IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A200140012970
APPEAL 2015/3

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal against an order of the Māori Land Court made on 31 October 2014 at 90 Taitokerau MB 67-106 in respect of Te Tii (Waitangi) B3 Trust and Lot 16 Deposited Plan 61631 and Lot 18 Deposited Plan 61631
BETWEEN	MEREAWAROA DAVIES AND RICHARD BOYD TAKIMOANA Appellants
AND	TRUSTEES OF TE TII (WAITANGI) B3 AHU WHENUA TRUST Respondents

A200150003844
APPEAL 2015/13

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal against an order of the Māori Land Court made on 10 June 2015 at 104 Taitokerau 139-147 in respect of Te Tii (Waitangi) B3 Trust
BETWEEN	WIREMU LESLIE TANE AS TRUSTEE OF TE TII (WAITANGI) B3 AHU WHENUA TRUST Appellant
AND	MEREAWAROA DAVIES AND RICHARD BOYD TAKIMOANA Respondents

Hearings:	14 August 2015 (Heard at Whangarei)
Coram:	Deputy Chief Judge C L Fox (Presiding) Judge S T A Milroy Judge C T Coxhead
Date:	19 October 2015

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

Background

[1] This is an appeal from a decision of the Māori Land Court of 31 October 2014.[1] In that decision Judge Armstrong found that the trustees of the Te Tii (Waitangi) B3 Ahu Whenua Trust had not breached Te Ture Whenua Māori Act 1993 ("the Act"), the trust order, or general trustee duties in seeking to bring existing leases over Lot 16 Deposited Plan 61631 ("Lot 16") and Lot 18 Deposited Plan 61631 ("Lot 18") to an end. Judge Armstrong considered that in such circumstances the Court should not intervene in the trustees' decision concerning the leases. In addition, he found that the particular circumstances did not give rise to an equitable estoppel and the trustees were entitled to rely on the terms of the substituted leases.

[2] Richard Takimoana and Mereawaroa Davies appeal that decision. At the lower Court hearing the appellants were represented by Mr Peters. The appellants' applications in the lower Court were:

(a) An application pursuant to s 19(1)(b) of the Act seeking an urgent injunction to prevent the trustees from evicting them from the land; and

(b) Applications pursuant to s 18(1)(a) of the Act for determinations that the trustees had acted in breach of their duties and were estopped from purporting to evict them from the land.

[3] The appellants are now assisted by Mr Tuari Rupene Hetaraka. The grounds of appeal are significantly different from what was argued before the lower Court, and were not immediately apparent. The notice of appeal listed several grounds of appeal as follows:

(a) *Ngāti Koata & Ors v Attorney General* – referring to paragraphs [14], [49], [53], [61], [140] and [143] of that decision regarding customary land;[2]

(b) *Nireaha Tamaki v Baker* – referring to a passage from that decision;[3]

(c) An un-cited quote "An affirmative statute cannot derogate from common law, with that the statute and the common law doctrine used together, forms the common law under statute of Maori customary law...";

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1 *Takimoana – Te Tii (Waitangi) B3 Ahu Whenua Trust* (2014) 90 Taitokerau MB 67 (90 TTK 67).
2 It appears that the decision referred to is actually *Ngāti Apa v Attorney General* [2003] 3 NZLR 643.
3 *Nireaha Tamaki v Baker* [1901] AC 561.

(d) British Intention – The Standing Orders in Council, 14 August 1839 – referring to a passage from those orders;

(e) It is not tikanga to place a lien or fee or renewal of any further lease upon any or all taonga tuku iho without whānau assent;

(f) It is not tikanga to place a lien or fee to any ahi kā for any or all taonga tuku iho retention, usage, or administration thereof;

(g) Te Ture Whenua Māori Land Act 1993, the Preamble and ss 2, 3 and 5;

(h) He Whakaputanga o ngā Rangātira o Nu Tirani 1835; and

(i) Whakapapa-tanga.

Issue

[4] The main issue for determination, as gleaned from the appellants' appeal notice and submissions, is whether the land in question is Māori customary land.

[5] However, as part of oral submissions made at the hearing the appellants both referred to the injustice of being evicted from homes built and paid for by their parents, with the only alternative offered by the trustees being to pay a full market rental in relation to the houses and land occupied by them. The appellants understood that they would have perpetual occupation of the properties and that they owned the houses. This raises an additional issue as to whether the Judge in the lower Court took into account all relevant factors in determining that the circumstances did not give rise to an equitable estoppel.

Procedural matters

[6] We note at the outset that the appellants would have been more ably assisted if they had engaged a lawyer. The Court encouraged the appellants to appoint counsel and they were provided that opportunity through the directions of the presiding officer.[4] However, they declined that offer and chose not to engage counsel.

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4 2015 Māori Appellate Court MB 264 (2015 APPEAL 264).

[7] Following the filing of the appeal, we issued directions on 30 March 2015 to address procedural matters. We were concerned that the grounds of appeal had not been fully particularised and directed the appellants to file further particulars of the appeal, including an application to adduce further evidence if that was their intention. It was also apparent that the appellants purported to have Mr Hetaraka act on their behalf, even though he is not an enrolled barrister and solicitor of the High Court. Accordingly we directed the appellants to provide a detailed application for leave for Mr Hetaraka to appear as their representative. In addition, as the Court had received 12 notices of intention to appear in support of the application, a direction was issued for all those who had filed a notice to file their intended submissions with the Registrar. We advised that failure to file such submissions would result in the Court declining to hear from any person not complying with the directions. Finally, we deemed it appropriate to set security for costs and directed the appellants to deposit the sum of $1500.00 with the Registrar of the Court.

[8] The security for costs amount was duly deposited but the remainder of our directions were not complied with. We made further directions on 7 May 2015 for compliance with our earlier directions, indicating that further failure to comply could result in the appeal being adjourned *sine die*.[5] The appellants again failed to provide the required information within the timeframe and the application was accordingly adjourned *sine die*.[6]

[9] However, the appellants subsequently filed further material with the Court and we allowed the appeal to proceed and be set down for hearing.[7]

Submissions for the appellants

[10] The focus of the appellants' arguments was that the land in question is Māori customary land. They claimed that native title with regards to the land had not been extinguished and therefore the Māori Land Court had no jurisdiction over this land.

[11] There was no expansion on any of the other grounds of appeal.

[12] Mr Takimoana took the opportunity to remind the Court of his whānau's long association with the land, and provided some context to the matter, which had also been put before the lower Court. He emphasised that the whānau's extended occupation of this land block (and previously a land block

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5 2015 Māori Appellate Court MB 112 (2015 APPEAL 112).
6 2015 Māori Appellate Court MB 137 (2015 APPEAL 137).
7 2015 Māori Appellate Court MB 200 (2015 APPEAL 200); 2015 Chief Judge's MB 360 (2015 CJ 360).

close by) differentiates them from other whānau living on Te Tii (Waitangi) 3B Trust lands as his whānau has actually built on the land. Mr Takimoana made it clear that while others living on the land may be happy to pay rent, his whānau are not happy to pay rent for living on the land, nor do they believe that they should have to.

[13] Ms Davis emphasised that the trust wants to treat them like all other beneficiaries when, in her view, they are not like all the other beneficiaries. She too was clear in her submissions that her whānau do not want to pay rent for living in a house that their whānau built.

Submissions for the respondent

[14] The respondent trustees submitted that:

(a) The trustees' actions regarding the leases were not about throwing people off the land and not about calling people squatters;

(b) The trustees have an obligation to address what is happening on the land;

(c) The trustees are agreeable to the appellants staying on the land as long as they are treated the same way as all other beneficiaries;

(d) The matters regarding customary title are not issues properly for this Court as those issues were not raised in the lower Court. In any case, it is clear that statute deals with the issue. Ownership has been determined and a Court order has determined the land is Māori freehold land;

(e) The trustees clearly have the power to make the decision they did. They are not in breach of their trust order or the Act. Further, this is not an issue that has been challenged on appeal;

(f) In terms of equitable estoppel, Judge Armstrong was correct in his assessment. This is also not an issue that has been challenged on appeal; and

(g) Many of the matters raised on appeal are not material to the lower Court decision.

The Law

[15] The Māori Appellate Court's powers on appeal are expressly set out in s 56 of the Act, which provides:

> **56 Powers of court on appeal**
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> (1) On any appeal, the Maori Appellate Court may, by order, do such 1 or more of the following things as it thinks fit:
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> (a) it may affirm the order appealed from:
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> (b) it may annul or revoke that order, with or without the substitution of any other order:
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> (c) it may vary that order:
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> (d) it may direct the Maori Land Court to make such other or additional order as the Maori Appellate Court thinks fit:
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> (e) it may direct a rehearing by the Maori Land Court of the whole or any specified part of the matter to which the order relates:
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> (f) it may make any order that the Maori Land Court could have made in the proceedings:
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> (g) it may dismiss the appeal.
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> (2) The Maori Appellate Court, in the exercise of the jurisdiction conferred on it by this section, may exercise, as though it were the Maori Land Court, any of the discretionary powers conferred upon that court.

[16] In *Taueki – Horowhenua X1B 41 North A3A and 3B1* the Māori Appellate Court discussed the role and function of an Appellate Court on appeal:[8]

> [42] The Supreme Court recently considered the general scope of the appellate court function where there is an appeal by way of rehearing in *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103.
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> …The Supreme Court concluded that the High Court was required to come to its own view on the merits. The weight it gives to the decision of the Commissioner is a matter of judgment. If it is of a different view from the Commissioner and is therefore of the opinion that the Commissioner's decision is wrong, it must act on its own view. While the decision does not deal directly with our jurisdiction, it reinforces the principle that, aside from matters of assessment of credibility of witnesses or exercise of judicial discretion, an appellate court's role is not to defer to the view of the lower court but must make up its own mind.

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8 *Taueki - Horowhenua X1B41 North A3A and 3B1* (2008) 16 Whanganui Appellate Court MB 30 (16 WGAP 30) cited with approval in *Apatu v Trustees of Owhaoko C Trust - Owhaoko C* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34). See also *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

> [43] The Supreme Court was not required to consider the principles applicable to an appeal against the exercise of a judicial discretion. The law in that regard is well settled. In *Harris v McIntosh* [2001] 3 NZLR 721 the Court of Appeal confirmed that an appellant has the burden of showing that the judge had acted on a wrong principle, or that he or she failed to take into account some relevant matter, or that he or she took account of some irrelevant matter, or that he or she was plainly wrong. We refer also to the fuller discussion of appeals against judicial discretion by Judge McHugh in this Court in *Re Tarawera C6* (1982) 9 Takitimu ACMB 286-324 at 306-310.
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> [44] The Maori Appellate Court has a particular duty to intervene in respect of orders of the Court that are made without jurisdiction. In *Re Maungatautari 5BIA and 1 other, Matehaere v Baillie* (1976) 15 Waikato-Maniapoto ACMB 188 the view was expressed that this Court could itself take steps to rectify orders even though the parties no longer wished to proceed with the appeal:
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> "This Court is far from unmindful of the fact that it is a "titles Court" and in addition that it has an unambiguous responsibility of ensuring that where a patent deficiency in a purported order of the Maori Land Court presents itself of taking some step towards its correction or of putting that order at an end."
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> [45] In *Re Torere 34A and Torere 50B2* (1983) Rotorua ACMB 6/322 the Court expressed this principle as follows:
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> "When an Appellate Court is satisfied that the lower Court has exceeded its jurisdiction in purporting to make an order it is the clear duty of the Appellate Court to annul that order. This principle is set out in Halsbury's Laws of England, 4the.d. Vol.10 at p. 325, para 717 viz "It is the duty of an Appellate Court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the Court below" - and at p. 326, para 718: "Where, by reason of any limitation imposed by Statute, charter or commission, a Court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled."
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> See also 4th Ed Vol , p 159 at para 165. See also dictum of Fair J. in *Bethune v Bydder 919380* NZLR, 1. Refer also *Re Eruini Maihi* (1916) GLR p 131, 136 where it is said that the Maori Land Court has jurisdiction to cancel an order in the sense of declaring it null and void on the ground of fraud, or for want of jurisdiction, notwithstanding the time for appeal and rehearing has expired."
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> [46] From these authorities we take clear guidance that it is this Court's function to consider for itself the issues that had to be determined at the original hearing, that we have a duty to correct any orders made without jurisdiction and that, where there are proper grounds to do so, we should overturn the exercise of a judicial discretion.

[17] We adopt the principles set out in that decision.

Is this land Māori customary land?

[18] The appellants argued that the land they live on is customary Māori land. It is an argument that has been played out a number of times before the Māori Land Court, where applicant claimants, and in this case the appellants, argue that land is still held in customary title and therefore the Māori Land Court has no jurisdiction to make the orders that it has made.

[19] While this was not a point argued in the lower Court, Judge Armstrong, in the background section of his decision, made reference to the *Baker – Te Tii (Waitangi) B3 Trust* decision of Judge Ambler, which helpfully summarised the history of the Trust.[9] Judge Armstrong reproduced the relevant extract in his judgment and we reproduce that extract again here:

> [11] The land known as Te Tii was part of an area that was originally alienated to Henry Williams prior to the Treaty of Waitangi. In 1839 Henry Williams returned the Te Tii block. In 1968 Judge Nicholson of this Court summarised his understanding of the history of the land:
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> ...Going back into the history just a little bit – the list of owners at present in force was fixed in 1891 by the Māori Appellate Court and some successions were recorded up to 1918. There were 253 names on the 1891 list and there are 273 names on the list in 1918 when it was before the Court again. There have been no successions recorded since then on Te Tii B so the land really and truly is the Ngati Rahiri and its descendants of those original 253 people who were verified in 1891 as being the owners. It was fully considered then. I have read all the records starting from when the land had been sold and was then given back to the people. It was given by Henry Williams in 1839 to Wi Kemara and the Ngati Rahiri and in 1891, after some arguments, there being no descendants of Wi Kemara, the only owners were the Ngati Rahiri they were listed and with 251 people.
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> [12] Judge Nicholson's reference to "253" owners is a mistake: the 1891 list of owners shows there to be 251 owners of which approximately 90 were minors. The Court did not determine the relative interests of the owners and today the owners are not recorded as having any individual shares, that is, their shares are shown as "0".
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> [13] By the time the Trust was established in 1954 this part of the Te Tii block was known as Te Tii B and eventually came to be known as Te Tii (Waitangi) B3. The land was subsequently subdivided, some areas were sold, and today 70 Māori freehold land blocks remain under the administration of the Trust. The land is adjacent to the Waitangi marae, Te Tii (Waitangi) A, which is under separate administration. Four of the blocks are under commercial leases, some of which are due to expire in 2014. There are approximately 45 residential properties which are rented to beneficiaries or members of their whānau. The Trust also operates a holiday park and a backpacker accommodation business on parts of the land.
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> [14] The Court's record shows there to be 1,317 owners. However, as Judge Nicholson intimated, successions have been sporadic and it seems that many beneficiaries are divided on whether successions are even appropriate for this land. The lack of successions is also explained by the fact that the trust order provides that the beneficiaries are the "descendants" of the original 251 owners. Thus, from its inception the Trust has operated much like a whenua topu trust and it is the whakapapa to the original 251 owners that determines the beneficiaries and not the Court's list of owners. The current beneficiaries are estimated to number more than 5,000, though a register is not kept.

[20] We agree with this historic account for the Te Tii block. It is clear that ownership was determined in 1891. Following that determination of ownership, completion of subdivisions, and the sale of some areas, the block today is comprised of 70 Māori freehold land titles, including Lot 16 and Lot 18, under the administration of the Te Tii (Waitangi) B3 Trust.

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9 *Baker – Te Tii (Waitangi) B3 Trust* (2010) 19 Taitokerau MB 116 (19 TTK 116).

[21] As s 129(2) of the Act provides, land with the status of Māori customary land is land that is held by Māori in accordance with tikanga Māori. By contrast, land, the beneficial ownership of which has been determined, shall have the status of Māori freehold land. It is clear that, in determining ownership of the Te Tii block and subsequent blocks, customary title was extinguished. In addition, the Māori Land Court records provide that both Lot 16 and Lot 18 are Māori freehold land. An order was made declaring the status of the lands to be Māori freehold land on 7 March 1997,[10] which was registered against those titles on 14 May 1997.[11]

[22] As we noted earlier, this issue was not raised before the lower Court. Judge Armstrong was not asked to address this question, nor was he required to specifically address whether customary title had been extinguished. We cannot therefore see how that matter can be properly brought before this Court. What is clear however is that customary title with regard to these blocks of land has been extinguished.

[23] The appellants' main ground of appeal therefore fails.

Other grounds of appeal

[24] We remind ourselves that as an appeal Court our function is to consider for ourselves the issues that were to be determined at the original hearing. We have a duty to correct any orders made without jurisdiction and, where there are proper grounds to do so, we can overturn the exercise of a judicial discretion. However, there still exists a burden on the appellant to show that the Judge either acted on a wrong principle, failed to take into account a relevant matter, took into account an irrelevant matter, or that the decision was plainly wrong.[12]

[25] As we identified earlier, the appellants did not look to expand on any grounds of appeal beyond matters relating to their argument regarding customary title. By way of example, the notice of appeal listed the Preamble, and ss 2, 3 and 5 of the Act as one of the grounds of appeal however, nothing further was submitted to the Court regarding this ground. Given this, we have been unable to discern the appellants' arguments regarding these provisions or how Judge Armstrong's decision may have been in error in that regard. We point out that it is not for us to fill gaps in the case for the appellants or to infer what their arguments may have been.

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10 83 Whangarei MB 150 (83 WH 150).

11 See Computer Freehold Register NA18A/616 – Lot 16 Deposited Plan 61631; Computer Freehold Register NA18A/618 – Lot 18 Deposited Plan 61631.

12 *Harris v McIntosh* [2001] 3 NZLR 721 (CA) at [13]; *May v May* [1982] 1 NZFLR 165 at 169-170; *Blackstone v Blackstone* [2008] NZCA 312; and *Kacem v Bashir* [2011] 2 NZLR 1 (SC) at [32].

[26] However, in saying that, we do consider that, in circumstances where the appellants are not legally represented but where their notice of appeal and comments during the appeal hearing implicitly raise issues, then it is open to this Court to consider and determine the matters which were before the lower Court, to the extent that no new issues arise and no new evidence is required. In line with that approach, we propose to consider the matters raised in the lower Court in relation to the determinations sought per s 18(1)(a) and the issue of estoppel.

Section 18(1)(a) – Have the trustees acted in breach of their duties?

[27] We agree with the respondents that the trustees have the power to make the decision they made. They are guided by their trust order, which provides a wide range of powers in administering these lands.

[28] The Māori Appellate Court in *Eriwata v Trustees of Waitara SD Sections 6 & 91 Lands Trust* confirmed the long held position that where the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole, then the Court would be reluctant to interfere with trustees' decisions.[13] The Court stated:

> [5] When trustees are appointed to an Ahu Whenua Trust, they take legal ownership. The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Māori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

[29] This approach was followed by the Māori Land Court in *Trustees of Okahukura 8M2C2C2B v Whakatihi*:[14]

> [9] Some of the respondents say that they whakapapa to the land, some say that they also are owners. It makes no difference. The law is that the right to control and manage the land is vested in the trustees. That is a matter of law…
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> [10] The trustees therefore have the right to decide who, if anyone, can occupy the land and it is their duty to do that for the benefit of the owners as a whole. No particular owner can dictate to them…The short point is that they are responsible and they, the trustees, must make the decision.

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13 *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust – Waitara SD Sections 6 & 91 Land Trust* (2005) 15 Whanganui Appellate MB 192 (15 WGAP 192).

14 *Trustees of Okahukura 8M2C2C2B v Whakatihi* (2007) 188 Aotea MB 96 (188 AOT 96).

[30] Similarly in *Porou – Whareongaonga 5 Trust*,[15] the Court referred to the *Eriwata* decision and noted that only where there is evidence of an actual or potential breach of duties and risk to the trust will the Court invoke its powers as set out in Part 12 of the Act to endeavour to protect the interests of the beneficiaries of the trust. The Court rarely interferes with the day-to-day running of a trust.

[31] In *Eriha v Munro – Kairakau Lands Trust*,[16] the Court noted that where owners no longer support their trustees then there are remedies available to them. [17] Even then, such an outcome as the removal of trustees requires cogent evidence of breach of trust and the absence of a tenable defence.

[32] In the lower Court, Judge Armstrong considered whether the Court should intervene with regard to the trustees' decision. He considered whether the trustees had breached the trust order, the Act or general trustees' duties in relation to this matter and whether the trustees had failed to adopt a proper process in making their decision concerning Lot 16 and Lot 18. In coming to his decision, Judge Armstrong took into account a number of factors, including the fact that the trustees were complying with the terms of the contract of lease and followed a proper process in coming to their decision. It is noted that the decision was approved by a majority of trustees at a trustee meeting and the approach adopted was consistent with earlier decisions made by the trustees concerning the recovery of leasehold premises where the lease had expired. The trustees received support from the beneficiaries at an AGM to proceed with an overall plan for the land blocks and their actions regarding these leases were consistent with the implementation of that plan.

[33] We have sympathy for the appellants' position. As was noted in the lower Court and also before us, the appellants their parents and whānau built on the land blocks in question and have a long association with both the houses and the land. For some of the whānau this is the only house they have ever known. For the past 42 years the whānau have been paying rental at the level of $1.00 per week, however the trust now seeks to charge a market rent which will be in excess of $300.00. Further, no compensation will be payable for the improvements made (the building of the houses) on the trust land. Given the appellants clear indication that they do not wish to pay rent, they are faced with the situation of potentially being evicted from the land on which they have lived for many years.

[34] On the other hand however, we also have sympathy for the trustees. They are attempting to bring order to how these hapū lands are administered and in doing so are being asked to make difficult decisions. The trust has allowed this whānau the exclusive use of Lot 16 and Lot 18 for the past 42

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15 *Porou –Whareongaonga 5 Trust* (2015) 49 Tairawhiti MB 46 (49 TRW 46) at [35] – [36].
16 *Eriha v Munro – Kairakau Lands Trust* (2014) 32 Takitimu MB 84 (32 TKT 84).
17 *Ellis v Faulkner – Poripori Farm A Trust* (1996) 57 Tauranga MB 7 (57 T 7).

years, at a rental of only $52.00 per year, which is clearly an extremely minimal return from the land. The trustees wish to provide for *all* beneficiaries not just one or two families. Going forward the trustees want to ensure that the benefits of the trust's assets, not just from these blocks but all blocks that the trust administers, are received at proper rates and that all beneficiaries are treated the same. Such an approach is in accordance with their duties as trustees to treat all beneficiaries fairly and to act prudently in administering the assets of the trust.

[35] In these circumstances, there has been no finding of a breach of trust, the current trustees are not in breach of their trust order, nor is their decision contrary to the general functions of trustees per s 223 of the Act or the general powers of the trustees as per s 226 of the Act. If that were all there is to it then the appeal would fail on this ground. However, associated with this issue is the question of whether the trustees are estopped from terminating the lease, and, if the appellants fail to agree to the higher rental, then evicting the appellants from the properties. We discuss this further below.

Are the trustees estopped from purporting to evict the appellants from the land?

[36] The final matter for consideration was raised in the lower court as an issue of estoppel. Judge Armstrong helpfully summarised the law relating to estoppel at paragraphs [93] to [100] of his decision.[18] For convenience we reproduce those paragraphs below:

> [93] In *Commissioner of Inland Revenue v Morris* the Court of Appeal found that:
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> > The essence of the doctrine is that a person is not permitted to enforce strict legal rights when it would be unjust that he should be allowed to do so, having regard to the dealings which have taken place between the parties. But those dealings must amount to one party having been led by the attitude of the other to alter his own position.
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> [94] In *Andrews and Colonial Mutual Life Assurance Society Limited*, the High Court referred to the five probanda which had previously been required for the operation of proprietary estoppel. Those probanda are:
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> (a) The plaintiff must have made a mistake as to his legal rights;
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> (b) The plaintiff must have expended money or done some other act on the faith of his mistaken belief;
>
> (c) The defendant, who is the possessor of the legal right, must know of the existence of his own right inconsistent with the right claimed by the plaintiff;
>
> (d) The defendant, as possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not so know, there is nothing to call upon him to assert his own rights;

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[18] *Takimoana – Te Tii (Waitangi) B3 Ahu Whenua Trust* (2014) 90 Taitokerau MB 67 (90 TTK 67).

(e) The defendant, as possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts he has done either directly or by abstaining from asserting his legal rights.

[95] At page 570 of that decision Barker J went on to find:

> However, the recent cases show that strict adherence to the probanda is not necessary; it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed another to assume to his detriment rather than inquiring whether the circumstances can be fitted into some preconceived formula.

[96] This flexible approach was supported by the decision of the Court of Appeal in *Gillies v Keogh*. In that decision Cooke P commented that the tide has set on the view that proprietary estoppel and promissory estoppel are entirely separate and take their origins from different sources. Richardson J stated that there had been a trend away from the strict application of the five probanda to a more flexible test of unconscionability. Despite that, Richardson J considered that there were still three essential elements which had to be satisfied namely:

(a) The creation or encouragement of a belief or expectation;

(b) A reliance by the other party; and

(c) Detriment suffered as a result of that reliance.

[97] This approach was endorsed in the subsequent decision of the Court of Appeal in *Goldstar Insurance Co Limited v Gaunt* [1998] 3 NZLR 80.

[98] In the House of Lords decision of *Thorner v Major* [2009] 3 All ER 945, Lord Scott found that:

> Lord Walker, in para [29] of his opinion, below, identified the three main elements requisite for a claim based on proprietary estoppel as, first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and, third, some detriment incurred by the claimant as a consequence of that reliance. These elements would, I think, always be necessary they might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity.

…

[99] Having reviewed the above authorities it is clear that the modern trend is to adopt a more flexible approach when considering claims in equitable estoppel. Nevertheless at least three main elements must be met. Those are:

(a) A creation or encouragement of a belief or expectation;

(b) A reliance by the other party; and

(c) Detriment as a result of that reliance.

[100] While all of these elements must be met that on its own may not be sufficient. The Court must then assess the overall circumstances of the case and determine whether it would be unconscionable for the party against whom estoppel is alleged to enforce their strict legal rights.

[37] In the lower Court all parties placed considerable importance on a letter dated 10 July 1978 sent by the trustees to Richard's and Mereawaroa's parents. The letter proposed the change from a lease with a perpetual right of renewal to a lease for a fixed term of 42 years. The full body of the letter is set out below:[19]

> You are the lessee of the above land and rental for the first ten years, expiring 26th July 1981, has been set at $52.00p.a. For the remaining 11 years of the first term of the lease, and for any renewal thereof, annual rent is to be determined in accordance with Section 22 of the Public Bodies Leases Act 1969[.] This lease has perpetual right of renewal.
>
> The Trustees are aware of the extremely high land value (that is value of the land without improvements) being assessed by the Valuation Department for the Waitangi area and are concerned that you may have difficulty in meeting the assessed rental under the lease at the expiry of the first 10 year term together with increased land rates.
>
> The Trustees think your main thought is to reside permanently at Waitangi and to enable you to achieve this I have been authorised to offer you the following alternative lease, subject only to the consent of the Department of Maori Affairs who hold a first mortgage over your section;
>
> 1. That the present lease containing perpetual right of renewal be surrendered.
>
> 2. That a new lease be entered into for a term of 42 years from 27/7/1971 at a rental of $52.00 per annum with general terms and conditions as recently negotiated by the Trustees with other lessees.
>
> This offer is available until 11th August 1978.

[38] Both Mr Takimoana and Ms Davies' parents accepted the trust's proposal by signing at the bottom of the letters.

[39] Judge Armstrong analysed the letter in relation to the question of whether it was sufficiently clear that the lessees would no longer have a perpetual right of renewal, but would instead have a fixed term lease at the advantageous rental of $52.00 per annum. Judge Armstrong also considered ancillary evidence, including the minutes of the trustees' meeting of 6 August 1978, to determine whether there was any weight to the appellants' contention that the letter of 10 July 1978 would have led their parents to believe that they and their descendants would be able to live permanently in the properties at the same rental.

[40] We have no criticism of the way in which Judge Armstrong analysed that evidence or the conclusion that he came to, which was that there was not sufficient evidence to establish that the trust created or encouraged a belief that the substituted lease would allow the lessees to remain permanently in the properties.

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[19] Affidavit of W Tane sworn 9 May 2014 Exhibit "AA".

[41] However, we have some concern that Judge Armstrong failed to consider whether the trustees had a duty to bring to the attention of the appellants' parents the difference in the bargain created by changing the lease from one with a perpetual right of renewal to a fixed term lease, while still retaining the provision that there would be no compensation for improvements and that the parties would not be able to remove any buildings from the land. Our concern arises for the following reasons:

(a) While the lease provided for a perpetual right of renewal, the provisions for no compensation for improvements would have little effect. However, once the lease changed to be one for a fixed term, provisions for no compensation for improvements and a prohibition on removing buildings would have quite a different impact. Rather than the consideration for the change to the term of the lease being simply an advantageous rental of $52.00 per annum, the fixed term lease provisions have the effect of transferring the dwellings to the trust. There is no evidence that this change in the values being exchanged was ever brought to the attention of the appellants' parents;

(b) In approaching the lessees with their proposal in the letter of 10 July 1978 the trustees were not engaging in an arms-length transaction. Rather they were in the role of trustees dealing with beneficiaries, with duties of fairness and good faith towards them. The beneficiaries were not legally represented. It was incumbent upon the trustees to ensure that the beneficiaries fully understood the transaction they were being asked to enter into. While the trustees may have had the best interests of all the beneficiaries in mind when approaching the transaction, nevertheless that does not relieve them of their responsibilities to the individual beneficiaries;

(c) Judge Armstrong questioned Mr Takimoana during the hearing and asked if he had ever talked to his mother about what might happen if the trustees said no to a further lease at the end of the term. Mr Takimoana replied "move my house back to where it belongs in the motor camp".[20] Although the evidence is not clear, there is some support for the view that the appellants and perhaps their parents believed that the houses belonged to them, rather than to the trust.

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[20] *Takimoana – Te Tii (Waitangi) B3 Ahu Whenua Trust* (2014) 90 Taitokerau MB 67 (90 TTK 67) at [145]; and 88 Taitokerau MB 295 (88 TTK 295) at 334.

[42] At paragraph [147] of his decision, Judge Armstrong came to the conclusion that the parents of the appellants must have been aware that the trustees might not agree to a further leasing arrangement. He goes on at paragraphs [153] to [158] to discuss the effect of cls 7 and 18 of the perpetual lease, which require the lessee to yield up all the land and buildings in good condition, and that no compensation shall be payable to the lessee for any improvements. Judge Armstrong accepted that if the perpetual right of renewal was exercised the effect of these provisions would not crystallise. He also noted at paragraph [157] that both Mr Takimoana and Ms Davies believed that they owned the houses. However, the conclusion he draws from that evidence relates to the issue of whether the trustees led the parents to believe that they would have permanent occupation for them and their descendants. He did not consider whether the trustees could either be estopped from claiming ownership of the houses or that the trustees of the time might have breached their duties to the beneficiaries in failing to ensure that they understood the full consequences of the corresponding clauses in the substituted leases.

[43] We must acknowledge that the submissions in the lower Court were weighted to the question of the term of the lease, rather than to the other provisions. Nor was the issue of the question of trustees' obligations and duties in 1978 raised clearly. Rather, the emphasis was on the trustees' obligations and duties towards beneficiaries at the expiry of the lease, when all these provisions had been in place for 40 years. Nevertheless, we note that Mr Peters did argue that his clients had given up the value of $90,000.00 of improvements in consideration for paying rent in 1978 which would not have exceeded $1,000.00 per annum. We note that Judge Armstrong gave some consideration to these matters but found that there was insufficient evidence to determine whether the lessees had suffered a detriment by entering into the substituted leases.

Overall conduct of parties

[44] In assessing the overall conduct of the trustees in arranging the substituted leases Judge Armstrong found that the trustees were not trying to deceive or trick the lessees into signing the substituted lease. He also referred to a meeting of beneficiaries on 7 December 1991, in which the trustees stated that they intended to offset the foregone rental increases in respect of the two properties through receiving ownership of the house without payment of compensation at the end of the fixed term. Judge Armstrong went on to say that the appellants' parents may not have completely understood the terms of the substituted lease but that they knew that further occupation rights would need to be negotiated with the trustees. While the Judge clearly understood the attachment of the appellants and their whānau to these properties he made the point that the land is, in fact owned by the trust and the trust must act for the benefit of all beneficiaries. He also noted the comments of the

chair of trustees that the trustees would seek to enter into negotiations to give the appellants continued right of occupation on market terms.

[45] The Judge's analysis raises similar questions again. These are:

(a) Whether he gave due consideration to the relationship between the trustees and the beneficiaries at the time of entry into the substituted leases, in terms of the standards of communication, transparency and fairness to which the trustees needed to be held when dealing with their own beneficiaries;

(b) The statement of the trustees at the meeting of beneficiaries on 7 December 1991 took place after the entry into the substituted leases, so that it cannot in any way be seen as advice to the appellants' parents as to the full impact of the new arrangement in terms of the ownership of the dwelling;

(c) The Judge analysed the agreement as being one where, if the beneficiaries were able to keep the house, they would be unjustly enriched, because they would have also had the benefit of a fixed rental for an extra 19 years. But previously that benefit was seen as consideration for the change from a perpetual right of renewal to the fixed term leases in that there was a clear benefit to the trust in having fixed term leases and clear detriment to the tenants in giving up the perpetual leases. It is doubtful in those circumstances that the retention of ownership of the houses by the beneficiaries can be considered as unjust enrichment;

(d) If the arrangement was as the beneficiaries' parents thought, i.e. that they got a fixed rental for a longer term in exchange for giving up a perpetual right of renewal, but keeping the ownership of the houses, then the negotiations of the current trustees would be on the basis of a ground rental for continued occupation of the properties, rather than as appears to have happened, rental assessed on the occupation of the house and land.

[46] This Court is also aware that despite repeated requests from the beneficiaries to meet with all the trustees, in fact the trustees have taken proceedings in the Tenancy Tribunal without such a meeting occurring. Given the requirement of trustees to act in all good faith towards beneficiaries, we have some doubts that lodging proceedings in the Tenancy Tribunal is fulfilling those duties.

[47] In summary, it appears that the assessment of s 18(1)(a) matters and the estoppel requirements was done on the basis that the trustees in the 1970s and the beneficiaries' parents were engaged in an arms-length transaction, and without taking account of the trustees' fiduciary duties towards these beneficiaries.

[48] If the duties of the trustees of clear, transparent communication of the whole transaction and fair treatment towards the appellants' parents as beneficiaries had been taken into account by the Judge there is still no guarantee that he would have come to a different conclusion. In this regard we note that Judge Armstrong referred to lack of evidence being provided by the appellants on which a proper assessment could be made of the trustees' behaviour at the time the substituted leases were entered into. However, given the bare bones of the transaction and the relationship of the parties involved it may be arguable that the onus of producing such evidence lies with the trustees rather than the beneficiaries.

[49] We therefore consider that this matter ought to be referred back to the lower Court to consider whether there was a breach of their fiduciary duty by the trustees in 1971 and , if so, what the remedy for such breach ought to be, including whether any declaration should be made pursuant to s 18(1)(a) as to the ownership of the houses. It may be that the lower Court should give directions as to further evidence that may be required in order to undertake the assessment we consider is necessary. It may also be that the lower Court may be able to direct a mediation or facilitation between the trustees and the appellants to ensure that good faith measures are taken at this time by the trustees. Accordingly we allow the appeal in relation to this matter and refer it back to the lower Court pursuant to s 56(1)(e).

Injunction

[50] For the sake of completeness, we note the further matter before us regarding the interim injunction granted by Judge Armstrong in favour of the appellants, to preserve their position pending completion of the appeal.

[51] On 10 June 2015, Judge Armstrong granted an interim injunction preventing the trustees of the Te Tii (Waitangi) B3 Ahu Whenua Trust from taking any steps to remove or evict the appellants, Mereawaroa Davies and Richard Takimoana, from Lot 16 and Lot 18. At that stage, the trustees had filed proceedings with the Tenancy Tribunal to evict the appellants and a hearing had been set for 12 June 2015. However, the injunction granted by Judge Armstrong was to continue until further order

of the Māori Land Court or of the Māori Appellate Court.[21] The respondent trustees appealed that injunction decision on 26 June 2015 and the matter was heard on 14 August 2015.

Trustees' submissions

[52] The respondent trustees set out the following grounds in support of their appeal:

(a) An injustice has been served upon the trust through no fault of its own;

(b) The trust was not given proper notice of the injunction and so did not have an opportunity to address the issuing of the injunction; and

(c) The rights of the trust have been upheld by the lower Court decision of Judge Armstrong and, while that decision is subject to appeal, there has been no stay of orders granted.

[53] The trustees argued that there was a distinct lack of due process with regard to notification of the injunction hearing. They advised that a copy of the injunction application had been received at the trust office from the appellants on 4 June 2015; however that notice merely indicated that the application was expected to be heard in Whangarei with the comment "Hope in the month of June 2015 yet to be advised". Subsequently Mr Hetaraka, the appellants' representative, phoned the trust office and advised that a hearing would be held on 10 June 2015, but did not indicate a specific time for the hearing. No other formal notification of the hearing was received and it subsequently became apparent that e-mail notification of the hearing from the Court had incorrectly recorded the trust's e-mail address and the e-mail had not therefore been received by the trust.

[54] The trustees argued that such notification was not best practice and the e-mail notification should have been followed up with a hard copy notice. The trustees say that although they were contacted on the day of the hearing, there was insufficient time to enable a trust representative to attend Court. However, despite this, an injunction was issued by the Court, which they contend limits the rights of the trust, and the trust is now confronted with an injunction without being provided with any substantive documentation to consider the basis upon which such an injunction was granted. They argue that, given the nature of an injunction, the Court needed to exercise caution in considering the application let alone granting it.

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[21] 104 Taitokerau MB 139 (104 TTK 139).

[55] The trustees referred to the action they took in the Tenancy Tribunal to enforce their rights and advised that those proceedings were taken as the trustees had serious concerns about the activities on the land and the effect of such activities on the performance of their duties as trustees. They point out that the dwellings located on the land do not have council consent and there are electrical safety issues. Such issues put the buildings at risk of fire, which the trust has already experienced in relation to another dwelling on the block, and this opens the trust up to liability in terms of their insurance. Further, the trust has lost rental income since 1 November 2014 amounting to $18,000.00, and there are unpaid water rates of $1,100.00. In addition, the trust continues to be liable for land rates, insurance, and repairs and maintenance. The trustees say they sought to resolve the issues amicably and presented offers for solution, but there has continued to be a lack of co-operation from the occupiers, and they are concerned that this may set a precedent for other tenants.

[56] The trustees submitted that their rights have been upheld in the lower Court by Judge Armstrong's substantive decision. They acknowledge that the decision is subject to an appeal but point out that no stay has been granted by either the lower Court or this Court.

Appellants' submissions

[57] At the hearing, the appellants confirmed that, given the injunction was to cease on the issue of the decision of this Court, they did not see any need to argue the matter further.

Additional submissions

[58] We also record that notices of intention to appear in opposition were received, firstly from the Waiariki Ngaurupa Takimoana Raua Ko Whakaiti Reihana Whānau Trust and secondly, from the "Te Tii 1 Waitangi Māori Incorporation". The grounds on which those parties opposed the appeal of injunction were not clearly articulated, however the whānau trust appeared to argue that they occupied the land as ahi ka; that there was in fact no existing lease and the trust had not considered their ongoing occupation; and that the trust's application to the Tenancy Tribunal to evict them contained a number of anomalies.

[59] After receipt of the first notice of intention to appear, we issued directions for the whānau trust to provide written submissions to the Court. We noted that no new evidence could be filed or presented and failure to provide submissions would result in the Court declining to hear from any such persons at the hearing.

[60] The notice of intention to appear filed by "Te Tii 1 Waitangi Māori Incorporation" supported the submissions of the whānau trust and attached documents which purported to vest the land in itself, grant an occupation order and licence to the whānau trust, and to trespass the trustees of the block.

The Law

[61] Section 19 of the Act refers to the jurisdiction of the Court in respect of injunctions and provides:

> **19 Jurisdiction in respect of injunctions**
>
> (1) The court, on application made by any person interested or by the Registrar of the court, or of its own motion, may at any time issue an order by way of injunction—
>
> (a) against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land, Maori reservation, or wahi tapu; or
>
> (b) prohibiting any person, where proceedings are pending before the court or the Chief Judge, from dealing with or doing any injury to any property that is the subject matter of the proceedings or that may be affected by any order that may be made in the proceedings; or
>
> (c) prohibiting any owner or any other person or persons without lawful authority from cutting or removing, or authorising the cutting or removal, or otherwise making any disposition, of any timber trees, timber, or other wood, or any flax, tree ferns, sand, topsoil, metal, minerals, or other substances whether usually quarried or mined or not, on or from any Maori freehold land; or
>
> (d) prohibiting the distribution, by any trustee or agent, of rent, purchase money, royalties, or other proceeds of the alienation of land, or of any compensation payable in respect of other revenue derived from the land, affected by any order to which an application under section 45 or an appeal under Part 2 relates.
>
> (2) Notwithstanding anything in the Crown Proceedings Act 1950, any injunction made by the court under this section may be expressed to be binding on the Māori Trustee.
>
> (3) Any injunction made by the court under this section may be expressed to be of interim effect only.
>
> (4) Every injunction made by the court under this section that is not expressed to be of interim effect only shall be of final effect.

[62] In terms of the grant of an interim injunction, the Court must be satisfied that there is a serious question to be tried, that the balance of convenience is in the applicant's favour and that the overall

justice of the case supports a grant of injunction.[22] The Court of Appeal in *Roseneath Holdings Limited v Grieve* put it this way:[23]

> [35] The object of an interim injunction is to protect the plaintiff from harm occasioned by any breach of rights, that is the subject of current litigation, for which the plaintiff might not be adequately compensated by an award of damages by the court, if successful at the trial. Against that object it is necessary to weigh the consequences to defendants of preventing them from acting in ways which the trial may determine are in accordance with their rights. The well established two stage approach to addressing applications for interim injunctions involves first, ascertaining whether there is a serious question to be tried and secondly, considering the balance of convenience if the relief sought is granted…

[63] In the lower Court, Judge Armstrong relied on the decision of *Orion Property Trust Care v Du Cane Court* in finding that the Māori Land Court retains jurisdiction to grant an interim injunction, even though the substantive action is an appeal before the Māori Appellate Court.[24]

Discussion

[64] The appellants highlighted that the injunction issued was of interim effect, continuing only until further order of the Māori Land Court or this Court, effectively ending with the issuing of our decision.

[65] Judge Armstrong granted the injunction to preserve the status quo and to preserve the subject matter of this appeal so as to not render the appeal nugatory.

[66] Given our decision to part grant this appeal we are of the view that the injunction should continue to again preserve the status quo and to preserve the subject matter of the proceedings being referred back to the lower Court.

[67] Therefore we grant an injunction preventing the trustees from taking further action in relation to recovery of the land until these proceedings are finally determined.

Decision

[68] The appeal is allowed in part. Pursuant to s 56(1)(e) of Te Ture Whenua Maori Act 1993 we refer this matter back to the lower Court to consider whether there was a breach of their fiduciary duty

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22 *Klissers Farmhouse Bakeries Ltd v Harvey Bakeries Ltd* [1985] 2 NZLR 129; *Henry Roach (Petroleum) Pty Ltd* [1976] VR 309.

23 *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168.

24 *Orion Property Trust Care v Du Cane Court* [1962] 3 All ER 466.

by the trustees in 1971 and, if so, what the remedy for such breach ought to be, including whether any declaration should be made pursuant to s 18(1)(a) as to the ownership of the houses.

[69] Pursuant to s 56(1)(c) of Te Ture Whenua Maori Act 1993 we vary the injunction order of Judge Armstrong so that the trustees are prevented from taking further action in relation to recovery of the land until these proceedings are finally determined.

Costs

[70] Given this appeal was partly successful we do not intend to make any orders as to costs. If the parties have a different view then they should file focussed memorandum within 14 days of receiving this decision. If no submissions are received within that time frame the money deposited as security for costs is to be refunded to the appellants.

[71] A copy of this decision is to be sent to all interested parties.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

C L Fox (Presiding) **DEPUTY CHIEF JUDGE**	S Te A Milroy **JUDGE**	C T Coxhead **JUDGE**