge the fair market value of Paihia. Indeed, Mr Nicholls' 2008 valuation did not initially refer to comparable properties at all. Moreover, none of the valuers have performed a crosscheck valuation, for example, by way of the hypothetical subdivision method.

It is a matter of concern that the valuations presented in the evidence are markedly different. As noted, Mr Nicholls valued the property in 2008 at $22,861,000. In November 2009 Mr McBain valued it at $32,500,000. Mr Nicholls re-valued the property in March 2011. He considered that the market had changed by this stage, and that the value of virtually all types of property in Northland had declined. He reassessed the total value of the property at $15,756,500. Mr Scholefield did not separately value the property, but he did value some of the areas of common value assessed by Mr Nicholls. There were marked discrepancies in some of the figures. Mr Nicholls assessed the value of the prime land adjoining Onewhero Bay at $375,000 per hectare. Mr Scholefield assessed it at $1 million per hectare. The differences between the valuers are extraordinary. All are experienced and reputable valuers and all had access to the same material. As a result I am not persuaded that I can rely on any of the valuations which have been produced. I certainly cannot be confident that the two lots proposed by Mr Nicholls are of equal value.

(c) In any event, I am not persuaded that value per se should be the definitive factor in ordering the division of land between co-owners. Land can and often does have a very real emotional appeal to its

owners. In striving to affect a fair and reasonable partition, the Court should, in my view, endeavour to recognise, insofar as it can, particular features which attach to land and which have subjective appeal to the parties. Mr Nicholls did not attempt to do this.

(d) If Mr Nicholls' proposed partition line were to be approved, and the southern lot vested in Jocelyn, Marion and Mr Hick's bach would be located on land owned by Jocelyn, and they would have real difficulty in obtaining practical access to it. Jocelyn is not prepared to concede anything other than access by foot.

(e) The protective covenants volunteered by Jocelyn over the land she proposed Marion and Mr Hicks should take would seem to preclude practical access other than on foot to the three beaches on the eastern coastline.

(f) For the same reasons, Marion and Mr Hicks would have no practical access to Onewhero Bay. Onewhero Bay is the single most unique feature of Paihia, and it is clearly something which is very important to Marion and to her family. I can readily understand why.

(g) If Mr Nicholls' and Jocelyn's proposed partition and allocation is approved, Marion and Mr Hicks would end up not only with a much smaller area of the land, but also with land which is of less productive value for farming purposes. That would directly affect their ability to generate income from the property. Mr Nicholls cannot be criticised in this regard. He was instructed to divide the property into two approximately equal valued portions, and to ensure that any partition retained the productive pastoral country in Wairoa. That is the effect of the partition line he has proposed. If Mr Nicholls' partition were to be approved, Jocelyn's future intentions in regard to the property would be elevated over those of Marion and Mr Hicks. They would be denied the opportunity of generating sufficient income from their part of the property to enable them to retain it and use it for holidays and recreational purposes.

(h) In my judgment, Mr Nicholls' proposed partition line creating only two lots by way of a boundary adjustment is not sufficiently sensitive to the diverse land areas which make up the Paihia property.

(i) Mr Nicholls' proposal was predicated on the basis that the Council would not require an esplanade reserve. It has required such a reserve, and it proposes to pay compensation to the landowners forit. . The proposed partition line would place virtually the whole of Onewhero Bay in the lot which Jocelyn wishes to take. There could be difficulties over the receipt of any compensation paid. The parties would have to agree amongst themselves as to the division of compensation or the matter would have to be dealt with by way of Court order.

[85] For these reasons, I am not prepared to order a partition along the line proposed by Mr Nicholls, notwithstanding that a partition on that basis has received resource consent from the Far North District Council.

Mr Garton

[86] Mr Garton did not propose a separate partition line. Rather, he endorsed Mr Nicholls' proposals.

Mr McBain

[87] Mr McBain took the view that a fairer way of partitioning the property, and one more likely to lead to two portions with similar market values, would be to give the northern portion some of the Onewhero Bay frontage. He prepared a plan, a copy of which is annexed to this judgment as "D", that allowed for this and which shows his proposed partition line. It follows Mr Nicholls' line for a short distance and then runs off downhill in a south-easterly direction to a point roughly a third of the way along Onewhero Bay, and some 250 metres south of Marion and Mr Hicks' bach.

[88] As already noted, Mr McBain valued the total property at $32,500,000. He valued his northern block, with the benefit of access to Onewhero Bay, at $16,250,000 and his southern block at the same figure.

[89] In my judgment, Mr McBain's proposed partition line is not satisfactory either. It suffers from much the same difficulties as does Mr Nicholls' proposed partition line. I am not persuaded that either is sufficiently sensitive to the diverse land areas which make up the Paihia property.

[90] Mr McBain in his affidavit stated that the varied nature of the Paihia property means that it is very difficult to draw a line which divides it into two pieces of equal value. I agree with that comment, particularly if any division is limited to two lots. In my view, Mr McBain's suggested partition line does not however sufficiently recognise the different areas, and the benefits and detriments associated with each, which make up the total property.

[91] The fact that the Council is likely on any subdivision application to require an esplanade reserve by way of a condition on any resource consent granted, minimises the value of the 250 metre strip Mr McBain proposed should attach to the northern lot to give it access to Onewhero Bay. It would not fully allow Jocelyn and Marion to share the compensation that the Council will have to pay if it acquires the esplanade reserve.

[92] Moreover, Mr McBain's proposed partition line does not alleviate the problems which Marion and Mr Hicks would face if they do not have sufficient productive farmland to try and generate an income from their share of the property.

[93] With respect to Mr McBain, it seems to me that his proposal does little more than graft a little extra onto Mr Nicholls' proposed partition line. That little extra is designed to keep Marion and Mr Hicks' bach in the northern lot and to give the northern lot access to Onewhero Bay. It solves those issues to an extent, but otherwise Mr McBain's proposed partition line is subject to the same complications as is Mr Nicholls' proposed partition line.

[94] I am not prepared to order a partition along the lines proposed by Mr McBain.

Mr Scholefield

[95] Mr Scholefield filed affidavits which analysed Mr Nicholls' evidence. He also gave evidence at the hearing. He considered that Mr Nicholls' proposed partition line was fundamentally flawed, because it created a situation where one lot would contain a prime beach, and the other lot would have good views but no access to the beach. He took the view that if a partition was to achieve equity, the partition line had to take into account the other attributes of the property and not shut out one-half shareowner from Onewhero Bay.

[96] Unfortunately, Mr Scholefield did not produce a plan showing where he thought any partition line should go. Rather, he spoke about it in general terms. Mr Scholefield contemplated a partition along the following lines:

(a) Approximately 50 per cent of the beach and the immediate inland area in each lot.

(b) A boundary running almost directly up from the beach to the first ridge.

(c) A boundary following the ridge to the north back up to the right of way off Wharau Road.

(d) The headland being partitioned in whatever manner was feasible as to fairly reflect value, views and productivity.

(e) Both parties having access to Wharau Road and the northern block.

(f) Farm and vehicle access to the resulting northern block remaining as at present.

(g) Access to the northern end and to both the northern and southern blocks would need to be upgraded to some form of legal road so as not to inhibit future potential.

(h) The southern block would be slightly larger than previously contemplated.

(i) The southern block would continue to enjoy a long common boundary with Wairoa.

[97] The difficulty of course is that Mr Scholefield's proposals are not specific and there is nothing concrete to approve or disapprove.

Preferred approach to subdivision

[98] The first thing to note is that there is no single right or ideal partition option.[22]

[99] A significant part of the problem confronting any partition in this case is that the property is not homogeneous, with the result that there are multiple partition options.

[100] Here, and as I have explained at [52] above, there are three primary areas of land on Paihia:

(a) The land immediately behind Onewhero Bay that runs up to the ridge which overlooks the bay. This land affords development opportunities, both immediately adjacent to the beach and also on, and below the ridge.

(b) The productive farmland to the west of the ridge, and in the southwestern corner of the property adjoining Wairoa.

---

22 *Robertson v Gilbert* HC Auckland CIV 2001-404-3141, 10 December 2004 at [31].

(c) The headland, to the north of the existing right of way. This headland could be used for farming purposes, but its real value lies in the development opportunities it offers. It provides a number of potential building sites, each of which would have extensive views.

[101] The primary asset offered by Paihia is Onewhero Beach. The other five beaches are all fine beaches in their own right. While they do not rival Onewhero Bay, each makes a contribution to the overall value and attractiveness of Paihia.

[102] It seems to me that a fair and reasonable partition as between Jocelyn on the one hand, and Marion and Mr Hicks on the other, needs to take into account the primary land areas as well as the opportunities both for development and farming offered by each of them. Further, any fair and reasonable partition needs to recognise the outstanding natural feature of Onewhero Bay and the other five beaches to the north of Onewhero Bay.

[103] It seems to me that both Mr Nicholls and Mr McBain were blinkered in their approach, because both contemplated only a two-lot subdivision by way of a boundary adjustment. In my judgment, the values attaching to Paihia can be more fairly and reasonably apportioned if a three-lot subdivision is undertaken. A three-lot subdivision enables a more nuanced division to be undertaken.

[104] I put the prospect of a three or more-lot subdivision to both Jocelyn and Marion. Jocelyn did not see a lot of merit in the proposal. She considered that it would become quite difficult, particularly from a farming point of view. She described a three-lot subdivision as “very Mickey Mouse” and it was clearly not her preferred choice. Marion thought that a three-lot proposal could be “very, very fair”, but that it could “open up a lot of hardship with the Council”. She preferred to avoid that possibility. Her primary concern was to put in place a partition that was fair as between her and Jocelyn.

[105] I also raised the issue with Mr Nicholls. He accepted that a three-lot subdivision was an option, and that if the three lots were properly defined, they might better recognise the benefits and risks associated with the division of the land.

Other than in relation to tax issues (which in my view are non-existent) he saw no downside, except in regard to the "workability" of the property, presumably from a farming perspective.

[106] Annexed to this judgment and marked with the letter "E" is a plan showing the partition lines which I prefer. It needs to be emphasised that the suggested partition lines shown on annexure E are no more than suggestions, particularly insofar as the size and shape of the lots are concerned, and the location of the proposed right of way between Lots 1 and 3.

[107] In my judgment any fair and reasonable division has to start with Onewhero Bay. It should be divided as near as may be equally between the parties. The partition line should then run to the western boundary of the property, to create as near as may be two areas south of the existing right of way, each offering both development and productive land, of more or less equal size and value. The headland north of the existing right of way should similarly be divided into two areas which are approximately equal in value and area.

[108] One lot which would be created by a partition of the headland is shown marked Lot "1" on annexure E. The eastern area which would be created by a division of the headland should join with the northern area which would follow on from a division of Onewhero Bay and the land to the west of Onewhero Bay, to create one lot: shown as Lot "2" on annexure E. The southern lot which would be created by a division of the land to the west of Onewhero Bay is shown as Lot "3".

[109] Lot 1 and Lot 3 would need to be linked by means of a right of way. It would need to be a general right of way, of reasonable width, say 10 to 20 metres. To try and avoid limiting the development potential of Lot 2, and to keep the right of way as far away from Marion's bach as is practicable, it seems to me that the right of way should be to the west of the high ridge. A possible location is shown by the dotted line marked "ROW" on annexure E.

[110] Given the District Plan provisions, and having read the further affidavits prepared at my request by the parties' planners, Mr Kemp for Jocelyn, and Mr Putt for Marion and Mr Hicks, it seems to me that the first part of the existing right of

way should vest as public road until the north/south boundary between Lots 1 and 2 is reached.. This part is shown marked “a” to “b” on annexure E. This road would give Lot 2 road frontage. Was it only to have access to Wharau Road by virtue of a right of way its subdivision potential would be adversely affected.

[111] I am also concerned to ensure that both Lots 1 and 2 should have access to the two beaches at the northern end of the property, and to the three beaches on the eastern coast, all of which are north of Onewhero Bay. To that end, it seems to me that it would be sensible to create a relatively narrow right of way, perhaps five to 10 metres wide, limited to foot access only, around the cliff tops to the north, along the boundary between Paihia and the property at Days Point, and along the bush line above the three beaches on the eastern coast. This right of way is shown on annexure E as “ROW (limited to foot access only)”. Lot 1 should have foot access along this right of way over Lot 2, so that the three or perhaps four beaches to the north of Onewhero Bay (depending on the final division of the headland) which are on the northern and eastern coasts can be accessed. Lot 2 should have access along the right of way over Lot 1 so that the beach(es) on the northern coast can be accessed. It seems to me that the provision of this right of way access on foot will facilitate the future development of the headland.

[112] The Court can order the grant of easements over one or more of the lots created on a partition.[23]

[113] I would propose that Lots 1 and 3 should vest in Jocelyn, and that Lot 2 should vest in Marion and Mr Hicks. This has obvious advantages for Jocelyn. Marion accepts that Jocelyn should have the southern lot and it creates no hardship for her and Mr Hicks if the southern lot is vested in Jocelyn.

[114] On the basis of the evidence currently before me, it seems to me that a partition along these lines would be fair and reasonable as between the parties. First, it seeks to recognise and allow for the parties’ respective interests as equal one-half owners in Paihia. Secondly, it seeks to divide more or less equally the primary features of Paihia and to recognise and share the properties’ unique nature and location. Thirdly, it seeks to minimise any hardship to either Jocelyn or Marion.

---

[23] *Ko v Chamberlain* (2007) 8 NZCPR 261 at [45].

Jocelyn will enjoy the benefit of the productive farmland immediately adjoining Wairoa. There will be some inconvenience to her because she will have to access Lot 1 via the proposed right of way. However, she and her husband already farm the area shown as Lot "1" on annexure E. I cannot see that there would be any marked additional hardship to Jocelyn. Marion and Mr Hicks bach can remain on Lot 2, as long as the necessary consent can be obtained from the Council. There would be no impediments to access, either to the bach or to Onewhero Bay. Both parties would retain a half share of Onewhero Bay and the productive land immediately adjacent to Wairoa. Any compensation received from the Council could be readily split as between Jocelyn and Marion and Mr Hicks. The proposal would give the parties a more or less equal ability to either use the land for productive purposes in the short to medium term, or for development purposes in the longer term. Most importantly, the present impasse will be resolved.

[115] I accept that there are downsides to a three-lot subdivision:

(a) It may be more difficult to obtain resource consent for a three-lot subdivision.

(b) The Council may seek to utilise a three-lot subdivision application to try and obtain public access to its proposed esplanade reserve.

(c) The rates postponement issue may become more difficult.

(d) There are likely to be increased costs, for example, in obtaining consent, in putting in additional fencing, in creating the right of way between Lots 1 and 3 and perhaps in paying a reserve contribution.

[116] Nonetheless, in my judgment none of these factors are fatal to a three-lot subdivision along the lines I propose. There is nothing to suggest that the Council would decline a three-lot subdivision application, and resource consent is required even for a two-lot boundary adjustment. The Council will seek to require an esplanade reserve even if a two-lot boundary adjustment is undertaken. Further, the Council will at some stage try and obtain public access to the esplanade reserve, and it appears from Mr Killalea's evidence and from Mr Kemp's evidence, that it has the

ability to do so either now, or in the future. A three-lot subdivision may bring matters to a head, but ultimately the issue will have to be faced. Similarly, the repayment of postponed rates is an issue which will have to be faced at some stage, even with a two-lot boundary adjustment. Additional costs will be incurred but these are necessary costs of a fair and reasonable division. The value of the lots which will be created makes the expenditure an economic proposition.

[117] In my judgement, the dotterels are not affected by the proposed division. They are more likely to be affected by the Council's proposals to put in place an esplanade reserve, and to provide public access to that esplanade reserve. That, however, is not a matter which I can deal with.

Result

[118] I am not prepared to direct a partition on the basis proposed by either Mr Nicholls or Mr McBain. Mr Scholefield's proposed partition line is too uncertain to either approve or disapprove.

[119] I am prepared to consider a partition which broadly adopts the suggestions shown on annexure E. It is my preliminary view that a division along those lines is workable and that it would be fair and reasonable as between the parties.

[120] It will be necessary for appropriate experts to prepare a modified subdivision plan incorporating, insofar as is practicable, the suggestions I have made which are illustrated on annexure E. To that end, an independent surveyor will need to be retained. So will a valuer. I am satisfied that I have the power to appoint an expert surveyor under r 9.36 of the High Court Rules noted previously . I can appoint a valuer under s 399(3).

[121] The parties' views as to the appointment of the appropriate experts are sought.

[122] Once the independent experts are agreed or appointed, it will be necessary for me to issue a minute giving the experts the necessary instructions. I would appreciate the parties' views on this matter as well.

[123] When the Court-appointed experts have reported to the Court, their reports will be made available to the parties. I will then direct the Registrar to reconvene the hearing to give the parties the opportunity to call evidence in relation to, and to comment on, those reports. They will also be able to address any issues arising out of them. No final decision on the appropriate division will be made until that process is completed.

[124] As I noted above at [28], the owners of the property at Days Point who enjoy the benefit of the right of way were not served. This interim judgment has the potential to affect the right of way. I direct Jocelyn as the applicant to serve copies of all papers filed in this proceeding and this interim judgment on the owners of the property at Days Point. I reserve to the owners of that property the right to file such memorandum in relation to the matters raised by this interim judgment, or by the application, as they consider are appropriate. Any memorandum is to be filed within 30 working days of the date of this judgment. The owners of the property at Days Point will also be entitled to appear at any reconvened hearing.

[125] The parties will need time to consider this interim judgment and their response to the various issues it raises. Accordingly, I direct that the parties are to file and serve within 30 working days of the date of this judgment, memoranda setting out their respective views in relation to the partition lines suggested in annexure E, and how they suggest that matters should proceed. I will then, if necessary, convene either a telephone conference or a further hearing in relation to these issues.

[126] Any costs to date are reserved pending final resolution of this matter.

____

Wylie J

A

Hauparua Inlet

Lot 1
DP 383159
4.126
32052

Lot 2
DP 383159
4.386
32053

Blk XIII Kerikeri Survey District
(SO 1151)
9.7607
56D/1017
more...

Lot 4
DP 383159
12.728
332055

Lot 3
DP 383159
6.089
332054

Lot 2
DP 312822
11.78
50341

Lot 1
DP 312822
4.119
50340

Lot 1
DP 161158
1.9078

Lot 3
DP 185629
20
116A/443

Lot 1
DP 175588
7.804
108A/330
more...

Lot 2
DP 175588
7.804
108A/331
more...

Lot 2
DP 366585
6.047
270202

Lot 1
DP 366585
0.0928
270201

Lot 1
DP 399437
7.072
396572

Lot 1
DP 194156
0.8195

Lot 1
DP 6009
23.6994
80D/606

Lot 3
DP 334799
238.5105
142598

Foreshore Deposited Plan
3.2375
399/140

Onewhero Bay

Sec
Kerikeri Survey District
(SO 4630/A)
31.4036
61A/328

Lot 5
DP 51237
73.3745
5D/1436

Lot 2
DP 51237
87.1971
6A/1012

Sec 56
Kerikeri Survey District
(SO 44098)
3.9621
6A/1012

Sec 57
Blk XII Kerikeri Survey District
(SO 44098)
1.0787
5D/1436

Sec 58
Blk XII Kerikeri Survey District
(SO 44098)
1.6368
5D/1436

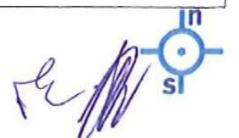
Lot 6
DP 51237
63.7632
5D/1436

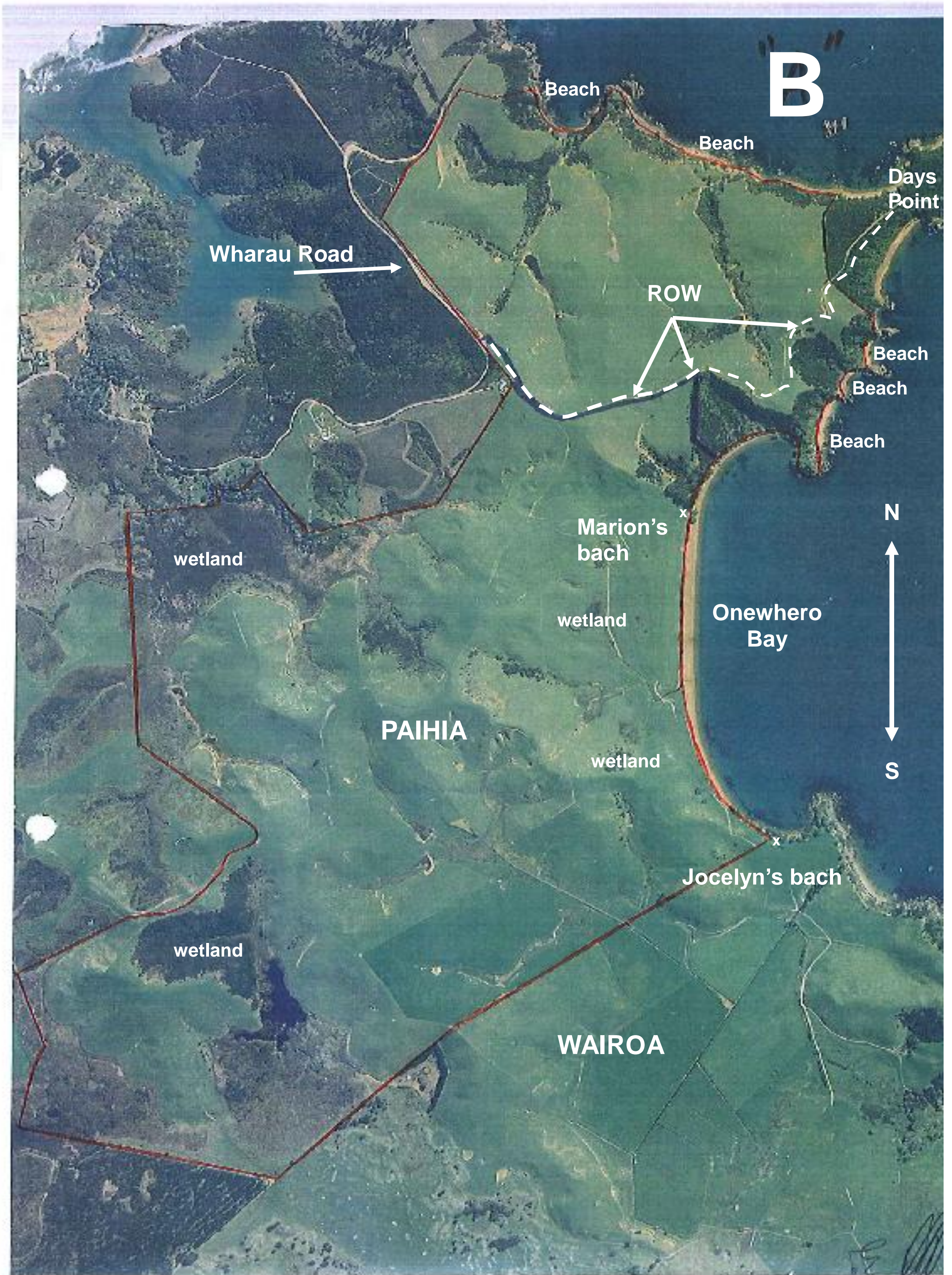
Lot 4
DP 51237
18.2235
5D/1436

Pt OLC 27
(OLC 27)
516.0298
12B/1137

Scale: 1:15000

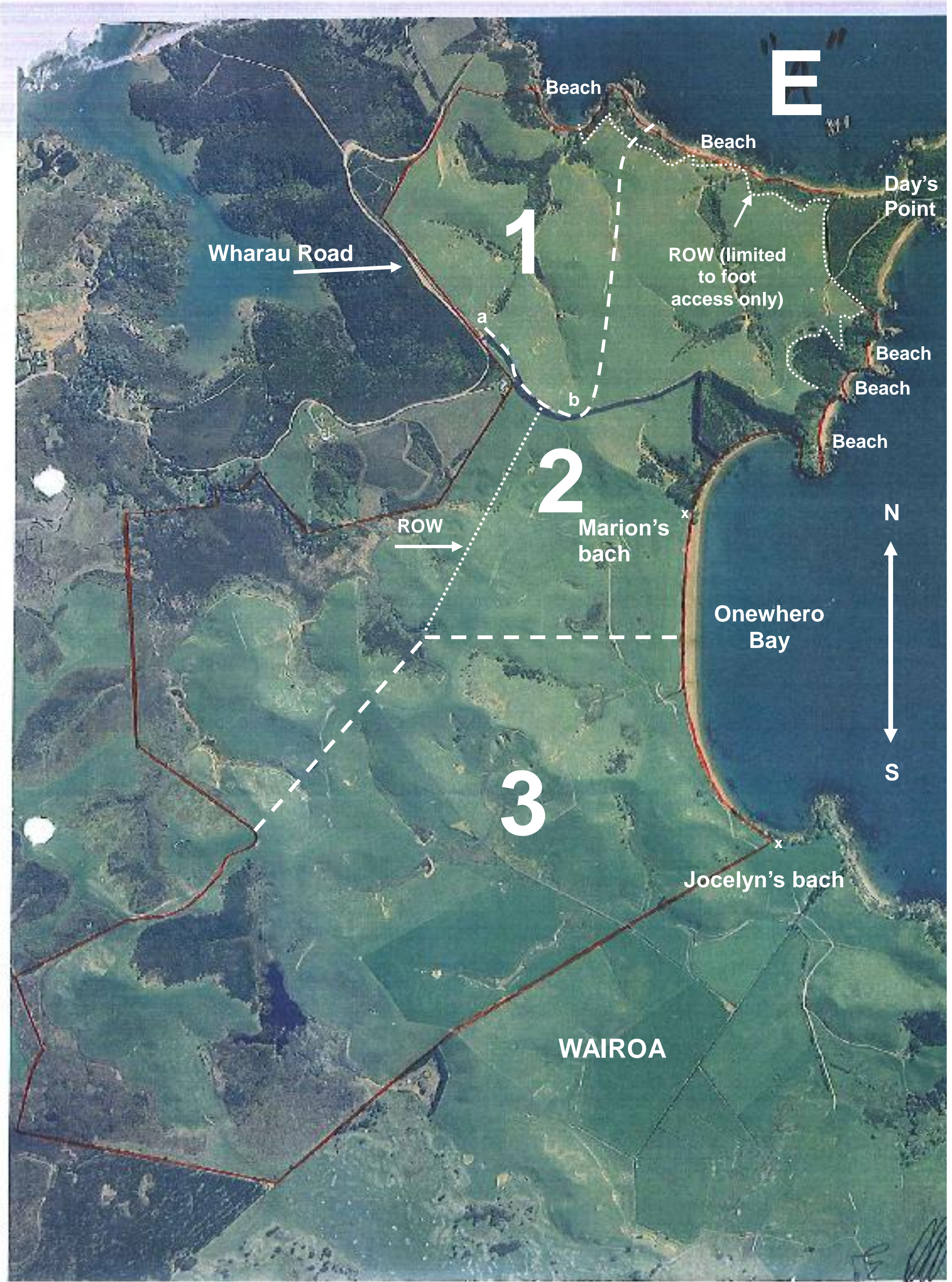
1000 metres




B
Beach
Beach
Days Point
Wharau Road
ROW
Beach
Beach
Beach
Marion's bach
N
wetland
wetland
Onewhero Bay
PAIHIA
wetland
S
Jocelyn's bach
wetland
WAIROA

C
Mr Nicholls'
proposed
partition line
N
S

"MKM-4"


"E"
Beach
Beach
Day's Point
1
Wharau Road
ROW (limited to foot access only)
a
b
Beach
Beach
Beach
2
ROW
Marion's bach
N
S
Onewhero Bay
3
Jocelyn's bach
WAIROA