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 Mr P Jefferies and Ms H Putaranui for the Second Respondent
Judgment:	14 November 2013

RESERVED JUDGMENT OF JUDGE DAVID AMBLER OF THE MĀORI APPELLATE COURT

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Introduction

[1] In 1999 Areka Phillips transferred two blocks of Māori freehold land to the Kotahitanga Building Society Incorporated ("the Society").[1] The transfers were registered in breach of Te Ture Whenua Māori Act 1993 ("TTWMA"); they had not been confirmed by the Māori Land Court, and part of one of the blocks had been set aside as a Māori reservation and was therefore "inalienable".

[2] Areka Phillips died in 2008 and not long afterwards the appellants, his daughters, applied to the lower Court to address a range of issues concerning the land and the associated Māori reservation. By way of an amended application filed in 2010, the appellants sought (among other things) an order determining that the 1999 transfers were invalid and that the blocks were owned by the estate of Areka Phillips.

[3] In a reserved judgment issued on 3 May 2012,[2] Judge Milroy dismissed the challenge to the 1999 transfers and the claim that Areka Phillips' estate owned the land, but ruled in favour of the appellants in relation to the bulk of their other claims – in essence, confirming that the trustees of the Māori reservation and not the Society have authority over the land. The appellants appeal the lower Court's decision in respect of the 1999 transfers and the ownership of the land. The Society was the only respondent to participate in the appeal.

[4] I agree with Deputy Chief Judge Fox and Judge Carter that the appeal fails. I have set out my reasons in this separate judgment because I take a slightly different approach to some of the issues.

Background

[5] The background to this appeal is set out in more detail in the majority judgment and I will therefore try to avoid repetition. I note that at the commencement of the appellate hearing, counsel for the appellants and the second respondent accepted Judge Milroy's summary of the background and chronology of events as contained in her judgment.

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1 The Society was originally known as the Kotahitanga Building Society Incorporated and following changes of name is today known as the Te Kotahitanga Society Incorporated. It is a charitable body.

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

Accordingly, in this appeal we are primarily concerned with the application of the law to settled facts.

Dealings with the land

[6] As observed in the majority judgment, Areka Phillips was a man of vision and charisma. He established a community on his land north of Taumarunui, which came to be known as Manu Ariki. This is where he practised his faith and healing ministry, established the Manu Ariki Marae and carried on a farming operation. The Society, formed in 1961, was the legal body associated with the Manu Ariki community.

[7] Manu Ariki comprises several blocks of land. We are only concerned with Rangitoto Tuhua 55B Sec 1B comprising 61.6336 hectares ("55B1B"),[3] and Rangitoto Tuhua 55B Sec 1A2 comprising 26.3223 hectares ("55B1A2").[4]

[8] The key facts for the purposes of this appeal are as follows:

- Prior to 1983 Areka Phillips and the Society had established substantial buildings and facilities on the land at Manu Ariki (estimated at the time to be worth over one million dollars).

- At all relevant times prior to 5 March 1999 (the date of the transfers) Areka Phillips was the registered proprietor of 55B1B and 55B1A2, which were general land until 12 February 1996, when they became Māori freehold land.

- On 20 July 1983 the lower Court recommended pursuant to s 439 of the Māori Affairs Act 1953 ("MAA") that an area of 1.7912 hectares of 55B1B be set aside as a Māori reservation for the purposes of a marae for the common use and benefit of the people of New Zealand – that is the Manu Ariki Marae. On 26 January 1984 the Māori reservation was promulgated by notice in the *New Zealand Gazette*. On 16 April 1984 the Court made an order under s 439(7) of the

[3] CFR SA 880/102.
[4] CFR SA 46B/35.

MAA vesting the Māori reservation in seven trustees. The *Gazette* notice and vesting order were never registered against the certificate of title for 55B1B.

- On 17 June 1993 the lower Court heard an application to include further lands in the Māori reservation, including the whole of 55B1B and 55B1A2. The Court made recommendations cancelling the existing Māori reservation and setting aside a new Māori reservation under s 338 of TTWMA (for the purpose of the existing Māori reservation). However, the recommendations were never promulgated by notice in the *New Zealand Gazette*.

- On 16 December 1993 the lower Court made orders pursuant to s 133 of TTWMA changing the status of 55B1B and 55B1A2 to Māori freehold land. The status orders were registered against the certificates of title on 12 February 1996.

- On 5 March 1999 the Land Transfer Office registered transfers of 55B1B and 55B1A2 from Areka Phillips to the Society. The transfers were not confirmed by the Court and nor were the preferred classes of alienees ("the PCA") offered the land. The land was gifted to the Society.

- On 27 September 2002 the lower Court made a further recommendation under s 338 that 55B1B and 55B1A2 (together with three other blocks of general land) be set aside as a Māori reservation for the purpose of the existing Māori reservation. The Court also made an order vesting the land in eight trustees. The reservation was promulgated by notice in the *New Zealand Gazette* on 2 September 2004. The 2002 vesting order and 2004 *Gazette* notice were never registered against the certificates of title for the land.

The proceeding in the lower Court

[9] The proceeding in the lower Court began with an application filed on 12 November 2008 for a judicial conference pursuant to s 67 of TTWMA. The appellants brought the application as treasurer and secretary of the Manu Ariki Marae trustees. It raised issues to do with the functioning of the Māori reservation trustees and the Society in respect of certain activities on the land, but did not expressly raise any issues to do with the 1999 transfers. On 22 June 2009 the Court appointed counsel, Mr Armstrong, to represent the appellants in the proceeding.

[10] On 19 November 2010 the appellants, through their counsel, filed an amended application. The amended application set out four causes of action, only the fourth of which is relevant to the appeal:

> **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 5 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.

[11] In summary, the appellants claimed that the transfer was invalid because of non-compliance with TTWMA. I note that the appellants did not claim fraud or breach of trust.

[12] The hearing took place on 26 May 2011. Judge Milroy delivered her decision on 3 May 2012. She found in relation to the 1999 transfers that Areka Phillips had not offered the right of first refusal to the PCA. There was no dispute that the transfers had not been confirmed by the Court. Accordingly, the transfers were registered in breach of s 156(1) of TTWMA. Nevertheless, the question remained whether the Society was entitled to claim the protections of indefeasibility under the LTA. Judge Milroy separately addressed the non-reservation land and the reservation land in this regard.

[13] As far as the non-reservation land was concerned, Judge Milroy distinguished the *Smith v Hugh Watt Society Inc* decision relied on by the appellants.[5] Areka Phillips was not an express trustee for the PCA and despite the transfer, the PCA retained the right of first refusal under TTWMA. She noted that no one argued an implied trust. As for the claim that the failure to comply with TTWMA amounted to fraud, Judge Milroy rejected this argument and distinguished the *Tapsell v Murray* decision.[6] She expressly rejected any suggestion that Areka Phillips was acting dishonestly or fraudulently in transferring the land, and noted the open and transparent manner in which he approached matters, including holding a dinner held on 19 July 1998 of about 120 members of the community where there was formal acknowledgement of the transfer of the land to the Society. Significantly, no one objected to the transfer at the time (or, I would add, prior to Areka Phillips' death).

[14] Overall, Judge Milroy concluded that Areka Phillips and the Society had not intended to breach TTWMA and that the LTA's indefeasibility provisions "trump" the confirmation provisions of TTWMA, per *Warin v Registrar-General of Land*.[7] Therefore, the Society remained the owner of the non-reservation land.

[15] Turning to the reservation land, Judge Milroy noted the additional provision in s 338(11) of TTWMA that land within a reservation is "inalienable". Areka Phillips was aware of the reservation status (he applied for the reservation in the first place), and both he and the Society would have been aware that the trustees needed to consent to any transaction. That did not happen. Added to that, the reservation was inalienable. But the breach of s 338(11) simply brought into focus once again the indefeasibility provisions of the LTA. Judge Milroy found that there had not been any fraud by Mr Phillips or the Society, and that there was no other basis to defeat the Society's indefeasible title. Therefore, the reservation status of the land did not change the outcome, and the reservation land also remained the property of the Society.

The appellants' standing

[16] The appellants' standing in the lower Court and in this Court deserves comment.

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5 *Smith v Hugh Watt Society Inc* [2004] 1 NZLR 537 (HC).
6 *Tapsell v Murray* (2008) 9 NZCPR 184 (HC).
7 *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

[17] In the lower Court the appellants brought the application as trustees of the Māori reservation. However, their fourth cause of action sought a determination of ownership of the land in favour of the estate of Areka Phillips. It is not clear what standing the appellants had to bring such a claim. Although it was suggested that Areka Phillips had a will, it was not proven in the lower Court, and nor was it established whether probate had been granted or trustees appointed or who was entitled to succeed under the will.

[18] Conversely, in this Court Ms Wara emphasised that the appellants were bringing the appeal in their "personal capacity". Yet the appellants' arguments asserted at different times claims on behalf of the estate, on behalf of the PCA, and on behalf of the beneficiaries of the Māori reservation.

[19] There is therefore some conflation in the roles of and arguments brought by the appellants. I will return to this point later.

The appellants' arguments

[20] The majority judgment has more than adequately set out the grounds of appeal and summarised the parties' respective arguments. On my analysis, the appellants' arguments may be reduced to four points.

[21] First, the appellants rely on the indefeasibility provisions in s 62 of the LTA to argue that those provisions in fact support their rights to the land. That is, they argue that as the status of the land was registered against the certificates of title prior to the 1999 transfers, the status order is an "interest" in the land in terms of s 62. Therefore, the Society holds the land subject to that "interest" which, Ms Wara argued, includes the right of first refusal of the PCA under s 147A of TTWMA (in 1999, s 147(2)), which therefore gives rise to an entitlement to the land that defeats the Society's status as registered proprietor.

[22] Second, the appellants argue that the present case can be distinguished from *Warin v Registrar-General of Land* in four respects.[8] First, in *Warin* the status order was not registered against the certificate of title whereas here it was. Second, in *Warin* the

[8] *Warin v Registrar-General of Land*, above n 7.

transferees were bona fide purchasers for value whereas here the Society is a volunteer. Third, here there is a Māori reservation and s 338(11) applies. Fourth, in *War in* the exceptions to indefeasibility in s 62 of the LTA did not apply whereas here the appellants argue that they do apply (these are the third and fourth points below).

[23] Third, as one of the exceptions to indefeasibility of title, the appellants say the transfers amounted to fraud as they were in breach of TTWMA or in breach of trust.

[24] Fourth, as a further exception to indefeasibility of title, the appellants argue that they have established the basis for an in personam claim entitling them to the transfer of the land to the estate of Areka Phillips.

The legislation

[25] I set out below the relevant legislation. Because TTWMA has changed since 5 March 1999 (the date of the transfers), the provisions I outline below are as they stood at the date of the transfers unless otherwise stated.

[26] To begin with, the fourth cause of action was brought under s 18(1)(a) of TTWMA, which, as it did in 1999, currently provides:

> **18 General jurisdiction of Court**
>
> (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: ...

[27] Several provisions in TTWMA concern the mechanics and legality of transfers of Māori freehold land:

> **126 No registration without prior confirmation**
>
> The District Land Registrar shall not register any instrument affecting Māori land (other than an instrument not required to be confirmed or an order of the Court or of the Registrar) unless the instrument has been confirmed by the Court, or the Registrar of the Court has issued a certificate of confirmation in respect of the instrument, in accordance with the relevant provisions of Part 8 of this Act.

146 Alienation of Māori freehold land

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

147 Alienation of whole or part of block

(1) Subject to this Act,--

(a) The sole owner of a block of Māori freehold land has the capacity to alienate the whole or any part of the land; ...

(2) Where any Māori freehold land is to be alienated by sale, gift, or lease, the alienating owners shall give the right of first refusal to prospective purchasers, donees, or lessees who belong to one or more of the preferred classes of alienee, ahead of those who do not belong to any of those classes. ...

150 Manner of alienation of undivided interests

(1) No undivided interest in any Māori freehold land may be alienated otherwise than by a vesting order made by the Court under Part 8 of this Act, unless the Court is of the opinion that the arrangement or agreement of the parties should be given effect to by memorandum of transfer, and so orders.

(2) Nothing in subsection (1) of this section applies in relation to the alienation of –
(a) Shares in a Māori incorporation:
(b) Interests in shares in a Māori incorporation:
(c) Beneficial interests in land that, by virtue of section 250(2) of this Act, remain vested in the several owners of that land despite the vesting of the legal estate in fee simple in that land in a Māori incorporation.

(3) No other interest in any Māori freehold land may be alienated otherwise than by –
(a) An instrument of alienation, executed and attested in accordance with the rules of Court, and confirmed by the Court under Part 8 of this Act; or
(b) A vesting order made by the Court under that Part.

(4) Nothing in subsection (3) of this section applies in relation to the alienation (other than by sale or gift) of any interest in Māori freehold land if that alienation –
(a) Is effected –
(i) By a Māori incorporation; or
(ii) By the trustees of any trust constituted under Part 12 of this Act; or
(b) Is effected by way of—
(i) The assignment of a lease of an interest in Māori freehold land (being Māori freehold land owned by a Māori incorporation or the trustees of any trust constituted under Part 12 of this Act); or

(ii) The granting of a sublease of an interest in Māori freehold land of the kind described in subparagraph (i) of this paragraph; or

(iii) The granting of a mortgage of a lease or sublease of an interest in Māori freehold land of the kind described in subparagraph (i) of this paragraph.

(5) Notwithstanding sections 228(3) and 254(2) of this Act, nothing in subsection (3) of this section applies in relation to an alienation that is the granting, renewal, variation, transfer, assignment, or mortgage of a forestry right (within the meaning of section 2 of the Forestry Rights Registration Act 1983) over or in respect of Māori freehold land (being Māori freehold land owned by a Māori incorporation or the trustees of any trust constituted under Part 12 of this Act).

152 Court not to grant confirmation unless satisfied of certain matters

(1) The Court shall not grant confirmation of an alienation of Māori freehold land unless it is satisfied – ...

(b) That the alienation is not in breach of any trust to which the land is subject; and...

(f) That, in the case of –

(i) A sale or gift of a block of Māori freehold land; or

(ii) A lease of Māori freehold land, –

the alienating owners have, as required by section 147(2) of this Act, given a right of first refusal to prospective purchasers, donees, or lessees who belong to one or more of the preferred classes of alienee, ahead of those who do not belong to any of those classes; ...

156 Effect of confirmation

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

[28] I note that in 2002 s 147(2) was replaced by s 147A, which today provides:

147A Right of first refusal for sale or gift

A person referred to in section 147 who seeks to alienate any Māori freehold land by sale or gift must give the right of first refusal to prospective purchasers or donees who belong to 1 or more of the preferred classes of alienees, ahead of those who do not belong to any of those classes.

[29] Section 123(1), (2) and (5) of TTWMA concerns the registration of orders against certificates of title, as it did in 1999, and reads:

123 Orders affecting title to Māori freehold land to be registered

(1) Subject to subsection (7A) of this section, every order to which this Part of this Act applies shall, in accordance with the succeeding provisions of this Part of this Act, be registered against the title to that land under the Land Transfer Act 1952 or (as the case may require) the Deeds Registration Act 1908.

> (2) For the purposes of registration, the order shall be transmitted by the Registrar of the Court to the District Land Registrar or (as the case may require) the Registrar of Deeds; and the District Land Registrar or the Registrar of Deeds shall, except as otherwise provided in this Act, register the same accordingly. ...
>
> (5) Until registration has been effected, an order of the Court in respect of land subject to the Land Transfer Act 1952 shall affect only the equitable title to the land.

[30] Sections 140 and 142 of TTWMA concern the registration of a status order:

> **140 Registration of other orders**
>
> Every status order made under this Part of this Act, and every vesting order made under section 134 of this Act, shall be registered under the Land Transfer Act 1952 in accordance with Part 5 of this Act.
>
> **142 Effect of status orders upon registration**
>
> Every status order made under this Part of this Act shall, upon registration, or upon noting under section 124 of this Act, have the effect of giving to the land the particular status specified in the order.

[31] Finally in relation to TTWMA, s 338(9), (11) and (12) provides in relation to Māori reservations:

> **338 Māori reservations for communal purposes –**
>
> (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 Māori reservation, or in their successors.
>
> (11) Except as provided in subsection (12) of this section, the land comprised within a Māori reservation shall, while the reservation subsists, be inalienable, whether to the Crown or to any other person.
>
> (12) The trustees in whom any Māori reservation is vested may, with the consent of the Court, grant a lease or occupation licence of the reservation or of any part of it for any term not exceeding 14 years, upon and subject to such terms and conditions as the Court thinks fit.

[32] I have not set out the Preamble and ss 2 and 17 of TTWMA but, as always, they are in the background.

[33] The key provision in the LTA is s 62:

> **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 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 or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—
>
> (a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
>
> (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
>
> (c) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

Preliminary observations

[34] Before addressing the appellants' arguments it is apposite to make some observations about the effect of the various dealings with the land (aside from the transfers themselves) and ownership of the land today.

Effect of dealings with the land

[35] By reason of ss 123(5) and 142 of TTWMA, the status orders only had effect in relation to the legal titles when registered, which was on 12 February 1996. Therefore, at the date of the transfers the land was without question Māori freehold land. However, the question of the legal effect of the Māori reservation over the land is not as straightforward.

[36] The 1984 *Gazette* notice set aside the Māori reservation over part of 55B1B. The notice was never registered against the title. Nor was the trustee vesting order.

[37] A Māori reservation is strictly speaking not created by order of the Court (see s 439(1) of the MAA and s 338(1) of TTWMA) but by notice published in the *Gazette*. Therefore, s 123(5) of TTWMA does not govern when a notice is of legal effect. But s 62 of the LTA is to the same effect, and therefore a notice does not affect the legal title until it is registered. Consequently, at the date of the transfers the legal title to 55B1B was not subject to the 1984 Māori reservation.

[38] Nevertheless, the failure to register the notice against the legal title is not of great consequence in the present circumstances. That is because the Māori reservation affected the equitable title to the land, and none of the parties – whether Areka Phillips or the Society or the appellants – ever disputed the existence of the reservation. Had the transfers been to a third party with no knowledge of the Māori reservation, then the failure to register the notice may have had different consequences.

[39] Similarly, the failure to register the 1984 order vesting the Māori reservation over part of 55B1B in the trustees is not of great consequence. As the vesting order related to part only of the land, it could not have been registered to take effect in respect of the whole of the legal title. Consequently, at the time of the transfers the land remained in the sole legal ownership of Areka Phillips but his equitable title was subject to the order vesting part of the land in the trustees.

[40] As for the Court's 1993 recommendation that a replacement Māori reservation be set aside in respect of the whole of 55B1B and 55B1A2, as a *Gazette* notice was never issued, the purported Māori reservation never came into effect.

[41] Finally, the 2002 vesting order and 2004 *Gazette* notice have the same effect as the 1984 notice and order; as they have not been registered they do not affect the legal title but do affect the equitable title.

Ownership of the land today

[42] Although the appeal raises interesting legal issues concerning the ownership of 55B1B and 55B1A2, there is a danger that those issues may overshadow the realities of legal and equitable ownership of the land today.

[43] As noted, the 1984 and 2004 Māori reservation notices and the related trustee vesting orders have yet to be registered against the legal titles. This is something that can be easily remedied, and in fact the Registrar of the Court is obliged to do so under s 123(2) of TTWMA.

[44] Notwithstanding that lack of registration, the Māori reservation and trusteeship take effect in respect of the equitable titles to the land. Therefore, for practical purposes the

Māori reservation trustees have all the rights of ownership and trusteeship over the land in accordance with the Māori reservation. That was the effect of Judge Milroy's decision in relation to the other causes of action.

[45] Consequently, while the Society is shown on the title as the legal owner, its underlying ownership is nominal only. The majority refer to it as a "residual interest".[9] In *Ruapuha and Uekaha Hapu Trust v Tane – Hauturu East 8 Block*, this Court spoke of a similar interest of underlying owners who were not the beneficiaries of an ahu whenua trust as a "reversionary interest".[10] Whether that is what Areka Phillips intended by the transfer of legal title is not entirely clear. Nevertheless, the point remains that because of the Māori reservation, the Society has no tangible rights in the land. It is only if the Māori reservation were ever to be cancelled that the Society's rights would spring into life – see s 338(9) of TTWMA.

[46] But that would also be the case for the appellants if they were successful in this appeal. That is, if this Court were to rule that 55B1B and 55B1A2 should be vested in the PCA or the estate of Areka Phillips, any such ownership interest would be nominal only while the Māori reservation remains in place.

[47] Importantly, none of the parties have expressed a wish to alter or cancel the Māori reservation. Accordingly, the ownership interest that the appellants claim by way of this appeal is very much a nominal one, and very much contingent on the possibility that some day the Māori reservation may be cancelled.

[48] That is not to say that there is no value in the underlying ownership of land under a Māori reservation. The underlying ownership is often of cultural importance to the underlying owners – the land is still a taonga tuku iho to them. But it is only when a Māori reservation is to be varied or cancelled that the underlying ownership truly has significance in terms of the law. First, as observed by Judge Durie (as he then was) in the *Mount Tauhara Māori Reservation* case,[11] the underlying owners have a right to express a view where there is a proposal to vary or cancel a Māori reservation. Second, in accordance

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9 See majority judgment at [58].

10 *Ruapuha and Uekaha Hapu Trust v Tane – Hauturu East 8 Block* (2010) 2010 Māori Appellate Court MB 512 (2010 APPEAL 512) at [78]-[83].

11 *Part Tauhara Middle 4A2A (Mount Tauhara Māori Reservation)*(1977) 58 Taupō MB 168-204 (58 TPO 168-204) at 186.

with s 338(9) of TTWMA, upon cancellation of a Māori reservation the whole of the land is vested in the underlying owner or his or her successors.

[49] What all of this means is that the outcome of the appeal has very little bearing on the actual control and management of the Manu Ariki lands – that remains with the Māori reservation trustees. The outcome is only of significance if the Māori reservation were ever to be cancelled, which appears highly unlikely at this point in time.

Discussion

Illegal transfers

[50] Clearly, the 1999 transfers of 55B1B and 55B1A2 to the Society were registered in breach of TTWMA. By reason of ss 146, 147(1)(a) and 150(3) the transfers had to be confirmed by the Court. They were not. Furthermore, the Court could not have granted confirmation as an offer had not been made to the PCA (s 152(1)(f)) and part of 55B1B was subject to the trust created by the Māori reservation (s 152(1)(b)). Leaving to one side the roles of Areka Phillips, the Society and their respective advisors in the transfers, the Land Transfer Office acted in clear breach of the express statutory prohibition against registration of such instruments in the absence of confirmation from the Court (s 126 of TTWMA). The registration of the transfers was quite simply illegal.

[51] Unfortunately, the illegal registration of instruments against Māori freehold land titles is not new or novel. Where the courts have addressed similar situations in the past, they have ruled that the illegality of the registration does not affect the indefeasible title under the LTA. In short, the courts have concluded that orthodox principles of statutory interpretation and policy considerations dictate that the LTA is paramount over legislation purporting to protect Māori land. This was most recently addressed by the High Court in *Warin v Registrar-General of Land*.[12] The Court's approach in that case reflected earlier decisions concerning the relationship between the LTA and the MAA: *Housing Corporation of New Zealand v Māori Trustee* and *Registrar-General of Land v Marshall*.[13]

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12 *Warin v Registrar-General of Land*, above n 7.

13 *Housing Corporation of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC); and *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC).

[52] Consequently, in this appeal the appellants had to establish that these binding High Court authorities do not apply in the present circumstances.

[53] I now turn to the appellants' arguments.

Section 62 of the LTA

[54] The appellants argue that their interests as members of the PCA are protected by s 62 of the LTA. They say that the guarantee of indefeasibility of title in s 62 in fact supports the PCA's right to ownership of the land. The argument is novel and unsupported by any authorities on point, and may be broken down into three propositions.

[55] First, by reason of registration, the status orders had been "notified against the folium of the register" of each LTA title, per s 62. This is uncontroversial.

[56] Second, any such notification on the title must fall into one of the categories identified in s 62, namely, "... encumbrances, liens, estates, or interests...". Relying on the High Court decision in *Edwards v Māori Land Court*,[14] a status order is an "interest" for the purposes of s 62 and is therefore protected by that section. The relevant paragraphs of the judgment are set out below:[15]

> [113] This statutory regime therefore makes it clear that registration of status orders is required and that it is only when registration occurs that land has the status of the new order. Given all land in New Zealand is required to have a "status" (s 129) given compulsory registration and given that a change of status does not occur until registration the intention of the legislature was clearly to emphasise that registration is all important.
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> [114] Status runs with the land and will exist independently of the individual registered proprietor. It clearly affects the estate or interest of the individual proprietor. The land's status, if for example it is Maori freehold land, will affect the capacity of the registered proprietor to deal with the land by e.g. sale or lease.
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> ...
>
> [116] Thus the registered proprietor holds the land (if registered under the Act) against all other claims to the land except in the case of fraud (and other particular exceptions) and subject to interests notified on the register.

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14 *Edwards v Māori Land Court* HC Wellington CP78/01, 11 December 2001.
15 At [113]-[119] (emphasis added).

> [117] *One of those interests "notified in the folium of the register" will be a status order. The order affects the registered the 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. s 81 Land Transfer Act; s 125 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* [1967] NZLR 1069 at 1075-1076 in the following terms:
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> > " … 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 (s 62 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).

[57] Third, the appellants argue that the "interest" comprises not only the status of the land, but also the full statutory consequences of that status, including the right of first refusal of the PCA (per s 147A of TTWMA). Therefore, because that right was not offered to the PCA prior to the transfer, the PCA are now entitled to the land either by way of the District Land Registrar correcting the title pursuant to s 81 of the LTA, or by being given the option to "purchase" – noting, of course, that in this instance the land had been gifted and therefore there is nothing to pay. Apart from the suggestion that the District Land Registrar might correct the title, Ms Wara did not specify the mechanism by which the option to purchase might now be triggered in favour of the PCA.

[58] I am not persuaded by the appellants' argument.

[59] First, a small quibble. I am not entirely certain that the status order is an "interest" under s 62 of the LTA, per *Edwards v Māori Land Court*.[16] The High Court's decision was

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[16] *Edwards v Māori Land Court*, above n 14.

successfully appealed to the Court of Appeal and that Court did not expressly address this point. Certainly, I accept that something notified on the folium of the register must logically be either an encumbrance or a lien or an estate or an interest, as s 62 expresses those categories to be exclusive. But there may be arguments that a status order is an "encumbrance". Ultimately I need not resolve that issue as, regardless of whether or not a status order is an encumbrance or an interest for the purposes of s 62, the key issue remains: what is the legal effect of a status order registered against a title?

[60] The legal effect of a status order is governed by s 142 of TTWMA. It is to give to the land "the particular status specified in the order". That is all. In my view, it is going well beyond the effect of s 142, and the intent of TTWMA and the LTA, to conclude that the registration of a status order imports with it the right of the PCA to have a transfer which transgresses the TTWMA reversed in their favour. That is the effect of the appellants' argument. Fundamentally, such an approach would defeat the principle of immediate indefeasibility of title which is central to the LTA regime.

[61] This Court is bound to follow the views expressed in *Housing Corporation of New Zealand v Māori Land Court*, *Registrar-General of Land v Marshall*, *Edwards v Māori Land Court* and *Warin v Registrar-General of Land* that, if the legislature had intended non-compliance with TTWMA to impinge upon indefeasibility of title under the LTA, then the legislation needed to expressly say so.[17] It did not, and s 142 further counters any such argument in the present context. While it may appear to the appellants (and to Māori in general) to be absurd that the law does not provide a remedy in terms of the land where the PCA's rights have been breached, that is the legal position. As it was put in the *Warin* decision:[18]

> [125] ... 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

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17 *Housing Corporation of New Zealand v Māori Trustee* above n 13; *Registrar-General of Land v Marshall* above n 13; *Edwards v Māori Land Court* above n 14; *Warin v Registrar-General of Land* above n 7.

18 *Warin v Registrar-General of Land*, above n 7, at [125].

> 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. I do not accept that the availability of possible compensation claims would constitute an appropriate remedy to dispossessed registered proprietors who have acquired land in good faith and for value, possibly decades after the original alienation.

[62] But the appellants' argument suffers from two further difficulties.

[63] First, the right of first refusal does not give rise to an "interest in land" in the general property law sense. The right under s 147A of TTWMA is a limited and conditional right. The alienating owner has an obligation to give the right of first refusal to prospective purchasers or assignees belonging to the PCA ahead of those who do not belong to the PCA. Per s 152(1)(f) of TTWMA, the Court cannot confirm the alienation unless that right has been given. However, importantly, there is no obligation on the owner to alienate the land to members of the PCA if they elect to buy the land; the owner can simply decide not to proceed with any alienation. The right is negative in nature.

[64] In *Motor Works Limited v Westminster Auto Services Limited* the High Court considered whether a right of first refusal gives rise to an interest in land.[19] The Court adopted the following analysis: [20]

> The first issue, as stated at the outset, is whether Motor Works has any interest in Westminster Auto's land so as to justify its caveat remaining in force. When considering whether a right of first refusal creates an interest in land, it is convenient to analyse the general point in four stages. Stage one is where all that exists is a bare right of pre-emption. Stage two is reached when a triggering event occurs requiring an offer to be made to the person with the right of pre-emption. Stage three relates to the time after an offer has been made pursuant to the right of pre-emption and stage four, for completeness, relates to the stage, if reached, when a contract results from the acceptance of such offer.

[65] The Court observed that difficulties in analysis of such rights arise at stage two, where a triggering event has occurred. The Court went on to note that the exact terms of the right are important to the outcome, and that unless specific performance can be awarded, the right holder does not have an interest in land:[21]

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19 *Motor Works Ltd v Westminster Auto Services Ltd* [1997] 1 NZLR 762 (HC).
20 At 765.
21 *Motor Works Ltd v Westminster Auto Services Ltd*, above n 19, at 766.

> Unless the Court can order specific performance I do not see how the holder can be regarded as having an interest in land. Thus, in short, at stage two the holder of the right of pre-emption will not have an interest in land unless and until the circumstances are such that specific performance can be ordered and the vendor thereby required to make an offer on sufficiently certain terms.

[66] In *Bruce v Edwards*,[22] the Court of Appeal addressed the High Court's decision in *Edwards v Māori Land Court*.[23] The Court noted:[24]

> [54] The prevailing judicial opinion is that a right of first refusal does not give rise to an interest in land before the occurrence of a triggering event – in this case a decision to alienate. Accounts of the differing views are given in *Butterworths Land Law in New Zealand* (1997), para 2.148(k), Megarry & Wade's *The Law of Real Property*, 6th ed (2000), para 12-061 and Professor Wade's case note on *Pritchard v Briggs* [1980] Ch 338 at (1980) 96 LQR 488). But the question is not finally settled and was not the subject of argument. On the basis most favourable to the PCA, we will therefore assume for present purposes that their statutory right of first refusal was an interest in land and that it antedated the agreement to sell to the Bruces – that it was an interest in the land which existed at all times whilst the land remained Maori freehold.

[67] Notwithstanding the Court of Appeal's view, I would respectfully suggest that the s 147A right of first refusal is a right of pre-emption only, does not give rise to a right to specific performance, and therefore is not an interest in land. As noted earlier, the right imposes a negative obligation on the landowner to not alienate the land to someone outside of the PCA before first making an offer to the PCA. But, critically, there is no obligation on the landowner to then sell the land to the PCA.

[68] This point was discussed in different context by the English Court of Appeal in *Pritchard v Briggs*,[25] which was referred to in *Bruce v Edwards*:

> In my judgment a right of pre-emption, and particularly that in the present case which is in purely negative form, does not satisfy this test. Counsel for the defendants argued that it does because it fetters one of the important rights inherent in ownership, that of freedom of alienation. I cannot accept that, however, because a right of pre-emption gives no present right, even contingent, to call for a conveyance of the legal estate. So far as the parties are concerned, whatever economic or other pressures may come to affect the grantor, he is still absolutely free to sell or not. The grantee cannot require him to do so, or demand that an offer be made to him. Moreover, even if the grantor decides to sell and makes an offer it

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22 *Bruce v Edwards* [2003] 1 NZLR 515 (CA).
23 *Edwards v Māori Land Court*, above n 14.
24 *Bruce v Edwards* above n 22, at [54].
25 *Pritchard v Briggs* [1980] 1 All ER 294 (CA) at 304-305.

> seems to me that so long as he does not sell to anyone else he can withdraw that offer at any time before acceptance. ...
>
> The distinction is well stated by Street J in his judgment in the Australian case of *Mackay v Wilson* ((1947) 47 SR (NSW) 315 at 325) in passage which I respectfully adopt and which reads as follows:
>
> > 'Speaking generally, the giving of an option to purchase land *prima facie* implies that the giver of the option is to be taken as making a continuing offer to sell the land, which may at any moment be converted into a contract by the optionee notifying his acceptance of that offer. The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period so that it remains available for acceptance by the optionee at any moment within that period. It has more than a mere contractual operation and confers upon the optionee an equitable interest in the land, the subject of the agreement: see, for example *per Williams J.* in *Sharp v. The Union Trustee Co. Of Australia Ltd*. [(1944) 69CLR 539 at 558] But an agreement to give "the first refusal" or "a right of pre-emption" confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer which he also may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement.'

[69] The courts in *Re Rutherford* and *Gainford v Stinson* also observed that a right of first refusal expressed as a negative obligation (that is, not to sell property without first offering it to a party having the right of first refusal) does not create an interest in land.[26]

[70] Consequently, the PCA did not have a right to insist that Areka Phillips transfer the land to them. It is therefore difficult to see how this Court could insist on that outcome. The PCA simply had the ability to prevent the transfer to the Society.

[71] Second, there are insurmountable difficulties in attempting to translate the right of first refusal in the present circumstances into a right to conveyance of the land to the PCA. First, any such conveyance would still be without the confirmation of the Court and in breach of s 147A of TTWMA and, as far as 55B1B is concerned, in breach of s 338(11) of that Act. Second, we simply do not know what Areka Phillips would have elected to do had the right of first refusal been brought to his attention in 1999. He may have convinced the PCA not to take up the right; he may have elected not to proceed with the transfer to

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[26] *Re Rutherford* [1977] 1 NZLR 504 (NZSC) at 506; *Gainford v Stison* (1994) ANZ ConvR 406 (1994) 2 NZ ConvC 191, 768 (CA).

anyone; or he may have transferred the land to a member or members of the PCA other than the appellants or those they nominate. Third, and following on from the previous point, there is no way of knowing who within the PCA would be entitled to the land today. As for the estate of Areka Phillips, it has not taken a formal role in the proceeding and the Court would simply be guessing as to who might be "entitled" to the land.

[72] For these reasons I do not believe the registration of the status orders does anything more than change the status of the land, and s 62 of the LTA does not operate to enforce the rights of the PCA under s 147A of TTWMA.

Warin v Registrar-General of Land

[73] The appellants are correct that there are three key points of difference between *Warin v Registrar-General of Land* and the present case.[27] (I deal with the fraud and in personam exception arguments separately.) First, in *Warin* a status order had not been registered against the LTA title whereas here the status orders had been registered. Second, in *Warin* the purchasers had paid valuable consideration for the land whereas here the Society paid nothing – it was a volunteer. Third, here s 338(11) of TTWMA applied to part of 55B1B. But the question remains whether those differences undermine the authority of *Warin* and alter the outcome for indefeasibility of title.

[74] While it is correct that in *Warin* a status order had not been registered against the title, it appears from a close reading of the decision that the lack of a status order did not feature in the Court's reasoning. That is, the Court accepted that the land was Māori freehold land despite the lack of an order to that effect. Importantly, the Court did not say that the PCA's case would have been stronger had a status order been registered.

[75] *Warin* and the related decisions are very clear that the LTA guarantees indefeasible title, and I cannot see that it makes a difference that a status order was registered against the title. Ms Wara could not explain why it made a difference. In both *Warin* and here, the registration of the transfer was illegal but, critically, the LTA protects an indefeasible interest in such circumstances.

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[27] *Warin v Registrar-General of Land*, above n 7.

[76] The second point of difference – that the Society is a volunteer – can be quickly disposed of. I agree with the view expressed in the majority judgment. Section 62 of the LTA does not withhold indefeasibility of title from volunteers. Ms Wara referred the Court to an extract from an out of date edition of *Hinde McMorland & Sim: Introduction to Land Law*.[28] The equivalent current text, *Hinde Campbell and Twist: Principles of Real Property Law*, expressed the position of volunteers under the LTA to be "uncertain" in New Zealand.[29] More importantly, in the more recent Supreme Court decision in *Regal Castings Ltd v Lightbody*,[30] Tipping J sets out in compelling terms the reasons why volunteers acquire indefeasible title under s 62 of the LTA. The majority judgment sets out the relevant quotation and I need not repeat it here. Therefore, the fact that the Society is a volunteer does not negate its guaranteed title under s 62 of the LTA.

[77] The third point of difference – that a Māori reservation was laid over part of 55B1B and s 338(11) of TTWMA applied – certainly introduces an element that was not present in the *Warin* decision. That is, not only was the transfer of 55B1B illegal because of non-compliance with TTWMA but part of the land was expressly "inalienable". Nevertheless, ultimately I do not believe that such a difference alters the outcome in terms of the core guarantee of indefeasibility contained in s 62 of the LTA. There are two primary reasons for this.

[78] First, the decision in *Warin* and the related authorities make it plain that, in the absence of fraud or another exception under the LTA, the mere illegality of a transaction does not defeat the title of the registered proprietor. Although the registration of the transfer was even more egregious in respect of 55B1B because of the existence of the Māori reservation, that in itself does not take the transaction beyond the protection contained in s 62.

[79] Second, there is the problem that the 1984 *Gazette* notice had not been registered against the title to 55B1B. As a consequence, the legal title was not subject to the Māori reservation. I cannot see how the appellants can successfully argue that the legal title (which is what Areka Phillips transferred) was encumbered by something that was not registered. That is the point made by Patterson J in *Town and Country Marketing Ltd v*

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

McCallum concerning an unregistered restrictive covenant – a case relied on by the appellants.[31]

[80] For these reasons I do not consider that the appellants can distinguish the *Warin* decision and it governs the present circumstances.

Fraud

[81] The appellants argue that the 1999 transfer of 55B1B to the Society constituted a fraud because it was in breach of the Māori reservation over the land. As there was no Māori reservation over 55B1A2 at the time, the appellants did not argue fraud in relation to that block.

[82] The initial difficulty with the fraud argument is that the appellants did not bring a claim in fraud. That is, the fourth course of action does not plead fraud. It simply claimed that the 1999 transfers were invalid because of non-compliance with TTWMA. This lack of pleading not only brings into question whether the appellants were entitled to argue fraud in the lower Court, but also gives rise to uncertainty as to who was said to have been defrauded, by whom, and what the nature of the "fraud" was.

[83] Ms Wara's arguments on appeal endeavoured to clear up the uncertainty. On the one hand, she argued that Areka Phillips committed fraud as he was a trustee of the Māori reservation, had a duty to hold the land for the beneficiaries under the Māori reservation (who are, as I noted earlier, the people of New Zealand) and breached that duty in transferring the land to the Society. On the other hand, she argued that the Society had committed a fraud as it knew the land was vested in trustees, the trustees' consent to the transfer was not obtained and the Māori reservation was inalienable.

[84] It would seem that the appellants were arguing that the people of New Zealand, as beneficiaries of the Māori reservation, had been defrauded by the transfer. However, as noted earlier, the amended application claimed the land on behalf of the estate of Areka Phillips, and the arguments on appeal equally asserted the rights of the PCA. There was therefore some confusion in how the appellants framed their case.

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[31] *Town and Country Marketing Ltd v McCallum* (1998) 3 NZ ConvC 192, 698.

[85] On the question of the beneficiaries of the Māori reservation, Ms Wara argued that a Māori reservation is not held for the class of beneficiaries under the Māori reservation but is restricted to the whānau or the hapū to which the land relates. She relied on the *Mount Tauhara Māori Reservation* decision and a decision of Deputy Chief Judge Fox in the lower Court, *Bristowe – Section 4C1 Block II Tuatini Township.*[32] Ms Wara has misunderstood these decisions and the provisions that relate to Māori reservations.

[86] Land subject to a Māori reservation is held for the common use and benefit of the owners or of Māori of the class or classes specified in the *Gazette* notice: s 338(3) of TTWMA. Alternatively, under s 340 a Māori reservation can be set aside for the people of New Zealand. But, it is ss 338(3) or 340 or the *Gazette* notice that dictate who the beneficiaries of a Māori reservation are, and it is not correct to say that the whānau or the hapū are nevertheless the beneficiaries. Here, the beneficiaries are the people of New Zealand, a much wider group than those on whose behalf the appellants were claiming.

[87] But there are further difficulties with how the fraud claim was framed.

[88] First, Areka Phillips did not execute the transfer in his capacity as a trustee of the Māori reservation but as the underlying owner of the land. As explained earlier, the Māori reservation trustees did not hold legal title to 55B1B as the *Gazette* notice and vesting order had not been registered against the title. I do not see how Areka Phillips can have acted in breach of a duty to the beneficiaries when he was acting in his personal capacity only.

[89] Second, the registration of the transfer did not in fact affect the Māori reservation over 55B1B. It remained (and remains) in place. The Society took title to the land subject to the Māori reservation, and readily acknowledges the reservation. Although the reservation has yet to be perfected by registration, that is a simple matter of process.

[90] Third, there is no apparent detriment to the beneficiaries of the Māori reservation as a result of the transfer of legal title to the Society. I expressly raised this issue with Ms Wara during the hearing. Her answer was to refer to the Preamble to TTWMA and the

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[32] *Part Tauhara Middle 4A2A (Mount Tauhara Māori Reservation)* above n 11; *Bristowe – Section 4C1 Block II Tuatini Township, Lot 1 DP 7439 and Lot 2 DP 7439* (2002) 151 Gisborne MB 250 (151 GIS 250).

retention of Māori freehold land by its owners, their whānau and hapū. But that does not explain what the beneficiaries have lost. As I see it, their interests are the same as they were prior to 5 March 1999. Certainly, the PCA may well have suffered detriment as a result of the loss of the s 147A right, but the fraud claim was not made on behalf of the PCA.

[91] Putting to one side the problems with the lack of pleading and the inherent difficulties with how the appellants framed their case, the appellants did not directly challenge Judge Milroy's findings that there had been no deception or trickery on the part of Areka Phillips or the Society, and that there was no fraud in the sense of dishonest misconduct. Rather, they argued that Judge Milroy had adopted a definition of fraud under the LTA that was too narrow in requiring there to be dishonest misconduct and in holding that, because Areka Phillips and the Society did not deny the existence of the Māori reservation, there was no fraud.

[92] Ms Wara provided limited submissions on what amounts to fraud under the LTA, and relied primarily on the observations of Anderson J in *Auckland City Council v Man O' War Station Ltd*:[33]

> 1. The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them.
> 2. Wilful blindness or voluntary ignorance may amount to fraud.
> 3. Where there is knowledge of a claim and of the possibility of that claim being well founded this may or may not amount to fraud depending on the particular circumstances of the case.
> 4. Where the circumstances are such as should raise in the mind of a purchaser a strong suspicion that the transaction in which he is engaged is fraud on the right of another, he is bound to go no further in it without full inquiry, and that to omit such inquiry is a want of honest dealing.
> 5. If a purchaser acquires title intending to carry out an agreement with the holder of an unregistered interest there is no fraud at that time, but relevant fraud may exist in later repudiating the agreement and in endeavouring to make use of the position the purchaser has obtained to deprive a plaintiff of rights.

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[33] *Auckland City Council v Man O' War Station Ltd* (HC Auckland, CP1355/83, 19 August 1997) at 41.

[93] In essence, Ms Wara argued that Areka Phillips and the Society exhibited "wilful blindness or voluntary ignorance" in effecting the transfers in breach of ss 147A and 338(11) of TTWMA. But their ignorance is clearly not in the realm of what Anderson J and the case law require for there to be fraud. Some form of moral dishonesty is necessary. That was simply not proven.

[94] What amounts to fraud for the purposes of the LTA is an extensive topic. For present purposes I simply set out the summary of the law as contained in *Hinde Campbell and Twist*:[34]

> The following conclusions on the concept of fraud within the meaning of the Land Transfer Act 1952 are offered:
>
> (1) Fraud in the Torrens system statutes is a separate concept. It is broader than the common law concepts of deceit and fraudulent misrepresentation and narrower than constructive or equitable fraud. Where, however, conduct amounting to equitable fraud involves dishonesty or moral turpitude it may also amount to fraud within the meaning of the Torrens system statutes.
>
> (2) Fraud means dishonesty of some sort. The test of dishonesty is a moral test: there must be something in the nature of moral turpitude. Whether conduct is dishonest does not always depend upon whether it is made legitimate by the law.
>
> (3) Fraud must be brought home to the person whose registered title is impeached or to that person's agents. Fraud by other persons (for example, the transferor in the transfer instrument upon registration of which the registered proprietor acquired title) does not affect the registered proprietor.
>
> (4) If the designed object of a transfer be to cheat a person of a known existing right, that is fraudulent.
>
> (5) Dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.
>
> (6) Wilful blindness or voluntary ignorance may amount to fraud.
>
> (7) In the present state of the authorities, the crucial dated for determining whether a person has sufficient information about an unregistered interest to render it fraudulent to repudiate that equitable interest is the date of registration of that person's instrument of acquisition.
>
> (8) It is not yet settled whether fraud may supervene after registration.
>
> (9) The issue of fraud or not is a question of fact, the answer to which must depend upon the particular circumstances of the individual case.
>
> (10) In the absence of fraud a claim in personam can be made by any plaintiff who can establish against the registered proprietor a recognised cause of action at law or in equity that involves unconscionable conduct relating to the land.

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[34] *Hinde Campbell and Twist: Principles of Real Property Law*, above n 29, at [9.023], references omitted.

[95] In my view, Judge Milroy has not misinterpreted the law concerning LTA fraud. She characterised Areka Phillips and the Society as having entered into the transfers in ignorance of the law but without any fraudulent intent. That assessment was not challenged. I certainly do not understand the authorities to construe an innocent but illegal transaction to amount to LTA fraud.

[96] Finally, the appellants referred to two decisions that they say align with the present facts.

[97] First, the appellants relied on *Smith v Hugh Watt Society Inc* to argue that a breach of trust amounted to LTA fraud.[35] But in that decision the High Court expressly ruled that the case was not decided on the basis of LTA fraud but rather on an in personam claim for breach of trust.[36]

[98] Second, there is the *Tapsell v Murray* decision.[37] That was a case where the executor of a will transferred land belonging to the estate to himself in contravention of the terms of the will. The executor's actions were held to be fraudulent, which in turn tainted the title of the transferee who had received the land by way of gift. Section 63(1)(c) of the LTA applied in those circumstances. Judge Milroy concluded that the present case was quite different as Areka Phillips was not being dishonest or fraudulent in transferring title to the land to the Society. I agree with Judge Milroy's assessment.

[99] I therefore conclude that Judge Milroy properly rejected the fraud claim.

In personam claim

[100] The appellants say that Judge Milroy failed to consider whether an in personam claim existed in relation to the 1999 transfers. They say that Areka Phillips owed a fiduciary duty to act in the interests of the beneficiaries of the Māori reservation and that he breached that duty in transferring the land to the Society. Once again, they align the present case with the *Smith v Hugh Watt Society Inc* decision.[38]

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35 *Smith v Hugh Watt Society Inc*, above n 5.
36 At [79].
37 *Tapsell v Murray*, above n 6.
38 *Smith v Hugh Watt Society Inc*, above n 5.

[101] The primary difficulty with this argument is that the appellants did not plead an in personam claim for breach of trust in the lower Court. Ms Wara properly conceded this. The appellants can hardly blame the lower Court for not having addressed such a claim.

[102] But putting to one side the lack of pleading, the in personam claim encounters similar difficulties to those I discussed earlier in relation to the fraud claim. That is, Areka Phillips was not acting in his capacity as trustee of the Māori reservation when he transferred the land to the Society, and there has been no detriment to the beneficiaries. Therefore, I cannot see how he acted in breach of the Māori reservation trust. And the Society was certainly not acting as a trustee in receiving the land.

[103] Judge Milroy briefly considered whether an implied trust argument could be made in respect of the breach of the PCA's right under s 147A. She did not think it could. I agree. The appellants' case fell well short of establishing that by reason of s 147A, a registered proprietor of Māori freehold land owes a duty as trustee to the PCA.

[104] But even if it could be argued that s 147A gives rise to some form of trustee duty (which I do not accept), the authorities are clear that a successful in personam claim must satisfy three guidelines: the remedy cannot be used to undermine the fundamental concepts of the Torrens system; there must have been unconscionable conduct on the part of the current registered proprietor; and claims in personam must encompass only known legal or equitable causes of action.[39]

[105] I do not see how the appellants' case can satisfy these guidelines.

[106] First, in reality the appellants are endeavouring to bring an in personam claim in order to avoid the consequences of indefeasibility of title under s 62. That is, if the law holds that breach of ss 147A and 338(11) does not impinge on s 62 indefeasibility, then the alternative is to argue some form of trust. But that offends the first of the guidelines.

[107] Second, it is simply not possible to conceive of Areka Phillips' actions or the Society's actions as having amounted to "unconscionable conduct". Areka Phillips and the Society clearly acted in ignorance of the statutory requirements, but there is no evidence

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39 *Land Law* (online looseleaf ed, Brookers) at [LT 62.12].

that they acted unconscionably, as that term is understood in equity. Areka Phillips considered it proper and timely to transfer the land to the Society, which had been involved in establishing the substantial facilities on the land over a 40 year period. The transaction was entered into openly and no one objected to it at the time or during the following nine years prior to Areka Phillips' death in 2008.

[108] Third, the appellants are effectively asking this Court to rule that a breach of s 147A of the Act amounts to a breach of trust and therefore entitles the PCA to an in personam remedy. But they have not been able to point to any authorities that treat the breach of a statutory right as giving rise to an in personam claim. Certainly, the present facts are not enough for me to launch into such apparently unchartered waters.

[109] Finally, an in personam claim alleging breach of trust invites the Court to exercise its equitable jurisdiction. Equity does not reward those who delay in pursuing their claimed rights.[40] The appellants did not bring a claim in respect of the 1999 transfers until November 2010, a delay of over eleven years. Putting to one side the question of whether the claim was statue barred, the appellants have not justified why the Court should grant equitable relief in the face of such substantial delay.

Outcome

[110] This case demonstrates once again that the LTA operates to protect title to Māori land even where the rights of the PCA have been overlooked in breach of TTWMA. Often such an outcome gives rise to substantial injustice. But I do not sense that is the case here.

[111] Areka Phillips had a particular vision for this land and it is difficult to imagine that he would have been dissuaded from transferring the land to the Society had the PCA been given its option in 1999. Furthermore, it is no coincidence that the appellants did not bring a challenge during their father's lifetime – they knew what his likely response would be. I believe the appellants' challenge to the Society's title to the land was of lesser importance to the other complaints they raised in the lower Court. They were successful in regard to those matters. Ultimately, the outcome of this appeal does not alter the fact that the Māori reservation trustees control the Manu Ariki land.

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[40] "Equity aids the diligent not the tardy": see Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [2.7.8].

[112] The appeal is dismissed. The majority invited submissions on costs, which we now await.

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D J Ambler
JUDGE