IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20120013041
APPEAL 2012/10

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 3 May 2012 at 282 Aotea MB 75 in respect of Rangitoto Tuhua 55B1B and 55B1A2 (Manu Ariki Marae)
BETWEEN	BEVERLY MURAAHI and FAITH BARLOW Appellants
AND	TEINA PHILLIPS First Respondent
AND	TE KOTAHITANGA SOCIETY INCORPORATED Second Respondent
AND	WAITUHI FARMS (2008) LIMITED Third Respondent

Hearing:	11 February 2013 (Heard at Rotorua)
Coram:	Deputy Chief Judge C L Fox Judge G D Carter Judge D J Ambler
Appearances:	Ms T Wara for the Appellants P Jefferies and H Putaranui for the Second Respondent
Judgment:	14 November 2013

RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE CAREN FOX AND JUDGE GLENDYN CARTER OF THE MĀORI APPELLATE COURT

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Table of Contents

The appeal

[1] This appeal concerns the actions of Areka Phillips, also known as Alex Phillips, in transferring the land transfer titles to certain lands to, what was then, Kotahitanga Building Society Incorporated. The lands were Māori freehold land. The provisions of Te Ture Whenua Māori Act 1993 ("TTWMA") require that before a transfer can be legally effected, confirmation of the alienation has to be granted by the Māori Land Court. No such confirmation was obtained. There was also a further legal barrier to the transfer in that a small area comprising 1.7912 ha of the land transferred had, pursuant to s 338 of TTWMA, been gazetted and set aside as a Māori Reservation. Section 338(11) of TTWMA provides that land set aside as a Māori Reservation is inalienable.

[2] The appellants, who are children of Areka Phillips, applied to the Māori Land Court seeking an order under s 18(1)(a) of TTWMA ruling that the transfer was unlawful because it was not in conformity with the provisions of TTWMA, and vesting the lands back in the name of Areka Phillips. The lower Court declined to make an order giving as its major reason that such order would be contrary to the indefeasibility provisions of the Land Transfer Act 1952 ("LTA"). The appellants appeal that decision.

Background

[3] The chronology of this matter has been clearly set out by her Honour Judge Milroy in the judgment subject to this appeal.[1] We highlight only those aspects of particular significance to the outcome of the appeal. We begin by noting that Areka Phillips appears to have been a man of vision, charisma and drive. He acquired a reputation as a healer and a prophet, and in the 1950s attained a following both for the church he was to later establish and his care for the sick. In 1961, he was instrumental in establishing, what is now, after three changes of name, Te Kotahitanga Society Incorporated ("the Society"); a charitable society which was essentially the operative body for his enterprise. It was through this society and the support of his followers that a complex was built on his farm property, River View Farms at Okahakura, about 14 kilometres north of Taumarunui.

[1] *Barlow v Phillips – Rangitoto Tuhua 55B1B (Manu Ariki Marae)* (2012) 282 Aotea MB 75 (282 AOT 75).

[4] As to the nature of the complex, we can do no better than cite from the decision of Judge Milroy in the lower Court. Referring to 1983 when the land on which the complex was situated was recommended to be set aside as a Māori Reservation the learned Judge said:[2]

> At that time a meeting house, wharehui, wharekai, kitchen complex and two newly built living quarters, a surgery and a statue of the Virgin Mary had already been built on the land. The buildings were worth about $1,000,000.00 and additional buildings were planned for the future. The funding came from contributions from Mr Phillips' followers.

[5] The application to set aside 1.7912 ha of the Rangitoto Tuhua 55B1B block as a Māori Reservation was heard on 2 June 1983 at 66 Tokaanu MB 5-7. Accordingly the Court made a recommendation on 20 July 1983 at 66 Tokaanu MB 134 and the reservation was duly gazetted. Rangitoto Tuhua 55B1B comprised 61.6336 ha, so the land set aside was only a small part of the block and largely comprised the area upon which the above-mentioned buildings were situated. It is apparent that one or two buildings may be outside the area of the reservation and others extend a small distance across the boundary but this is not material to the issues on appeal. Further details relating to this reservation are provided later in this decision.

[6] In 1997, Areka Phillips decided to transfer some of his lands to the Society. A copy of a signed transfer dated 20 September 1997 appears in the Record of Appeal at folio 608. As we have noted, the Society was the operative body under which his enterprise was carried out. The transfer would cement the Society's position for the future and was obviously part of Areka Phillips' vision for the continued use of the complex. The intended transfer was made widely known to Areka's followers and a special dinner to celebrate the gift of the land was held on the site on 19 July 1998. Evidence, which was not contested, was presented that over 120 followers were present at the dinner.[3] A further transfer for exactly the same lands as were in the 1997 transfer was executed on 1 September 1998 and registered in the Land Transfer Registry on 5 March 1999.[4]

[7] Subsequently, in 2002, Areka Phillips was instrumental in the filing of an application for all the lands which were transferred to the Society in 1999 to be set aside as a Māori Reservation under s 338 of TTWMA. Further details as to the setting aside of this land as a reservation are contained at [17] of this decision.

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[2] *Barlow v Phillips – Rangitoto Tuhua 55B1B (Manu Ariki Marae)* (2012) 282 Aotea MB 75 (282 AOT 75) at [3].
[3] Record of Appeal at 636.
[4] Record of Appeal at 493.

[8] The land subject to the application before the lower Court is Māori freehold land. TTWMA provides that certain procedures need to be taken relative to a transfer or gift of Māori land. It is the transfer and the failure of the parties thereto to comply with the provisions of TTWMA that form the main grounds for these appeal proceedings.

The application

[9] Once the Māori Reservation was created in 1984, trustees were appointed and the land contained in the reservation vested in the trustees. The same process followed when further lands were set aside as a Māori Reservation in 2004. These trustees operated alongside the Society. Following the death of Areka Phillips on 16 April 2008, disputes arose between the officers of the Society and the trustees.

[10] Initially the appellants sought to resolve these disputes by filing an application for the holding of a judicial conference under s 67 of TTWMA. A number of questions were raised in connection with the activities of the Society and these form the basis of an amended application/statement of claim which was filed on 19 November 2010 in accordance with directions issued by the Court. The application involved four separate issues all of which were decided in the lower Court's judgment of 3 May 2012.[5] Of these only the issue relating to the transfer was subject to appeal.

[11] The amended application stated:

> **APPLICATION** is hereby made for an order under sections 18(1)(a) and 87 TTWMA that the transfer of the 55B1B and 55B1A2 block from Alex Phillips to the Society on 05 March 1999 ("the transfer") was not valid and that these blocks are owned by the estate of Alex Phillips on the grounds that:
>
> 1. These blocks are Maori Freehold Land.
> 2. These blocks can only be transferred in accordance with the provisions of TTWMA.
> 3. The provisions of TTWMA were not complied with.
> 4. The right of first refusal was not offered to the preferred class of alienees.
> 5. The consent of the Court was not obtained.
> 6. A vesting order was not made under Part 8 TTWMA.

[5] *Barlow v Phillips – Rangitoto Tuhua 55B1B (Manu Ariki Marae)* (2012) 282 Aotea MB 75 (282 AOT 75) at [3].

[12] The application refers to only two blocks, Rangitoto Tuhua 55B1B and Rangitoto Tuhua 55B1A2. Judge Milroy, in her decision, confines her assessment to those two blocks. We intend to do the same. We make this comment as our research shows that Areka Phillips owned other blocks and the land set aside as a Māori Reservation or gifted to the Society included some of those other blocks.

Land subject of appeal

[13] The blocks which form the subject of this appeal are:

> 61.6336 ha being Rangitoto Tuhua No 55B Sec 1B Block – CFR SA 880/102 (55B1B); and
>
> 26.3223 ha being Rangitoto Tuhua No 5B Sec 1A2 Block – CFR SA 46B/35 (55B1A2).

[14] As we noted above, in 1983 Areka Phillips applied to the Court to have 1.7912 ha, being part of 55B1B, set aside as a Māori Reservation under s 439 of the Māori Affairs Act 1953. This comprised the area upon which the main building complex was situated. A recommendation was made by the Court on 20 July 1983 at 66 Tokaanu MB 134 setting aside the land for the purposes of a marae for the common use and benefit of the people of New Zealand.[6] The reservation was duly notified in the *New Zealand Gazette* on 26 January 1984.[7] On 16 April 1984 an order under s 439(7) of the Māori Affairs Act 1953 was made appointing seven trustees and vesting the land in them.[8]

[15] On 17 June 1993, an application was heard for further lands to be included in the reservation. These included all of 55B1B and 55B1A2. A recommendation was made at 32 Aotea MB 159-160 in terms of the application. As the whole of 55B1B was named in the recommendation, including the 1.7912 ha set aside in the 1984 *Gazette*, a further recommendation was made for the cancellation of the previous *Gazette* notice for this area. Although recommended, these reservations were not set aside as they were not gazetted due to the applicant's failure to file a suitable plan defining the areas to be set aside. These lands were subsequently gazetted as Maori Reservation in 2004 (see [17] of this decision).

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[6] Record of Appeal at 799.
[7] "Setting Apart General Land as a Maori Reservation" (26 January 1984) 8 *New Zealand Gazette* 199 at 214.
[8] 67 Tokaanu MB 96 (67 ATK 96).

[16] Under s 129(3) of TTWMA, the land retained the same status that it held immediately before the commencement of that Act on 1 July 1993. Blocks 55B1B and 55B1A2 were deemed to be General land under s 2(2)(f) of the Māori Affairs Act 1953 and therefore retained that status. Areka Phillips applied for a change of status for both blocks under s 133 of TTWMA and an order was made on 16 December 1993 changing the status to Māori freehold land.[9] The status orders were registered against the land transfer titles for the blocks on 12 February 1996.

[17] An application to set aside further areas, including 55B1B and 55B1A2, as a Māori Reservation under s 338 of TTWMA was made in 2002. This was heard on 27 September 2002 and a recommendation made as sought.[10] The reservation was gazetted in the *New Zealand Gazette* on 2 September 2004.[11] At the hearing on 27 September 2002 eight trustees were appointed and the subject land vested in them.

[18] The titles to Blocks 55B1B and 55B1A2 were transferred by Areka Phillips to the Society in 1999. Taking into account the creation of the reservations, the situation immediately before the registration of the transfer to the Society on 5 March 1999 was:

- The land transfer titles to both blocks were in the name of Alexander or Areka Phillips;
- Both titles had endorsed on them a memorial indicating that the land was Māori freehold land;
- Only 1.7912 ha of Block 55B1B had been gazetted as a Māori Reservation;
- That *Gazette* notice had not been registered against the land transfer title for Block 55B1B;
- The area (1.7912 ha) of the Māori Reservation had been vested in trustees pursuant to an order under s 439(7) of the Māori Affairs Act 1953; that vesting order had not been registered against the land transfer title.

[19] As at the commencement of proceedings in the lower Court, the above position had changed in that the titles to 55B1B and 55B1A2 were by then recorded in the land transfer system in the name of the Society. However, neither the *Gazette* notice of 1984 setting the land

[9] 36 Aotea MB 118 (36 AOT 118).
[10] 120 Aotea MB 236 (120 AOT 236).
[11] "Setting Apart Māori Freehold Land and General Land as a Māori Reservation" 111 *New Zealand Gazette* 2681 at 2718.

aside as a Māori Reservation nor the order vesting the land in trustees has ever been registered against the title to Block 55B1B. In the case of the land subsequently set aside as a Māori Reservation in 2004, including 55B1B and 55B1A2, while there is a *Gazette* notice and an order vesting the land in trustees, these have also not been registered against the land transfer titles. In short, none of the *Gazette* notices that have been issued setting aside the Māori Reservations nor the Māori Land Court orders vesting those reservations in trustees have ever been registered against the two titles that are central to this appeal.

Grounds of appeal

[20] The grounds of appeal are that the Māori Land Court erred in**:**

(a) Failing to consider and/or apply section 62 Land Transfer Act 1952 which provides that the registered proprietor holds the blocks subject to encumbrances, liens, estates or interests notified on the register when both blocks had status orders registered on the titles prior to the transfer of the blocks to the respondent determining the status of the lands to be Māori Freehold Land.

(b) Failing to consider whether the transfer of the Māori Reservation lands in part of the Rangitoto Tuhua 55B1B block in breach of trust amounts to fraud.

(c) Failing to consider whether an "in personam claim" exists with respect to the Rangitoto Tuhua 55B1B block due to the transfer being in breach of trust with respect to the Māori Reservation established over part of that block.

(d) Failing to consider whether section 338(11) Te Ture Whenua Māori Act 1993 overrides the indefeasibility provisions in the Land Transfer Act.

(e) Failing to give due weight to the fact that the respondent was not a bona fide purchaser for value.

(f) Finding that the appellants lose nothing from being unable to effect a change in ownership of the underlying title.

(g) Finding that unless there was fraud in the sense of dishonest misconduct on the part of the transferor or the transferee, the Land Transfer Act 1952 indefeasibility provisions trump the confirmation provisions of Te Ture Whenua Māori Act in respect of the non-reservation land.

(h) Finding that unless there is fraud or one of the other exceptions to indefeasibility applies, the registered proprietor has title that is good against the world with respect to the alienation of a Māori Reservation.

(i) Finding that because Mr Alex Phillips and/or the respondent did not deny the existence of the reservation there is no fraud for Land Transfer Act purposes.

(j) Finding that the title of the respondent to the underlying ownership of the blocks is not impugned by reason of the purported alienation of the reservation.

(k) Finding that the respondent's title is protected if it relies on the actions of its lawyer in effecting the transfer.

(l) Finding that the respondent received indefeasible title with respect to the blocks.

Submissions for the appellants

[21] Counsel for the appellants, Ms Wara, made submissions supporting the various grounds outlined above. We set out below the basis of those submissions.

Indefeasible title

[22] The decision of Allan J in *Warin v Registrar-General of Land* as to indefeasibility of land transfer title can be distinguished on the facts.[12] The facts in *Warin* were different in that, unlike the present situation:

(a) there was no notification that the land was Māori freehold land on the certificate of title;
(b) the exceptions to indefeasibility did not apply; and
(c) the transferee was a bona fide purchaser for value.

[23] Counsel therefore argues that these distinctions were sufficient for the lower Court to decline to follow *Warin* and to make an order restoring the title to the estate of Areka Phillips.

Section 62 of the Land Transfer Act 1952

[24] The lower Court failed to consider, take into account and apply s 62 of the LTA. Section 62 provides that the registered proprietor of land shall:

> ... hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever – ...

[25] Ms Wara contends that the learned Judge failed to consider the condition stated within s 62 of the LTA that the registered proprietor's holding of land is conditional on any interest that has been notified on the register. She pointed to the case of *Edwards v Māori Land Court*,[13] in which Young J held that registration of status orders on a title was an important part of maintaining the Torrens system by notifying those dealing with the land as to its status.

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[12] *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).
[13] *Edwards v Māori Land Court* HC Wellington CP78/01, 11 December 2001.

[26] Counsel submits that the effect of notification of the status orders on the register was that they became "interests" for the purpose of s 62. The implication of this is that the provisions of TTWMA apply and that the respondent's title is therefore subject to the alienation provisions of that Act. This meant that Mr Phillips could not transfer the land without compliance with the provisions of TTWMA and thus the Society is precluded from relying upon the indefeasibility provisions of the LTA.

Breach of trust, fraud, claim in personam

[27] Counsel begins from the premise that the transfer was in breach of trust. She submits that the Māori Land Court failed to consider whether the transfer of the 1984 reservation in breach of trust amounts to fraud. She points to the following findings of the Māori Land Court:

(a) that the Society would have known that the 1984 reservation lands were vested in the trustees as a number of trustees were also officers in the Society;

(b) that the trustees' consents were not obtained for a transfer; and

(c) that the 1984 reservation lands were inalienable therefore the transfer is in breach of statute.

[28] Reference is made to the High Court case of *Smith v Hugh Watt Society Inc*.[14] In that case the High Court found that the party receiving trust property transferred in breach of trust is liable as a constructive trustee if it was received with actual or constructive notice that it was trust property and that the transfer was a breach of trust. Counsel maintained that the Society had actual and/or constructive knowledge that part of the land was trust property and that it was transferred in breach of trust.

[29] Ms Wara claims that the lower Court was in error in finding that the LTA indefeasibility provisions trump the confirmation provisions of TTWMA unless there was fraud in the sense of dishonest misconduct on the part of the transferor or the transferee. She pointed to the *Hugh Watt Society* case as providing authority for the proposition that a breach of trust gives rise to a finding of land transfer fraud.

[30] Also in reliance on the *Hugh Watt Society* case and on *Frazer v Walker*,[15] Counsel submits that the learned Judge did not properly consider whether or not a claim in personam

[14] *Smith v Hugh Watt Society Inc* [2004] 1 NZLR 537 (HC).
[15] *Frazer v Walker* [1967] NZLR 1069 (PC).

lay. She asserts that Mr Phillips, as the registered proprietor, had a fiduciary obligation to act in the interests of the beneficiaries of the reservation. By virtue of the transfer, he breached his fiduciary obligations.

Lack of consideration

[31] The Māori Land Court failed to give due weight to the fact that the purchaser was not a bona fide purchaser for value. Ms Wara put forward the proposition that a volunteer is in a no better position than his predecessor, citing in support the 1986 text *Hinde McMorland & Sim: Introduction to Land Law* at [2.100].[16] She also refers to s 183 of the LTA which gives protection to a bona fide purchaser for value where the vendor's title may have been obtained through fraud or error or under any void or voidable instrument.

[32] She points out that in *Warin* the Court placed great weight on the fact that the transferee in that case was a bona fide purchaser for value and goes on to submit:

> 53. As the transfer of the land was by way of gift, the Society is not a bona fide purchaser for value, and therefore cannot rely on the indefeasibility provisions in the LTA. For this reasons (sic) *Warin* does not apply and the Society does not have indefeasible title.

Section 338(11) of Te Ture Whenua Māori Act 1993

[33] Section 338(11) provides that land comprised in a Māori Reservation is inalienable. Counsel points out that this provision did not apply and therefore was not considered in the *Warin* decision. She submits that TTWMA explicitly states that Māori Reservation land is inalienable; that inalienability differs significantly from compliance with alienation provisions, as in the latter, alienation can take place as long as a process is followed; and that, as such, the 1984 reservation land was inalienable and therefore this must trump the indefeasibility provisions of the LTA.

Disconnection with whenua

[34] Ms Wara stressed that it is important to her clients that the family connection to what was their whānau land be recognised. The transfer into the name of the Society meant that if the reservation was ever cancelled then by virtue of s 338(9) of TTWMA the land would be

[16] *Hinde McMorland & Sim: Introduction to Land Law* (2nd ed, Butterworths, Wellington, 1986).

vested back into the Society as former owner instead of the estate of Areka Phillips. She pointed out that the principles of TTWMA, s 2 as to interpretation and the objectives in s 17, all stressed the importance of the retention of land in the hands of its owners, and the Court has to take this into account. She states that the final issue is one of mana and that the appellants seek recognition of the mana of the whānau and the part they have played in fulfilling the vision of their father, Areka Phillips.

Submissions for the second respondent

[35] As may be expected Mr Jefferies as counsel for the second respondent supported the decision of the lower Court. He submitted that the *Warin* case was not controversial and that the reasons for the decision were based on well established conventions and case law. Where sections of TTWMA applied that were not relevant to the *Warin* case Counsel contended that the indefeasibility provisions of the LTA still prevailed.

[36] Mr Jefferies responded to the various submissions made on behalf of the appellants. Invariably he supported Judge Milroy's decision and raised little new argument. We see no need to summarise those submissions at this stage. Where any are relevant we consider them in arriving at our decision.

Legislation

[37] The application is brought under s 18(1)(a) of TTWMA which reads:

> (1) In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, the Court shall have the following jurisdiction:
>
> (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[38] Ms Wara relies on ss 62 and 183 of the LTA as part of her submissions and these are reproduced below:

> **62 Estate of registered proprietor paramount**
>
> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of

> land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever-
>
> [then follow 3 exceptions which are not relevant to the argument in this case.]
>
> **183 No liability on bona fide purchaser or mortgagee**
>
> (1) Nothing in this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.
>
> (2) This section shall be read subject to the provisions of sections 77 and 79.

[39] Reference is also made to ss 140, 142, and 338(9), (10) and (11) of TTWMA. Those provisions are relatively short and we find it more convenient to reproduce those provisions where they are considered in our discussion.

Discussion

Main issue

[40] It is clear that the major issue for this appeal is the effect of the *Warin* decision and its ratio concerning the principle of indefeasibility of title. We will consider whether Ms Wara has substantiated her submission that this Court can distinguish the facts of this appeal from those in that decision.

[41] In our discussion that follows, however, we propose to deal with the peripheral issues first, leaving the indefeasibility argument for final consideration.

The appellants

[42] The application in the lower Court is stated as being by "the trustees of Manu Ariki Marae" and is signed by the appellants, Faith Barlow and Beverley Muraahi.[17] Judge Milroy, in her decision, refers to the then-applicants bringing the application "on behalf of the trustees".[18] The appeal is brought by those same persons. In her opening Ms Wara, appearing for the appellants, told this Court that the appeal "is now brought by two of the trustees in their personal capacity as opposed to their capacity as trustees".[19]

[43] In the lower Court, counsel for the applicants took a broad brush approach to the issues before the Court. His argument was based not only on the effect of the transfer on the applicants personally, but also on the trust. Although the trust is not a party to the appeal proceedings Ms Wara, in this Court, continued with submissions much along the same lines as those before the lower Court. We perceive that the fact that this appeal has been brought by the appellants in their personal capacity has, to some extent, changed the focus or direction of the proceedings. That is a matter that we need to take into account.

Events after the 1999 transfer

[44] Ms Wara based much of her argument on the effect of the transfer immediately after it had taken place. In answer to a question from Deputy Chief Judge Fox she replied: "I do not think that the effect that the 2002 order has any effect on the transfer that took place three years previously".[20] We disagree. The position had changed through the regazetting of the reservation in 2004 and we deal with this in paragraphs [45-48] and [51].

Position of the trust

[45] Once the Māori Reservation was established by *Gazette* notice in 1984 over the 1.7912 ha area of Block 55B1B and that area was vested in trustees under s 439 of the Māori Affairs Act 1953, those trustees were entitled to be registered as the legal owners of that land. The trustees took no action to ensure that the Māori Land Court had transmitted the *Gazette* notice and the order vesting the reservation in trustees. Nor did they follow up to ascertain whether

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[17] Record of Appeal at 1350.
[18] *Barlow v Phillips – Rangitoto Tuhua 55B1B (Manu Ariki Marae)* (2012) 282 Aotea MB 75 (282 AOT 75) at [2].
[19] 2013 Māori Appellate Court MB 201 (2013 APPEAL 201).
[20] 2013 Māori Appellate Court MB 217 (2013 APPEAL 217).

these had been registered. Areka Phillips remained as the owner on the land transfer title. This failure to register means that by virtue s 123(5) of TTWMA the order vesting the reservation in trustees applies only to the equitable title.

[46] The registration of the transfer to the Society in 1999, resulted in the legal ownership passing to the Society. Until then it was open for registration of the *Gazette* notice and the vesting order to occur. Once the transfer to the Society was registered, it would have been very difficult for the trustees to have the *Gazette* notice and the vesting order registered as those documents predated the registered transfer.

[47] We note that Areka Phillips subsequently arranged, with the consent of the Society, for the various lands including those transferred in the 1999 transfer, to be set aside as a Māori Reservation on the same terms as the 1983 order. That order was made in 2002, and the *Gazette* notice issued in 2004. Over 336 ha were gazetted as reservation. That area included the 1.7912 ha area gazetted in 1984.

[48] The position at this point became precisely the same in respect of the 1.7912 ha area as it was immediately prior to the registration of the transfer to the Society in 1999. The trustees became the equitable owners and were entitled, upon registration of the 2004 *Gazette* notice and the order vesting the reservation in trustees, to become the holders of the legal title in the land transfer system. This remains the current position. What is important to note is that the trustees hold the title on the same terms and for the same beneficiaries as existed prior to transfer being made. While technically there was a breach of trust, that position has been remedied. As far as the trust is concerned, no action is required by the Court to restore it to the position it held prior to the transfer.

Fraud, breach of trust, claim in personam

[49] The submissions on these matters arise out of actions by Areka Phillips to the detriment of the trust. The 1999 transfer deprived the trust of its right to be recorded as the legal owner of 1.7912 ha reservation area. This formed the grounds for the claim that Areka Phillips' actions constituted fraud. The transfer also forms the basis for the claim that Areka Phillips, as a trustee, was in breach of trust in arranging the transfer. The claim in personam also arises from these actions which are said to be to the detriment of the trust.

[50] As outlined in the previous section, at the date of filing the application which is the forerunner of these proceedings, the position of the trust was, in respect of the 1.7912 ha reservation, the same as it was prior to the 1999 transfer, both as to its title to the reservation and as to the composition of its beneficiaries. There was no need for the trust to bring any action over the transfer to the Society and in any event no cause of action then existed.

[51] If there were any elements of fraud arising out of the transfer, and we do not say that there were, they were redressed by Areka Phillips through his action in 2002 in arranging for the further gazetting of land as a Māori Reservation. As indicated above, the rights of the trustees and the beneficiaries were fully restored as a result of that action. The property of the trust remained within the trust. The reference to the *Hugh Watt Society* case and the remedies available are not applicable in the present case. That is because there has been no detriment to the trust or its beneficiaries.

[52] In any event we agree with Judge Milroy's finding that there was no fraud. Areka Phillips was entitled to alienate all his lands except for the 1.7912 ha area set aside as reservation. Under TTWMA he was, where Māori land was involved, required to conform with the requirements of that Act. One would have expected his solicitors, who should have been alerted to the fact that the land was Māori land by memorials on the titles, to have advised him as to the legal requirements relating to a transfer of the land.

[53] Areka Phillips transferred three land titles to the Society by way of the 1999 transfer totalling in excess of 128 ha. Included in one title (Block 55B1B) was the 1.7912 ha Māori Reservation. The transfer of the land to the Society was not covert but made known to its members and a special dinner held to mark the occasion as outlined at [6] of this decision. There is no evidence to suggest that Areka Phillips sought to deprive the trust of its right to legal title to the 1.7912 ha reservation. It seems clear that this was an error or oversight. The subsequent setting aside of further lands but also including the 1.7912 ha area in 2002 is a further indication that Areka Phillips always wished the reservation land to be held under the trust.

[54] In their grounds of appeal, set out at [20](k), the appellants take issue with the finding of the lower Court that the respondent's title was protected because it relied on the actions of its lawyer in effecting the transfer. This is not entirely correct. The finding was in relation to

fraud and was made on a number of factors of which the actions of the solicitor were one. Intent can be an ingredient of fraud and the actions of the solicitor can be material to a finding of fraud. We find no fault in the comments of the lower Court as to those actions having regard to the context in which they were made.

[55] As to the claim in personam, this was based on the alleged breach of trust. As the position of the trust had been restored by the 2002 orders to that which prevailed prior to the 1999 transfer, no claim arises. We add that, in response to a question from the bench over a claim in personam and constructive trust, Ms Wara acknowledged that there was no specific claim addressing this proposition before the lower Court.[21]

Disconnection with whenua

[56] Blocks 55B1B and 55B1A2 have now been set aside as a Māori Reservation by the *Gazette* notices of 1984 and 2004. The appellants claim that by virtue of the transfer of those lands to the Society they are disconnected from that land.

[57] Section 338 of TTWMA applies to Māori Reservations. Section 338(5) allows, among other things, for a reservation to be cancelled or land excluded from it. Subsections 338(9) and (10) provide the outcome when either of those events occur. The subsections state:

> (9) Upon the exclusion of any land from a reservation under this section or the cancellation of any such reservation, the land excluded or the land formerly comprised in the cancelled reservation shall vest, as of its former estate, in the persons in whom it was vested immediately before it was constituted as or included in the Maori reservation, or in their successors.
>
> (10) In any case to which subsection (9) applies, the Court may make an order vesting the land or any interest in the land in the person or persons found by the Court to be entitled in the land or interest.

[58] The effect of these provisions is that the legislation recognises that where a reservation is set aside there remains, for want of a better term, a residual interest for the owners, in the event that the reservation is cancelled. Those owners may not be beneficiaries while the reservation subsists but in the event of its cancellation or the exclusion of any land from it that land vests back in those owners or their successors.

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[21] 2013 Māori Appellate Court MB 198 (2013 APPEAL 198) at 219.

[59] The appellants claim that the fact that their father transferred Blocks 55B1B and 551A2 to the Society prior to the setting aside of those lands as a reservation means that in the event that the reservation is cancelled it will vest back in the Society, not their father's estate. Their potential connection with the land, by succession, will therefore be lost.

[60] Ms Wara in her submissions comments:

> 67. The final issue is one of mana. The Appellants wish for the mana of the whanau to be recognised in the part they have played in fulfilling the vision of their father, Alex Phillips.

[61] The above statement is inconsistent with the evidence. The evidence shows that Areka Phillips wished the Society to carry on with the day to day running of his organisation. There is ample evidence on the record that not only did he transfer land to the Society in the 1999 transfer, he later transferred a number of other titles as well. These transfers were effected after some deliberation and show a clear preference by Areka to provide for the continuation of his work over provision for the whānau.

[62] The appellants have brought this appeal as individuals and are not supported by the estate of Areka Phillips. They consider that the effect of the transfer was to break their connection with the land in that their potential residual interest ceased to exist once legal title passed to the Society.

[63] The problem with this submission is that the appellants have adduced no evidence to show that if it were not for the transfer they would have been entitled to succeed to Areka Phillips. In her evidence before the lower Court, Beverley Muraahi acknowledged that Areka Phillips left a will and named the executors.[22] At no time was evidence presented that the appellants were beneficiaries under the will, let alone entitled to succeed to 55B1B and 55B1A2.

[64] We cannot assume that the appellants were beneficiaries. There is no evidence supporting this submission to the extent needed and as a consequence we are not able to take it into account in our assessment of this appeal.

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[22] 267 Aotea MB 168 (267 AOT 168).

The Warin *decision*

[65] The remaining submissions on behalf of the appellants all involve indefeasibility of title and the effect of the *Warin* decision. Ms Wara, in her submissions, states that she does not seek that the Māori Appellate Court "overturn" that decision. Rather, she submits that *Warin* depends very much on the fact situation and that it can be distinguished on the facts of this case.

[66] Those distinguishing facts are listed as:

(a) there was no formal notification on the certificate of title that the land was Māori freehold land;

(b) the exceptions to indefeasibility did not apply; and

(c) the transferee was a bona fide purchaser for value.

[67] To those above facts we add Ms Wara's argument over s 338(11) of TTWMA and its effect on the indefeasibility provisions of the LTA. Section 338 did not apply to the *Warin* situation and therefore can be considered as a further distinguishing factor.

Failure of lower Court to consider submissions

[68] The appellants claim, in the grounds of appeal, that the lower Court failed to consider or give due weight to a number of submissions or arguments put forward on their behalf (see [20](a) to [20](e)). It is apparent from a perusal of Judge Milroy's decision that not all of those claims can be substantiated. Rather than deal with them separately we propose to deal with the issues on appeal and then, if we find merit in the submissions for the appellants on any issue, weigh those submissions against the finding of the lower Court.

Indefeasibility, failure to comply with the provisions of Te Ture Whenua Māori Act 1993 and the effect of the Warin *case*

[69] The *Warin* decision measures the relationship between the LTA and Māori land legislation, and traverses well-known precedent relating to indefeasibility of title. The clear conclusion to be drawn from *Warin* is that where Māori freehold land is transferred without compliance with the provisions of TTWMA and none of the exceptions to indefeasibility apply the transferee obtains indefeasible title.

[70] The failure to comply with the provisions of TTWMA in *Warin* is similar to that in the present case. In *Warin* the land was held by the Māori Trustee and transferred to a purchaser for value. Under s 228(3) of TTWMA as it then read, the transfer was "of no force or effect unless and until it is confirmed by the Court". Confirmation under s 152 was never sought. The circumstances of the transfer required the Court to be satisfied, before granting confirmation, that a right of first refusal be given to the preferred classes of alienees. No such right of first refusal was offered to the preferred classes of alienees.

[71] In the present case the transfer from Areka Phillips to the Society constituted an alienation of Māori freehold land under TTWMA. Under s 150C(3)(a) of TTWMA the transfer required confirmation under s 152 of that Act, again involving a right of first refusal to the preferred classes of alienees. No such confirmation was sought and no right of first refusal offered. The transfer was therefore of no force or effect by virtue of s 156(1) of TTWMA:

> (1) No instrument of alienation that is required to be confirmed under this Part shall have any force or effect until it is confirmed by the Court under this Part.

[72] The transfer was also made contrary to the provisions of s 146 of TTWMA, which provides:

> No person has the capacity to alienate any interest in Maori freehold land otherwise than in accordance with this Act.

[73] Ms Wara does not dispute the ratio of the *Warin* decision. Instead, as outlined earlier, she seeks to distinguish it on the facts and submits that the differences were such as to allow the lower Court to decline to follow *Warin* and to make the orders she sought.

[74] In these circumstances, we see no need at this stage to discuss the *Warin* decision in detail, nor to refer to the other authorities on indefeasibility. That decision was a declaratory judgment. Quite clearly this Court is bound by that decision unless it can be distinguished. The question is whether the decision can be distinguished on the facts and, if so, whether the circumstances are such as to enable the Court to make the order sought.

[75] There is however one aspect of the *Warin* decision that we do comment on. In that decision Allan J, in referring to inconsistencies between the LTA and TTWMA, relied heavily

on the decision of McGechan J in *Housing Corporation of New Zealand v Māori Trustee*.[23] In that decision Justice McGechan referred to previous decisions favouring immediate indefeasibility. He went on to make a statement to the effect that the legislature would have been aware of that background and that if it had intended the Māori land legislation to override the indefeasibility provisions it would have made its intentions very clear; that it did not do so, leading to a clear inference that the general rule of immediate indefeasibility is to apply.

[76] In *Warin*, Allan J referred to a number of recent decisions which had approved the *Housing Corporation* decision and went on to say:[24]

> Security of title by registration lies at the very heart of this country's system of land ownership. The legislature must be taken to have been well aware of that, as is noted by McGechan J at p 673 of the *Housing Corporation* case. Those responsible for drafting the Act must be taken to have known of the Judge's comments in that case and have been aware of the need, if the intention was to override the LTA, to say so expressly. Had Parliament intended to impinge upon indefeasibility entitlements, then that could have been simply achieved, either by a specific section in the Act, or by an appropriate amendment to s 63 of the LTA. Instead, Parliament enacted s 126 of the Act which, although directing that the first defendant must not register an instrument which has not been confirmed by the Court, stops short of taking the next step of declaring that any such registration would itself be of no effect.

[77] In the above passage Justice Allan emphasises the importance of security of title by registration and the need for any legislation, if it is to override the provisions of the LTA, to say so expressly. We now proceed to consider the arguments put forward on behalf of the appellants distinguishing the facts of the present case from those in *Warin* and as to whether they justify this Court departing from the principles expressed in that decision.

Section 338(11) of Te Ture Whenua Māori Act 1993 – land inalienable

[78] Section 338 (11) of TTWMA states:

> Except as provided in subsection (12), the land comprised within a Maori reservation shall, while the reservation subsists, be inalienable, whether to the Crown or to any other person.

[79] At the date of the transfer to the Society 1.7912 ha of Block 55B1B was a Māori Reservation, having been set aside by gazette in 1984. In the same year the Court made an

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[23] *Housing Corporation of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC).
[24] *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC) at [125].

order vesting the reservation land in trustees (see [14]). The reservation area was therefore, by virtue of s 338(11), inalienable.

[80] This provision was not considered in *Warin* as it had no application in that case. Ms Wara states that in Judge Milroy's determination s 338(11) was not considered in relation to the LTA. She points out that the subsection specifically states that Māori Reservations are inalienable. She continues in her written submissions:

> 59. Inalienability differs significantly from compliance with alienation provisions – where alienation can take effect as long as a process is followed.
>
> 60. As such, it is submitted that the 1984 reservation land was inalienable, and therefore must trump the indefeasibility of the LTA.

[81] At [13]-[19] of this decision, details of the lands are set out, as well as any gazettal of the lands as a Māori Reservation. It is noted that as at the date of commencement of proceedings in the lower Court, no action had been taken to register the two *Gazette* notices (1984 and 2004) or the vesting of the land in trustees against the relative titles. The result is that the reservations are not recorded against the legal title, the land transfer title. The reservations apply only to the equitable title which is recorded in the Māori Land Court.

[82] The gazetting of a registration empowers the Māori Land Court to appoint trustees and vest the reservation in those trustees. Part 5 of TTWMA deals with recording of ownership and ss 122 and 123 in that Part require all orders of the Court affecting ownership of land, with two minor exceptions, to be registered against the title to that land under the LTA. Section 123(5) of TTWMA provides that until it is registered an order affects only the equitable title to that land.

[83] Under s 62 of the LTA, where a transfer is registered, title is perfected subject only to the encumbrances, liens, estates, or interests recorded on the title. In the present case the transfer to the Society would override the equitable interest held by the trustees of the reservation.

[84] Ms Wara submits that the "inalienability" provision in s 338(11) is different from provisions restricting alienation unless there is compliance with TTWMA. We tend to agree. "Inalienable" strictly prohibits alienation. In contrast, where alienation is restricted by compliance with certain conditions, it is nonetheless permitted subject to meeting those

conditions. Māori Reservations generally contain wāhi tapu or land of special significance to Māori. It makes sound sense that reservation land should be inalienable.

[85] Yet if we look at the situation where land is alienated in breach of TTWMA the result is the same whether it is reservation land or not. Despite the significance of reservation land, the legislature did not, as suggested in *Warin*, see fit to impose any sanctions or protections which might override the indefeasibility provisions of the LTA.

[86] There is another aspect to this issue. TTWMA requires and anticipates that orders affecting title will be registered against the land transfer register. The legislature may well have considered that such registration would have provided the necessary protection to Māori Reservations.

[87] We therefore find that the fact that the transfer was, insofar as it contained an area of Māori Reservation, contrary to the provisions of s 338(11) of TTWMA does not provide sufficient reason to override the indefeasibility provisions of the LTA. The *Warin* decision dictates that there needs to be a clear indication of intent to override the indefeasibility provisions of the LTA and this is not contained in TTWMA.

[88] The situation might have been different had the *Gazette* notice and vesting order been registered against the relative title. We do not need to consider this possibility. We observe, however, that had the *Gazette* notice and the vesting order been registered, thus recording the legal ownership in the names of the trustees, it is most unlikely that the transfer would have been registered.

Lack of consideration

[89] Ms Wara submits that the lack of consideration in this case is a further distinguishing factor. We accept that there is a distinction. In *Warin* the transaction was for value. In the present case it is not contested that transfer of the lands was by way of gift.

[90] Counsel emphasises that the Society was a volunteer and therefore not entitled to the protection of indefeasibility under the LTA. She relies on an extract from the 1986 text *Hinde*

McMorland & Sim: Introduction to Land Law.[25] Unfortunately that extract is well out of date and a more recent discussion of the status of volunteers under the LTA is contained at [9.079]-[9.082] of the 2007 text *Hinde, Campbell and Twist: Principles of Real Property Law*.[26] Importantly, the views expressed in the extract relied upon by counsel for the appellants had changed considerably. In the 2007 text the authors begin by noting:[27]

> The extent to which the indefeasibility provisions of the Land Transfer Act 1952 protect a registered proprietor who did not give valuable consideration is uncertain.

[91] The authors go on to discuss the conflicting approaches taken by different states in Australia. In short, the courts of New South Wales and Western Australia favour the proposition that volunteers do acquire an indefeasible title; whereas the courts in Victoria favour the proposition that they do not. The authors of the 2007 text noted that in New Zealand there was no modern authority directly on point. However, since 2009 there has been such an authority in Tipping J's decision in the Supreme Court in *Regal Castings Ltd v Lightbody*.[28] Tipping J expressed in very clear terms (and was not contradicted by his fellow judges) that volunteers acquire an indefeasible title under the LTA to the same extent as bona fide purchasers for value.

[92] In his decision, Tipping J measures the differing opinions as to whether a volunteer acquires an indefeasible title under s 62 of the LTA. He goes on to say that those who say that only those who have given valuable consideration acquire indefeasible title draw their conclusion by implication from the reference to valuable consideration in some places of the indefeasibility sections of the LTA.[29] He considers s 183 LTA and states that its purpose is to make it clear that those who take in good faith and for valuable consideration are not affected by any vice in a predecessor's title.

[93] Justice Tipping then goes on to consider the relationship of s 183 of the LTA to s 62 of that Act. He says:[30]

> [133] When regard is had to s 62, s 183 cannot, however, be interpreted as meaning that a volunteer does not take an indefeasible title. I do not consider the express reference to

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[25] *Hinde McMorland & Sim: Introduction to Land Law* (2nd ed, Butterworths, Wellington, 1986).
[26] *Hinde, Campbell and Twist: Principles of Real Property Law* (LexisNexis, Wellington, 2007).
[27] *Hinde, Campbell and Twist: Principles of Real Property Law* at [9.079].
[28] *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 (SCNZ).
[29] *Regal Castings Ltd v Lightbody* at [130].
[30] *Regal Castings Ltd v Lightbody* at [133].

> a bona fide purchaser for value in s 183 was meant by implication to exclude volunteers from the protection given by s 62. A volunteer who takes without fraud gains the benefit of s 62. There is no other way of harmonising the two sections. The reference in s 183 to valuable consideration does not, in my opinion, carry with it the implication that if you are bona fide, but have not given valuable consideration, you are liable to be affected by a vice in a predecessor's title. Section 62 makes it clear that this is not so, there being no valuable consideration precondition in that section. If those drafting the Land Transfer Act had intended volunteers to be excluded from the scope of s 62, it seems most unlikely that they would have left that result to implication from s 183 as opposed to stating the exclusion directly in s 62.

[94] In the absence of any other authority we agree with the view expressed by Justice Tipping and therefore disagree with Ms Wara's submission that the fact that the Society was a volunteer means that it does not acquire indefeasible title under s 62 of the LTA.

Registration of status order

[95] In the *Warin* case the status of the land was not recorded on the land transfer title. There was no indication whether the land was Māori or General land. Conversely, in the present case the status of the land as Māori land was recorded against the relevant titles. Title SA880/102 for 55B1B contains the memorial – B323597.1 STATUS ORDER DETERMINING THE STATUS OF THE WITHIN LAND TO BE MAORI FREEHOLD LAND – 12.2.1996 AT 9.45 AM. Title SA46B/35 for 55B1A2 has the same memorial recorded under number B329597.2. Both memorials are in the body of the respective titles and are in capital letters.

[96] The Māori Land Court maintains its own register of Māori land titles. In Part 5 of TTWMA, ss 122 and 123 require the Court, with one or two exceptions, to register all orders of the Court as to ownership of land against the land transfer title. Over the past few years initiatives have been taken by the Court and Land Information New Zealand to ensure that all Māori land titles are registered in the Land Transfer Office.

[97] In the case of status orders a similar requirement to register is contained in s 140 of TTWMA:

> Every status order made under this Part, and every vesting order made under section 134, shall be registered under the Land Transfer Act 1952 in accordance with Part 5 of this Act.

[98] Section 142 provides the effect of registration:

> **142 Effect of status orders upon registration**
>
> Every status order made under this Part shall upon registration, or upon noting under section 124, have the effect of giving to the land the particular status specified in the order.

[99] In her submissions Ms Wara considers that the fact that the status orders were registered provides grounds for the Court to distinguish the *Warin* decision. She points to *Edwards v Māori Land Court* as recognising the importance of registration of those orders and cites Young J at [64] of his decision:[31]

> [64] Even without s 140 I would have concluded that a status order once registered is "in respect of title" to land. These sections are concerned to ensure the Torrens system of title by registration is also maintained by TTWMA. Thus until registration the MLC order affects only the equitable but not the legal estate in the land (see s 123(1) and (5)).
>
> [65] The importance of a change of status (to general land) is significant. Once registered it potentially removes most of the restrictions contained in TTWMA and thus is of considerable importance in relation to those dealing with the land. All land in New Zealand has a particular status (s 129).

[100] Ms Wara then submits as to the effect of the status order following registration. We quote from her written submissions:

> 26. In *Town and Country Marketing Ltd v McCallum* (1998) 3 NZ ConvC 192, 698, Paterson J had to consider the status of a restrictive covenant notified on the title pursuant to section 126A Property Law Act 1952. Paterson J held that:
>
> > "Notification does give an indefeasibility benefit in that it prevents a purchaser who becomes registered proprietor from relying upon the indefeasibility provisions of the Land Transfer Act in order to defeat a restrictive covenant notified upon a certificate of title."
>
> 27. The effect of the status orders being notified on the register is that they become "interests" for the purposes of section 62. The implication of "interests" is that the provisions of the Act apply, therefore the respondent's title is subject to the alienation provisions of the Act. The result being that the interests of Mr Phillips in the land could not be transferred without compliance with the provisions of the Act.
>
> 28. Accordingly, notification of the status of the land on the titles in this case prevents the society from relying on indefeasibility provisions of the Land Transfer Act in order to defeat the restrictions under the Act.

[31] *Edwards v Māori Land Court* HC Wellington CP78/01, 11 December 2001.

[101] Although Ms Wara did not refer to it, we note that Young J in *Edwards v Māori Land Court* also found that on registration a status order became an "interest" for the purposes of s 62 of the LTA. After citing s 62 he went on to say:[32]

> [116] Thus the registered proprietor holds the land (if registered under the Act) against all the other claims to the land except in the case of fraud (and other particular exceptions) and subject to interests notified on the register.
>
> [117] One of those interests "notified in the folium of the register" will be a status order. The order affects the registered proprietors estate in the land. This order is effectively protected in the same or a similar way to, for example, the registered proprietors' interest as "owner" of the land. The status order cannot be removed or changed other than by statutory authority e.g. s81 Land Transfer Act; s125 TTWMA. It is notice to the world of the actual status the land holds. And where for example the land has the status of Maori freehold land it will be subject to statutory restraints in TTWMA. And the land only holds the status once registration is effected.
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> [118] Indefeasibility was described in *Fraser v Walker* [1976] NZLR 1069 at 1075-76 in the following terms:
>
> > "…a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys."
>
> [119] And indefeasibility also protects the registered proprietor from encumbrances, liens, estates or interests not registered (s62 Land Transfer Act). Thus given the status of land is part of the estate or interest in the [land. Registration] of the status order will protect it against claims that the land enjoys another status or that the status of the land was wrongfully obtained outside of the statutory exceptions allowing disputation. Once registered the order is entitled to the same indefeasibility protection of other encumbrances liens, estate or interest in the land which will collectively be susceptible to attack only by statutory authority, here the Land Transfer Act (e.g. fraud, wrongfulness) and TTWMA (e.g. annulment).

[102] In her submissions Ms Wara, after submitting that status orders, upon registration become "interests" for the purposes of s 62 of the LTA, concludes that such notification on the land transfer title prevents the Society from relying on the indefeasibility provisions of the LTA in order to defeat the restrictions under that Act. Unfortunately she does not explain with any clarity just how this comes about.

[103] We accept, for the purposes of coming to our decision, that a status order, once registered, comprises an "interest" for the purposes of s 62 of the LTA. We simply note that this issue is perhaps not clear cut. We agree with Paterson J's comments in the *Town and*

[32] *Edwards v Māori Land Court* HC Wellington CP78/01, 11 December 2001.

Country Marketing case as applied to restrictive covenants.[33] However, this does little to advance the question as to whether a status order is an "interest".

[104] Counsel's reference to Young J's comments in the *Edwards v Māori Land Court* case[34] (see [99]) do little to advance her client's position, as those comments were made in the circumstances pertaining to that case and did not involve, as in this case, the indefeasibility of a registered transfer. Young J's decision was overturned by the Court of Appeal, although on other grounds. The Court of Appeal also overturned a material finding as to whether s 81 or s 125 of TTWMA applied. The finding that a registered status order comprised an "interest" was not essential to the ratio of the decision.

[105] We need not determine this matter. As we have indicated, for the purpose of coming to a decision, we assume that the registration of a status order is an "interest" in the terms of s 62 of the LTA. That section provides that the registered proprietor shall hold the title subject to such encumbrances, liens, estates, or interests as are noted on the register but free from all other encumbrances, liens, estates or interests whatsoever. This would mean that where a status order is noted, a purchaser would acquire the land subject to that status; that is, as General land or Māori land as the case may be. As Young J observed, registration of the status order protects that status from claims that some other status is correct.

[106] If we look at ss 140 and 142 of TTWMA (see [97]-[98]), it would appear that this is the intention of the legislation regardless as to the operation of s 62 of the LTA. Section 140 of TTWMA requires all status orders to be registered under the LTA in accordance with Part 5 of TTWMA. Section 142 of TTWMA states that a status order shall, upon registration, have the effect of giving the land the specified status in the order. Put more simply, the status order does not affect the legal title until the registration of the order.

[107] The effect of s 142 of TTWMA with regard to status orders is much the same as s 62 of the LTA. Once registered, that status applies to the land until such time as another order is registered. The Court of Appeal decision in *Bruce v Edwards* confirms that transactions properly made in reliance on that status will be protected.[35]

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[33] *Town and Country Marketing Ltd v McCallum* (1998) 3 NZ ConvC 192, 698 (HC).
[34] *Edwards v Māori Land Court* HC Wellington CP78/01, 11 December 2001.
[35] *Bruce v Edwards* [2003] 1 NZLR 515 (CA).

[108] Ms Wara argues that once a status order is notified on the register it is an interest under s 62 of the LTA. In answer to questions from the bench she responded to the effect that because the status of the land had been notified and registered as an interest on the register, the alienation provisions of TTWMA should apply. She goes on to submit that because those interests exist under s 62 of the LTA the Society does not have an indefeasible title and that the matter could be referred to the District Land Registrar under s 81 of the LTA to correct the title.

[109] The essence of Ms Wara's argument is that by registering the status order there is imported into the LTA a provision requiring compliance with the alienation provisions of TTWMA and creating, in the case of failure to comply, an exception to the indefeasibility provisions of s 62 of the LTA. That argument is not sustainable. The registration of a status order merely records the status of the land; normally either General land or Māori land. Registration is a simple and uncomplicated operation. The effect of registration of a status order is itself simply stated in s 142 of TTWMA; it gives to the land the status specified in the order.

[110] Ms Wara's approach is to try to read into the registration of a status order obligations that are not stated and an outcome that is not provided for. We are mindful of the emphasis in the *Warin* decision, namely, as to the importance of the security of title by registration and the need for any legislation, if it is to override the provisions of the LTA, to say so expressly. TTWMA contains s 142 which has as its only purpose the pronunciation of the effect of registration of a status order. That effect is solely to give to the land the status specified in the order. We are of the view that if any other effect was intended it would have been clearly stated, particularly if it was to override the indefeasibility provisions of the LTA.

Preferred classes of alienees – right of first refusal

[111] There is no doubt that the appellants, as children of Areka Phillips, are members of the preferred classes of alienees ("PCA") and that in the circumstances of the alienation of any Māori land were entitled to a right of first refusal under s 147A of TTWMA. From time to time Ms Wara's submissions make the point that they had been denied that right. We therefore comment on this situation.

[112] TTWMA defines the preferred classes of alienees in s 4. They can be loosely described as kin groups with a connection to the land. In the event of a proposed sale or gift of Māori land

to a person who is not a member of the PCA, s 147A prescribes that the vendor must give a right of first refusal to the PCA ahead of any person who is not a member of the PCA.

[113] An alienation by way of sale or gift has to be confirmed by the Māori Land Court under s 152 of TTWMA. This section requires the Court to be satisfied as to a number of preconditions including the proper discharge of the vendor's obligation under s 147A to grant the right of first refusal to the PCA.

[114] A right of first refusal is a procedural requirement of TTWMA. Where it applies and an application is filed for confirmation, the application is referred to a Judge and directions given as to public notice of the right of first refusal. Those members of the PCA interested will be given a date to notify the Court of their interest in exercising that right and will then be advised as to a date of hearing at which they will be entitled to pursue the right of first refusal. Rules governing the procedure are contained in the Māori Land Court Rules 2011.

[115] The right of first refusal differs from a contractual right given to an individual. It is a right created by statute for the benefit of a group or classes of people. There are procedures to identify those interested in exercising the right. If there is more than one person interested, the vendor is entitled, by virtue of rule 11.7(2) of the Māori Land Court Rules 2011, to select the person he wishes he deal with. If the selected member of the PCA fails to complete the alienation, the alienor must offer the right to another member of the PCA who has given notice until either the right of first refusal is exercised or all the members of the PCA who have given notice have been given the opportunity to exercise the right of first refusal.[36]

[116] The procedure outlined above provides an opportunity for the PCA to purchase the land by exercising the right of first refusal. It is not a right that they can exercise unilaterally. It is a right that has to be exercised through the Court as part of the application for confirmation. Until the process is completed and the person who is to be offered the right of first refusal is selected, the procedure merely provides a potential for a member of the PCA to be selected. At any stage prior to confirmation the vendor may decline to go ahead with the alienation and withdraw his application.

[36] Māori Land Court Rules 2011, r 11.7(6).

[117] Because the transfer has been effected without confirmation under s 152 of TTWMA the appellants have been denied their right of first refusal under TTWMA. The principles of TTWMA espouse the retention of land in the hands of the owners, their whānau and hapū. Section 2(2) of TTWMA requires the Court to exercise its powers, duties and discretions, as far as possible, in a manner that promotes retention of Māori land. The right of first refusal in the case of alienation by way of sale or gift is a measure aimed at retention of Māori land.

[118] Section 123(5) of TTWMA provides that orders of the Court, until registered, only affect the equitable title thus acknowledging the superiority of registration under the LTA. The LTA was passed in 1952. In 1993 when TTWMA was passed both the legislature and the draftsmen would have been aware of the importance placed on security of title in the LTA and various Court decisions in favour of indefeasibility of title. Despite the importance placed by TTWMA on retention of Māori land, no provisions were included to protect that land from the overriding provisions of the LTA. We find that the discretion allowed to the Court under s 2(2) of TTWMA is not sufficient to allow us to make a finding in favour of the appellants.

[119] Indefeasibility of title means that there are winners and losers. In this case the appellants have been denied their right of first refusal. However the land remains Māori land and the right of first refusal continues to exist in the event of any further alienation. It may well be that this continued protection was considered sufficient in the circumstances.

[120] The intended transfer was made well-known to the followers of Areka Phillips and we cannot envisage any officers of the Society or trustees not being aware of the proposal. A dinner to celebrate the gift was held. There is no evidence of any opposition to the proposal. While it is not a reason for our decision, we are left with the view that had the proper process been followed, then such were the standing and persuasive powers of Areka Phillips, that had anyone indicated that they wished to exercise a right of first refusal they would have been dissuaded from doing so. This would apply particularly to officers of the Society or trustees.

[121] In evidence in the lower Court, Beverley Muraahi stated that had she and her fellow appellant been offered the land they would certainly had agreed to take it in order to keep it in

the family.[37] Later in her evidence she acknowledges the control her father Areka Phillips maintained:[38]

> **Miss Rush:** The trustees were established to oversee and manage the running of Manu Ariki or the marae reservation in particular, but they took no active role throughout until Mr Phillips death. Is that correct?
>
> **Mrs Muraahi:** Can I elaborate on that a little bit?
>
> **Mrs Rush:** Yes.
>
> **Mrs Muraahi:** If you knew my father he (sic) wouldn't do anything unless he told you to. I'm sorry but that's the way it was. God help you if you didn't.
>
> **Miss Rush:** Why are the trustees suddenly taking such an active role?
>
> **Mrs Muraahi:** Because he was there to call the shots as such. I don't want to say horrible things about my father, but sometimes if he told you something you had to do it and if you didn't you were in trouble. So after he died we just decided to get back on board and bring the trust back into form.

[122] These proceedings were not brought until after the death of Areka Phillips. The above evidence is indicative of the control Areka Phillips wielded and hardly supports the statement that the appellants would have exercised the right of first refusal contrary to his wishes.

Registration of orders

[123] In [83]-[88] of this decision we commented on the special significance of Māori reservations and the importance of registration to protect its standing. Retention of Māori land is included in the principles of TTWMA and the requirement for the Registrar to register is obviously a protective mechanism for this purpose. We note that the 2004 *Gazette* notice and vesting order are still not registered. There may be reasons for this and we have not sought any explanation. The failure to register is a matter of concern and should be brought to the attention of the Registrar to address.

Decision and order

[124] For the reasons outlined above the appeal fails. There is an order under s 56(1)(g) of the Te Ture Whenua Māori Act 1993 dismissing the appeal.

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[37] 267 Aotea MB 156 (267 AOT 156).
[38] 267 Aotea MB 166-167 (267 AOT 166-167).

Costs

[125] We note that no costs were awarded in the lower Court although the appellants won on 4 of the 5 issues which were decided. Our preliminary view is that costs should lie where they fall. Costs are reserved. Should the appellants wish to pursue costs, they have 21 days from the date of this decision to file a submission. The second respondent then has 14 days in which to file a reply.

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

_____	_____
C L Fox	G D Carter
DEPUTY CHIEF JUDGE	**JUDGE**