I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O WAIKATO MANIAPOTO
In the Māori Appellate Court of New Zealand
Waikato Maniapoto District

A20210012662
APPEAL 2021/6

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Whangape Lot 65B Sec 2A Block
I WAENGA I A *Between*	DICK RATU, HAYDEN RATU AND THOMAS WAKA AS TRUSTEES OF WHANGAPE LOT 65B SEC 21 AHU WHENUA TRUST Kaitono pīra *Appellants*
ME *And*	ROSEMARY MARSHALL Kaiurupare pīra *Respondent*
ME *And*	WAIKATO DISTRICT COUNCIL Te Tanga Whaitake Interested party

Nohoanga: *Hearing*	10 February 2022, 2022 Māori Appellate Court MB 42-90 (Heard at Hamilton via Zoom)
Kooti: *Court*	Judge M P Armstrong (Presiding) Judge T M Wara Judge R P Mullins
Kanohi kitea: *Appearances*	C Hockly for Appellants K Katipo and K Ketu for Respondent C Pidduck for Interested Party
Whakataunga: *Judgment date*	19 June 2023

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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Hei tīmatanga kōrero
Introduction

[1] For over 50 years, Rosemary Marshall has lived in the family home at 116 Marshall Road, near Lake Whangape in Waikato (the homestead). Her continued right to do so is now under challenge.

[2] The homestead straddles three blocks of land. One is Whangape Lot 65B Sec 2A (the whenua), a block of Māori freehold land administered by the trustees of the Whangape Lot 65B Sec 2A Ahu Whenua Trust (the trustees). The other affected blocks are: Part Allotment 65B2C1, general land owned by Mrs Marshall's daughter and her husband; and Marshall Road, an unformed roadway managed by the Waikato District Council.

[3] The trustees want that part of the homestead that sits on the whenua to be removed. Mrs Marshall applied to the Māori Land Court to prevent this. On 12 August 2021, Judge Stone:[1]

(a) Determined that Mrs Marshall owns the homestead as far as it sits on the whenua;

(b) Granted Mrs Marshall a licence to occupy that part of the whenua on which the house sits for her lifetime; and

(c) Ordered her to pay compensation of $20,000 and damages for trespass of $1,000 to the trustees.

[4] The trustees appeal.

[5] Before hearing the substantive appeal, the trustees sought to amend the grounds of appeal and to adduce further evidence. We granted the former and dismissed the latter with reasons to follow.[2] This judgment:

(a) Sets out those reasons; and

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1 *Marshall v Ratu – Whangape Lot 65B Sec 2A* (2021) 227 Waikato Maniapoto MB 148 (227 WMN 148).
2 2022 Māori Appellate Court MB 1-2 (2022 APPEAL 1-2).

(b) Determines the substantive appeal.

He aha i whakaae ai mātou ki ngā kaitiaki tarati kia whakahoungia te pīra, engari, kāore i whakaaetia ki ngā taunakitanga hou?
Why did we allow the trustees to amend the grounds of appeal but not adduce further evidence?

[6] The original grounds of appeal only challenged Judge Stone's order granting Mrs Marshall a licence to occupy the whenua for her lifetime. On 24 December 2021, the trustees applied to amend those grounds to challenge the findings that:

(a) The homestead is a fixture; and

(b) Mrs Marshall has an equitable interest in the homestead that meets the requirements of a constructive trust.

[7] By the time this application was made, the appeal had already been set down for hearing.[3]

[8] Generally, an applicant is entitled to amend pleadings at any time. However, they must seek leave to do so where the application has been set down for hearing.[4] When deciding whether to grant leave, we have to consider whether the amendment is in the interests of justice, whether it would cause significant prejudice to the respondent, and whether it would cause significant delay.[5]

[9] Mr Hockly, for the trustees, argued that the trustees' primary concern is the licence which allows Mrs Marshall to continue to live on part of the whenua. The trustees want the homestead removed off their land. That is why the original grounds of appeal only challenged the order granting a licence. However, upon further review, the trustees realised that the findings that the homestead is a fixture, and that Mrs Marshall has an equitable interest in the home, also relate to the grant of the licence. The trustees sought to enlarge the

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3 2021 Chief Judge's MB 1479 (2021 CJ 1479).
4 *Shanton Apparel Ltd v Thornton Hall Manufacturing Ltd* [1989] 3 NZLR 304 (CA); *Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528 (CA); and Māori Land Court Rules 2011, r 8.17(2)(c).
5 *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216; [1958] 3 All ER 540 (CA).

grounds of appeal to challenge those findings as they relate to whether a licence can or should be granted.

[10] Mr Hockly also argued that enlarging the grounds of appeal did not require further evidence. It would only require further submissions based on the evidence already before the lower Court. He said the application to adduce further evidence related to the original grounds of appeal not the amended grounds of appeal.

[11] Ms Katipo, for Mrs Marshall, argued that the order per s 18(1)(a) of Te Ture Whenua Māori Act 1993 (the Act) is a separate order and is a separate part of Judge Stone's decision. She also said that her client would suffer prejudice if the grounds were amended as there was insufficient time to prepare legal submission on those additional issues.

[12] We accept that Judge Stone's findings that the homestead is a fixture, and that Mrs Marshall has an equitable interest in it, are separate stand-alone findings. Judge Stone also granted a separate order per s 18(1)(a) of the Act concerning this. However, we also accept that these are related to the order granting Mrs Marshall a right to occupy the whenua. Judge Stone expressly relied on Mrs Marshall having an equitable interest in the homestead when deciding whether it was just and equitable to grant a licence to Mrs Marshall.[6] Mr Hockly also raised whether Judge Stone was able to grant a licence per s 325(1)(c) of the Property Law Act 2007 (PLA) in this case. This relates directly to the earlier finding per s 18(1)(a).

[13] As such, while the trustees primarily object to the grant of the licence, the s 18(1)(a) order has a direct bearing on that. Given that the licence has the effect of allowing a non-owner to live on Māori freehold land against the wishes of the trustees, we considered it was in the interests of justice to allow the grounds of appeal to be amended so that the trustees could argue this issue in full.

[14] We took into account that, as a result, Mrs Marshall may suffer prejudice by having limited time to respond to the new issues. However, we didn't consider this prejudice was significant. Ms Katipo represented Mrs Marshall in the hearing before Judge Stone. These issues were argued in full there. Ms Katipo was already familiar with the arguments and so

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6 *Marshall v Ratu – Whangape Lot 65B Sec 2A* (2021) 227 Waikato Maniapoto MB 148 (227 WMN 148) at [45].

it was not unduly difficult for her to address those same issues on appeal. We also granted Ms Katipo an extension for filing her submissions so that she would have additional time to address the new issues.[7] This alleviated any prejudice that would have arisen. We note that Ms Katipo filed comprehensive submissions addressing all issues on appeal.

[15] Taking this approach also allowed us to maintain the existing hearing date for the appeal and so there was no delay.

Further evidence

[16] Generally, a party cannot adduce further evidence on appeal. They must rely on the evidence adduced before the lower Court. However, this Court may grant leave to adduce further evidence where it is necessary to enable it to reach a just decision.[8] To do so, the applicant must demonstrate that:[9]

(a) The evidence could not have been obtained with reasonable due diligence for use at trial;

(b) The evidence would probably have an important influence on the result of the case though it need not be decisive; and

(c) It is presumed the evidence will be believed though it need not be incontrovertible.

[17] The trustees sought to adduce further evidence on the possibility of Mrs Marshall dying in the homestead. They argued this was a significant issue in tikanga and it was not addressed in evidence before the lower Court.

[18] This evidence could have been obtained with reasonable due diligence for use in the lower Court. The proposed new evidence was submitted in a statement from Thomas Waka. He is one of the trustees. Mr Waka speaks about the tikanga that would apply in the event

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7 2022 Māori Appellate Court MB 1-2 (2022 APPEAL 1-2).
8 Te Ture Whenua Māori Act 1993, s 55(2).
9 *Tairua v Aati* (2020) Māori Appellate Court MB 224 (2022 APPEAL 224) at [36]; *Faulkner v Hoete – Motiti North C No 1* (2017) Māori Appellate Court MB 188 (2017 APPEAL 188).

Mrs Marshall died in the homestead. This evidence was not discovered after the hearing in the lower Court. It was simply not produced.

[19] Mr Hockly argued that the evidence in the lower Court focused on historical issues concerning the homestead. He said the evidence from the trustees and the Marshalls did not address the possibility of Mrs Marshall passing away in the homestead. We do not agree.

[20] Mrs Marshall swore an affidavit in the lower Court, where she states:[10]

> …I have left written instructions to my family stating that I would like to lay in state in my own home, like my husband Ted, and for the funeral service to take place on the Homestead site.

[21] This was expressly raised in the lower Court. The trustees failed to respond to it.

[22] We acknowledge that Mr Waka is a Wesleyan Minister, and so one would presume his evidence on tikanga would be believed. We also accept the evidence would be relevant, though whether it would have an important influence on the result is unclear. Ultimately, this should have been presented in front of Judge Stone. It wasn't and we saw no proper basis to adduce it before us.

He aha te tūāpapa o te pīra, ā, me pēhea te kōkiri whakamua?
What are the grounds of appeal and how do we approach it?

[23] The trustees argue that Judge Stone erred in fact and/or law by:

(a) Finding per s 18(1)(a) of the Act that:

(i) The homestead is a fixture rather than a chattel; and

(ii) Mrs Marshall has an equitable interest in the homestead that meets the requirements of a constructive trust.

(b) Granting Mrs Marshall a licence to occupy as this:

(i) Was not available per s 325(1)(c) of the PLA;

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[10] Affidavit of R Marshall, dated 29 January 2020, at [70].

(ii) Was not just and equitable; and/or

(iii) Is contrary to the principles and objectives of the Act, contained in the Preamble, ss 2 and 17.

[24] The findings per s 18(1)(a) involve mixed questions of fact and law. They do not involve an exercise of discretion. This part of the appeal is a general appeal.[11] We must make our own assessment of the merits of the case. The weight we give to the reasoning of the lower Court is a matter for our assessment, though the trustees still bear the onus of satisfying us that we should differ from the decision under appeal.[12]

[25] Granting a licence to Mrs Marshall under subpart 2, Part 6 of the PLA involved the exercise of discretion.[13] On those issues, we can only intervene if the trustees satisfy us that:[14]

(a) There was an error of law or principle;

(b) The Court took into account an irrelevant consideration;

(c) The Court failed to take into account a relevant consideration; or

(d) The decision is plainly wrong.

[26] We approach the appeal on this basis.

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11 *Nicholas v Te Amo* [2023] NZCA 22 at [8].

12 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; *Kacem v Bashir* [2010] NZSC 112.

13 Property Law Act 2007, ss 323 and 325.

14 *Kacem v Bashir* [2010] NZSC 112 at [32]. See also *Matthews v Matthews – Estate of Graham Ngahina Matthews* [2015] Māori Appellate Court MB 512 (2015 APPEAL 512); *Flight v Fletcher – Waipapa 1D 2B 3B* [2017] Māori Appellate Court MB 96 (2017 APPEAL 96); *Faulkner v Hoete – Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17); *Hohepa v Banks – Waima C30A and Waima Topu Blocks* [2019] Māori Appellate Court MB 629 (2019 APPEAL 629); *Nicholas v Te Amo – Te Whaiti-Nui-A-Toi* [2021] Māori Appellate Court MB 273 (2021 APPEAL 273).

He papakāinga rānei, he rawa rānei?
Is the homestead a chattel or a fixture?

[27] The two main indicators of whether a house is a chattel or a fixture are the degree and purpose of annexation.[15]

[28] Mr Hockly argues the lower Court was wrong to find the homestead was a fixture. He says the homestead is on piles and so is capable of removal. He submits that the structure was first erected as a bach and was only added to over time indicating that it was not intended to provide a permanent dwelling.

[29] In *Ratana v Tihi – Ruatoki B Sections 23*, this Court considered the relevance of a house being removable, in the context of whether a house can transition from being a fixture to a chattel or vice versa:[16]

> [19] Returning to the approach in *Anderson*, it is clear that in *Elitestone* and *Auckland City Council* the courts accepted that when a structure or materials are brought onto the land they are a chattel, and they may then become part of the realty depending on the degree and purpose of annexation. This supports the first part of the approach in *Anderson*. *Elitestone* also recognised the possibility that a house which is capable of removal *may* remain a chattel. This is not authority that a house capable of removal *must* remain a chattel. It is also inherent within these comments that a house which is capable of removal *may* also remain a fixture. Regard must be had to the particular circumstances of the case.
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> [20] In the New Zealand context, it is common for houses to be built on wooden piles. Such houses are capable of uplift and removal and there is an established trade where such houses are uplifted, sold and transferred to a new site. The prospect of a future uplift, removal and sale, does not, on its own, affect the degree and purpose of annexation at the time the house was built. At that time, if the house was constructed to provide a permanent dwelling, it would likely become part of the realty.

[30] While the homestead is on piles this, of itself, does not mean it is a chattel. Nor does the fact that it started as a bach. A bach indicates intermittent occupation, but it does not necessarily indicate a temporary dwelling. Many baches are built as a permanent structure albeit for holidaying purposes. From the time Mrs Marshall and her family moved in, they continued to add to and develop the homestead as a permanent home for their whānau. Mrs

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15 *Ratana v Tihi – Ruatoki B Sections 23* [2021] Māori Appellate Court MB 290 (2021 APPEAL 290); *Elitestone Ltd v Morris and another* [1997] 2 All ER 513.

16 *Ratana v Tihi – Ruatoki B Sections 23* [2021] Māori Appellate Court MB 290 (2021 APPEAL 290).

Marshall has lived there for over 50 years. Both the degree and the purpose of annexation indicates that the homestead has become part of the land.

[31] We agree with Judge Stone that the homestead is a fixture.

I hē a Kaiwhakawā Stone i tana whakatau ki ngā tōkeke itarete a Marshall ki te whare?
Did Judge Stone err finding that Mrs Marshall has an equitable interest in the house?

[32] Generally, a house that is a fixture is owned by the owners of the land according to their respective interests. The interests of those legal owners in the house are subject to any equitable interests. This Court has jurisdiction per s 18(1)(a) of the Act to determine whether any equitable interests exist adopting equitable principles such as a constructive trust or equitable estoppel.[17]

[33] Judge Stone applied the test in *Lankow v Rose* to determine whether the trustees, as the legal owners, hold the homestead on constructive trust for Mrs Marshall.[18] He found that they do as:

(a) Leonard Marshall gifted the bach to Mrs Marshall and her husband. They made substantial contributions to the homestead. There was no dispute before Judge Stone that Mrs Marshall 'owns' the homestead;

(b) Mrs Marshall had an expectation of an interest in the homestead. She invested significant time and money on the renovations and extensions over the years. She raised her family there;

(c) The expectation that she would own the homestead is a reasonable one. No one disputed that 'ownership';

(d) The trustees would reasonably expect to yield an interest to Mrs Marshall.

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17 *Nicholas v Te Amo* [2023] NZCA 22 at [8]; *Tihi v Nuku – Ruatoki B Sections 23, 25, 26B, 27, 31, 32, 33B2C2, 38 and 79 and Ruatoki C Sections 11, 12, 15, 17, 18B2, 21, 22B, 23 (Aggregated)* [2019] Māori Appellate Court MB 531 (2019 APPEAL 531); *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2).

18 *Lankow v Rose* [1995] 1 NZLR 277.

[34] Having found that Mrs Marshall has an equitable interest in the homestead, Judge Stone considered what is the appropriate relief. He noted the difficulties of granting a vesting order and the payment of compensation. He found that the question of relief under s 18(1)(a) of the Act was intertwined with the relief sought under s 24 of the Act and subpart 2, Part 6 of the PLA. He declined to grant relief under s 18(1)(a) and instead proceeded to consider relief per the PLA regime.

[35] Mr Hockly argues that Judge Stone erred in his approach. He contends that the test for a constructive trust was not met as:

(a) It is not reasonable for Mrs Marshall to expect that she could continue to live on the whenua; and

(b) It is not reasonable to expect the trustees to yield ongoing occupation of the whenua to Mrs Marshall.

[36] He submits that Judge Stone failed to consider these matters and instead sidestepped the issue by proceeding to consider relief under the PLA.

[37] It is clear that Judge Stone was considering whether Mrs Marshall held an equitable interest in the homestead. We agree with his findings that she did for the reasons he outlined. We note the trustees did not dispute that Mrs Marshall 'owned' the homestead in the lower Court.

[38] Ordinarily, where such a finding is made, the Judge will proceed to consider the appropriate relief per s 18(1)(a) of the Act. If he was considering whether to grant Mrs Marshall an ongoing right of occupation per s 18(1)(a) of the Act, then the issues raised by Mr Hockly would be relevant. However, Judge Stone was not compelled to make that assessment. Here Mrs Marshall also sought relief per the PLA regime. There was nothing preventing Judge Stone from considering whether to grant relief under that alternative regime.

[39] We observe that if Judge Stone refused to grant relief under the PLA regime, then he would be required to consider relief under s 18(1)(a) of the Act. Mrs Marshall filed her

application per ss 18(1)(a) and 24 of the Act. If Judge Stone granted relief under one regime he was not required to consider the other. However, if he refused to grant relief under one then he was compelled to consider the other. We return to this below.

I hē te whakaaetanga a Kaiwhakawā Stone kia noho a Marshall ki te whare?
Did Judge Stone err granting Mrs Marshall a licence to occupy?

[40] Judge Stone found that:

(a) The homestead is a wrongly placed structure;

(b) Mrs Marshall is entitled to apply for relief per s 322 of the PLA; and

(c) It is just and equitable to grant her relief.

[41] Judge Stone then granted Mrs Marshall a licence to occupy that part of the whenua on which the homestead stood for her lifetime. He did so per s 325(1)(c) of the PLA.

[42] Mr Hockly submits that Judge Stone erred as:

(a) Relief was not available in this case per s 325(1)(c) as Mrs Marshall is not an owner of the relevant land, nor does she have an estate or interest in the land; and

(b) It was not just and equitable to grant a licence taking into account the kaupapa of the Act as set out in the Preamble, ss 2 and 17.

[43] We consider these in turn.

Was relief available per s 325(1)(c) of the PLA?

[44] Subpart 2, Part 6 of the PLA sets out special powers for dealing with wrongly placed structures. The Māori Land Court can exercise those powers in relation to Māori freehold land per s 24 of the Act. Generally, those provisions apply to disputes between neighbours where one has placed a structure that encroaches on the land of the other.

[45] As noted, the homestead straddles three blocks of land:

(a) Whangape Lot 65B Sec 2A – owned and administered by the trustees;

(b) Marshall Road - an unformed roadway managed by the Waikato District Council; and

(c) Part Allotment 65B2C1 - owned by Mrs Marshall's daughter and her husband.

[46] Part Allotment 65B2C1 was originally owned by Henry Marshall.[19] On 10 October 1975, a new title was issued for this land in the name of Mrs Marshall and her late husband.[20] On 25 June 2007, they transferred the land to their daughter Kristin Blake and her husband.[21] This is important as, while Mrs Marshall has an equitable interest in the homestead, she is no longer an owner in Part Allotment 65B2C1.

[47] Section 322 of the PLA sets out who can apply for relief under that regime:

> **322 Certain persons may apply for relief for wrongly placed structure**
>
> (1) The following persons may apply to a court for relief, under section 323, for a wrongly placed structure:
>
> (a) the owner, occupier, or mortgagee of, or the holder of any other encumbrance over, the land affected by the wrongly placed structure:
>
> (b) the owner, occupier, or mortgagee of, or the holder of any other encumbrance over, the land intended for the wrongly placed structure:
>
> (c) any person by whom, or on whose behalf, or in whose interest the wrongly placed structure was placed on or over the land affected:
>
> (d) any person who has an interest in the wrongly placed structure:
>
> (e) the relevant territorial authority.
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> …

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19 CFR SA457/157.
20 CFR SA19C/567.
21 Transfer 7426009.2 recorded on CFR SA19C/567.

[48] Although Mrs Marshall is not an owner in the affected land or the intended land, she can apply for relief per s 322(1)(d) of the PLA. She has an interest in the wrongly placed structure being the homestead.

[49] Section 323 of the PLA provides that the Court may grant relief for a wrongly placed structure to any person entitled to apply for relief under s 322, or to any other party to the proceeding. Section 325 of the PLA sets out the various forms of relief the Court can grant:

> **325 Orders court may make**
>
> (1) In granting relief under section 323 on an application under section 322, the court may make 1roa or more orders to the following effect:
>
> (a) requiring any land specified in the order to be vested in the owner of the land affected by, or the land intended for, the wrongly placed structure, or in any other person with an estate or interest in either of those pieces of land:
>
> (b) granting an easement over any land specified in the order for the benefit of the land affected by, or the land intended for, the wrongly placed structure:
>
> (c) giving the owner of the land affected by, or the land intended for, the wrongly placed structure, or any other person with an estate or interest in either of those pieces of land, the right to possession of any land specified in the order for the period and on the conditions that the court may specify:
>
> (d) giving the owner of the land affected by the wrongly placed structure, or any other person having an estate or interest in that piece of land, the right to possession of the whole or any part of the structure that is specified in the order:
>
> (e) allowing or directing any person specified in the order to remove the whole or any specified part of a wrongly placed structure and any specified fixtures or chattels from any land specified in the order:
>
> (f) requiring any person to whom relief is granted under paragraphs (a) to (e) to pay to any person specified in the order reasonable compensation as determined by the court.
>
> ….

[50] Section 325(1)(c) allows the Court to grant a right of possession concerning the affected land. This is the provision Judge Stone relied on. However, the Court can only grant such a right of possession to:

> (a) The owner of the land affected by the wrongly placed structure;

(b) The owner of the land intended for the wrongly placed structure; or

(c) Any other person with an estate or interest in either of those pieces of land.

[51] Mrs Marshall is not an owner in the affected land or the intended land. It appears that Judge Stone granted this order as:[22]

(a) Mrs Marshall has an equitable interest in the homestead;

(b) The homestead is a fixture;

(c) A fixture is part of the land; and

(d) As such, Mrs Marshall has an interest in the land.

[52] Ms Katipo confirmed this is the basis upon which Mrs Marshall asserts her right to relief per s 325(1)(c).[23] This raises whether an equitable interest in a house per s 18(1)(a) of the Act is an estate or interest in land per s 325(1)(c) of the PLA.

[53] In *Bidois – Te Puna 154D3B2B*, this Court considered whether an occupation order was a personal chattel. It discussed the following principles of property law:[24]

> [33] Real property is divided into corporeal and incorporeal hereditaments. Incorporeal hereditaments are intangible rights over physical land. They are classified according to their duration as either freehold or less than freehold. Freehold estates or interests have an uncertain duration and today comprise fee simple, life estates and stratum estates. The essential characteristic of an estate or interest less than freehold is that its duration is either certain, or capable of being made certain. The most common example is a leasehold estate. Incorporeal hereditaments of a less than freehold nature are chattels real.
>
> [34] A distinction must also be drawn between estates and interests in land. The terms tend to be used interchangeably but this can lead to confusion. Incorporeal hereditaments include both estates and interests in land. An estate gives rise to use of the parcel of land as a whole, whereas an interest is more narrow in its scope. In *Tainui Māori Trust Board v Attorney General* the President of the Court of Appeal concluded in relation to coal mining rights (page 523):

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22 *Marshall v Ratu – Whangape Lot 65B Sec 2A* (2021) 227 Waikato Maniapoto MB 148 (227 WMN 148) at [48].

23 2022 Māori Appellate Court MB 42-90 (2022 APPEAL 42-90) at [83].

24 *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 APWA 102).

> *"The view that I have reached is that a right to work the mines and carry away the minerals won is an incorporeal hereditament (because it is a right over land in possession over another). If of indeterminate duration it is a freehold interest; if a fixed duration a chattel interest. In either case it is an interest in land (Webber v Lee (1882) 9 QBD 315) but not an estate in the narrowest sense of that term as it does not give use of the parcel of land as a whole … "*

[54] The approach to recognising an equitable interest in a house per s 18(1)(a) of the Act has been discussed in a number of cases. In *Stock v Morris*, the late Judge Ambler held:[25]

> [65] Section 18(1)(a) enables the Court to "do equity" in relation to Māori freehold land. While the Preamble and ss 2 and 17 set the kaupapa of the Act and promote the interests of the owners, the Court cannot allow the actions of owners to cause injustice to non-owners. The case law provides helpful guidance on the appropriate remedies where non-owners have contributed to improvements on Māori freehold land
>
> …
>
> [70] The following principles can be distilled from these cases. There is no bar to the Court making a s 18(1)(a) order in favour of a non-owner. However, an order vesting interests in the land or a right to possession of the land (or part of it) in favour of a non-owner will likely offend the kaupapa and provisions of the Act. Although in *Grace* the Court of Appeal did not completely rule out that possibility. Where the Court concludes that a non-owner is entitled to equitable relief, the Court will in the first place look to awarding monetary compensation. If monetary compensation is inappropriate, the Court may award ownership of the house if it can be removed from the land. The Court will take into account the non-owner's free occupation of the land as a factor. Ultimately, each case depends on its own facts.

[55] In *Broad v Samson*, Deputy Chief Judge Fox held:[26]

> [37] This Court has recognised that s 18(1)(a) enables the Court to consider equitable remedies in situations where it would be unconscionable to deny the existence of an equitable interest or would result in unjust enrichment. The cases inevitably arise in situations where a non-owner of Māori freehold land has made significant contributions to a dwelling or property situated on Māori freehold land and is not able be recognised as having a legal interest in the property. The Court, in determining such situations, has often considered the existence of a remedial constructive trust and normally looks first to awarding monetary compensation in recognition of the equitable interest

[56] In *Tipene v Tipene,* Judge Doogan found that the test for a constructive trust had been met.[27] He then proceeded to consider what relief was appropriate:

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25 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).
26 *Broad v Samson – Otarihau 2B1C* (2018) 169 Taitokerau MB 138 (169 TTK 138).
27 *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2) at [61]-[62].

> [63] In *Lankow v Rose* Justice Tipping observed that a constructive trust can be given practical effect by such means as the justice of the case requires. The most common means are either a vesting order or an order for payment of the assessed value of the beneficial interest. A vesting order is not sought in this instance. I note for completeness that I share the reservations expressed by Judge Ambler in the *Stock v Morris* case as to whether or not a non-owner can be granted a right of possession under s 18(1)(a).

[57] In *Nicholas v Te Amo,* the Court of Appeal observed that:[28]

> … A review of the case law suggests that (at least in the case of a co-owner such as Mrs Nicholas) there is no impediment to a constructive trust being given practical effect by a right of occupancy, should justice require it in the circumstances of that particular case. Where a constructive trust is made out in respect of a house, and neither compensation nor removal of the property are possible or appropriate, there seems to be no reason that the equitable owner cannot enjoy occupation rights.

[58] These authorities demonstrate that when considering an application per s 18(1)(a) of the Act, the Court takes a two-step approach. The first is to consider whether the applicant has an equitable interest in the house. If he or she does, the Court will then proceed to consider what relief should be granted to recognise that equitable interest. That relief will usually consist of:

(a) The right to remove the house from the land;

(b) Monetary compensation; or

(c) A right of occupation.

[59] What relief is appropriate will depend on the circumstances of the case. Where the person who has an equitable interest in the house is an owner in the land, and there is no administration structure in place, it may not be necessary to grant such relief. It may be sufficient for the Court to recognise that the person has an equitable interest in the house and do no more. This is because the owner already enjoys a common right to occupy the land along with all other owners and so additional relief may not be necessary.[29] This would not preclude that owner from seeking further relief in the future if necessary. Where the person who has the equitable interest is not an owner, or where there is an administration structure

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28 *Nicholas v Te Amo* [2023] NZCA 22 at [52].

29 See *Fredricson v Hikuwai* (2016) 143 Taitokerau MB 135 (143 TTK 135) at [20].

in place and the administrators are seeking to remove the house or the person with an equitable interest, the Court will need to consider whether to grant additional relief.

[60] In the present case, Judge Stone recognised this two-step approach. He found that Mrs Marshall had an equitable interest in the homestead and then turned to consider whether to grant relief per s 18(1)(a) of the Act. Because of the difficulties of doing so, he did not grant relief per s 18(1)(a) and proceeded to consider the application under the PLA regime. Judge Stone found he could grant a right of occupation per s 325(1)(c) of the PLA on the basis that Mrs Marshall's equitable interest in the homestead was an interest in the land. This is not the case.

[61] Judge Stone had only recognised that Mrs Marshall had an equitable interest in the homestead. He had not granted any form of relief per s 18(1)(a) of the Act to recognise that interest. Following the conventional forms of relief, a right to remove a house or monetary compensation are clearly not interests in land. A right of occupation could amount to an interest in the land depending on the nature of that right. Judge Stone granted Mrs Marshall a licence to occupy the land. A licence to occupy land is personal to the licensee and does not amount to an interest in the land.[30]

[62] Recognising that someone has an equitable interest in a house fixed to the land is not an interest in that land. Where appropriate, the Court may grant an order per s 18(1)(a) of the Act to give effect to that equitable interest. That order may, or may not, amount to an interest in the land depending on the nature of the relief granted. In this case, no such order had been granted. Mrs Marshall did not have an interest in the land and so was not entitled to a right to occupy the land per s 325(1)(c) of the PLA. Judge Stone erred in law and principle by granting Mrs Marshall relief per s 325(1)(c) of the PLA.

[63] Although not argued before us, we briefly address whether s 325(1)(c) of the PLA has to be interpreted in light of those eligible to apply per s 322.

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30 *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102) at [35]; *Thomas v Sorrell* (1673) Vaugh 330, 124 ER 1098 at [351]; *Cash – Moetangi B1A and B1B section 1* (2001) 6 Taitokerau Appellate Court 1 (6 APWH 1).

[64] When interpreting legislation, the meaning of the Act must be ascertained from its text and in light of its purpose.[31] The Act is to be read as a whole, so that individual provisions are not treated as standing alone but are considered in context as part of the Act. This has been referred to as considering relevant provisions within the scheme of the Act. The scheme is derived from reading all of the provisions, together with the long title and any statements of purpose contained in the Act.[32]

[65] The purpose of the PLA is to restate, reform and codify (in part) certain aspects of law relating to real and personal property.[33] Part 6, subpart 2 of the PLA sets out the special powers of the Court concerning wrongly placed structures. Per s 322, Mrs Marshall can apply for relief per s 323 as she has an interest in the wrongly placed structure. Per s 323, the Court can grant relief to any person entitled to apply per s 322. When granting relief per s 323, on an application under s 322, the Court may make one or more orders per s 325.

[66] It could be argued that, reading these provisions as a whole, a person with an interest in the wrongly placed structure per s 322, is a person with an estate or interest in the relevant land per s 325(1)(c) of the PLA. We cannot find any decisions considering the interplay between these provisions. This is not surprising given that most applications seeking relief under the PLA regime would involve encroachment between neighbours. No authorities appear to address the unique situation before us where someone has an interest in the wrongly placed structure but not the affected or intended land. Despite the lack of case law, this argument does not assist Mrs Marshall.

[67] Section 322 carefully sets out the categories of those who may apply for relief for a wrongly placed structure. The owner of the affected land, the owner of the intended land, and a person who has an interest in the wrongly placed structure, are separated out into distinct categories. Section 322 does not attempt to conflate the interests of those eligible to seek relief. One of those who can apply for relief is the relevant territorial authority. It would be a very strange result if a territorial authority had an interest in the relevant land merely because they could apply for relief concerning a wrongly placed structure. Section

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31 Interpretation Act 1999, s 5(1).

32 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA); *Haira v Burbery Mortgage Finance & Savings Ltd* [1995] 3 NZLR 396 (CA).

33 Property Law Act 2007, s 3.

321 of the PLA also sets out clear and separate, definitions for land, land affected, land intended, structure and wrongly placed structure. Again, these interests are not conflated.

[68] While s 325 sets out the various forms of relief available, each provision prescribes who is entitled to receive the specified order. Those forms of relief are not available generally. Given this careful approach, it would be wrong to conflate a person who has an interest in the wrongly placed structure per s 322 with a person who has an estate or interest in the affected or intended land per s 325(1)(c).

[69] As we have found that Mrs Marshall could not receive a right to occupy the whenua per s 325(1)(c) of the PLA, it is not necessary to consider the remaining grounds of appeal concerning that order. We do make some observations below about Judge Stone's approach when exercising that discretion.

[70] The remaining question is what relief, if any, should now be granted. We have considered whether we should refer this back to Judge Stone for determination. It is not appropriate or necessary to do so.

[71] Per s 56(1)(f) of the Act, we can make any order that the lower Court could have made in the proceeding. This matter has already been before the lower Court, and this Court, for some time. Referring this back to Judge Stone will cause further delay which will not benefit anyone. The primary facts in this case are not in dispute. We can assess what relief is appropriate on the evidence presented to the lower Court.

Mehemea e taea ana te awhina atu, me pēhea te awhi?
What relief should be granted, if any?

[72] As noted, there are two avenues for relief, the first per s 18(1)(a) of the Act, the second per Part 6, subpart 2 of the PLA. We first consider the other forms of relief available under the PLA.

[73] We have already found that Mrs Marshall cannot receive a right to occupy the whenua per s 325(1)(c) of the PLA. For similar reasons, we cannot grant a vesting order in her favour per s 325(1)(a). Mrs Marshall is not seeking an easement per s 325(1)(b) and such an order would be inappropriate anyway given that the easement is to benefit the affected or intended

land. Per s 325(1)(d) of the PLA, we can grant the trustees a right to occupy that part of the homestead on their whenua. Neither side is seeking such an order. We can also grant compensation per s 325(1)(f) but that is to compensate a party where we have otherwise granted relief per s 325(1)(a) to (e).

[74] This means that the only form of relief available, and appropriate, in this case per the PLA is an order to remove that part of the homestead on the whenua per s 325(1)(e) of the PLA. The trustees seek a removal order. Although Mrs Marshall is the applicant, we can grant relief under the PLA to any party to this proceeding.[34] We return to this below.

[75] Per s 18(1)(a) of the Act, we can recognise Mrs Marshall's equitable interest in the homestead by such means as the justice of the case requires.[35] Previous authorities suggest three main options:

(a) An order to remove the homestead;

(b) Compensation; or

(c) A right of occupation.

[76] The Preamble, ss 2 and 17 of the Act promote, amongst other things, the retention of land by Māori owners, their whānau, hapū and descendants. This is a key purpose which forms an important part of the overall scheme and kaupapa of the Act.

[77] As Mrs Marshall is not an owner, granting her a right to occupy the whenua may offend this kaupapa. That does not mean a non-owner cannot be awarded a right of occupation. Rather, the Court will first consider compensation or removal. If those options are not possible, or appropriate, the Court may consider whether it is appropriate to grant a right of occupation.[36]

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34 Property Law Act 2007, s 323(1)(b).

35 *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2); *Lankow v Rose* [1995] 1 NZLR 277 (CA).

36 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2); *Broad v Samson – Otarihau 2B1C* (2018) 169 Taitokerau MB 139 (169 TTK 138); *Grace v Grace* [1994] 12 FRNZ 614; and *Nicholas v Te Amo* [2023] NZCA 22 at [52].

[78] Generally, compensation may be appropriate where the house is to remain on the land and the person who has an equitable interest in it is not entitled to occupy it. In those cases, the affected person loses the value of the contributions he or she made to the house. The land-owner receives the benefit of those contributions and so is required to pay compensation for the equitable interest in that house. The trustees do not seek to benefit from the homestead. They want it removed. Requiring them to pay compensation would be on the basis that they could use and benefit from that part of the homestead on their land. Such co-habitation is not sought by either side. This is not an appropriate form of relief.

[79] The homestead is on piles. Generally, a house on piles is capable of removal as opposed to a house fixed to a concrete pad. In this case, there is conflicting evidence on whether the homestead is capable of removal. Brent Marshall gave evidence that the homestead would not survive being relocated. The trustees gave evidence that the homestead could be moved. None of the witnesses have expertise in such matters. No expert evidence was led by either side on whether the homestead could be relocated.

[80] We note that Judge Stone considered this when determining whether it was just and equitable to grant relief under the PLA regime. Curiously, he referred to the conflicting evidence but made no determination on whether the homestead could be moved. Judge Stone then failed to consider whether to grant an order requiring the homestead to be removed (per s 18(1)(a) of the Act or the PLA regime). This is despite the trustees expressly seeking such an order before him. While we have already upheld the appeal in relation to the availability of s 325(1)(c) of the PLA, we comment on this briefly as it may assist the lower Court with the future conduct of similar cases.

[81] The PLA offers a different regime of relief to an order per s 18(1)(a) of the Act. Despite that, similar considerations apply. When deciding whether to grant relief under the PLA, the Court has to consider whether it is just and equitable in the circumstances that relief should be granted.[37] Section 324 of the PLA sets out matters that the Court may take into account when deciding whether to grant relief. The matters listed there are not exclusive.

[82] In the context of Māori land, the Court also has to take into account the special nature of Māori land and the kaupapa of the Act. These are highly relevant circumstances per s 323

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[37] Property Law Act 2007, s 323(2).

of the PLA. When dealing with Māori land, the PLA regime is imported into the Act per s 24 of the Act. This triggers the kaupapa of the Act per the Preamble, ss 2 and 17.

[83] This means that when considering whether to grant relief under the PLA regime the Court must take into account similar factors when deciding whether to grant relief per s 18(1)(a). An order per s 18(1)(a) allows the Court to recognise equitable interests by way of equitable relief. This is again similar to granting relief where it is just and equitable in the circumstances per the PLA regime.

[84] Judge Stone recognised this. He found that when granting relief under the PLA regime it must be just and equitable and must not offend the principles and kaupapa of the Act. Despite that, Judge Stone failed to consider a highly relevant matter, whether an order should be granted requiring the homestead to be removed. When faced with evidential issues on removability, Judge Stone had two options. He could have called his own expert evidence on this per s 69(2) of the Act, or he could have made a finding of fact based on the evidence before him. However, he could not ignore this highly relevant matter and proceed to grant a right of occupation to a non-owner. Judge Stone had to weigh a removal order against the other available forms of relief. If we found in favour of Mrs Marshall on the availability of s 325(1)(c) of the PLA, we would have still upheld the appeal on the basis that Judge Stone failed to consider this relevant matter.

[85] Returning to our own assessment on relief. The time for further evidence has passed. Both parties had the opportunity to prepare and present the evidence in support of their case including calling expert witnesses. They chose not to do so.

[86] We cannot rely on the evidence from Brent Marshall or the trustees on whether the homestead can be moved. None are experts and both sides have an interest in the outcome of this proceeding. The only reliable evidence before us is that the house is on piles. This generally indicates that the homestead is capable of removal. If Mrs Marshall contends that it cannot be moved the onus was on her to demonstrate this in evidence. She has not done so.

[87] We find that the homestead is capable of removal. Prima facie, an order for removal is appropriate.

[88] Despite this, we still proceed to consider whether it is appropriate to grant Mrs Marshall an ongoing right of occupation on the whenua per s 18(1)(a) of the Act. This allows us to take into account any special circumstances that may outweigh the conventional approach of a removal order.

[89] In *Nicholas v Te Amo*, the Court of Appeal granted Mrs Nicholas a right to possession of the house she built on Te Tuturi C.[38] This entitled her to occupy the house and its curtilage, until 31 May 2066. The Court found that equitable estoppel applied because:[39]

(a) The trustees in that case made a representation to Mrs Nicholas that she would be entitled to occupy the house until May 2066;

(b) Mrs Nicholas incurred expenditure in reliance on that representation; and

(c) It would be unconscionable for the trustees to go back on that representation.

[90] That case can be distinguished from the present as Mrs Nicholas was a beneficial owner in that land. As the land was vested in a trust, Mrs Nicholas did not have a right of occupation unless authorised by the trustees. The trustees sought her removal. Granting a right of occupation to a beneficial owner in the face of trustee authority does not offend the kaupapa of the Act in the way that it does for a non-owner. Despite that, the Court of Appeal still observed that where a constructive trust is made out in respect of a house, the Court would first consider whether compensation or removal are possible or appropriate, before deciding whether a beneficial owner may be able to enjoy occupation rights.[40]

[91] *Thompson – Estate of Walter William Wihongi*, is a rare case where a non-owner was granted a right of occupation on Māori land.[41] In that case, Walter Wihongi was the sole owner of the land. He allowed his niece, Ms Harawene, to build a house on the land including executing two mortgages to fund the build. Ms Harawene and her husband paid the loan repayments and the rates. Mr Wihongi passed away and left the land to his nephew,

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38 *Nicholas v Te Amo* [2023] NZCA 22.
39 Above at [55] and [40].
40 Above at [52].
41 *Thompson – Estate of Walter William Wihongi* (2015) 117 Taitokerau MB 245 (117 TTK 245).

Mr Lomax, by will. No provision was made for Ms Harawene. The late Judge Ambler found that:[42]

(a) Mr Wihongi represented to Ms Harawene that she would have long term occupation of the land;

(b) Ms Harawene relied on that representation by building the house and making payments towards the loan and rates.

(c) Ms Harawene would suffer detriment if her long term occupation of the land was denied. Importantly, the house could be uplifted and moved to another piece of land but Judge Ambler considered that wasn't appropriate relief in that case.

(d) It would be unconscionable for Mr Wihongi (and therefore his successors) to depart from the understanding between Mr Wihongi and Ms Harawene.

[92] Judge Ambler granted Ms Harawene and her successors a right to occupy the house site for her lifetime plus 20 years. He vested the land in Mr Wihongi's successor but subject to the right of occupation. We also note that, although Ms Harawene was not an owner, she was closely related to the owner. Through her whakapapa, she associated with the land according to tikanga. She was 'whānau' of an owner as referred to in the Preamble and s 2 of the Act. Once again, this does not offend the kaupapa of the Act in the way it could by granting a right of occupation to a non-owner who has no such connection.

[93] These decisions demonstrate that in order to obtain a right to occupy the land, the legal owner must have acted in a way that encouraged the affected person to alter their position on the belief that they would have an ongoing right of occupation. In the context of equitable estoppel that would require the creation or encouragement of a belief or expectation by the trustees, reliance by Mrs Marshall on that, and detriment as a result. In the context of a constructive trust, that would require contributions by Mrs Marshall to the homestead, a reasonable expectation from her not only that she has an interest in the house,

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42 Above at [32].

but that she is entitled to ongoing occupation of the whenua, and that the trustees would reasonably expect to yield to Mrs Marshall an ongoing right of occupation.

[94] The evidence does not demonstrate this on either approach. The original bach was erected by Leonard Marshall prior to 1965. That original bach encroached on the whenua. Mrs Marshall and her husband moved into the bach in 1965. Over time they extended the bach to become the current homestead. This enlarged the encroachment. It appears neither side was aware of the encroachment until 2007. Since then, the owners of the whenua, and later the trustees, attempted to address it. Both sides blame each other for failing to reach a resolution. Importantly, neither the owners nor the trustees acted in a way that encouraged Mrs Marshall to alter her position on the belief that she would have an ongoing right of occupation.

[95] This is not a case where it is appropriate to grant Mrs Marshall an ongoing right to occupy the whenua. The only appropriate relief is to require the homestead to be removed.

Ka aha inaianei?
What removal order should be granted?

[96] We have already addressed that we can grant a removal order per s 325(1)(e) of the PLA. As Mrs Marshall cannot obtain a right to occupy the whenua under the PLA regime, we instead considered what form of relief is appropriate per s 18(1)(a) of the Act. The most appropriate relief is removal. We can grant an order per s 18(1)(a) allowing Mrs Marshall to remove the homestead. It is not clear whether we can grant an order per s 18(1)(a) compelling her to remove the homestead.

[97] We can grant an order per s 19(1)(ba)(i) of the Act requiring Mrs Marshall to remove the homestead. We can grant any injunction per s 19 of our own motion. In addition to that, per s 37(3) of the Act we can exercise any part of the Court's jurisdiction without requiring a further application subject to the parties receiving sufficient notice.

[98] The trustees have sought a removal order throughout this proceeding. Mrs Marshall has filed evidence and made submissions responding to that. She has always been on notice that a removal order may be granted. There is no additional prejudice to her whether that is granted per s 19(1)(ba)(i) of the Act or s 325(1)(e) of the PLA.

[99] The trustees, as the legal owners of the whenua, are entitled to injunctive relief to remove a foreign structure. We have already determined that there are no equitable issues that go against the grant of such relief in this case.

[100] The last issue is how long Mrs Marshall should have to remove the homestead. Judge Stone granted Mrs Marshall a licence to occupy the whenua for her lifetime. Upon her death, her surviving whānau had six months to remove the homestead. We agree that this timeframe is appropriate.

Kupu whakatau
Decision

[101] The appeal is upheld.

[102] Per s 56(1)(b) of the Act, we revoke the orders granted in the lower Court on 12 August 2021 at 227 Waikato Maniapoto MB 148 – 172.

[103] Per s 56(1)(f) of the Act we grant the following orders:

(a) Per s 18(1)(a) of the Act, recognising that Mrs Marshall has an equitable interest in that part of the homestead located on Whangape Lot 65B Sec 2A;

(b) Per ss 37(3) and 19(1)(ba)(i) and (iii) of the Act, requiring Mrs Marshall to undertake the following steps, at her own cost, within six months of the date of this judgment:

(i) Removing that part of the homestead, and any other associated chattels or improvements, located on Whangape Lot 65B Sec 2A; and

(ii) Reinstating that part of the land on Whangape Lot 65B Sec 2A to a reasonable standard including levelling that part of the land, applying good topsoil if necessary, and sowing it with grass seed suitable for the area.

[104] As both parties have received grants under the special aid scheme, costs are not at issue.

I whakapuaki i te 3:00pm i Whangarei, 19th o ngā rā o June i te tau 2023.
Dated at 3:00pm in Whangarei on Monday this 19th day of June 2023.

M P Armstrong (Presiding) **JUDGE**	T M Wara **JUDGE**	R P Mullins **JUDGE**