**I TE KOOTI PĪRA MĀORI O AOTEAROA**
**I TE ROHE O TE TAITOKERAU**
*In the Māori Appellate Court of New Zealand*
*Taitokerau District*

**A20200001142**
**APPEAL 2020/1**

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| WĀHANGA<br>*Under* | Section 58, Te Ture Whenua Māori Act 1993 |
| MŌ TE TAKE<br>*In the matter of* | Lot 30 Deposited Plan 40840 being Part Oakura F2A and a judgment made at 204 Taitokerau MB 164-169 on 11 November 2019 |
| I WAENGA I A<br>*Between* | CARA MOORE<br>Te Kaitono<br>*Applicant* |

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| Nohoanga:<br>*Hearing* | 12 May 2020, 2020 Māori Appellate Court MB 196-206<br>(Heard at Whāngarei by Zoom) |
| Kooti:<br>*Court* | Judge P J Savage (Presiding)<br>Judge M P Armstrong<br>Judge D H Stone |
| Kanohi kitea:<br>*Appearances* | W Coutts for Appellant |
| Whakataunga:<br>*Judgment date* | 19 May 2020 |

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**TE WHAKATAUNGA Ā TE KOOTI**
*Reserved Judgment of the Court*

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## Hei timatanga kōrero – Introduction

[1] Larry Charles Moore, Janice Moore and Webb Ross Johnson Trustees Limited are the registered owners of Lot 30 Deposited Plan 40840, being part Oakura F2A ("the land"). Larry and Janice Moore are deceased. Their daughter, Cara Moore, seeks a determination that the land is General land. The Māori Land Court determined that the land is Māori freehold land.[1] Cara Moore appeals that decision.

## Kōrero whānui – Background

[2] The facts are not in dispute. As at 2 April 1976, the land was Māori freehold land. In 1983 it was vested in trustees.[2] In 1988, those trustees transferred the land to Craig Paterson Hart, a lawyer in Palmerston North. Mr Hart is not Māori.[3] The Māori Affairs Act 1953 ("the 1953 Act") required this transfer to be endorsed by the Registrar of the Court.[4] However, it was not. As a result, the transfer was of no force or effect.[5] Even so, it was registered under the Land Transfer Act 1952. There was no notation on the transfer that the land remained Māori freehold land. Mr Hart then transferred the land to the Moore family in 1993. They have held the land since.[6]

## Te take – Issue

[3] The issue is whether the transfer of the land to a non-Māori in 1988 changed the status of the land from Māori freehold land to General land because of the definition of Māori freehold land under s 2 of the 1953 Act, even though the transfer was of no force or effect per s 233 of the 1953 Act.

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1 *Moore – Oakura F2A* (2019) 204 Taitokerau MB 64 (204 TTK 164).

2 Being Harriet Purcell, Kahutai Roberts and John Roberts pursuant to s 438(1) of the Māori Affairs Act 1953.

3 Mr Hart swore an affidavit to this effect dated 28 November 2018.

4 Māori Affairs Act 1953, s 438(7). This section provided that an alienation by trustees need not be confirmed by the Court under Part 19, but the associated instrument of alienation required a memorial to be endorsed by the Registrar of the Court pursuant to s 233.

5 Māori Affairs Act 1953, s 233(1).

6 Mr Hart transferred the land to the appellant's parents in 1993. They subsequently severed the joint tenancy and settled the land amongst themselves and their family trust (the L and J Moore Family Trust). The appellant, Cara Moore, is a trustee of the L and J Moore Family Trust.

## Te Ture – The Law

[4] The starting point is s 438(7) of the 1953 Act, which allowed trustees to alienate Māori freehold land. It provided:

> **438 Court may vest land in trustees**
>
> …
>
> (7) No alienation by trustees in whom land is vested by an order under this section shall require to be confirmed by the Court under Part 19 of this Act, but the provisions of section 233 of this Act (as substituted by section 106 of the Maori Affairs Amendment Act 1967) shall apply to require the endorsement on any instrument effecting such an alienation of a memorial that it has been produced to the Registrar and noted in the records of the Court. Nothing in this subsection or in any other part of this Act shall be construed to require payment of the proceeds of alienation of land affected by an order under this section to the Maori Trustee.
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> …

[5] Section 233(1) of the 1953 Act provided:

> **233 Instruments to be produced to Registrar**
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> (1) No alienation of Maori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court.

[6] Section 2(2)(f) of the 1953 Act is also relevant, because it deemed land to be General land in certain circumstances. That section provided:

> …
>
> Unless expressly provided in this or any other Act with respect to any specified or defined area, and notwithstanding anything in the foregoing definition of the term "land" or in any of the subsidiary definitions included therein,—
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> (f) Maori freehold land the legal fee simple in which has been transferred otherwise than by an order of the Court or of a Registrar shall, except where it appears on the face of the instrument of transfer that the land has remained Maori freehold land, be deemed to be General Land until either—
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> (i) An order is made by the Court under paragraph (i) of subsection (1) of section 30 of this Act determining that the land is Maori freehold land; or

(ii) Any other order is made by the Court as a consequence of which the land becomes Maori freehold land.

[7] Finally, Māori freehold land was defined in the 1953 Act as:

…

"Maori freehold land" means land other than General Land which, or any undivided share in which, is owned by a Maori for a beneficial estate in fee simple, whether legal or equitable:

…

[8] The interplay between these sections was considered in the Māori Land Court decisions of *Deputy Registrar – Te Keti A2*[7] and *Dobson – Ahipara 2B47 Block*.[8] Relying on earlier decisions of various courts, Judge Ambler set out the following principles:

(a) The registration of a transfer under the Land Transfer Act 1952 gives rise to an indefeasible interest, even if the transfer is not endorsed by the Registrar per s 233 of the 1953 Act.[9]

(b) Registration under the Land Transfer Act 1952 does not automatically change the status of Māori freehold land. As Judge Ambler put it, registration of a void instrument does not cloak that instrument with indefeasibility for purposes *beyond* the Torrens system.[10]

(c) Section 2(2)(f) of the 1953 Act, which deems transferred Māori freehold land to be General land unless the instrument of transfer states otherwise, cannot be invoked, because the underlying instrument of transfer is of no force or effect.[11]

(d) Ultimately, however, the 1953 Act defines Māori freehold land as land owned "by a Māori". A transfer of Māori freehold land to a non-Māori means, by definition, that land is no longer Māori freehold land. Accordingly, the status of land changes from Māori freehold land to

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7 *Deputy Registrar – Te Keti A2* (2011) 15 Taitokerau MB 76 (15 TTK 76).
8 *Dobson – Ahipara 2B47 Block* (2014) 74 Taitokerau MB 139 (74 TTK 139).
9 Above n 7, at [22].
10 Above n 7, at [30].
11 Above n 7, at [36].

> General land simply by it being transferred to a non-Māori, even if the transfer is otherwise of no force or effect.

[9] Judge Wara, at first instance in the present appeal, largely endorsed Judge Ambler's analysis. However, she did not accept that the status of the land was changed by reason of the definition of Māori freehold land in the 1953 Act. She considered that, if the transfer instrument is void and s 2(2)(f) of the 1953 Act cannot be invoked as a result, there is nothing to effect a change in status.

[10] We are therefore faced with conflicting lower Court decisions on whether a transfer of Māori freehold land to a non-Māori in breach of the provisions of the 1953 Act changes the land status to General land. We must resolve that conflict.

**Kōrerorero – Discussion**

[11] The appellant argues for the reasoning of Judge Ambler in *Te Keti A2.* Mr Hart is not Māori. It is argued that as soon as he became the owner of the land in 1988, its status changed from Māori freehold land to General land. The land no longer fell within the definition of Māori freehold land because it was not owned by a Māori.

[12] Mr Coutts, for the appellant, argues that the land became General land as a matter of law when it was transferred to Mr Hart. He accepts that there is no general provision in the 1953 Act that operated to change the status of Māori freehold land to General land simply if the land was transferred to a non-Māori. He also acknowledges that it was possible for non-Māori to hold Māori freehold land under the 1953 Act. However, he submits that non-Māori could only own Māori freehold land if s 2(2)(f) could be invoked. As s 2(2)(f) cannot be invoked in the present case, he submits that we must revert to the definition of Māori freehold land. That definition requires Māori freehold land to be owned by Māori.

[13] The reasoning in *Te Keti A2* engages the art of statutory interpretation. We must also engage in that art to navigate and interpret the 1953 Act. This is no easy task.[12] The starting

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[12] See for example the comments of Mallon J in *Proprietors of Potikirua Block Inc v Te Kani* [2019] NZHC 3200 at [117]-[118].

point is section 5(1) of the Interpretation Act 1999, which requires us to ascertain the meaning of the 1953 Act from its text and in the light of its purpose. Our task is to:[13]

> Ascertain the meaning of the provisions from their language, read in context, and the statute's purpose informed by any relevant background material.

*Meaning of the definition of Māori freehold land*

[14] The definition of Māori freehold land in the 1953 Act refers to land that is "owned by a Māori". The ownership requirement is not expressed by reference to a particular point in time. On its face, it appears to be an absolute requirement. Land cannot be Māori freehold land unless it is owned by a Māori. If, at any time, that is not the case, then the land cannot be Māori freehold land by definition. This is the reasoning adopted in *Te Keti A2*.

[15] But that is not the end of the matter. First, the provision is a definition. It is not a substantive or operative provision, in the sense that it acts to *change* the status of land. Other provisions of the 1953 Act enable that change. Mr Coutts accepted that there is no operative provision of the 1953 Act that provides for the status of Māori freehold land to change to General land simply because it is not owned by a Māori. His argument, and the reasoning in *Te Keti A2*, relies on the definition of Māori freehold land in the 1953 Act having operative effect.

[16] Substantive legislative provisions are not normally incorporated into a definition. It is unusual for a definition to have operative effect. The courts will generally construe restrictively a provision masquerading as a definition and confine it to the proper function of a definition.[14]

[17] Second, the meaning must be cross-checked against the purpose of the 1953 Act. As the Supreme Court put it:[15]

> …Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5 [of the Interpretation Act 1999]. In determining purpose the court

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13 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7 at [55] per McGrath, Glazebrook and Arnold JJ.

14 Diggory Bailey and Luke Norbury *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017) at 472-473 citing *Munn v Angus* (1997) 6 NTLR 84 (Court of Appeal of the Northern Territory of Australia) and *Hrushka v Canada (Minister of Foreign Affairs)* [2009] FC 69 (Federal Court of Canada)

15 *Commerce Commission v Fonterra* [2007] NZSC 36 at [22].

> must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

*Purpose of the 1953 Act*

[18] Unlike modern statutes, including its successor,[16] there is no general stated purpose for the 1953 Act. The long title of the 1953 Act states that it was "an Act to consolidate and amend the law relating to Māori land and also to consolidate and amend certain provisions of the law relating especially to Maoris".

[19] The 1953 Act dealt with a range of matters, from Māori marriages to land consolidation schemes, and determining an overarching purpose for the Act beyond its long title is difficult. The matter before us relates to the transfer of land and its status as a result. That is the particular context of the 1953 Act that we must ascertain to determine the relevant purpose of the 1953 Act.

*Relevant context*

[20] The 1953 Act clearly provided for the transfer of Māori freehold land.[17] In some instances, such transfers required confirmation by the Court.[18] The Court was required to be satisfied of various matters before confirming such a transfer.[19] Other transfers required notation by the Registrar.[20] The general scheme of the Act in relation to the transfer of land had its own nuances.[21] However, it is clear that the 1953 Act set out specific and detailed provisions as to how Māori freehold land could be transferred. None of these detailed provisions (as opposed to statutory definitions) changed the status of transferred Māori freehold land.

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16 Te Ture Whenua Māori Act 1993.

17 See generally Māori Affairs Act 1953, Part 19; See also s 438(7) in relation to transfers by trustees.

18 Māori Affairs Act 1953, s 224.

19 Māori Affairs Act, s 227.

20 For example, Māori Affairs Act 1953, s 438(7).

21 As noted, some transfers required confirmation by Court order, while others required notation by a Registrar, depending on who was transferring the land. This distinction was discussed in *Pihema v Pehikano* [1984] 1 NZLR 625 (HC) and *Housing Corporation of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC), both of which noted that the Registrar's role was administrative only. In *Proprietors of Potikirua Block Incorporation v Te Kani* [2019] NZHC 3200, the High Court observed that the Registrar's role did not change depending on the nature of the underlying "alienation", whether it be a transfer, lease, or mortgage (for example).

[21] Section 30(1)(i) of the 1953 Act granted jurisdiction to the Court to determine whether any specified land was Māori freehold land or General land. However, this jurisdiction did not extend to *changing* the status of land from Māori freehold land to General land.

[22] Section 433 of the 1953 Act dealt with changing the status of Māori freehold land to General land. That had to occur by Court order.[22] The Court had to consider certain matters, including the suitability of the land for effective use and occupation.[23] After considering these matters, the Court had to be satisfied that, if the order were made, the land could be conveniently used or otherwise dealt with and that no undue difficulty or inconvenience would result.[24] Only when such an order was registered,[25] did the land cease to be Māori freehold land and become General land.[26] Accordingly, the 1953 Act set out a specific and detailed scheme to permit Māori freehold land to *change* to General land, only by order of the Court and subsequent registration.

[23] For the reasons set out in *Te Keti A2*, we agree that we cannot invoke s 2(2)(f) to determine that the land is now General land. We can, however, look to that section as part of ascertaining the relevant scheme of the 1953 Act. Unless certain exceptions applied, s 2(2)(f) deemed transferred Māori freehold land to be General land. Qualifying transfers of Māori freehold land therefore had the effect of *changing* the status of the land to General land. This established an irrebuttable presumption that Māori freehold land so transferred automatically became General land. In *Haddon v Rahui Te Kuri Inc – Pakiri R*, this Court held that:[27]

> The effect of Section 2(2)(f) as Judge Russell stated, is to apply an irrebuttable presumption that the land is to be treated as general land irrespective of its true status. A transferee may avoid that presumption by having it noted on the transfer that the land remains Maori freehold land. Alternatively he may seek an order of the Court under Section 30(1)(i) determining the land to be Maori land in which case the presumption or "deeming" remains in effect until such order.

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22 Māori Affairs Act 1953, s 433(1).
23 Māori Affairs Act 1953, s 433(2).
24 Māori Affaris Act 1953, s 433(3).
25 Orders under s 433 were capable of registration in accordance with s 36 of the 1953 Act, which meant registration under the Land Transfer Act 1952 or the Deeds Registration Act 1908.
26 Māori Affairs Act 1953, s 433(5)
27 *Haddon v Rahui Te Kuri Inc – Pakiri R* (1994) (3 APWH 178) at [25].

[24] The irrebuttable presumption expressly did not apply to Māori freehold land transferred by an order of the Court or a Registrar. As noted, in 1988 a transfer by trustees of Māori freehold land did not require an order of the Court. Nor did it require an order of a Registrar. The result is that this exception to the irrebuttable presumption did not apply to a transfer by trustees.

[25] The irrebuttable presumption also did not apply if the instrument of transfer recorded that the land remained Māori freehold land. Therefore, unless the transfer instrument said otherwise, s 2(2)(f) changed the status of land transferred by trustees, irrespective of whether it was transferred to a Māori or non-Māori. There is an argument that, through s 2(2)(f), the 1953 Act was designed to change by default the status of Māori freehold land transferred by trustees.

[26] But s 2(2)(f) must be read in context. First, it too is a definition, and should therefore be construed narrowly.[28] It is also subject to anything expressly provided in the 1953 Act or any other Act with respect to any specified or defined area. It is therefore subject to s 433, which sets out a more comprehensive process to change the status of Māori freehold land. Section 433 is also a specific provision, and s 2(2)(f) is more general in nature. Ordinarily the specific provision prevails over the general.[29] For these reasons, s 2(2)(f) must yield to s 433.

[27] Perhaps more importantly, the purpose of s 2(2)(f) must be read in light of s 233(1). Section 223(1) rendered a transfer of no "force or effect unless and until" the instrument of transfer had been noted by the Registrar. It was the very transfer that was of no force or effect. Section 2(2)(f) only applied if there was a transfer. Accordingly, s 2(2)(f) cannot be invoked to ascertain the scheme of the 1953 Act in relation to transfers. To do so would bring into effect that which is expressly stated as of no effect.

[28] Turning to the definition of Māori freehold land, it does not speak at all to changing the status of land. It assumes that Māori freehold land is owned by Māori. But that would not always be the case under the 1953 Act. There is no provision that declares all Māori

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28 Above n 14.

29 *Jennings Roadfreight Ltd (in liq) v Commissioner of Inland Revenue* [2014] NZSC 160; See also *R v Pora* [2001] 2 NZLR 37.

freehold land transferred to a non-Māori to become General land. The closest provision to this effect is the irrebuttable presumption established by s 2(2)(f). But one of the exceptions to this presumption expressly enabled a transfer instrument to record that transferred Māori freehold land retained that status. This would be the case even if the transfer were to a non-Māori. The 1953 Act therefore envisaged Māori freehold land being capable of ownership by non-Māori, despite the definition of Māori freehold land.

[29] Finally, in enacting the 1953 Act, Parliament must surely have assumed that its provisions would be complied with. It seems contrary to this intent if a transfer that violated the 1953 Act could, by virtue of the application of a definition, and in the face of an alternative specific and detailed statutory process, change the status of Māori freehold land.

[30] We therefore determine that the scheme of the 1953 Act did not contemplate or provide for the situation in which transfers in violation of the 1953 Act would automatically change the status of the land. Nor did the scheme of the 1953 Act contemplate or provide for the status of land to be changed through the application of a definition. A more detailed process had to be followed. The 1953 Act also contemplated that Māori freehold land could be held by non-Māori. There was certainly no principle in the 1953 Act that the transfer of Māori freehold land to a non-Maori automatically changed its status. Nor was there an operative provision to that effect. If land status could not be changed unless detailed processes were followed, how could a definition provide otherwise? Moreover, how could a definition perfect a transaction that violated the specific provisions and the general scheme of the 1953 Act? In our view, it could not.

*Parliamentary Intent - Hansard*

[31] Hansard can provide useful background material in interpreting the meaning of a provision. In relation to the 1953 Act, the following comments are recorded in the Hansard debates: [30]

> …This measure is an earnest attempt to institute a new set of rules governing Māori administration, and, as it deals with people and with property and property rights, every care that could be brought to bear on the matter has been taken by me and by those associated with me to bring forward a measure that will do justice to the Māori people, make administration more efficient, and put in order for the future a charter by which the Māori people can make some progress in the use of their land.

[30] (18 November 1953) 301 NZPD 29301-29309 per Mr Corbett, Minister of Māori Affairs.

> …
>
> There is too little of it left today [of Māori Land], and far too little to allow to it remain in its present condition.
>
> …
>
> …[T]his Bill has one purpose only, and that is to preserve for the Māori people this remaining portion of their ancestral land, at the same time enabling them, by good farming methods, to effect such an insurance over it that it will remain in their possession.
>
> …

[32] Although not determinative, the Hansard debates suggest that one of the purposes of the 1953 Act was to preserve for Māori the relatively small land holding that remained in their hands. Interpreting a definition in a manner that further reduces this already small land holding is contrary to this purpose.

*Te Ture Whenua Māori Act 1993*

[33] The appellant argued that ss 2 and 17 of Te Ture Whenua Maori Act 1993 ("the 1993 Act") do not apply to the determination of the status of land immediately before the commencement of the 1993 Act. We accept that the provisions of the 1953 Act must be interpreted in the context of the 1953 Act, rather than the 1993 Act. The purpose and scheme of the 1993 Act cannot be imported into the 1953 Act.

[34] Mr Coutts points to s 129(3) of the 1993 Act. It provides:

> **129 All land to have particular status for purposes of Act**
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> …
>
> (3) Notwithstanding anything in subsection (2), where any land had, immediately before the commencement of this Act, any particular status (being a status referred to in subsection (1)) by virtue of any provision of any enactment or of any order made or any thing done in accordance with any such provision, that land shall continue to have that particular status unless and until it is changed in accordance with this Act.

[35] It is submitted for the appellant that s 129(3) of the 1993 Act requires us to determine the status of the land immediately before the commencement of the 1993 Act, as if all other provisions of the 1993 Act (including ss 2 and 17) are of no effect. We do not accept that ss 2 and 17 of the 1993 Act are entirely irrelevant here. The original application in the present

case was filed pursuant to s 18(1)(h) of the 1993 Act for a determination under s 131.[31] We are exercising jurisdiction under the 1993 Act. Section 2(2) of the 1993 Act records Parliament's intention that powers, duties, and discretions conferred by the 1993 Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū and their descendants. We must be cognisant of that intention. Section 129(3) does not stand alone.

[36] Ultimately, however, the point is moot. We have found that the definition of Māori freehold land in the 1953 Act did not operate to change the status of the land. Such a finding is consistent with ss 2 and 17 of the 1993 Act, although it has been reached independently of those sections. We therefore do not need to decide the interplay between ss 2, 17 and 129(3) of the 1993 Act.

**Whakataunga – Decision**

[37] A transfer of Māori freehold land to a non-Māori in breach of the provisions of the 1953 Act did not change the land status to General land by virtue only of the definition of Māori freehold land in the 1953 Act. Accordingly, Lot 30 Deposited Plan 40840, being part Oakura F2A, is Māori freehold land.

[38] The appeal is dismissed.

This order is to issue immediately, per r 7.5(2)(b), Māori Land Court Rules 2011.

Pronounced at 4.00pm in Whāngarei on this 19th day of May 2020

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| P J Savage<br>**JUDGE** | M P Armstrong<br>**JUDGE** | D H Stone<br>**JUDGE** |

[31] Submissions of Appellant, filed 6 June 2019 at para [7].