IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A19990008028
A20030004701
A20030004702

UNDER	Sections 24 and 315 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	PARISH OF KARAKA LOT 64D BLOCK (WHATAPAKA MARAE) AND PARISH OF KARAKA LOT 64A BLOCK (GENERAL LAND)
BETWEEN	TED NGATAKI AND RENA NGATAKI ON BEHALF OF THE TRUSTEES OF WHATAPAKA MARAE Applicants
AND	NGAHUIA KUMETE, SHARON LAURA NATHAN, PATRICIA DAWN GRAY, HELEN JOYCE RANGIORA TE HAARA, PHILLIP RICHARD JAKEMAN, PAULA MARIA ARIKI JAKEMAN, LEO GEORGE TOKO JAKEMAN AND PETER IVAN WIRIHANA JAKEMAN Respondents

A20150003391

UNDER	Section 18 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	PARISH OF KARAKA LOT 64D BLOCK (WHATAPAKA MARAE) AND PARISH OF KARAKA LOT 64A BLOCK (GENERAL LAND)
BETWEEN	PATRICIA DAWN GRAY Applicant
AND	TRUSTEES OF WHATAPAKA MARAE Respondents

Hearing: 14, 15 and 16 December 2015 (114 Waikato Maniapoto MB 180-456)
16 May 2016 (121 Waikato Maniapoto MB 138-175)
(Heard at Hamilton)

Appearances:	Mr M T Milroy, Counsel for the Trustees of Whatapaka Marae Ms K Broadhurst, Counsel for Patricia Gray, 14-16 December 2015 and Mr N Russell, Counsel for Patricia Gray, 16 May 2016 Phillip Kahi in person Peter Jakeman in person William Rua in person
Judgment:	13 June 2016

RESERVED JUDGMENT OF JUDGE S R CLARK

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Introduction

[1] Whatapaka Marae is located adjacent to the southeast bank of the Manukau harbour. In the main the marae complex is situated on Parish of Karaka Lot 64D, a block of Māori freehold land ("Lot 64D"). That block was gazetted as a Māori reservation on 7 May 1970 and is vested in trustees.[1] The hapū associated with the marae are Ngāti Tamaoho, Ngāi Tai and Ngāti Koheriki.[2]

[2] For a number of years a significant part of the marae complex has encroached on an adjoining block – Parish of Karaka Lot 64A ("Lot 64A"). The mahau of the wharenui, part of the marae ātea, flag poles, a toilet block, concrete walls, waharoa and part of an urupā encroach upon Lot 64A.[3]

[3] Significantly for the purposes of this case Lot 64A is general land owned by Māori, in unequal shares.[4]

[4] Access to Whatapaka Marae is also at issue. Lot 64D has no road frontage. Access is currently obtained via a metalled right of way over Lot 64A. That right of way joins a Māori roadway.[5]

[5] Encroachment, access and water take issues have been in dispute for a number of years. On 15 January 1993, in consideration of $20,000 being provided by Whatapaka Marae Committee to assist with the refinancing of a mortgage secured over Lot 64A, the owners agreed to sign documentation and take the necessary steps to enable Whatapaka Marae to obtain a right of way and water supply easement over Lot 64A. The then owners

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[1] "Setting Apart Māori Freehold Land as Māori Reservation" (7 May 1970) 27 *New Zealand Gazette* at 806 (TN25/67). See also "Redefining Purposes of Māori Reservation" (28 January 1982) 7 *New Zealand Gazette* at 275 (TN45/007).

[2] The block comprises 1.2141 hectares, the CFR reference is 374284 (North Auckland). The marae trustees are Turua Ngataki, Carmen Rosalina Aroha Kirkwood, Denny Annie Bell Aroha Te Hinurangimoewaka Kirkwood, Tiraha Ngerengere, Carl Mohi Wawatai, Pokaiwhenua Ngataki, Dennis Raniera Kirkwood, Jeffrey Latham Lee and Mere-Hema Kahi, 23 Waikato Maniapoto MB 231 (23 WMN 231); 27 Waikato Maniapoto MB 248 (27 WMN 248).

[3] Mahau – porch/verandah. Wharenui – meeting house. Marae ātea – open area in front of the wharenui. Waharoa – main entranceway to the marae. Urupā – cemetery.

[4] Ngaahuia Kumete as to a one-quarter share, Sharon Nathan as to a one-quarter share as executor, Patricia Gray as to a one-quarter share, Helen Te Haara, Phillip Jakeman, Paula Jakeman, Leo Jakeman and Peter Jakeman as to a one-twentieth share respectively. CFR NA1558/35 (North Auckland).

[5] 14 Auckland MB 104 (14 AK 104).

also agreed to a "boundary realignment" so that lands encroached upon by Whatapaka Marae became "amalgamated with the marae land" ("the 1993 document").

[6] On 11 September 2002 the then owners of Lot 64A and the trustees of Whatapaka Marae entered into a deed ("the 2002 deed"). The agreement of 15 January 1993 forms part of that deed. Pursuant to that deed the parties agreed to:

a) A boundary adjustment which enabled that part of Lot 64A which had been encroached upon by the marae complex to become part of Lot 64D;

b) Easements to be laid out over Lot 64A providing for a right of way and right to take and convey water to the marae from a bore situated on Lot 64A;

c) That no further burials were to take place in that part of the urupā located on Lot 64A.

[7] Based upon the 2002 deed, Judge Milroy made orders on 2 April 2004.[6] She granted two easements in favour of Lot 64D. The first being the right of way, the second being an easement to take and convey water from Lot 64A. In addition she made an order pursuant to s 24 of Te Ture Whenua Māori Act 1993 ("the Act") vesting part of Lot 64A in the trustees of Whatapaka Marae, the beneficial interests to vest in the owners of Lot 64D in proportion to their shareholding.

[8] The 2004 orders were conditional upon a survey being completed within 12 months, the cost to be borne by the trustees of Whatapaka Marae. Suffice to say the condition relating to survey was not met within the 12 month period.

[9] Since 2004 a number of the Lot 64A owners, who were signatories to the 1993 document and 2002 deed, have died. Their interests have been succeeded to by the current owners. Some of the current owners of Lot 64A oppose the finalisation of the orders made by Judge Milroy. They point to a lengthy delay in obtaining the survey plan, further encroachment onto Lot 64A, breaches of the 2002 deed by the burial of tūpāpaku in Lot 64A and make a number of other allegations of trespass and nuisance.

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[6] 106 Waikato MB 178-181 (106 W 178-181).

[10] Mrs Patricia Gray, one of the owners of Lot 64A, filed an application on 22 May 2015.[7] She seeks, inter alia, an order for cancellation of the 2002 deed pursuant to the Contractual Remedies Act 1979, an order restraining the trustees from burying people in Lot 64A, an order for removal of the portion of a house which encroaches on Lot 64A, an order requiring the trustees of Whatapaka Marae to refrain from using a car park on Lot 64A and an order to stop the discharge of grey water onto Lot 64A. She also seeks damages in relation to allegations of trespass and nuisance.

[11] Mr Phillip Kahi appeared in person. He is the son of Ngahuia Kumete, a one-quarter owner in Lot 64A. He holds her power of attorney and appeared on her behalf.

[12] Mr Peter Jakeman appeared in person. He is an owner as to a one-twentieth share in Lot 64A and appeared for himself.

[13] Mr William Rua appeared in person. He is the partner of Sharon Nathan who is recorded on the Computer Freehold Register for Lot 64A as an owner as to a one-quarter share. Sharon Nathan is the executor of the estate of the late Lofty Rua, William Rua's father. The Will of the late Lofty Rua provides that, William Rua and his daughter Reitu Rua, are entitled to equally succeed to the one-quarter share owned by the late Lofty Rua. Whilst transmission of the legal estate from the executor, Sharon Nathan to William Rua and Reitu Rua has yet to occur, I was content to hear from William Rua.

[14] Although some initial documentation was filed with the Court by some of the remaining owners in Lot 64A, they did not participate in the proceedings.

Background

[15] I do not propose to set out a detailed factual background of events leading up to the 2004 orders made by Judge Milroy, however some background context is relevant. The background material is drawn from a variety of sources including the records of the Māori Land Court, evidence filed during the course of hearing these applications and material available to me by virtue of previous applications concerning Lot 64A and Lot 64D.

[7] Application A20150002391. The application was subsequently amended on 26 June 2015.

[16] On 14 October 1966, a recommendation was made by the Māori Land Court to set aside Lot 64D as a Māori reservation.[8]

[17] An Order in Council was gazetted on 7 May 1970. The Gazette Notice refers to the reservation being set aside for members of Ngāti Tamaoho, Koheriki and Ngāitai tribes and Māoris generally.[9]

[18] Issues concerning encroachment of the marae complex onto Lot 64A were apparent as early as 1980. Minutes of marae trustee meetings from 1980 – 1982 inclusive were produced during the course of the hearing. Those minutes demonstrate that the issue of encroachment was a live one at that stage and that the trustees and some owners of Lot 64A were attempting to reach a solution to the issues.

[19] On 4 September 1992, Mr George Weatley a then trustee of the marae, filed an application pursuant to s 418 of the Māori Affairs Act 1953. On behalf of the trustees he sought an order from the Court laying out a roadway over Lot 64A to provide access to Lot 64D.[10] That application later became A19990008028 and was subsequently amended by Judge Milroy on 2 April 2004 to be dealt with as an application pursuant to s 315 of the Act.[11]

[20] On or about 7 October 1992, the Māori Land Court received documentation in support of Mr Weatley's application. The documentation included correspondence between the Mangere Community Law Centre acting for the trustees of Whatapaka Marae, Inder Lynch, solicitors acting for the owners of Lot 64A and Simpson Grierson, solicitors acting for the Countrywide Banking Corporation. The documentation refers to a proposal that the Whatapaka Marae Committee provide $20,000 in order to avert a mortgagee sale of Lot 64A. In consideration of that, the trustees sought arrangements to secure the land encroached upon by the marae complex, and to gain access and water take rights.[12]

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[8] Pursuant to s 439 of the Māori Affairs Act 1953 – 26 Auckland MB 339 (26 AK 339).
[9] "Setting Apart Māori Freehold Land as Māori Reservation" (7 May 1970) 27 *New Zealand Gazette* at 806 (TN25/67).
[10] Application 56470.
[11] 106 Waikato MB 178-181 (106 W 178-181).
[12] Correspondence and materials dated 7 October 1992 provided by Ted Ngataki and George Weatley on behalf of the Whatapaka Marae trustees contained on Application 56470 – A19990008028.

[21] The application was adjourned on 7 October 1992.[13]

[22] The 1993 document was signed by all owners of Lot 64A on 15 January 1993. A few days later on 29 January 1993 the sum of $20,000 was transferred to the solicitors acting for the owners of Lot 64A. On or about 10 February 1993, the Mangere Community Law Centre filed a copy of the 1993 document with the Court.

[23] From correspondence on the Court files it appears that the parties continued to negotiate their positions. In late 1996, the trustees of Whatapaka Marae instructed new counsel, Mr Gordon Matenga. In November 1996, Mr Matenga wrote to the Court suggesting that in addition to the roadway order sought an application should be filed pursuant to s 338 of the Act.

[24] On 6 December 1996, Judge Carter issued directions concerning the application.

[25] It appears that negotiations continued between the parties, albeit slowly. In late July 1999, the Court issued a minute noting that the application had been before the Court for nearly seven years. Furthermore that counsel for the marae trustees had indicated two years previously that settlement would be sought and nothing further had been heard. The Court advised that the application would be dismissed if there was no request to set the matter down for a fixture.[14]

[26] In response Mr Matenga sought further time to advance negotiations in August 1999. The matter was called on 28 September 1999 and adjourned for a further 12 months.[15]

[27] Between 1999 and 2002 it appears that the parties, together with their solicitors, attempted to advance negotiations. Indeed a draft of what eventually became the 2002 deed was in circulation as early as 1999, but was not finally signed by all parties until September 2002.

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[13] 73 Waikato MB 29 (73 W 29).
[14] 88 Waikato MB 91 (88 W 91).
[15] 88 Waikato MB 179 (88 W 179).

[28] On 21 November 2002, Mr Matenga filed with the Court a memorandum together with the 2002 deed. He invited the Court to make orders based upon the deed, conditional upon completion of survey.

[29] Judge Carter issued a minute in response dated 16 December 2002.[16] He noted that the only application before the Court was one seeking a right of way. There were no applications before the Court seeking orders for an easement to take and convey water and in respect of the encroachment. Give these were also being sought, he suggested that formal applications needed to be filed with the Court.

[30] In line with Judge Carter's suggestions, formal applications for an easement to take and convey water and relief for encroachment were filed by counsel for the trustees on 4 August 2003.[17]

[31] On 23 October 2003, the Court received a letter from solicitors acting for Mrs Patricia Gray, who by then had succeeded to her late father's interest in Lot 64A. The solicitor raised various issues on behalf of Mrs Gray.

[32] Notwithstanding that, the orders referred to earlier were subsequently made by Judge Milroy in chambers on 2 April 2004.[18]

[33] The applications concerning the water easement, right of way and encroachment matter did not formally return to Court until 21 August 2013.[19] Later in this decision I will return to a discussion of the period between 2004 through to 2015.

[34] Suffice to say that in that period the trustees and beneficiaries of the marae became embroiled in applications concerning the appointment of trustees and the enforcement of obligations of trust. Issues concerning the right of way, water easement and encroachment were raised in all of those hearings, sufficiently so for the Court to direct that the trustees file reports on progress concerning those matters.[20]

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[16] 101 Waikato MB 7 (101 W 7).
[17] Applications A20030004701 and A20030004702.
[18] 106 Waikato MB 178-181 (106 W 178-181).
[19] 62 Waikato Maniapoto MB 38-59 (62 WMN 38-59).
[20] 23 Waikato Maniapoto MB 231 at 257 (23 WMN 231).

[35] Trustee reports were filed on 15 December 2011 and 24 January 2012 respectively. Facilitated hui were then held on 11 May and 24 July 2012 seeking to progress discussions between the parties.

[36] When the matter came back before Judge Milroy on 21 August 2013, she indicated that the Court would appoint an independent facilitator in an attempt to continue to progress negotiations.[21] Mr Lindsay Wilson, was subsequently appointed as a facilitator by the Court.[22] He held meetings with the parties on 25 September, 3 November, 14 December 2013 and 15 February 2014.

[37] The applications returned to Court on 28 November 2014. At that stage I became involved in the proceedings.[23] The information available to me prior to Court indicated that some of the owners of Lot 64A were in support of the application by the marae trustees for access, the water easement and for that land encroached upon on Lot 64A to be made available to the marae. During the course of that hearing Mrs Gray, via her counsel, indicated that she continued to oppose the orders. Timetabling directions were then given to counsel for the filing and circulation of evidence.[24]

[38] The applications were set down for a substantive hearing on 9 March 2015. On 26 February 2015 Mrs Gray advised the Court that she had engaged new counsel. The hearing was adjourned.[25]

[39] In May 2015, Mrs Gray filed an application seeking orders cancelling the 2002 deed, damages for trespass and nuisance, injunction orders against the trustees and orders concerning further encroachment onto Lot 64A.[26]

[40] The substantive hearings were eventually held on 14-16 December 2015 inclusive. The morning of 14 December 2015 also included a site visit.[27]

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[21] 62 Waikato Maniapoto MB 38-59 (62 WMN 38-59).
[22] 63 Waikato Maniapoto MB 272-273 (63 WMN 272-273).
[23] The reason being that Judge Milroy's brother was then acting as counsel for the trustees of Whatapaka Marae and she recused herself.
[24] 91 Waikato Maniapoto MB 18-31 (91 WMN 18-31).
[25] 95 Waikato Maniapoto MB 17-19 (95 WMN 17-19).
[26] A20150003391. The application was later amended on 26 June 2015.
[27] 114 Waikato Maniapoto MB 180-456 (114 WMN 180-456).

[41] At the conclusion of the substantive hearing both counsel sought leave to file written submissions following the receipt of the Court minutes. Written submissions were filed by counsel and those self-represented owners of Lot 64A. Oral closing submissions were then heard before the Court on 16 May 2016.[28]

The issues

[42] I am conscious that in this case there are three applications being run in parallel before the Court and that the position of the owners of Lot 64A is not uniform. Having said that, what I attempted to do during the oral hearing of the closing submissions was to identify and distil the issues which the Court needs to respond to. I consider the issues to be:

a) Does the Māori Land Court have jurisdiction to grant relief for encroachment in relation to general land owned by Māori?

b) Should the applications be analysed on the basis of a failure to comply with a conditional order or is an analysis pursuant to the Contractual Remedies Act 1979 more appropriate?

c) Should the conditional orders of 2 April 2004 be amended or cancelled?

d) Does the Māori Land Court have jurisdiction to hear contract or tort claims involving Lot 64A, a block of general land owned by Māori pursuant to s 18(1)(d) of the Act?

e) Has there been trespass, other injury or nuisance occasioned to Lot 64A?

f) Are the owners of Lot 64A entitled to relief in relation to Mr Wawatai's house?

g) Should the Māori Land Court issue injunctions restraining the trustees of Whatapaka Marae concerning any further burials in Lot 64A?

[28] 121 Waikato Maniapoto MB 138-175 (121 WMN 138-175).

Issue One – Does the Māori Land Court have jurisdiction to grant relief for encroachment in relation to general land owned by Māori?

[43] Section 24 of the Act is relevant. It reads as follows:

> **24 Power of court to grant relief if building is on wrong land or encroachment exists**
>
> The court may exercise with respect to Māori freehold land all of the powers conferred on a court by subpart 2 of Part 6 of the Property Law Act 2007.

[44] The relief sought relates to an area of land which encompasses the mahau of the wharenui, part of the marae ātea, concrete walls, a toilet block and the waharoa which encroach upon Lot 64A – general land owned by Māori. Section 24 refers to the Court's ability to grant relief with respect to Māori freehold land. A question arises whether the Māori Land Court has jurisdiction to make an order in this case.

[45] The issue was not argued before Judge Milroy in 2004. Counsel for both parties submitted that the Court has jurisdiction to make an order in relation to Lot 64A, notwithstanding that it is general land. They rely on *Elkington v Estate of Ruruku*,[29] and *Wharewera v Allison – Te Waiti No 2C No 2*,[30] as authorities.

[46] In the *Elkington* case the land encroached upon was Māori freehold land, the intended land being general land. Notwithstanding the reference to the Māori Land Court in s 24 of the Act, Wild J considered that the High Court had jurisdiction to make orders in respect of all land, whether it was general or Māori freehold land. He did not accept that jurisdiction lies exclusively with the Māori Land Court, where the encroachment also involves general land. The reasoning being that if that was the position every time an order was required affecting both general and Māori freehold land, applications would have to be made to separate Courts.[31]

[47] In 2014 Judge Coxhead considered the *Elkington* decision in the case of *Wharewera v Allison*. Mr Allison had built a dwelling partly on a block of Māori freehold

[29] *Elkington v Estate of Ruruku* (2007) 9 NZCPR 97.
[30] *Wharewera v Allison – Te Waiti No 2C No 2* (2014) 107 Waiariki MB 115 (107 WAR 115).
[31] *Elkington v Estate of Ruruku* (2007) 9 NZCPR 97 at [64] – [66] inclusive.

land and partly on a roadway, which was Crown land. In his discussion of the *Elkington* case and s 24 of the Act, Judge Coxhead reached the following conclusions:

a) The relevant part of the Property Law Act 2007 – s 321, contemplates that cases of this type will necessarily involve two parcels of land, the affected land and the intended land;[32]

b) The words "with respect to Māori freehold land" should not be read down to meaning "only involving Māori freehold land". Section 24 contemplates a situation where one of the blocks may not be Māori freehold land. In that situation the Court whilst exercising powers in regard to general or Crown land will still rightly be exercising its powers with respect to Māori freehold land;

c) Such a liberal reading is necessary in order to avoid the situation contemplated by Wild J in the *Elkington* decision whereby applicants would need to seek separate decisions from the High Court and the Māori Land Court;

d) Where the intended land is Māori freehold land, that is a sufficient connection to be caught by the phrase "with respect to Māori freehold land"; and

e) Section 24 is one of the few exceptional circumstances when the Māori Land Court's jurisdiction extends beyond Māori freehold land and general land owned by Māori. In applying s 24 in this way, the purposes and objectives of the Act are achieved.[33]

[48] The *Elkington* case is not binding in that the factual scenario before Wild J was the reverse of this case. In the *Elkington* case the land encroached upon was Māori freehold land whereas in this case the land encroached upon is general land. I am mindful however that Wild J did make the following obiter comment:

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[32] *Wharewera v Allison – Te Waiti No 2C No 2* (2014) 107 Waiariki MB 115 (107 WAR 115) at [31].
[33] Ibid at [33], [36], [37] and [39].

> [65] I consider that the jurisdictional position is that the High Court can make orders under s129 in respect of all land, whether it be general or Mäori freehold land, *and that the Mäori Land Court has jurisdiction to make s129* orders in respect of Mäori freehold land.
>
> (Emphasis added).

[49] For the purposes of this case, particularly whereas counsel have not argued to the contrary, I adopt the principle set out in the *Wharewera* decision, that is that in a case of encroachment where the intended land is Māori freehold land and the affected block is general land, the Māori Land Court has jurisdiction to make an order pursuant to s 24 of the Act.

[50] I am somewhat hesitant in reaching that conclusion as s 24 of the Act refers only to Māori freehold land. I also take into account the obiter comments made by Wild J in the *Elkington* decision, as referred to.

[51] However as Judge Coxhead said, all encroachment cases will necessarily involve two different blocks of land, either of which may have a different status. Secondly, s 24 of the Act does not expressly limit the jurisdiction of the Māori Land Court to orders only involving Māori freehold land. Had it done so then this Court would not have jurisdiction to make the orders sought. Notwithstanding that Lot 64A is general land, it is inextricably linked to the adjoining Lot 64D block by virtue of the wrongly located structures encroaching upon Lot 64A. In that sense when one views the reality of the situation which is that the intended block is Māori freehold land, one arrives at the conclusion that the Court is exercising its powers with respect to Māori freehold land.

Issue Two – Should the applications be analysed on the basis of a failure to comply with a conditional order or is an analysis pursuant to the Contractual Remedies Act 1979 more appropriate?

[52] The orders made by Judge Milroy on 2 April 2004 were conditional upon the marae trustees completing a survey within 12 months of the date of the order.

[53] Counsel for the trustees submitted that notwithstanding the lengthy delay in completing a survey it would be unjust and inequitable if the Court was to now cancel the conditional orders.

[54] In response to the trustees' applications, Mrs Gray argues that the trustees have caused unreasonable and unexplained delay in exercising their rights conferred by the 2002 deed and the Court orders. She points to the fact that the required survey was only completed in August 2013, over 10 years after the deed was signed and nine years after the Court orders. Mrs Gray emphasises that an order should only be made if the Court considers it just and equitable in the circumstances that relief should be granted. She submits that it would be inequitable to grant the relief sought as the trustees have breached and/or not complied with the 2002 deed and have continually trespassed on Lot 64A.

[55] As part of the application she filed, Mrs Gray submits that the 2002 deed should be cancelled pursuant to the Contractual Remedies Act 1979.[34] Specifically she submits that cl 4.2 of the 2002 deed, which prevented any persons from being buried on Lot 64A, other than the Kumete whānau, was an essential term of the 2002 deed. Mrs Gray argues that subsequent burials which encroached onto Lot 64A, were in breach of that clause and that she is entitled to cancellation of the entire 2002 deed.

[56] I consider that the correct starting point in this case is that orders were made in 2004, albeit on a conditional basis. The issue then becomes has the condition imposed by Judge Milroy been met, if not why not, and should it be amended or cancelled?

[57] Section 24A of the Act allows the Māori Land Court to exercise any power conferred on the High Court by the Contracts (Privity) Act 1982 or by specified provisions of the Contractual Remedies Act 1979. It provides:

> **24A Powers of court under Contracts (Privity) Act 1982 and Contractual Remedies Act 1979**
>
> (1) Subject to subsection (2), the court may exercise any power conferred on the High Court—
>
> (a) by the Contracts (Privity) Act 1982; or
>
> (b) by any of the provisions of sections 4, 7(6), 7(7), and 9 of the Contractual Remedies Act 1979.
>
> (2) A power conferred on the court by subsection (1) may be exercised only if the occasion for the exercise of that power arises in the course of proceedings (other than an application made for the purposes of section 7(1) of the Contracts (Privity) Act 1982 or section 7(6) or section 9 of the Contractual Remedies Act 1979) properly before the court under section 18(1)(d) of this Act.

[34] A20150003391.

[58] Whilst the Māori Land Court has jurisdiction to hear Contractual Remedies Act 1979 claims, such powers can only be exercised if an application is properly within the scope of s 18(1)(d) of the Act.

[59] There are few authorities from the Māori Land Court or Māori Appellate Court which have considered the Contractual Remedies Act 1979.[35] There are certainly no authorities which discuss cancellation of a contract, which involves conduct post the making of a conditional Court order.

[60] As a general proposition it appears that the issue of cancellation of a contract and remedies under the Contractual Remedies Act 1979 are generally considered independently from the issue of a conditional Court order.

[61] I do not consider that any analysis of this case based upon the Contractual Remedies Act 1979 is necessary. For reasons which I explain in more detail later in this judgment, the jurisdiction of the Māori Land Court to consider remedies available under the Contractual Remedies Act 1979, is only available in cases properly before the Court under s 18(1)(d) of the Act. I reach the conclusion that the contractual and tortious claims advanced by Mrs Gray pursuant to s 18(1)(d) of the Act cannot properly be brought within the ambit of s 18(1)(d) of the Act. Therefore the jurisdiction to consider the Contractual Remedies Act 1979 is not triggered in this case.

Conditional Court orders – Legal Principles

[62] Section 73 of the Act provides that the Court may make orders subject to conditions as follows:

> **73 Orders may be made subject to conditions**
>
> (1) Any order may be made subject to the performance of any condition within such period as may be specified in the order.
>
> (2) Notwithstanding anything in section 42 or the rules of court, no such order shall be sealed while it remains subject to a condition that has not yet been fulfilled.

[35] Two examples are *Tawhai – Rakautatahi B2* (2000) 12 Takitimu Maori Appellate Court MB 154 (12 ACTK 154) and *Kotahitanga Log Haulage Limited v Forest Distribution Limited – Mangaroa and Other Blocks Incorporated* (2015) 121 Waiariki MB 149 (121 WAR 149).

> (3) Where an order has been made subject to the performance of any conditions, the court may, without further application but subject to the giving of such notices (if any) as the court may direct,—
>
> (a) amend or cancel the order on the failure to comply with the condition within the specified period; or
>
> (b) extend that period for such further time as the court thinks fit.

[63] Section 73 of the Act gives the Court a wide discretion to impose conditions on any order. Where there is a failure to comply with the condition the Court may amend or cancel the order or may extend the period for compliance. However there is no express guidance provided as to how the Court should exercise its discretion.

[64] Reported decisions concerning the use of s 73 of the Act illustrate that it is often used in relation to the grant of orders affecting title, such as partition or easement orders. Generally such orders are made conditional on the filing of a survey plan or the completion of matters necessary to effect orders, within a specified timeframe. Where the condition is not completed within a specified timeframe, it appears that the approach of the Māori Land Court has generally been amenable to granting an extension of time, even when there has been considerable delay. In terms of amendment of orders, this appears to be restricted to situations where there have been complications, such as the issuing of titles from Land Information New Zealand ("LINZ") or where other matters arise which require such variation to enable completion of the orders. It appears that a strict cancellation approach is not commonly ordered, with the Court preferring variation or replacement to give effect to the orders.

[65] In *Ririnui – Rawhiti No 2 Pt Lot 4 DP 10483*, Judge Ambler granted partition and easement orders, conditional on the filing of a survey plan with the Court and on consent being obtained from the Council for the right of way easement, within six months of the judgment.[36] The conditions were not complied with by expiry of the six months and although the survey plan was filed earlier, the consent was not filed until some six years later. In a further Court minute, it was submitted that due to failure to comply with the conditions within the specified time it was appropriate to cancel the orders and issue fresh orders.[37] Other subsequent issues regarding closed roads and survey matters were also noted. In those circumstances Judge Ambler accepted that, despite the significant delays,

[36] *Ririnui – Rawhiti No 2 Pt Lot 4 DP 10483* (2008) 127 Whangarei MB 278 (127 WH 278).
[37] 88 Taitokerau MB 182-185 (88 TTK 182-185).

the partition should still be completed and it was appropriate to cancel the original orders and issue new ones.

[66] In *Dudley – Te Konoti B4A3B2*, the condition that a survey plan be filed within five months on the granting of partition orders was not complied with.[38] The final approved survey plan was eventually filed with the Court approximately three years later, which also amended the appellations. The Court subsequently amended the previous orders, replacing them with new partition orders.[39]

[67] In *Parker – Pt Waipahihi 2B2B Roadline,* orders were made in relation to the closing of a roadway and the re-vesting of land.[40] The orders were conditional on one party confirming how a particular area was to be included in the land title. Subsequent to the conditional orders, there were complications with the issue of title from LINZ under the Unit Titles Act 2010. Given this, Judge Ambler cancelled the previous orders per s 73 but replaced them with new orders.[41]

[68] In *Chase-Seymour v Walters – Paenoa Te Akau*,[42] Judge Savage dealt with an application where partition orders had been made subject to survey plans being filed within six months. Subsequent to the orders being made, issues arose in relation to the survey plans and the Court granted a six month extension for completion of the survey. Following that, the matter was adjourned and reports prepared by surveyors addressing the survey issues and ultimately putting forward two proposals for the Court to consider, which were referred to the parties. After considering the most appropriate proposal, Judge Savage amended the original orders by replacing the survey plan reference. Despite the extension for compliance with the condition being well past, the Court considered that the condition as to survey had been completed and determined the partition applications could be finalised.

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[38] *Dudley – Te Konoti B4A3B2* (2008) 129 Whangarei MB 15 (129 WH 15).
[39] 51 Taitokerau MB 103-105 (51 TTK 103-105).
[40] *Parker – Pt Waipahihi 2B2B Roadline* (2012) 52 Waiariki MB 295 (52 WAR 295).
[41] 55 Taitokerau MB 192-193 (55 TTK 192-193).
[42] *Chase-Seymour v Walters – Paenoa Te Akau* (2015) 114 Waiariki MB 195 (114 WAR 195).

[69] For an example where the Court cancelled a conditional order I refer to *Cooper-Nathan – Estate of Charlie Ape Cooper – Motatau 5A2A2*.[43] In that case the Court had made an order for succession to a deceased, which was conditional in relation to one block on the confirmation the land was Māori freehold land. Subsequently it was found that the interests of the deceased in the land had been sold and the conditional order was cancelled.

[70] From the material set out above, it appears that the Court has a wide discretion to make any orders subject to conditions as it thinks fit. While this power is wide, the conditions imposed must be within the purpose or contemplation of the provision pursuant to which the relevant order is made. Further, once a conditional order is made and there has been failure to comply with the conditions, the Court can amend or cancel the order, or can extend the specified time for the condition to be met. While there appear to be no general principles noted for exercise of this discretion, guidance can be taken from the approach of the general Courts, which promotes consideration of the overall justice of the case.

[71] The Court is limited however to amendment or cancellation only in relation to the remaining conditions. It appears that the Court cannot review the order via the provision in s 73 of the Act on any other basis, as it would be considered *functus officio* in relation to its substantive decision. In other words, the condition of the order is either met or not. If it is met, the order becomes final. If the condition is not met the Court can extend the time, amend or cancel the order in relation to that condition.[44]

Issue Three – Should the conditional orders of 2 April 2004 be amended or cancelled?

[72] At the conclusion of the orders pronounced by Judge Milroy on 2 April 2004, she said:[45]

> The orders as to the right of way and boundary adjustment are conditional upon survey being completed within 12 months of the date of the order. The trustees of Whatapaka Marae shall meet all survey costs of the boundary adjustment and right of way.

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[43] *Cooper-Nathan – Estate of Charlie Ape Cooper – Motatau 5A2A2* (2011) 22 Taitokerau MB 177 (22 TTK 177).
[44] *Rangitane O Tamaki Nui-A-Rua Incorporated Society v Tamaki A Nui-A-Rua Taiwhenua* (1996) 11 Takitimu Appellate Court MB 96 (11 ACTK 96).
[45] 106 Waikato Maniapoto MB 181 (106 WMN 181).

[73] Counsel for the trustees submitted that the conditional orders required the completion of survey but not the issue of new titles or the registration of any easement within a 12 month period. However, that submission rather misses the point that a Land Transfer Plan was not completed until 18 September 2013,[46] and then was not approved as to survey until 23 June 2015.[47] Further, the plan was not made available to the Māori Land Court until on or about 6 October 2015, when it appeared in an affidavit of Mr Wawatai prepared on behalf of the trustees.[48]

The delay in obtaining a survey plan

[74] Clearly the condition imposed by Judge Milroy was not met. On the face of it the delay is extraordinary. Counsel for the trustees submitted that delays were occasioned by the trustees not understanding that the Franklin District Council had to first approve any subdivision/amalgamation. Secondly, that development fees imposed for the subdivision were a burden on the trustees in the vicinity of $20,000. Further delays were caused by discussions having to be undertaken with the Gray whānau concerning the width of the proposed roadway and accessing the block following the service of a trespass notice on the trustees and the surveyors.

[75] During the course of oral closing submissions I asked counsel for the trustees whether the trustees had ever sought an extension of the survey condition. His response was that they hadn't. Post the hearing I read the file relating to Mr Weatley's 1992 application.[49] On 16 May 2005, the Māori Land Court received a letter from solicitors then acting for the trustees. They referred to delays in instructing a surveyor and sought an extension by six months. Judge Milroy granted that extension on 20 May 2005. The new date for filing the survey plan was extended until 2 October 2005.

[76] On 28 April 2006, the Māori Land Court received a letter from solicitors acting for the trustees. They recorded that the Court had yet to receive the requisite survey plan but went on to note that the roadway order of 28 July 1920 giving access to Parish of Karaka Lot 64A, 64B, 64C and 64E had not been drawn or registered. The solicitor, Mr Matenga,

[46] Affidavit of Dennis Kirkwood dated 12 June 2015, exhibit "A".
[47] Affidavit of Carl Wawatai dated 6 October 2015, exhibit "A".
[48] The relevant LT Plan 469018 is contained as exhibit "A" in the affidavit of Carl Wawatai dated 6 October 2015.
[49] Application 56470, A19990008028.

stated that the surveyor was unable to complete any easement or boundary adjustment plan until such time that the Māori Land Court completed the roadway order.

[77] On 2 May 2006, Judge Milroy gave directions to the Registrar that she was prepared to sign off any roadline order in order to complete the matter. Nothing further was done by the Registrar until 2 December 2010 when the Court commissioned Mr Lindsay Wilson, a former staff member, to investigate the situation. Mr Wilson enquired into the matter and drafted the necessary Court order together with an accompanied survey plan. The roadline order was not finalised until June 2011.

[78] The parties may not have been aware of this issue, particularly as they did not have access to the Court files as I do. Certainly the matter was not expressly referred to in the evidence before me. However the proposition advanced by Mr Matenga in April 2006 was undoubtedly correct. Until such time that the Māori Land Court had completed and lodged a copy of its roadline order with LINZ, any plan for an easement from that roadline to Lot 64D could not be completed.

[79] Based on the information before me I also note that the trustees were required to obtain a resource consent for a relocation of boundaries and the creation of the right of way. An application appears to have been made to the Franklin District Council on or about 30 October 2008 but was not obtained until 7 May 2010.[50] There was not a great deal of evidence before me on this issue however the sense that I got was that the signatories to the 2002 deed were unaware of the need to obtain any resource consent. Certainly the issue does not appear to have been raised before Judge Milroy and the order she made was not conditional upon obtaining any resource consent. This appears to be an issue which the parties were unaware of or overlooked.

[80] On or about 18 March 2009, Mrs Gray's then solicitors wrote to the surveyors acting for the marae trustees. The solicitors objected to the width of the right of way. Importantly they gave notice pursuant to the Trespass Act 1980 preventing the trustees, their invitees and agents from going onto Lot 64A, the only exception being use of the metal driveway. As a result, the surveyors were not able to access Lot 64A until 27 August

[50] Affidavit of Dennis Kirkwood dated 12 June 2015, exhibit "A".

2013, over four and a half years later. During that period the surveyors commissioned by the trustees were unable to complete the survey.[51]

[81] In September 2013 a Land Transfer Plan was completed. At that time the trustees along with Mrs Gray and other owners of Lot 64A were embroiled in a series of Court hearings and Court facilitated hui between August 2013 and 15 February 2014. It is significant to note that at that time, the Court facilitator was advised from representatives of three of the four whānau that were owners in Lot 64A, that they were in support of the marae trustees' application.[52]

[82] I set out the above matters in order to highlight that, whilst on the face of it the delay was extraordinary, the factual situation is far more complex. An initial extension was requested and granted, resource consents had to be obtained, the survey plan could not be completed until the Māori Land Court completed its orders, access to Lot 64A was denied for a lengthy period of time and in late 2013 and 2014 intense negotiations were being carried out in an effort to resolve the matter.

The trustees' conduct

[83] Mrs Gray submits that since the making of Judge Milroy's orders in April 2004, the trustees have continually breached the 2002 deed, trespassed and further encroached on Lot 64A. In their written submissions, counsel for Mrs Gray characterised the trust's actions as demonstrating "a pattern of taking for no payment or recognition". In oral closings, counsel for Mrs Gray submitted that the trustees demonstrated a "casual assumption" that Lot 64A was "available for their use as and when they see fit."[53]

[84] I accept there has been a number of examples of trespass and encroachment onto Lot 64A, post the making of the 2004 orders. Examples are the 2011 burial of Mr Rawiri, the unlawful use of Lot 64A as a marae car park, the unlawful use of parts of Lot 64A as a driveway and the placing of structures such as a bridge and shed on Lot 64A.

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[51] Affidavit Dennis Kirkwood dated 12 June 2015, exhibit "A" and affidavit of Patricia Gray dated 26 June 2015, exhibit "PG11".
[52] 91 Waikato Maniapoto MB 18-31 (91 WMN 18-31) at 20.
[53] 121 Waikato Maniapoto MB 138-175 (121 WMN 138-175) at 146.

[85] Whilst I stop short of necessarily finding that there has been a sense of entitlement on the part of the trustees to use Lot 64A when and if they saw fit, I accept that the trustees have been indifferent to the rights of the owners of Lot 64A.

[86] Before going too much further I need to address the question as to whether such conduct can be taken into account in deciding whether to amend or cancel the 2004 orders. Strictly speaking the conduct complained of does not relate to the survey condition imposed by Judge Milroy but does relate to the 2002 deed which was the basis upon which Judge Milroy made her conditional orders.

[87] In raising these issues, counsel for Mrs Gray referred to ss 323 and 324 of the Property Law Act 2007 (referred to in s 24 of the Act). Section 323(2) provides that the Court may grant relief if it considers it just and equitable in the circumstances that relief should be granted. Section 324(1)(b) provides that in making a decision whether or not to grant relief, the Court may take into account the conduct of the parties.

[88] Counsel for Mrs Gray urges the Court that the circumstances are such that it would not be just and equitable to grant the relief sought by the trustees. The difficulty with that submission is that I am effectively being asked by Mrs Gray to review the order made by Judge Milroy in 2004. She is asking me to take into account certain conduct by the trustees which has occurred post the making of the order to find that it would be unjust and inequitable to grant relief to the trustees.

[89] I accept that any decision whether or not to amend or cancel the 2004 orders requires an exercise of discretion. However I do not accept that discretion goes so far as to permit me to review, amend or cancel the 2004 order based upon the trustees' conduct post the making of the order. The exception to that obviously are factors relating to the delay in obtaining the survey plan, which I have already examined.

Amend or cancel the 2004 orders?

[90] Notwithstanding the delay in finalising the survey plan and examples of trespass and encroachment onto Lot 64A, I reach the conclusion that the orders granting relief for

encroachment and the easements setting out a right of way and a right to take and convey water should be finalised.

[91] First, the factual background concerning the delay in obtaining a survey plan, as I have discussed at paras [74] – [82] inclusive is complex. It is not as simple as saying the trustees simply did not get on and obtain the survey. The initial 12 month period was extended by six months to 2 October 2005. In April 2006 the trustees' solicitors advised the Court that the survey could not be completed given that a 1920 roadway order had yet to be drawn or registered. The finalisation of that roadway order did not occur until June 2011. Delays were occasioned by the fact that the trustees needed to obtain a resource consent. Mrs Gray herself prevented the surveyors from having access to Lot 64A for a four and a half year period between March 2009 – August 2013 which meant that the survey plan could not be completed. Thus the reasons for the delay are far more nuanced than what appears to be the case at first blush.

[92] Second, if the easement granting a right of way is not made, Whatapaka Marae will be left without any access by public road. The only access will be via the Manukau harbour and the Te Hihi tidal creek or by air. Practically the marae will be left landlocked. The evidence before me was that the marae hosts an annual poukai[54] and is not unaccustomed to hosting large numbers at hui and tangi. In addition to the normal comings and goings from a marae there are a number of whānau who live on the marae reservation. They too will not have access to their homes.

[93] Third, it was submitted by some of the owners of Lot 64A that the easement to take and convey water is no longer required. They stated that water was available to the marae taken from the roof of the marae complex and stored in water tanks at the rear of the marae. No objective evidence was put before me from the Court which confirms that to be the case. If the easement is not granted then there is the possibility that the marae complex would be left without water in particularly dry months which is something which should be avoided.

[94] Fourth, the issue of encroachment has bedevilled the trustees and the owners of Lot 64A since the early 1980's. The discussions which led to the signing of the 1993

[54] The poukai is a Kīngitanga hui.

document and the 2002 deed appear to have been genuine attempts by the then trustees and owners of Lot 64A to resolve the issue. Having said that, the parties have not been able to finalise any arrangements. The Court files and evidence that was put before me demonstrate that there have been negotiations, discussions and Court facilitated meetings over a very lengthy period of time without success. Some finality needs to occur.

[95] To accede to the wishes of the current owners of Lot 64A would, in my respectful view, represent a retrograde step. If the orders were cancelled the marae complex will in fact still encroach upon Lot 64A as does part of the urupā. That situation needs to be sorted out and addressed now. Leaving the issue to the parties to resolve it, as they have tried to do for over 35 years, has not worked.

[96] Cancelling the orders will inevitably lead to further litigation. Fresh applications pursuant to s 24 of the Act, applications for easements and possible applications to access landlocked land would undoubtedly be filed with the Court. In making the orders that I will, I am conscious of bringing some finality to a situation which has gone on for far too long, to determine the settlement of disputes which have occurred between the parties and to promote practical solutions which have arisen as a result of what has happened in relation to Lot 64A and Lot 64D. Those are matters which this Court is directed to seek to achieve by virtue of s 17(2) of the Act.

Issue Four – Does the Māori Land Court have jurisdiction to hear contract or tort claims involving Lot 64A, a block of general land owned by Māori pursuant to s 18(1)(d) of the Act?

[97] Mrs Gray has filed proceedings founded on contract and tort pursuant to s 18(1)(d) of the Act.

[98] She submits that the 2002 deed recognised that the boundary between Lots 64A and 64D was an essential term, as is cl 4.2 of the 2002 deed which prohibited the burial of further persons in that part of the urupā on Lot 64A. Mrs Gray says that those essential terms of the contract have been breached by further burials in Lot 64A, by Mr Wawatai's house encroaching onto Lot 64A, by the use of an area of Lot 64A for a marae car park and by moving a creek onto Lot 64A.

[99] As a remedy, Mrs Gray seeks to cancel the 2002 deed pursuant to s 7 of the Contractual Remedies Act 1979. The jurisdiction to cancel pursuant to the Contractual Remedies Act 1979 is conferred by virtue of s 24A of the Act. The caveat is however that the power to do so is only available to the Māori Land Court when proceedings are properly before the Court pursuant to s 18(1)(d) of the Act.

[100] Mrs Gray has also filed proceedings alleging that various tortious actions have been committed, being trespass by Mr Wawatai's house, trespass by using Lot 64A for a car park, trespass involving the creek, and nuisance for the escape of grey water from Lot 64D to Lot 64A.

[101] Lot 64A is general land, owned by Māori. In her amended application dated 26 June 2015, Mrs Gray made reference generally to s 18 but did not specify which subsection she was relying upon. Clearly s 18(1)(c) of the Act is not appropriate to the facts of this case as the alleged damage or other injury did not occur to Māori freehold. The issue was only clarified in the closing written submissions filed on behalf of Mrs Gray in which reliance is placed upon s 18(1)(d) of the Act. That provision reads as follows:

> **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:
>
> …
>
> (d) to hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage *relates to Maori freehold land*:
>
> …

(Emphasis added).

[102] As s 18(1)(d) refers to Māori freehold land not general land, an issue arises whether or not the Māori Land Court has jurisdiction to hear these claims.

Section 18(1)(d) – the authorities

[103] The scope of s 18(1)(d) of the Act has been examined by the Māori Land Court on a number of recent occasions. In *Churton v Trustees of Mangaporou Trust*,[55] Judge Harvey

[55] *Churton v Trustees of Mangaporou Trust* (2008) 132 Aotea MB 219 (132 AOT 219).

had before him an application under s 18(1)(d) for alleged stock losses arising from breach of agreements which centred on Māori land. Judge Harvey found that to allow s 18(1)(d) to be applied in the circumstances of that case would be to place a meaning on the phrase "related to" that travels beyond a plain and ordinary meaning of those words.

[104] Counsel placed particular reliance upon the decision of *Gardiner v Gorringe – Tauwhao Te Ngare Block.*[56] In that case the applicants were the trustees of a Māori land block. They filed proceedings alleging a breach of contract by lessees to properly re-grass the block. The respondent lessee in turn successfully sought to join a third party. The causes of action against the third party were brought in tort alleging negligence in the re-grassing of the block.

[105] In that case the issue of jurisdiction was argued before me, specifically in relation to the proposed claims against the third party based on negligence and whether or not they were properly within the ambit of s 18(1)(d) of the Act.

[106] Ultimately I concluded that the proceedings were properly brought in the Māori Land Court. One point that I closely examined was what was meant by the phrase "relates to Māori freehold land".

[107] I was satisfied that the alleged tortious act or omission of the third party was significantly referable to Māori freehold land for the following reasons:[57]

a) The allegation of breach of contract related to the re-establishment of pasture on a block of Māori freehold land;

b) The respondents entered into an agreement with a third party to carry out re-grassing on a block of Māori freehold land;

c) The allegation was that the third party was negligent in the cultivation and sowing of grass seed on a block of Māori freehold land;

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[56] *Gardiner v Gorringe – Tauwhao Te Ngare Block* (2008) 93 Tauranga MB 63 (93 T 63).
[57] Ibid at [67](a)-(e) inclusive.

d) The respondents alleged that the proposed third party by acts and/or omissions was negligent in the control of weed growth and the management of grass on the same block of Māori freehold land;

e) The respondents said that if they breach the term of the lease (which they denied) the damage caused to both the applicants and themselves was caused by the negligent acts and omissions of the proposed third party in relation to a block of Māori freehold land.

[108] The *Churton* case was able to be distinguished in those circumstances as it involved a case of moveable chattels, namely stock. In the *Gorringe* case it was crucial that the acts and omissions in the cultivation, re-grassing and management of re-growth of the grass all took place on and in relation to a block of Māori freehold land, rather than as losses or damages of moveable chattels.

[109] In *Wharewera v Allison – Te Waiti No 2C No 2*, [58] Judge Coxhead considered whether s 18(1)(d) of the Act gave the Court jurisdiction to order specific performance of a contract concerning amalgamation of Crown land with Māori freehold land. He referred to *Attorney-General v Maori Land Court*[59] and *Gorringe*. He noted that it would be inappropriate to interpret s 18(1)(d) of the Act as giving the Court jurisdiction where, as in that case, the land in question comprises Crown land. He found that a careful reading of s 18(1)(d) of the Act indicates it is intended to apply where the debt, demand or damage relates to Māori freehold land, however in that case the demand related to Crown land. He considered the correct forum was either the District Court or High Court.

[110] The case of *Kotahitanga Log Haulage v Forest Distribution Limited – Mangaroa and Other Blocks Incorporated* involved a forestry operation on Māori freehold land. [60] The applicant logging company had an oral haulage contract pursuant to which they carted four truckloads of logs per day from the Māori land block. Their contract was subsequently terminated and the logging company filed proceedings alleging that the termination of the oral contract was in breach of an employment clause in a lease

[58] *Wharewera v Allison – Te Waiti No 2C No 2* (2014) 107 Waiariki MB 115 (107 WAR 115).
[59] *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA).
[60] *Kotahitanga Log Haulage v Forest Distribution Limited – Mangaroa and Other Blocks Incorporated* (2015) 121 Waiariki MB 149 (121 WAR 149).

concerning the forestry operation. The key issue before Judge Doogan was whether or not the debt, demand or damage related to Māori freehold land pursuant to s 18(1)(d) of the Act.

[111] Judge Doogan arrived at the conclusion that the relationship between the parties was not sufficiently direct so as to bring the claim within the ambit of s 18(1)(d) of the Act.[61] One of the factors which assisted him in reaching that conclusion was that the subject matter of the contract or damage related to moveable stock or chattels, that is the haulage of logs, rather than the land itself.

[112] The obiter comments made by the Court of Appeal in *Attorney-General v Maori Land Court* also warrant consideration. [62] That case involved a paper road vested in fee simple in a local authority, which ran across a block of Māori land. The council was willing to close the road on the condition that the proprietors of the Māori land block allowed foot access to continue across it. The owners of the Māori land block argued that as the council no longer wished to build a road then it was under an obligation to return the land to them. Proceedings were brought pursuant to s 18(1)(i) of the Act which reads:

> **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:
>
> …
>
> (i) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

[113] The Māori Land Court found that the land was held by the council in a fiduciary capacity. That finding was upheld in the High Court and then subsequently appealed to the Court of Appeal.

[114] In its decision, the Court of Appeal, whilst noting the broad language of s 18(1)(i) of the Act, stated that it must be read in its context both in relation to the provisions which immediately surround it, s 17 and in relation to the scheme of the statute as a whole.

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[61] *Kotahitanga Log Haulage v Forest Distribution Limited – Mangaroa and Other Blocks Incorporated* (2015) 121 Waiariki MB 149 (121 WAR 149) at [43].
[62] *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA).

[115] The Court of Appeal examined the long title to the Act, the Preamble, s 17, s 18, s 19 and a variety of other sections. Ultimately they concluded that when properly read in context, any interpretation that s 18(1)(i) of the Act applied to general land and Crown land was inappropriate.[63]

[116] Interestingly for the purpose of this exercise the Court of Appeal made the following relevant obiter comments in relation to s 18(1)(a) – (g):[64]

> With those general objectives in mind, and there is nothing in them relating to General land or Crown land, the Court is then given in s18 its general jurisdiction, which is in addition to specific jurisdictions conferred elsewhere in the Act. In para (a) of subs (1) the Court is empowered to determine claims at law or in equity relating to Maori freehold land and the proceeds of its alienation. Paragraph (b) enables it to determine the relative interests in such land of the owners in common, whether at law or in equity. *Paragraphs (c) and (d) authorise the Court to determine claims of trespass and contractual and tortious claims relating to such land. The care with which this jurisdiction has been confined to Maori freehold land is to be contrasted with the wider equitable jurisdiction said to exist under para (i)*. Para (e) is directed to determinations about persons, not land. Para (f) relates to shares in Maori incorporations, which are deemed by s 260 for all purposes to be undivided interests in Maori freehold land. Para (g) also could not apply to General land. It deals with land to which certain sections of the Treaty of Waitangi Act 1975 applies (land transferred or vested in a State enterprise or to an institution under the Education Act 1989 or Crown forest land).
>
> (Emphasis added).

Discussion

[117] Counsel for Mrs Gray, in their written closing submissions, argued that the matters alleged are significantly referable to Māori freehold land – Lot 64D, for a number of reasons, they being:

a) The blocks are respectively Māori freehold land (Lot 64D) and general land owned by Māori (Lot 64A);

b) Persons buried in that part of the urupā on Lot 64A were associated with the trustees of Lot 64D and should have been buried on Lot 64D;

c) Mr Wawatai's house is primarily located on Lot 64D – Māori freehold land but encroaches onto Lot 64A. Mr Wawatai is a trustee of Lot 64D;

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[63] *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA) at 701.
[64] Ibid at 698.

d) The area used for a car park on Lot 64A is utilised by persons visiting the marae, which is Māori freehold land;

e) The movement of the creek onto Lot 64A is as a result of the actions undertaken by persons associated with the trustees of Lot 64D, Māori freehold land; and

f) The grey water system, from which grey water has escaped onto Lot 64A, is located on Māori freehold land.

[118] In oral submissions counsel for Mrs Gray emphasised that in all cases complained of the tortfeasor or wrongdoer were the trustees of Lot 64D or persons associated with that block being Māori freehold land. The actions complained of were taken by or for the benefit of the legal and beneficial owners of Māori freehold land, in many cases unlawfully.

[119] I understand the logic of the submissions made by counsel for Mrs Gray. However I am unable to agree that the contractual and tortious causes of action pleaded in this case are within the ambit of s 18(1)(d) of the Act. Although the Court of Appeal's comments referred to earlier are obiter, they are persuasive. Section 18 of the Act, when read properly in context, confers upon the Māori Land Court a range of civil jurisdiction relating to Māori freehold land. Had the Legislature intended to confer jurisdiction in relation to general land or general land owned by Māori it could have done so. It did so expressly in relation to s 26 which confers jurisdiction on the Māori Land Court to hear Fencing Act disputes in relation to Māori freehold land *or* general land owned by Māori. The Legislature did not do so in respect of s 18(1)(d) of the Act.

[120] Fundamentally the demand or damage alleged in this case is in relation to a series of alleged wrongful acts which were occasioned to Lot 64A which is general land owned by Māori. Whilst the alleged wrongdoers may have been the trustees and/or others associated with Lot 64D, the demand and damage is made in relation to Lot 64A. Any assessment of damages or relief will require an analysis of the damage to that block, a general land block.

[121] Read properly the *Gorringe* decision does not support Mrs Gray. In that case the demand and damage was occasioned to a block of Māori freehold land, not an adjoining block of general land as is the case here.

[122] Thus I arrive at the conclusion that the Māori Land Court does not have jurisdiction to hear the contractual or tortious claims alleged by Mrs Gray pursuant to s 18(1)(d) of the Act. That also necessarily means that the jurisdiction that the Court has pursuant to s 24A of the Act to consider a Contractual Remedies Act 1979 claim is not properly triggered in this case.

Issue Five – Has there been trespass, other injury or nuisance occasioned to Lot 64A?

[123] Given the answer I have arrived at concerning the s 18(1)(d) jurisdiction question, strictly speaking it is not necessary for me to address this issue. However I will make some brief comments.

Burials on Lot 64A

[124] No burials should take place on Lot 64A without the express permission of the owners. That point is sheeted home by cl 4.2.4 of the 2002 deed.

[125] There is an allegation of an unlawful burial in 2002. If required to I would have found that there is insufficient evidence to prove this allegation. There is no doubt however that the 2011 burial of Mr John Rawiri, albeit on top of a whānau member, breached not only the agreement reached in 2002 but was also an unlawful trespass onto Lot 64A. There is not a great deal of evidence which points to the then trustees condoning that burial. There is evidence however that trustees were present throughout the tangihanga. At no stage were the owners of Lot 64A approached seeking their permission for the burial to take place when they should have been.

Marae car park

[126] The area used for the marae car park is on Lot 64A. There is also a formed gravel access way in that area running alongside the eastern side of the marae complex. The marae trustees and their invitees and visitors are not entitled to use Lot 64A for a car park

or driveway without the express permission of the owners of Lot 64A or unless a legal arrangement is put in place allowing them to do so, for example, a lease.

[127] For the sake of completeness I also add that the Whatapaka Marae trustees are not allowed to hold out to visitors of the marae that part of Lot 64A is the "official marae car park". Signage is affixed to part of the wall which encroaches upon Lot 64A which indicates that visitors are permitted to park in that area. That is not correct and the trustees need to take steps to remove that sign unless they have the express permission of the owners of Lot 64A to park in that area or a legal arrangement which allows them to do so.

The creek

[128] There was a great deal of discussion about the movement of a creek and who was responsible for that. The allegation by Mrs Gray is that the creek has lessened the amount of land available to the owners of Lot 64A. I would have found that there is insufficient evidence which confirms that to be the case. There is a lack of evidence as to the path of the creek prior to any of the alleged work and whether any work that was carried out in fact altered the course of the creek.

[129] Having said that, there is no doubt that in the vicinity of the creek there are at least two bridges which have been placed on Lot 64A by the trustees of Whatapaka Marae. Those bridges are there unlawfully and should be removed.

[130] In addition, there is a shed which has been constructed under the authorisation of the trustees which straddles the boundary of Lot 64A and Lot 64D. That shed can be seen on exhibits "5", "6" and "7" of the maps provided to the Court by Mrs Gray.[65] That shed is encroaching onto Lot 64A and should be removed by the trustees.

The grey water system

[131] A grey water system has been constructed on Lot 64D. Some of the Lot 64A owners are concerned that it was located on the site of an ancestral homestead of significance to them. I do not propose to say anything in relation to this issue other than to

[65] Topographical maps prepared by The Surveying Company attached as exhibit "PG 4" to the affidavit of Patricia Dawn Gray dated 26 June 2015.

remind the parties that when a block of Māori freehold land is vested in trustees, it is the trustees who control the reservation, not the beneficiaries or the owners of an adjoining land block. Thus the choice of location for any grey water system is entirely up to the trustees.

[132] The specific allegation before the Court is that grey water has escaped Lot 64D and has caused damage to Lot 64A. Specific complaints are about smell, bogging of ground and damage to stock owned by owners of Lot 64A.

[133] Had I been required to, I would have found that the allegation was not proven. The photographs provided to the Court, which it was alleged demonstrate the nuisance complained of, do not greatly assist. There was no evidence as to when the photographs were taken, whether the presence of water could have been caused by ordinary rainfall, whether stock had in fact "pugged" the ground, and certainly when I visited, an absence of any smell. Probably more importantly there was an absence of any independent expert evidence which persuaded me that this claim would have been made out.

[134] The trustees need to take note of the fact that although the Māori Land Court does not have jurisdiction to hear the contract, trespass and nuisance claims filed by Mrs Gray, the District or High Court undoubtedly does. The comments I have made above are obiter and not binding upon any District or High Court. However from my observations it is clear that at least in respect to the Rawiri burial; the marae car park and associated gravel access way which runs to the eastern side of the marae complex; the bridges and shed I have referred to above, they are clear examples of trespass to Lot 64A. If the trustees do not take action to resolve those issues, they may end up having to re-litigate these issues in another Court.

Issue Six – Are the owners of Lot 64A entitled to relief in relation to Mr Wawatai's house?

[135] There is no doubt that part of Mr Carl Wawatai's house encroaches upon Lot 64A. and that he has been aware of the situation for some time.

[136] Following the death of his parents he inherited their house. Between February 1999 and October 2000, Mr Wawatai carried out extensions to the house. His evidence in chief was that he had the permission of one of the trustees, Mr Barney Kirkwood and one of the owners of Lot 64A, Willy Epiha.

[137] Mr Wawatai was asked if he had approached the current owners of Lot 64A in an attempt to sort the matter out. His response was that he had approached one owner representative, Mr Peter Jakeman.[66]

[138] In answer to questions from the Court, Mr Wawatai accepted that he became aware that part of his house and/or deck encroached upon Lot 64A in 2009.[67] Mr Wawatai was later appointed as a trustee for Whatapaka Marae on 19 May 2011.[68]

[139] It is possible that Mr Wawatai was initially under the mistaken impression, shared by others, that his house and associated deck were not offensive in the sense that it encroached upon Lot 64A. However by his own evidence he has known since 2009 that that is not the case, yet he has taken no steps to regularise the position. His fellow trustees have also been aware of the problem for some time, and although they do not support Mr Wawatai's position, nor have they condemned it.

[140] The simple point is that Mr Wawatai's house encroaches upon Lot 64A and it needs to be addressed.

[141] As noted, Mr Wawatai has been aware of the encroachment since 2009. He has not brought an application seeking relief pursuant to s 24 of the Act. He seems to have been content to await the outcome of the applications that are before the Court rather than taking any positive steps himself to address the situation. There is scant evidence that he has attempted to resolve the matter directly with all the owners of Lot 64A.

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[66] 114 Waikato Maniapoto MB 180-456 (114 WMN 180-456) at 276.
[67] 114 Waikato Maniapoto MB 180-456 (114 WMN 180-456) at 275.
[68] 23 Waikato Maniapoto MB 231-264 (23 WMN 231-264), 27 Waikato Maniapoto MB 248-249 (27 WMN 248-249).

[142] Strictly speaking, Mrs Gray's application and amended application do not make reference to s 24 of the Act. [69] However, both documents expressly refer to the Wawatai house and the relief sought includes the removal of that portion of the house which trespasses/encroaches upon Lot 64A.[70] Mr Wawatai was also questioned by counsel for Mrs Gray on this issue.[71]

[143] As a result of questioning from the Court, Mr Wawatai was left with the clear understanding that his house was partially encroaching upon Lot 64A and needed to be shifted. The following exchange happened during the course of the hearing on 15 December 2015:[72]

> **The Court:** It is very clear, on the evidence that's given in front of this Court, that part of your dwelling is encroaching on Lot 64A. The 2002 Deed which was entered into has been breached, okay? What am I to do and, more to the point, what can you do?
>
> **C Wawatai:** Well I'd like to enter into some sort of agreement where I don't have to pull the house down but if I have to, it will come down.
>
> **The Court:** Well you don't have to pull the whole house down.
>
> **C Wawatai:** No.
>
> **The Court:** Why can't it be shifted?
>
> **C Wawatai:** Yes it can be.

[144] In the written closing submissions filed on behalf of the marae trustees, counsel accepted that it was Mr Wawatai's responsibility to address the issue. A number of options were outlined by counsel, including the possibility of moving the house so that it is fully within the confines of Lot 64D. Indeed, a submission was made as follows:[73]

> Mr Wawatai has indicated to Counsel that he will remove the offending part of the building that encroaches upon Lot 64A in order to satisfy the concerns of the Kumete Whanau and remove any possible future argument over valuation of the lease payments and changing landowners.

[145] In the written closing submissions filed on behalf of Mrs Gray, not only are the facts concerning the Wawatai house traversed, but there is also express mention of s 24 of

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[69] Application A20150003391 dated 22 May 2015 and 26 June 2015 respectively.
[70] Application dated 22 May 2015 at paras [17]-[20] inclusive and application dated 26 June 2015 at paras [1(d)] and [4].
[71] 114 Waikato Maniapoto MB 180-456 (114 WMN 180-456) at 263-266.
[72] 114 Waikato Maniapoto MB 180-456 (114 WMN 180-456) at 276.
[73] Closing submissions of counsel for the trustees dated 4 April 2016 at 4.3 and 4.4.

the Act with the relief sought being an order requiring the removal of the portion of the house (including the deck) which trespasses on Lot 64A.[74]

[146] Although the relief sought by Mrs Gray in her application, amended application and written closing submissions is against the trustees of Whatapaka Marae, it is not the trustees of Whatapaka Marae who are responsible for Mr Wawatai's house encroaching upon Lot 64A, Mr Wawatai is solely responsible for that. Nevertheless I am satisfied that there is no impediment to me granting an order for relief pursuant to s 24 of the Act in favour of the owners of Lot 64A. What I propose to do is amend Mrs Gray's application pursuant to s 37(3) of the Act to include a s 24 order against Mr Wawatai. I am conscious that in exercising that discretion, the Court should proceed cautiously and observe the principles of natural justice.[75]

[147] Nevertheless I am satisfied that this is a case in which I can invoke s 37(3) as Mr Wawatai has been on notice since the time Mrs Gray's initial application was filed on 22 May 2015 that the encroachment of his house onto Lot 64A was a live issue. He is aware that relief was being sought which might involve the removal of that portion of his house which encroaches upon Lot 64A. Mr Wawatai gave evidence on this issue, he was questioned on it by counsel and the Court and made a concession, via counsel that an option was to remove his house. Thus the order that I subsequently make naturally flows from the proceedings that are before the Court and the same parties are involved.

Issue Seven – Should the Māori Land Court issue injunctions restraining the trustees of Whatapaka Marae concerning any further burials on Lot 64A?

[148] The urupā is located on a small hill to the immediate north of the marae complex. Part of it is located on Lot 64D and forms part of the Māori reservation. Part of it extends onto Lot 64A.

[149] In her evidence Mrs Gray describes part of the urupā located on Lot 64D as an "ancestral urupā". In essence her claim is that the ancestral urupā contains important

[74] Closing submissions of counsel for Patricia Gray dated 20 April 2016 at 69-78 inclusive, 151-152 inclusive and 156(a).
[75] *Maxwell v Parata – Maruata 2B2* (1994) 4 Taitokerau Appellate MB 18 (4 APWH 18) and *Matchitt v Matchitt – Te Kaha 65* [2015] Maori Appellate Court MB 662 (2015 APPEAL 662).

tūpuna to the Kumete whānau. Mrs Gray's father, Wiremu Epiha informed her that the urupā was full in 1998 and that no further burials should take place in that part.

[150] Mrs Gray is concerned that since then there have been burials in the ancestral part of the urupā, for example in 2006 two members of the Kirkwood family were buried there. During that burial process human remains were discovered which is deeply upsetting to Mrs Gray and her whānau. Mrs Gray characterises the failure to abide by her father's wishes as a sign of deep disrespect for her tūpuna and her whānau.

[151] The legal position is, however, quite clear. When a block of Māori freehold land has Māori reservation status and has been vested in trustees, it is the trustees who control the reservation, not the beneficiaries and not the owners of an adjoining land block.[76]

[152] Thus the trustees of Whatapaka Marae are lawfully entitled to make decisions on who gets buried and where, in relation to that part of the urupā located on Lot 64D. Such decisions are part of the lawful functions of the reservation trustees. There is no basis to grant Mrs Gray an injunction pursuant to s 19(1)(a) of the Act.

[153] It goes without saying however that neither the trustees nor anyone else associated with Whatapaka Marae have any legal right to make decisions concerning burials in that part of the urupā that extends onto Lot 64A. The only persons who can make those decisions are the co-owners of Lot 64A.

Decision

[154] At paragraph [42] of this decision I raised a number of issues which needed to be addressed. In summary my response is:

a) The Māori Land Court has jurisdiction to grant relief pursuant to s 24 of the Act, for encroachment in relation to general land owned by Māori;

b) Conditional orders were made by Judge Milroy on 2 April 2004. The correct approach is to analyse why the survey condition imposed by Judge

[76] *Bristowe – Section 4C1 Block II Tuatini Township* (2002) 151 Gisborne MB 250 (151 GIS 250).

Milroy was not met rather than assess the case pursuant to the Contractual Remedies Act 1979;

c) Notwithstanding the lengthy delay in complying with the survey condition, the conditional orders of 2004 should now be finalised;

d) The Māori Land Court does not have jurisdiction to hear contractual or tortious claims, involving Lot 64A, a block of general land owned by Māori, pursuant to s 18(1)(d) of the Act;

e) I have made obiter comments that the trustees of Whatapaka Marae have trespassed upon Lot 64A, specifically in relation to the Rawiri burial of 2002, the marae car park and associated driveway, bridges and a shed which have been placed or erected on Lot 64A;

f) Mr Wawatai's house encroaches upon Lot 64A. The owners of Lot 64A are entitled to relief pursuant to s 24 of the Act; and

g) The trustees of Whatapaka Marae are lawfully entitled to decide who may be buried and where, in that part of the urupā situated on Lot 64D.

Orders

The trustees' applications

[155] The Court makes the following orders pursuant to Te Ture Whenua Māori Act 1993:

a) Pursuant to s 315 an order creating an easement, for the purpose of a right of way, over Lot 2 DP 469018 (servient tenement) in favour of Lot 1 DP 469018 and Karaka 64D Block (dominant tenements), being area "A" as shown on Deposited Plan 469018, copy attached. The right of way shall be the minimum width required by the Auckland City Council. The trustees of Lot 64D are responsible for the costs of maintenance and repair of the right of way. The user rights are restricted to the owners of the servient and

dominant tenements, their servants, tenants, agents, workmen, licensees and invitees. The rights and powers implied in the easement are those set out in Schedule 4 of the Land Transfer Regulations 2002, unless expressly varied by this order;

b) Pursuant to s 315 an order creating an easement to take water from the bore located on Lot 2 DP 469018 and to convey water, over Lot 2 DP 469018 (servient tenement) in favour of Lot 1 DP 469018 and Karaka 64D Block (dominant tenements), being areas "A" and "B" as shown on Deposited Plan 469018, copy attached. The costs and maintenance of the bore, the pump, the pipes and any other costs associated with the use of the water will be borne by the users of the water. The rights and powers implied in the easement are those set out in Schedule 4 of the Land Transfer Regulations 2002, unless expressly varied by this order;

c) An order pursuant to s 24 granting relief for encroachment by vesting Lot 1 Deposited Plan 469018 (0.1771 ha) in the trustees of Whatapaka Marae as trustees for the owners of Lot 64D. The beneficial interests shall vest in the owners of Lot 64D in proportion to the owners' present shareholding.

[156] The orders I have made vary slightly from those made by Judge Milroy on 2 April 2004. That is necessary because the Seventh Schedule of the Land Transfer Act 1952, which she referred to has now been repealed. In addition the approved survey plan refers to appellations Lots 1 and 2 DP 469018 rather than Lot 64A.

[157] An issue concerns me however regarding Deposited Plan 469018. That is that the memorandum of easements refers to rights to convey electricity, telecommunications and computer media in areas "A" and "B". Those types of easements were not sought in the applications originally filed with the Court. As far as I can tell the applications were not amended seeking easements of that nature. If that is correct I have a preliminary view that unless the owners of Lot 64A agree to the Court creating those additional easements, I am not able to do so.

[158] I direct counsel for the trustees of Whatapaka Marae, Mrs Gray and any other owners of Lot 64A, if they wish to comment upon this issue, to do so by memorandum to be filed in this Court **no later than 4.00pm, Friday 1 July 2016**.

Mrs Gray's application

[159] Mrs Gray's application is amended pursuant to s 37(3) of the Act to include an application pursuant to s 24 of the Act. Pursuant to s 24 of the Act I consider it just and equitable in the circumstances of this case that relief should be granted in favour of the owners of Lot 64A.

[160] Pursuant to s 24 of Te Ture Whenua Māori Act 1993 I direct Mr Carl Wawatai to remove that part of his house and deck which encroaches upon Lot 64A, being that hatched area shown on Exhibit 7, copy attached.[77] Counsel for Mrs Gray and any other owners of Lot 64A, may wish to comment upon the wording of this order. If so they have leave to file memoranda on this issue **no later than 4.00pm, Friday 1 July 2016**.

Costs

[161] I do not consider it appropriate that costs should be awarded in this case. Although the trustees have obtained the orders they seek, they are in receipt of special aid funding. Furthermore these proceedings, and much of the unnecessary and bitter recriminations that are self-evident, would have been avoided had the trustees moved with greater speed to finalise the survey plan in the first instance.

[162] Whilst there have certainly been, at least in my opinion, examples of trespass occasioned to Lot 64A, the contractual and tortious claims brought by Mrs Gray are outside the jurisdiction of the Māori Land Court. Having said that, the owners of Lot 64A have properly raised issues concerning the use of their land by the trustees of Whatapaka Marae which need to be attended to or addressed by those trustees.

[77] The Surveying Company, Topographical Plan, December 2009, 296239.

[163] Although this case was conducted in a manner akin to ordinary civil litigation and as between Mrs Gray and the trustees of Whatapaka Marae was closely fought, at the end of the day all parties are beneficiaries of Whatapaka Marae. Awarding costs in favour of either party would simply add salt to what are some self-evident wounds and I do not consider that costs are appropriate in the circumstances of this case.

Pronounced in open Court at 9 am in Hamilton on the 13th day of June 2016.

S R Clark
JUDGE